

Maxwell v Leach

2019 NY Slip Op 34252(U)

January 31, 2019

Supreme Court, Westchester County

Docket Number: Index No. 60584/18

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ANDREW MAXWELL and THERESA
LETTERIO-MAXWELL,

Plaintiffs,

-against-

Index No. 60584/18
Mot. Seq. Nos. 001, 002, 003
Decision and Order

LAMARETTE LEACH, PROCHEK INSPECTION
SERVICES, INC. d/b/a PROCHEK, REKHA M.
CAROZZA, ROSE ANNE CAROZZA, DOUBLE C
REALTY CORP., and KELLER WILLIAMS
REALTY PARTNERS,

Defendants.

-----X
EVERETT, J.

The following papers were read on the motions:

- 001 Notice of Motion/Affirmation in Supp/Exhibits A-G/Memorandum of Law (docs 37-46)
- 002 Notice of Motion/Sudano Affidavit/Affirmation in Supp/Exhibits A-D/ Affirmation in Opp/Reply Affirmation (docs 26-33, 48, 52)
- 003 Notice of Motion/Affirmation in Supp/Exhibits A-G/Memorandum of Law (docs 37-46)

Defendant Rekha M. Carozza (R Carozza) moves, under motion sequence number 001, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint as against her.

Defendant HomeChek Real Estate Services, Inc., sued herein as Prochek Home Inspection Services, Inc. d/b/a ProChek (ProChek), moves, under motion sequence number 002, for an order dismissing the complaint and cross claim asserted against it by defendants Rose Anne Carozza (RA Carozza) and DCR Realty, Inc., d/b/a Double C. Realty Corp. (Double C). Defendant

Keller Williams Realty Partners (Keller Williams) moves, under motion sequence number 003, for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint. The motions, under motion sequence numbers 001, 002 and 003, are consolidated for disposition, and upon the foregoing papers, the motions are granted to the extent set forth below, and are otherwise denied.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiffs Andrew Maxwell and Theresa Letterio-Maxwell commenced the instant action by filing a summons with notice, as amended, in the Office of the Westchester County Clerk on July 11, 2018, followed by plaintiffs' filing of a complaint on August 10, 2018, seeking damages stemming from their purchase of a single family house at 2785 Heathercrest Drive, Yorktown Heights, New York (Property). The dispute centers on the actions and/or inactions that occurred prior to plaintiffs taking possession of the Property.

It is undisputed that plaintiffs and defendant seller, Lamarette Leach (Leach), executed a residential contract of sale (Contract) on July 10, 2015, and an amendment to contract of sale on July 28, 2015, by which the agreed upon price for the Property was reduced from \$308,200.00 to \$302,000.00. The closing took place on August 6, 2015. By post-closing agreement of the same date, August 6, 2015, plaintiffs and Leach agreed that Leach would be allowed to remain in the Property six extra days, or until August 12, 2015. Among the terms and conditions of the post-closing agreement is the provision granting plaintiffs "the right to inspect the premises prior to delivery of possession" (post-closing agreement ¶ 15). Plaintiffs took possession of the Property on August 12, 2015, and commenced the instant action for damages approximately three years later against six entities and/or individuals involved in the 2015 transaction.

In addition to suing Leach, plaintiffs bring claims against ProChek, the home inspection company they retained to perform a home inspection of the Property prior to their entering into the Contract. The inspection was performed on June 8, 2015, by ProChek's employee, "David." Plaintiffs are suing Keller Williams, the real estate broker office whose agent, non party Gerald Weil (Weil), listed the Property for sale on behalf of Leach, and Double C, the real estate office, whose agent, RA Carozza, was the selling agent working with plaintiffs with respect to their purchase of the Property. Plaintiffs are also suing RA Carozza's daughter-in-law, Rekha Carozza, the attorney they hired, based on RA Carozza's recommendation, to represent them in their purchase of the Property.

The complaint's 11 causes of action arise from plaintiffs' allegations that, on May 6, 2015, Keller Williams published an MLS listing for the Property that was based on representations made by Leach in conjunction with information gathered by Weil, who viewed the Property as part of his duty as listing agent. Plaintiffs claim that, at the time of the listing, both Leach and Keller Williams were aware of, but failed to disclose, certain defects at the Property and/or latent defects, which were covered over so as to make them not readily detectable by persons viewing the Property (Defects). Plaintiffs identify the following Defects: (1) a faulty roof that was listed as a new roof; (2) water damage caused by the faulty roof; (3) mold conditions existing in the stairways, closets, basement and sheetrock; (4) faulty exterior siding; (5) rotting sill plates and joints; and (6) bowing and rotting ceiling. Plaintiffs claim that, by virtue of the listing, Leach and Keller Williams made implicit representations to the general public that the Property was in reasonably good, safe and livable condition, and that there was no

need for substantial or expensive repairs, except as to disclosed items, and that the misleading representations were made with the intent of deceiving the prospective purchasers.

In the first cause of action, plaintiffs claim that they relied to their detriment on the misrepresentations made by Leach and Keller Williams in consummating the sale, and that, but for the misrepresentations, they would have discovered the Defects prior to gaining possession of the Property on August 12, 2015, and responded accordingly. In the second cause of action, plaintiffs claim that Leach and Keller Williams were unjustly enriched, in that, it was due to their acts of concealment and misrepresentations that they (plaintiffs) were caused to overestimate the value of the Property, and to pay more than they should have paid. The third cause of action charges Keller Williams with breaching its duty to plaintiffs to be honest and competent, and that the negligent manner in which it listed the Property caused plaintiffs to incur damages by purchasing the Property. The fourth cause of action charges Keller Williams with breaching its duty to impart correct information to plaintiffs about the Property, and that plaintiffs were damaged by relying on the information provided in the listing, which failed to disclose the Defects. In the fifth cause of action, plaintiff charge RA Carozza and Double C with negligence and breach of their duty to them by facilitating their purchase of the Property, when they, individually, and collectively: (1) should have been aware of the Defects; (2) were acting in conflict with their responsibilities as a buyer's agent; (3) acted with indifference, and not in plaintiffs' best interest, when they promoted their purchase of the Property in order to obtain a commission; (4) referred plaintiffs to ProChek, and in particular to David, because he was an engineer; and (5) referred plaintiffs to Rekha Carozza, who had a conflict of interest in representing plaintiffs' best interests. In the sixth cause of action, plaintiffs claim that RA

Carozza and Double C promoted the false representations made in the listing about the condition of the Property, and failed to assist them in their efforts to ascertain correct information about the Property. The seventh cause of action charges Rekha Carozza with legal malpractice, claiming that she breached her duty to act solely to protect and advance the interest of plaintiffs, as her clients. More specifically, plaintiffs are claiming that Rekha Carozza acted to ensure that plaintiffs purchased the Property in order to advance the interest of her mother-in-law, RA Carozza, whose commission would be earned only if the purchase was consummated. Plaintiffs further claim that Rekha Carozza breached her duty to them by failing to give them proper advice regarding the inspection, and by counseling them to enter into an agreement that allowed Leach to remain in possession of the Property after the closing, which effectively limited their ability to do a proper walk-through prior to closing. In their eighth cause of action, plaintiffs charge RA Carozza, Rekha Carozza and ProChek with intentional infliction of harm by causing them to: (1) pay in excess of the Property's fair market value; (2) incur costs for repairing the Defects; (3) expend time arranging for the repairs; and (4) be inconvenienced while living through the period of repairs. The ninth cause of action contains plaintiffs' allegations that, because RA Carozza and Rekha Carozza each had a fiduciary relationship with them, they each had a duty to protect and advance plaintiffs' interests, yet elected to advance their own interests, and those of each other, ahead of plaintiffs'. The tenth cause of action contains plaintiffs' allegations that ProChek breached its contract with them to conduct a thorough and comprehensive inspection of the Property, and to disclose conditions that should have been apparent to a reasonable inspector. The eleventh cause of action contains plaintiffs' allegations that ProChek performed the inspection in a negligent manner, and that it prepared its report in a negligent manner.

RA Carozza and Double C joined issue on or about September 24, 2018, by service of their joint answer with affirmative defenses and a cross claim against Leach, ProChek and Keller Williams for contribution and indemnification. The remaining defendants served their respective pre answer dismissal motions.

On a motion to dismiss pursuant to CPLR 3211(a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff[s] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87 - 88 [1994]). Furthermore, a dismissal pursuant to CPLR 3211 (a) (1) “is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.* at 88).

Addressing the dismissal motion of Rekha Carozza, it is her position that the complaint fails to state a cause of action for legal malpractice. The central question on a legal malpractice claim is whether the “attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff” (*Leder v Spiegel*, 9 NY3d 836, 837 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]).

Here, Rekha Carozza criticizes the complaint for asserting a series of bald legal conclusions without specifying: what the advice was that she gave plaintiff that was inadequate; what advice she should have given to plaintiffs; a legal basis for claiming that her permitting plaintiffs to enter into the post-closing agreement with Leach was a proximate cause of any of their purported damages; and what her specific conduct was that proximately, or “but for,” caused them to suffer damages. Rekha Carozza supports her motion with copies of the MLS

listing sheet, the Contract, the amendment to the Contract, and the post-closing possession agreement, and contends that these documents preclude a finding that she was negligent in performing her duties as their attorney. Next, Rekha Carozza points out that she is a real estate attorney, not a home inspector, and that she is, therefore, not responsible for any failure on the part of ProChek to uncover and disclose the Defects. She also points out that, to the extent that plaintiffs assert that the Defects either came about during, or were not apparent until after, the six-day post-closing period, and that Leach's presence in the Property during that period made it difficult for them to perform a thorough walkthrough, their assertions lack merit. Aside from the fact that she ensured, as part of the post-closing agreement, that plaintiffs had an opportunity to do the final walkthrough before taking possession, Rekha Carozza asserts that it is not possible for the alleged Defects to have only manifested themselves during that six-day period.

Rekha Carozza also relies on the documents to demonstrate that she advanced plaintiffs' interests by contractually ensuring them three separate opportunities to inspect the property, once before executing the Contract, once before closing, and once before taking possession. Next, Rekha Carozza points out that, although Leach, as seller, was statutorily entitled to credit plaintiffs, as purchasers, \$500.00, to forgo making any representations regarding the condition of the Property (Real Property Law § 465), the documents prove that she negotiated, and obtained, on plaintiffs' behalf: (1) a representation by Leach that: "the roof and basement [are] free from leaks and seepage, and all will be delivered at Closing in the same condition as when first inspected by Purchaser(s), reasonable wear and tear excepted," and that plaintiff shall have the "right to make a final inspection at any reasonable time, prior to the closing" (Contract Rider ¶¶ 20, 21); (2) an escrow of \$2,000.00, to cover any damages that might occur during the six-days

that Leach was permitted to remain in the Property after the closing; and (3) a reduction in the purchase price from \$309,200.00 to \$302,000.00. This she insists, contradicts plaintiffs' chief allegation against her, namely, that she failed to protect their interests in favor of her mother-in-law RA Carozza's interests and commission.

Lacking from Rekha Carozza's motion papers is a copy of, or even a reference to, a written retainer agreement outlining the terms and conditions of their professional relationship. Given that Rekha Carozza's mother-in-law's compensation was, as plaintiffs allege, contingent on their consummation of the sale, the omission of the retainer agreement from the motion papers prohibits the Court from assessing whether Rekha Carozza breached any obligations under that agreement. While the submitted documents substantiate many of Rekha Carozza's assertions, the omission of the retainer document prevents the Court from determining whether it contains, or references, a conflict waiver, or other language setting forth plaintiffs' understanding and acceptance of how the relationship between the Carozza defendants might impact on their purchase of the Property. As a result, a question of fact exists as to whether Rekha Carozza breached her duty to plaintiffs that is not conclusively resolved by the documentary evidence submitted for review (CPLR 3211 [a] [1]).

Plaintiffs' separate cause of action against Rekha Carozza for breach of fiduciary duty is, however, dismissed, as it is based on the same facts as their legal malpractice claim, and is therefore duplicative of that claim.

Finally, Rekha Carozza also seeks an order dismissing plaintiffs' claim that she intentionally inflicted harm upon them (eighth cause of action). The elements of this cause of action are:

“(1) intentional infliction of harm; (2) which results in special damages; (3) without any excuse or justification; and (4) by an act or series of acts which would otherwise be lawful . . . The action complained of must have been solely motivated by malice or disinterested malevolence, and the plaintiff[s] must have suffered specific, measurable loss, which requires an allegation of special damages”

(*Kassab v Kasab*, 56 Misc 3d 1213 [A], Sup Ct, Queens County 2017; internal quotation marks and citations omitted).

To this end, Rekha Carozza argues that plaintiffs do not proffer any allegations of fact from which it can be inferred that her actions and/or inactions were solely motivated by malice or disinterested malevolence, without which they cannot state this claim. A review of the motion papers confirms that, even if true, plaintiffs’ allegations of fact are inadequate to state a cause of action for intentional infliction of harm, requiring a dismissal of this claim, as well as a dismissal of a breach of fiduciary duty claim. The Court also notes that the cause of action against Rekha Carozza for intentional infliction of harm, an intentional tort, is time-barred (CPLR 215).

Plaintiffs’ causes of action against ProChek are for intentional infliction of harm (eighth cause of action), for breach of contract (tenth cause of action) and for negligence (eleventh cause of action). ProChek contends that it is entitled to a dismissal of these claims based on: the statute of limitations, as the allegations actually sound in malpractice, which is a three-year statute of limitations; the limitation of damages provision contained in the ProChek Home Inspection Contract (Inspection Contract); and on plaintiffs’ rejection of its offer of the full amount of the damages provision. ProChek also contends that the pleading lacks the required specificity.

The Inspection Contract, dated and executed by Andrew Maxwell on the date of the inspection, June 8, 2015, provides, in relevant part:

“PRO CHEK agrees to conduct an inspection for the purpose of informing the customer of major deficiencies in the condition of the property. The inspection and report are performed and prepared for the sole confidential and exclusive use and possession of the customer. The written report will include information about the following:

The general exterior condition of the structure, including roof, gutter, chimney, siding, foundation, drainage and grading. The general interior condition of the structure, including ceilings, walls, floors, windows, insulation and ventilation. The condition of electrical and mechanical systems, including main, circuit panel, branch circuits, septic, plumbing, hot water, heating and air-conditioning systems.

It is understood and agreed that this inspection will only include readily accessible areas of the building and is limited to visual observations of apparent conditions existing at the time of the inspection only. Latent and concealed defects and deficiencies are excluded from the inspection. Equipment, items and systems will not be dismantled. Only non-intrusive testing will be performed. Maintenance and other items may be discussed, but they are not a part of our inspection. The report is not intended to assign responsibility to any party for replacement or repairs of items inspected.

The parties agree the PRO CHEK and its employees and agents assume no liability or responsibility for the cost of repairing or replacing any unreported defects or deficiencies, either current or arising in the future or for any property damage, consequential damage or bodily injury of any nature. The inspection and report are not intended as, or to be used as, a guarantee or warranty, expressed or implied, regarding the adequacy, performance or condition of any inspected structure, item or system. PRO CHEK is not an insurer of any inspected conditions.

* * *

It is understood and agreed that should PRO CHEK and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of its obligations, including but not limited to negligence, breach of contract, otherwise, then the liability of PRO CHEK and/or its agents or employees, shall be limited to a sum equal to the amount of the fee paid by the customer for the inspection and report.

Acceptance and understanding of this agreement are hereby acknowledge[d]”

(ProChek notice of motion, exhibit C).

In New York, “[a] clear contractual provision limiting damages is enforceable absent a

special relationship between the parties, a statutory prohibition, or an overriding public policy, none of which” is alleged here (*Schietinger v Tatscher Cronacher Professional Engrs., P.C.*, 40 AD3d 954, 955 [2d Dept 2007] [internal citations omitted]). “Moreover, while a party may not limit its liability for damages caused by its own grossly negligent conduct [ProChek’s] alleged failure to properly conduct its inspection does not rise to the level of gross negligence” (*id.* at 956). Therefore, while the limitation of liability provision is enforceable against plaintiffs on the issue of damages, neither its inclusion in the Inspection Contract, nor plaintiffs’ rejection of ProChek’s offer to refund the full amount of the inspection fee (\$690.00), mandates a pre answer dismissal of the complaint as against it. The only question is which, if any of plaintiffs’ causes of action against ProChek can proceed to discovery in plaintiffs’ effort to recover damages from it, which cannot exceed \$690.00.

Plaintiffs’ breach of contract claim is based on their allegations that ProChek failed to perform a complete, thorough and comprehensive inspection of the Property, and failed to disclose in their report all such conditions that would be apparent to a reasonable and competent inspector. By these allegations, plaintiffs adequately plead a breach of contract claim, which is subject to a six-year statute of limitations (CPLR 213), and survives the motion to dismiss. The claim is not, as argued by ProChek, barred by the three-year statute of limitations applicable to non medical malpractice actions (CPLR 214 [6]). Plaintiffs’ remaining two causes of action against it (negligence and intentional infliction of harm) are barred by the three-year statute of limitations, and are also subject to dismissal on the basis that they are duplicative of the breach of contract claim.

As to that aspect of ProChek’s motion that seeks a dismissal of the RA Carozza and

Double C's cross claim against it for contribution and indemnification in the event plaintiffs obtain a verdict or judgment against them, the motion is granted as to indemnification and denied as to contribution.

As it pertains to ProChek, the cross claim specifically charges it with causing or contributing, in whole or in part, to the injuries and damages allegedly sustained by plaintiffs to the extent that such injuries and damages occurred due to the culpable conduct, recklessness, breach of contract, negligence or other fault of these co-defendants, without any fault or negligence on the part of RA Carozza and Double C.

To the extent that RA Carozza and Double C seek recovery from ProChek based upon the duty it owed to plaintiffs, and a breach of that duty contributed to plaintiffs' alleged injuries, they adequately state a cross claim for contribution (*see Razdolskaya v Lyubarsky*, 160 AD3d 994, 997 [2d Dept 2018] [internal citations omitted]). On this issue, the Appellate Division, Second Department stated that: "[a]n essential requirement for contribution is that the parties must have contributed to the same injury [and] that [c]ontribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories" (*id.*). Here, cross claimants RA Carozza and Double C, as well as ProChek, Leach, Rekha Carozza and Keller Williams, are alleged to have caused the same injury to plaintiff, that being plaintiffs' payment for the Property in excess of its fair market value, as well as the costs, time and inconvenience associated with repairing the Defects. RA Carozza and Double C do not, however, state a cross claim for common-law indemnification, requiring its dismissal, as the cross claim lacks allegations that ProChek owed a contractual, or other duty, to RA Carozza and/or Double C (*id.*).

With respect to Keller Williams, plaintiffs' charge Keller Williams, via four somewhat

intertwined and duplicative causes of action, with unjust enrichment, and with negligence and breach of its duty to be honest with the general public, by producing the MLS listing for the Property, that includes misrepresentations about the condition of the Property. The offending conditions, which Keller Williams allegedly failed to disclose and/or actively concealed, were the water and mold damage in the interior of the house.

While New York has long adhered to the doctrine of caveat emptor in an arm's length real property transfer, imposing "no liability on the seller or the seller's agent to disclose any information concerning the premises . . . unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" (*Gallagher v Ruzzine*, 147 AD3d 1456, 1459 [2d Dept 2017] [internal quotation marks and citation omitted]), New York has enacted statutory law (*see* Real Property Law Article 14) codifying a seller's disclosure obligations for certain residential real property transfers," that being the seller's obligation to provide a fairly comprehensive disclosure statement about the property (*see* Real Property Law § 462 [1], [2]). Article 14 also provides that, in lieu of delivering the disclosure statement, a seller can opt to credit \$500.00 against the agreed upon purchase price of the residential real property (Real Property Law §465 [1]), which is what Leach chose to do in this instance.

With respect to Keller Williams, it is plaintiffs' contention that, as the listing agent, it was aware of the superficial repairs and/or efforts made by Leach to obscure the Defects, and that it purposefully and/or negligently made misrepresentations of fact when it published the MLS listing for the Property that not only failed to disclose such conditions, but made implicit representations that the Property was in a reasonably good, safe and livable condition, which it was not. Plaintiffs further allege that Keller Williams benefitted from its misrepresentations and

was unjustly enriched when, in reliance upon the misrepresentations, they paid more than they should have, in light of the true condition of the Property.

Keller Williams contends that the causes of action lack merit, in that: plaintiffs' allegations are contradicted by the clear terms of the Contract; it did not owe plaintiffs a duty to use to impart accurate information, and it was not reasonable for them to rely upon the information in the MLS listing; and to the extent the allegations sound in fraud and/or misrepresentation, they do not meet the pleading specificity requirements of CPLR 3016 (b).

Upon review of the complaint, the Court finds that it does not include allegations from which it can be construed that plaintiffs had a special relationship with, or were in privity with, Keller Williams, a prerequisite for imposing liability on it in the event of a breach of a duty flowing from that relationship.

Furthermore, the allegations of misrepresentation, or negligent misrepresentation, fail because the Contract executed by plaintiffs and Leach on July 10, 2015, contains an acknowledgment that Leach was providing plaintiffs the \$500.00 credit, rather than a property condition disclosure statement, and because it contains a merger clause that states as follows.

"Purchaser is relying solely upon Purchasers' personal inspection of the premises and/or inspections made on Purchasers' behalf by engineers, laboratories, home inspection services, termite and pest inspectors, etc. Purchaser acknowledges that Purchaser agrees to accept title to the premises with the property in its 'as is' condition and that this provision will be strictly construed. Purchaser agrees that for the purposes of this contract, Purchaser has not relied upon any of the statements made by the Seller and that except as specifically set forth in the Contract of Sale, no representations, warranties or guarantees have been made to the Purchaser. Purchaser acknowledges that Purchaser shall have no recourse to the Seller for any conditions in the property or at the property which are discovered by Purchaser after the delivery of the deed to be conveyed hereunder and any and all representations of Seller shall be deemed to be merged in the delivery of the deed and shall not survive the closing. This provision shall similarly be strictly construed"

(Contract ¶ 37).

Keller Williams also contends that, to the extent plaintiffs allege misrepresentation and/or fraud, the causes of action are inadequately pleaded. The elements of a claim sounding in fraud “are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Orlando v Kukielka*, 40 AD3d 829, 831 [2d Depot 2007]).

CPLR 3016 (b) provides: “[W]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”¹ Here, plaintiffs offer little factual detail other than claiming that, because Keller Williams was the listing agent and its employee, Weil, visited the Property, it knew of the various Defects, and knowingly made misrepresentations about the condition of the Property for the purpose of inducing the general public to rely on them. These allegations constitute little more than conjecture, and lack the necessary factual assertions about what Keller Williams knew about the Defects at the time it listed the Property, and about what steps it took to hide the information, to state a claim for misrepresentation and/or negligent misrepresentation and/or fraud.

Inasmuch as plaintiffs’ claim against Keller Williams for unjust enrichment is premised on the same allegations as underlie the balance of their causes of action, which are subject to

¹ The heightened pleading standard is required unless the facts supporting the cause of action “are peculiarly within the knowledge of the party charged with fraud” or misrepresentation (*Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486, 491 [2008] [internal quotation marks and citation omitted]), which is not claimed by plaintiffs.

dismissal on CPLR 3211 (a) (1) and (7) grounds, that claim, like RA Carozza and Double C's cross claim for contribution, also does not survive dismissal. The Court's finding that Keller Williams is not liable to plaintiffs necessarily defeats a cross claim asserted against it for either contribution or indemnification (*see Tapinekis v Rivington House Health Care Facility*, 17 AD3d 572, 574 [2d Dept 2005]).

Accordingly, it is

ORDERED that the motion of defendant Rekha Carozza is granted to the extent that the causes of action sounding in breach of fiduciary duty and intentional infliction of harm are dismissed as against said defendant, and the motion is otherwise, denied; and it is further

ORDERED that the motion of defendant HomeChek Real Estate Services, Inc., sued herein as Prochek Home Inspection Services, Inc. d/b/a ProChek is granted to the extent that the causes of action sounding in negligence and intentional infliction of harm are dismissed as against said defendant, and the cross claim for indemnification is dismissed as against said defendant, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant Keller Williams Realty Partners is granted and all claims and cross claims are severed and dismissed as against said defendant; and it is further

ORDERED that defendants Rekha Carozza and HomeChek Real Estate Services, Inc., sued herein as Prochek Home Inspection Services, Inc. d/b/a ProChek, are directed to serve answers to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for plaintiffs and the remaining defendants are directed to appear

for a preliminary conference in room 811, 111 Dr. Martin Luther King, Jr. Blvd., White Plains,
New York on Monday, February 25, 2019, at 9:30 a.m.

This constitutes the decision and order of the Court

Dated: White Plains, New York
January 31, 2019

ENTER:



HON. DAVID F. EVERETT, J.S.C.

Filed Electronically

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