SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

EVELIN MARIA ORTIZ PACHE and KATHLEEN LIZ,

Plaintiffs,

- against -

KINGDOM PLUS HOLDINGS, LLC.,

Defendant.

- x

Index No.: 709140/2020

Motion Date: 10/1/20

Motion No.: 19

Motion Seq.: 1

The following electronically filed documents read on this motion by defendant for an Order pursuant to CPLR 3211(a)(1) and (7) dismissing the plaintiffs' Complaint in its entirety:

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits.....	EF 3 - 11
Affirmation in Opposition-Exhibits-Memo. of Law.....	EF 12 - 17
Reply Affirmation.....	EF 18 - 19

Plaintiffs commenced this action by filing a summons and complaint on July 2, 2020. The Complaint seeks rescission of a Contract of Sale and/or monetary damages and other compensation for negligence, fraud, fraudulent inducement, constructive fraud, violations of New York General Business Law, and breach of contract.

By way of relevant background, defendant purchased the subject property located at 130-26 176th Place, Jamaica, New York 11431 for $365,000 in January 2018. Defendant then undertook a substantial renovation and rehabilitation of the property. On March 22, 2019, plaintiffs and defendant executed a Residential Contract of Sale to purchase the subject property for $875,000. Around the same time, plaintiffs conducted a home inspection. No issues were observed. The closing took place on April 30, 2019. A deed was recorded on May 6, 2019. By summer of 2019, plaintiffs were dealing with persistent water intrusion in the basement,

noxious smells of sewage permeating throughout the property, and visible signs of mold. In September 2019, plaintiffs hired a plumber and discovered that there was no system to remove wastewater and sewage from the property. As a result, wastewater and sewage from the last several months were deposited directly in the ground under the property, accumulating in open spaces and soil. As the ground became saturated, raw sewage pooled under the floors in the basement and the first floor at the front of the property. Wastewater was seeping into walls and floors. The odor was sickening plaintiffs and their family members. There were high levels of ambient mold in the air and evidence of water intrusion, toxic mold, and insect infestation in the basement and on the first floor. Due to the unsafe conditions, plaintiffs and their family members had to vacate the property for the duration of the repairs and remediation, which lasted several months.

Defendant seeks to dismiss the action on the grounds that the Contract bars this action. Specifically, at the closing, defendant elected not to disclose and plaintiffs received and accepted $500 as a credit in full satisfaction of all of defendant's obligations per New York State Real Property Law Article 14. Defendant further contends that since title to the property closed and the deed was delivered, the doctrine of merger extinguished any claims plaintiffs may have regarding the Contract. Lastly, defendant claims that the fraud claims fail because there was no justifiable reliance upon the alleged misrepresentation of defendant concerning the sewer connection. Additionally, under the doctrine of caveat emptor, there is no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal, as here, at arm length.

Plaintiffs oppose the motion.

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Teitler v Pollack & Sons, 288 AD2d 302 [2d Dept. 2001]). "A motion to dismiss a complaint based on documentary evidence 'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (Stein v Garfield Regency Condominium, 65 AD3d 1126 [2009], quoting Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002].

It is well settled that in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR

3211[a][7]), the pleadings must be liberally construed. The sole criterion is whether, from the complaint's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (Leon v Martinez, 84 NY2d 83 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2d Dept. 2003]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see Morone v Morone, 50 NY2d 481 [1980]; Gertler v Goodgold, 107 AD2d 481 [1st Dept. 1985], affirmed 66 NY2d 946, [1985]). The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11[2005]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]).

Initially, the merger doctrine does not apply to latent defects (see Fehling v Wicks, 179 Misc.2d 1041, 1042 [2d Dept. 1999][stating that the merger doctrine "has no application where the purchaser discovers latent defects which are discoverable only after the purchaser occupies the premises"]). Moreover, neither caveat emptor nor the "as-is" clause shields defendant from liability. Specifically, caveat emptor does not insulate a seller from liability where "there is some conduct on the part of the seller which constitutes active concealment" or "the seller omits facts that are peculiarly within its knowledge, and the other party cannot discover such facts through a diligent inspection of the premises and the exercise of ordinary intelligence" (533 East 12th Street LLC v DS 531 E. 12th Street Owner LLC, 2020 NY Slip Op 32806[U][Sup Ct., New York Cnty. 2020]; see Simone v Homecheck Real Estate Servs., Inc., 42 AD3d 518 [2d Dept. 2007]). Here, it is significant that defendant is alleged to have recently gutted and renovated the entire property and that the sewer is a nonvisible component, not easily verified without destructive testing (see Schooley v Mannion, 241 AD2d 677 [3d Dept. 1997][denying the defendant's motion to dismiss based on an "as-is" clause and finding that a clear question of fact existed regarding whether the defendant misrepresented the existence of insulation throughout the premises and, if so, whether the plaintiffs reasonably relied on such statements]; Schottenstein v Windsor Tov LLC, 2009 NY Slip Op 30651[U][Sup Ct, New York Cnty 2009][finding that caveat emptor did not preclude the plaintiff's equitable claim for rescission where the plaintiff sufficiently alleged that the defendant should have known about and disclosed water intrusion and leaks that resulted in a dangerous mold condition, which the plaintiff discovered

after closing]; 533 East 12th Street LLC v DS 531 E. 12th Street Owner LLC, 2020 NY Slip Op 32806[U][Sup Ct., New York Cnty. 2020][finding that neither caveat emptor nor a contractual "as-is" clause barred liability where the defects to the roof, facade, walls and ceiling related to conditions peculiarly within the seller's knowledge]). Accordingly, at the very least, issues of fact remain as to whether defendant actively concealed the fact that there was no sewage system, whether plaintiffs reasonably relied on such, and whether the lack of the sewage system was a condition peculiarly within defendant's knowledge.

Defendant's contention that the Property Condition Disclosure Act, Real Property Law Article 14, relieves defendant of responsibility because plaintiffs accepted a $500 credit at the closing is also without merit. Section 467 of the Real Property Law provides that nothing contained in Article 14 shall be construed as limiting any existing legal cause of action or remedy at law.

Defendant also seeks to dismiss the action on the ground that the Complaint fails to state a cause of action. However, viewing the factual allegations in the Complaint as true, the Complaint sufficiently sets forth each cause of action.

Regarding the cause of action seeking rescission, defendant contends that it would be severely prejudiced because it has been over one year since the title was transferred and defendant is no longer in possession of the funds. Such argument does not address the sufficiency of the pleadings.

Regarding the breach of contract claim, the Complaint pleads the essential elements for breach of contract, including the existence of a contract, the plaintiffs' performance pursuant to the contract, the defendant's breach, and damages resulting from the breach. Moreover, this Court has already found that the merger doctrine, "as-is" clause, and caveat emptor do not shield defendant from liability under the circumstances set forth in the Complaint.

Regarding the fraud claims, the Complaint alleges that defendant, who rehabilitated and gutted the property, covered up the fact that the property had no sewage system by, among other things, dumping construction debris in open cavities and closing access to open walls, floors, and underground plumbing. Additionally, the Complaint alleges that the facts concerning the lack of a sewage system were peculiarly within defendant's knowledge. Once again, viewing the factual allegations in the Complaint as true, this Court finds that the Complaint

sufficiently sets forth a claim for fraud. Moreover, the fraud claims are not duplicative of the breach of contact claims (see First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 [1st Dept. 1999][finding that if the complaint alleges that the plaintiff was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also gave rise to the plaintiff's breach of contract claim]). Moreover, whether plaintiffs reasonably relied upon any misrepresentation or omission is an issue of fact.

Regarding the negligence claim, defendant alleges that it did not owe a duty to plaintiff to perform the renovations with due care. However, this Court finds that at this stage in the litigation, a question of fact remains as to whether defendant launched a force or instrument of harm by creating or exacerbating a dangerous condition, and thus, assumed a duty of care.

Lastly, the Complaint alleges that defendant advertised on the internet that the property was connected to the New York City sewer system or otherwise had an existing system for waste removal when, in actuality, no such system existed. Based on such allegation, plaintiffs allege that defendant engaged in a deceptive act and false advertising in violation of General Business Law Sections 349 and 350. Here, taking the allegations in the Complaint as true, this Court finds that the Complaint sufficiently states causes of action under the General Business Law (see Board of Mgrs. Of Bayberry Greens Condominium v Bayberry Greens Assoc., 174 AD2d 595 [2d Dept. 1991]).

Accordingly, and based on the above reasons, it is hereby

ORDERED, that defendant's motion to dismiss is denied.

Dated: October 8, 2020
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.

FILED
10/8/2020
1:26 PM
COUNTY CLERK
QUEENS COUNTY