Wiles v Murphy
2019 NY Slip Op 31931(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 159690/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM
Justice

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INDEX NO. 159690/2016

NICOLE WILES and OWEN WILES,

Plaintiffs,

MOTION SEQ. NO. 002

- v -

STACIA MURPHY,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for DISMISSAL.

In this action by plaintiffs Nicole Wiles and Owen Wiles sounding in fraudulent inducement and breach of contract, defendant Stacia Murphy moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. Plaintiffs oppose the motion. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

This action was commenced by summons with notice on November 17, 2016 (Doc. 1) and plaintiffs filed their verified complaint on January 25, 2017. Doc. 6. In the complaint, plaintiffs alleged that, on or about April 16, 2016, they entered into a contract of sale ("the contract"), as buyers, with defendant, as seller, for the purchase of a building located at 292 West 137th Street, New York, New York ("the building" or "the premises"). Doc. 6 at pars. 2-4; Doc. 40. The contract required, inter alia, that defendant 1) obtain a legal certificate of occupancy ("CO") for a two-family dwelling (Doc. 40 at par. 3[a][v]); 2) deliver the building free of all violations and

lawsuits relating thereto (Doc. 40 at par. 13[d]); and 3) deliver the building without any leases "approved or deemed approved" by plaintiffs (Doc. 40 at par. 3[a][ii]). Doc. 6 at par. 5. A closing for the purchase of the building was held on August 19, 2016. Doc. 6 at par. 6.

Plaintiffs alleged that the building's CO was deficient insofar as it was not for a two-family dwelling, and defendant represented that the deficiency was not material and would be cured within a reasonable period. Doc. 6 at pars. 7-10. They further claimed that they relied on defendant's representation that the premises could be legally occupied as a two-family dwelling. Doc. 6 at par. 11. As a result of defendant's representation that the CO could be remedied, plaintiffs were allegedly induced to enter into an escrow agreement at the closing ("the escrow agreement"). Doc. 6 at par. 12; Doc. 41. The escrow agreement provided that plaintiffs would be entitled to "CO escrow funds" in the amount of $50,000 if a legal and valid CO were not provided to them by December 31, 2016. Doc. 6 at par. 12; Doc. 41. The escrow agreement also provided that:

> This agreement represents the entire agreement between the [p]arties hereto and supersedes all prior and contemporaneous agreements, negotiations or representations, whether oral or written, between the [p]arties with respect to the subject matter of the [a]greement. Notwithstanding the foregoing, this [a]greement shall be in addition to and an amendment to the [c]ontract between the [p]arties and shall not in any other way alter the terms thereof other than as specified. This [a]greement shall not be amended, modified or discharged unless said amendment, modification or discharge is executed in a written instrument signed by both [p]arties.

Doc. 58 at par. 12.

Plaintiffs subsequently learned that the building was not actually a two-family dwelling but instead a restricted single room occupancy building with no CO. Doc. 6 at par. 13. They claimed that, as a result of defendant's intentional and material misrepresentations, they were

misled regarding the true extent of the deficiencies in the CO, and that they would not have entered into the contract or the escrow agreement had they known about such deficiencies. Doc. 6 at par. 14-16. Additionally, plaintiffs asserted that the $50,000 in CO escrow funds were inadequate to compensate them for the lack of a permanent CO for a two-family dwelling. Doc. 6 at par. 17.

In addition, plaintiffs alleged that, although paragraph 13(d) of the contract provided that defendant "ha[d] no knowledge of the existence of any material violation or alleged violation of any rule, regulation, ordinance, law or similar matter that applies to the [p]remises" (Doc. 40 at par. 13[d]), defendant was aware that, in March 2016, the New York City Department of Housing Preservation and Development ("HPD") issued numerous violations against the building. Doc. 6 at pars. 18-20. Additionally, defendant was aware that HPD had commenced a proceeding, on behalf of a tenant at the building, against defendant demanding that the violations be cured. Doc. 6 at par. 21. According to plaintiffs, the said violations were still pending against the building at the time of the closing. Doc. 6 at par. 23. Thus, claim plaintiffs, defendant, by failing to cure the violations and by making intentional misrepresentations, violated paragraph 13(d) of the contract, thereby causing them to incur damages. Doc. 6 at par. 24.

Further, although paragraph 13(d) of the contract also provided that defendant warrants that she "has no knowledge of any actual, pending or threatened suits, actions, arbitrations, claims or proceedings, at law or in equity, affecting the premises" (Doc. 40 at par. 13[d]), court records reflected that there was "considerable litigation" between defendant and her tenant including, but not limited to, the HPD proceeding pending at the time of the closing. Doc. 6 at pars. 27, 30. Plaintiffs further alleged that a prior proceeding by defendant to evict the tenant was discontinued on March 30, 2016 based on the court's determination that the tenant was entitled to the protection of the Rent Stabilization Law and could not be evicted based on the grounds asserted by defendant.

Doc. 6 at par. 29. Thus, claimed plaintiffs, defendant intentionally and knowingly violated paragraph 13(d) of the contract, thereby causing plaintiffs damages as a result of their reliance on the misrepresentations. Doc. 6 at pars. 31-34.

Next, plaintiffs alleged that, although the building was to be sold "subject to no liens or encumbrances other than . . . any leases and other matters approved or deemed approved by [plaintiffs]" (Doc. 40 at par. 3[a][ii]), they did not approve any lease pursuant to that provision but discovered that a tenant of defendant's was still living in the building. Doc. 6 at pars. 35-38. At the closing, defendant represented to plaintiffs in writing that "there is no current lease with the current tenant" at the building. Doc. 6 at par. 39. Based on the false statements made by defendant, plaintiffs entered into the escrow agreement at the closing, which provided, inter alia, that if the tenant did not vacate the building by September 16, 2016, defendant would release to plaintiffs "Tenant Vacate Escrow Funds" in the amount of $50,000. Doc. 6 at par. 40; Doc. 41.

Following the closing, plaintiffs learned from filings in New York City Housing Court that there was in fact a current lease with tenants of defendant which was governed by the Rent Stabilization Code ("the RSC"). Doc. 6 at par. 41. Specifically, plaintiffs alleged that, in the case of [defendant] *Stacia Murphy v Veronica P. Jones and Stephen Burrows, et. al.*, L & T Index No. 087108/14, the New York County Landlord Tenant Court determined, less than three weeks before the closing, that defendant's tenants were subject to the RSC. Doc. 6 at pars. 42-43. Thus, maintained plaintiffs, defendant's representation regarding the tenants was intentionally misleading and plaintiffs relied on such misrepresentation in entering into the escrow agreement and in proceeding with the closing, since they never would have entered into the contract had they known about the rent stabilized tenants. Doc. 6 at pars. 45, 47-49. They further assert that the

$50,000 "Tenant Vacate Escrow Funds" would be grossly inadequate for the purpose of inducing the tenants to vacate the building. Doc. 6 at par. 46.

As a first cause of action, plaintiffs alleged a breach of the contract and asserted damages in the amount of $250,000. Doc. 6 at pars. 52-61. As a second cause of action, plaintiffs alleged fraud in the inducement and claimed damages in an amount no less than $250,000. Doc. 6 at pars. 63-73.

Defendant joined issue by service of her verified answer on March 2, 2017. Doc. 7.

Defendant now moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint based on documentary evidence and for failure to state a cause of action, respectively. In an affidavit in support of the motion, defendant argues, inter alia, that she did not make any misrepresentations to plaintiffs and that all of the issues raised in the complaint were addressed in, and resolved by, the escrow agreement. Defendant maintains that, by entering into the escrow agreement, plaintiffs waived all claims against her. She claims that plaintiffs sued their closing attorneys, JLC & Associates, for legal malpractice based on counsel's failure to perform reasonable due diligence to discover the "conditions and defects in the subject premises" and in negotiating the escrow agreement and that she was not responsible for the shortcomings of their attorneys.

Defendant further insists that, although she did not provide plaintiffs with a final CO, she did not breach the contract since the issue of the CO was negotiated and resolved between the parties pursuant to the escrow agreement. She also maintains that, despite plaintiffs' claim that she failed to sell the building free of violations, paragraph 4 of the escrow agreement provided that plaintiffs were entitled to a $5,000 credit for removing violations and penalties. Defendant also maintains that she did not mislead plaintiffs regarding any tenants remaining in the building since

the escrow agreement specifically provided that the tenant would vacate the premises by September 16, 2016, $50,000 was placed in escrow in case the tenant did not vacate by that date, and that $50,000 was released because the tenant did not vacate by that date. She further argues that paragraph 12 of the escrow agreement provides that the said agreement supersedes the contract. Additionally, she maintains that, since the building was sold "as is", plaintiffs cannot recover for any defects relating to the same.

In opposition to the motion, plaintiffs argue that plaintiff ignores paragraph 8 of the contract, which permits them to have "such remedies as [they] shall be entitled to at law or in equity . . ." They further assert that, in one of the two riders to the contract, defendant warranted that there were no tenants, former tenants or others claiming any right to occupy or possess any portion of the building. Doc. 57, Rider dated 4/16/16 at pars. 5 (g)-(h). Additionally, plaintiffs assert that defendant never disclosed that her tenant was rent stabilized and they did not learn of this fact until September, 2016, when the tenant failed to move out. They maintain that defendant fraudulently induced them to enter into the escrow agreement, and that they would not have entered into the agreement had defendant not made material misrepresentations to them.

Plaintiffs urge that defendant is incorrect in her assertion that she is protected by the "sole remedy clause" in the escrow agreement. They maintain that any such clause cannot be read into the escrow agreement and that, even if the escrow agreement contained such a clause, which they maintain it does not, the provision would be unenforceable as against public policy. Additionally, urge plaintiffs, defendant's self-serving affidavit cannot be considered by this Court since it does not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1).

Further, plaintiffs argue that they have set forth a prima facie claim of fraud in the inducement and that New York law prohibits defendant from limiting her liability for willful acts, as she claims the escrow agreement does.

Finally, plaintiffs assert that, since defendant has repeatedly delayed appearing for her deposition, she should not be awarded dismissal of the complaint.

In reply, defendant argues, inter alia, that the documentary evidence she relies on is not her affidavit but rather the escrow agreement, which refutes plaintiffs' version of the facts. Defendant reiterates her claim that she did not make any material misrepresentation to plaintiffs but rather plaintiffs' attorney failed to undertake due diligence in investigating the premises prior to the closing. She insists that she did not know or conceal from plaintiffs that her tenant was rent stabilized; rather, she asserts that a holdover proceeding against the tenant was dismissed without prejudice to the tenant's claim that she was rent stabilized. Defendant also reiterates her claim that plaintiffs waived their claims by entering into the escrow agreement.

LEGAL CONCLUSIONS:

"[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction." *Leon v Martinez*, 84 NY2d 83, 87–88 (1994).

A. Documentary Evidence

CPLR 3211 (a)(1) provides for dismissal should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 (1st Dept 2004); *see also Leon*, 84 NY2d at 88. Therefore, if the complaint's "allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference . . ." *Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 (1st Dept 2004). However, a motion pursuant to CPLR 3211(a)(1) may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 888 (2013) (citation omitted).

1. Breach of Contract

The elements of a claim for breach of contract are the existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of its obligations under the contract, and damages resulting from the breach. *See Meyer v New York-Presbyterian Hosp. Queens*, 167 AD3d 996 (2d Dept 2018). Here, the terms of the escrow agreement do not conclusively establish a defense to plaintiffs' claim for breach of contract. Although defendant maintains that the escrow agreement provided for certain payments to be made to plaintiffs if certain contingencies were met, she incorrectly asserts that these contingent payments would be plaintiffs' sole remedy under that agreement, since there was no express language limiting defendant's liability in such manner. *See Granite Broadway Dev. LLC v 1711 LCC*, 44 AD3d 594 (1st Dept 2007). Further, paragraph 8 of the contract provided that plaintiffs had "such remedies as [they] shall be entitled to at law or in equity . . ." Given the parties' conflicting submissions regarding whether defendant breached

her obligations under the contract and/or the escrow agreement, defendant has thus failed to establish her entitlement to dismissal of the breach of contract claim. *See Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681 (2d Dept 2017).

Moreover, to the extent defendant relies on her own affidavit in an attempt to refute plaintiffs' claims, the affidavit is not "documentary evidence" within the meaning of the statute. *Flowers v 73rd Townhouse LLC, 99 AD3d 431*, 99 AD3d 431 (1st Dept 2012).

2. Fraudulent Inducement

To state a claim for fraudulent inducement, a plaintiff must allege a material misrepresentation, known to be false, made with the intention of inducing reliance, upon which the plaintiff actually relies to his or her detriment. *See Merrill Lynch, Pierce Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005). Contrary to defendant's contention, the escrow agreement does not utterly refute plaintiffs' allegations of fraudulent inducement as a matter of law. *See Mitchell v Diji*, 134 AD3d 779 (2d Dept 2015). At this stage of the action, there is no basis on which this Court can conclude that, by executing the escrow agreement, plaintiffs waived their fraudulent inducement claim against defendant. *See TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 89 (1st Dept 2015).

B. Failure to State a Claim

A motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) "test[s] the facial sufficiency of the pleading in two different ways." *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 (1st Dept 2014). First, "the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable

at law." *Id.* Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. *Id.* "The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action." *McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661 (2d Dept 2005).

1. Breach of Contract

Here, plaintiffs have properly pleaded a cause of action for breach of contract. Plaintiffs allege that they entered into a contract with defendant; that they performed pursuant to the contract; that defendant breached her obligations pursuant to the contract by failing to deliver a valid CO, by failing to deliver the building free of any leases, lawsuits and violations against the building; and that they sustained damages in the amount of $250,000 as a result of the breach.

2. Fraudulent Inducement

Plaintiffs have also properly pleaded a cause of action for fraudulent inducement. Specifically, they claim that defendant made deliberate, false and misleading representations to them in order to induce them to enter into the escrow agreement, including that: the building had no violations against it, there was no pending litigation relating to the building, that the building could be legally occupied as a two-family dwelling, and that there were no leases encumbering the building. Plaintiffs claim that these misrepresentations were known to be false, were made with the intention of inducing their reliance, and that they relied on the same to their detriment.

Defendant's claim that she is shielded from liability by the escrow agreement is without merit. Even assuming, arguendo, that the escrow agreement contains an exculpatory provision,

such provisions are "disfavored by the law and closely scrutinized by the courts" and such a provision would only be "accorded judicial recognition where it does not offend public policy" (*Bank of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244 [1st Dept 2007] [citations omitted]) and does not extend to willful or intentional wrongdoing, such as that alleged by plaintiffs.

The remainder of the parties' contentions are without merit or need not be addressed in light of the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Stacia Murphy seeking dismissal of the complaint is denied; and it is further

ORDERED that the parties are to appear for a previously scheduled status conference on July 23, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

7/3/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE