

<b>Thompson v .95 Sackman, LLC</b>
2019 NY Slip Op 33824(U)
December 24, 2019
Supreme Court, Kings County
Docket Number: 524434/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of December, 2019.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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ILENE THOMPSON,

Plaintiff,

- against -

Index No. 524434/17

95 SACKMAN, LLC,

Defendant.

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The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____35-36_____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Ilene Thompson moves for an order, pursuant to CPLR 2221, granting leave to renew and/or reargue an order of this court, dated July 17, 2019, which denied an award of damages following an inquest due to failure of proof.

Plaintiff commenced this action seeking damages for breach of a contract of sale of real property located at 95A Sackman Street in Brooklyn. The contract included a rider which contained, among other provisions, the following paragraphs:

“R3. Seller represents to Purchaser that

“(i) To the best of Seller's knowledge there are no plumbing leaks and the plumbing system will be free of leaks at Closing. The roof is free of all leaks as well and same shall [be] delivered in [ ] such condition at Closing:

“(k) The plumbing, electrical and heating/ cooling systems servicing the Property are now, and will at closing be, in working order and condition at Closing and Seller shall maintain said systems in said order and condition between the date hereof and Closing, reasonable wear and tear excepted. Same shall be delivered as-is but in working order. All appliances shall be delivered in working order along with refrigerators installed in both units.”

In her complaint, plaintiff alleges that the seller, defendant 95 Sackman, LLC, materially breached the contract by conveying the property with the following “material defects:”

“a. The Defendant has failed to install a drain at the base of the steps to the rear yard. This leads to flooding in the Property’s basement upon the occurrence of rain and is a violation of Paragraph R3(i) of the Contract;

“b. In the Property’s front yard, the sewer system’s vent is malfunctioning, causing flooding. This is a violation of Paragraph R3(i) of the Contract;

“c. The air shafts servicing the Property’s bathrooms leak. This is a violation of [ ] Paragraph R3(k) of the Contract;

“d. The Property’s heating system for all units often goes long periods of time without supplying heat to the Property and is completely non-functional in a large section of the Property. This is a violation of Paragraph R3(k) of the Contract;

“e. The Property’s air conditioning system is non-functional in a large section of the Property. This is a violation of Paragraph R3(k) of the Contract;

“f. Much piping throughout the Property is made of PVC, which is a code violation. This is a violation of Paragraph R3(k) of the Contract.”

“g. Both of the Property’s hot water generators are not correctly configured or connected to their exhaust pipes. This is a violation of Paragraph R3(k) of the Contract.”

As the result of defendant’s failure to appear in this action, a default judgment was entered on April 19, 2019. At the inquest held before this court on July 17, 2019, plaintiff’s counsel presented the affidavit and report of a home inspector who made an assessment of damages. In the report, the inspector refers to problems with the building’s exterior (in addition to plumbing, heating and electrical systems) and projects that the total cost to bring the building up to code would be in the range of \$125,000 - \$150,000.

At the inquest, the court noted that the report was not itemized and may include exterior work “completely unrelated to the contract of sale” (Transcript at 6), and because the inspector was “billing for things not contracted for” the court dismissed the inquest for insufficient proof (*id.*).

In her motion to renew and/or reargue, plaintiff states that the court overlooked the fact that the representations in paragraph R3 (addressing leaks, plumbing, heating, electrical and air conditioning) were not the exclusive representations made by defendant in the contract. Plaintiff contends that under paragraph R9 of the contract, defendant represented

that “any alterations and renovations made to the Property were made in full compliance with all applicable laws, rules, regulations and ordinances of all governmental and municipal authorities having jurisdiction,” and that the expert’s affidavit and report state that the premises were largely renovated. Plaintiff argues that the court did not give counsel a chance to point out the applicability of paragraph R9 at the inquest, and thus renewal is warranted. Alternatively, plaintiff requests renewal to submit an affidavit at inquest that is more detailed.

With respect to plaintiff’s contention that the court overlooked paragraph R9, in which defendant represented that all renovations and alterations to the subject premises were code compliant, the court notes that plaintiff never alleged any violation of paragraph R9 in her complaint. All of the defects set forth in the complaint were alleged to constitute violations of only paragraphs R3(i) or R3(k).


Nonetheless, “it is improvident to deny leave to renew where it may fairly be said that the new matter was not raised because of excusable mistake or inadvertence” (*Olean Urban Renewal Agency v Herman*, 101 AD2d 712, 713 [4th Dept 1984]). The court finds plaintiff’s belief that the inspector’s affidavit and report was a sufficient measure of proof as to the relevant defects is a reasonable excuse for not providing an itemized or more detailed affidavit (*see Segall v Heyer*, 161 AD2d 471 [1st Dept 1990] [renewal granted where plaintiff mistakenly believed expert testimony was not required to withstand a motion for summary judgment in a negligence action]).

Accordingly, plaintiff's motion to renew/reargue is granted to the extent that plaintiff shall appear for a new inquest in this Part on January 16, 2020 with detailed proof as to the damages stemming from each "material defect" outlined in the complaint.

The following constitutes the decision and order of the court.

ENTER,

  
J. S. C.  
**HON. LAWRENCE KNIPEL**  
Administrative Judge

  
KINGS COUNTY CLERK  
FILED  
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