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| Vella v Coldwell Banker Real Estate LLC |
| 2020 NY Slip Op 35222(U) |
| May 13, 2020 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 66202/2019 |
| Judge: William J. Giacomo |
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To commence the statutory time period for appeals as of right (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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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MICHAEL VELLA,

Plaintiff,

Index No. 66202/2019

– against –

Mot. Seq. 1 & 2

COLDWELL BANKER REAL ESTATE LLC, KAREN O’CONNOR AS AGENT FOR COLDWELL BANKER REAL ESTATE LLC, BERKSHIRE HATHAWAY HOME SERVICES HUDSON VALLEY, MICHAEL KAHNS AS AGENT FOR BERKSHIRE HATHAWAY HOME SERVICES HUDSON VALLEY, MICHAEL L. STRAUB and ERIN L. CUMMINGS STRAUB,
Defendants.

DECISION & ORDER

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In an action to recover damages for negligent and fraudulent misrepresentation (1) the defendants Coldwell Banker Real Estate LLC and Karen O’Connor as Agent for Coldwell Banker Real Estate LLC move for summary judgment dismissing the complaint insofar as asserted against them pursuant to CPLR 3212 (motion sequence #1); and (2) the plaintiff cross-moves for leave to amend the complaint pursuant to CPLR 3025(b) (motion sequence #2):

Papers Considered

1. Notice of Motion/Affirmation of Mordy Yankovich, Esq./Exhibits 1-2/Affidavit of Karen O’Connor/Exhibit A;
2. Notice of Cross Motion/Affirmation of Stephen R. Stern, Esq./Exhibits 1-4/Affidavit of Michael Vella;
3. Affirmation of Mordy Yankovich, Esq. in Opposition to Cross Motion and in Reply;
4. Affirmation of James D. Spithogiannis, Esq. in Opposition to Cross Motion.

Factual and Procedural Background

Plaintiff purchased real property located at 2 Dellworth Dr., Yorktown Heights, New York from the defendants Michael E. Straub and Erin L. Cummings Straub

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pursuant to a contract of sale dated July 9, 2018. The property is located next to several acres of state owned land.

The Straubs had retained Coldwell Banker Real Estate LLC as their selling broker. The defendant Karen O'Connor executed the exclusive right to sell agreement on behalf of Coldwell.

Plaintiff retained Michael Kahns of Berkshire Hathaway Home Services Hudson Valley as his buyer's broker in connection with the purchase of the property.

The listing for the sale of the home, which was viewed by plaintiff on Zillow described the property as "[a] great home that is situated next to 750 acres of state owned land at the end of a quiet road! ... Enjoy the outdoors and barbecues in the backyard!". After viewing the listing, plaintiff visited the property on five separate occasions in June and July 2018 prior to making an offer. Plaintiff alleges that he did not hear any noise from the adjacent state property during these visits.

After closing, plaintiff moved into the home on August 24, 2018. On September 8, 2018, he became aware of noise from the adjacent state property caused by all-terrain vehicles (ATVs). It was then plaintiff learned that the state property is regularly used by ATVs at all times of day and night. While plaintiff contacted the State Police about the ATV noise, the ATV activity remains ongoing.

Plaintiff commenced this action against Coldwell, O'Connor as agent for Coldwell, Berkshire Hathaway, Kahns as agent for Berkshire Hathaway, and the Straubs alleging that they negligently and fraudulently misrepresented that the subject premises was quiet. The complaint asserts that plaintiff was interested in the property based upon the listing describing the property as "quiet" and that he would be able to enjoy the outdoors. The complaint alleges that plaintiff would not have purchased the property had he been made aware of the noise from the ATV activity. Plaintiff alleges that the defendants were aware or had reason to be aware of the noise and that the failure to disclose the noise was a material misrepresentation. As relevant to the motions herein, the complaint asserts causes of action against Coldwell and O'Connor for negligent misrepresentation, fraudulent misrepresentation, and fraud.

Prior to a preliminary conference or any discovery taking place, the Coldwell defendants move for summary judgment dismissing the complaint insofar as asserted against them. Defendants argue that the causes of action for fraud and fraudulent misrepresentation should be dismissed because any noise emanating from the state property could have been discovered by plaintiff's own due diligence. Defendants also argue that the negligent misrepresentation cause of action should be dismissed as they had no duty to disclose the noise. The Coldwell defendants also seek sanctions against plaintiff arguing that the action is frivolous.

In support of the motion, Karen O'Connor attests that she was the sales person representing the Straubs on behalf of Coldwell for the sale of the property. O'Connor

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executed the exclusive right to sell agreement as an agent of Coldwell. She states that she described the premises as "quiet" on the listing "because the seller described the subject premises as 'quiet' on a 'quiet street' and 'next to state property'". During the course of her representation, O'Connor visited the property twelve to fifteen times and never heard any noise. O'Connor states that neither she nor anyone else from Coldwell restricted the plaintiff from visiting the property prior to closing or did anything to conceal any alleged noise or restrict plaintiff from ascertaining information related to the property.

Plaintiff opposes the motion and cross-moves to amend the complaint to add a cause of action for private nuisance and to verify the complaint. Plaintiff attaches two copies of the proposed verified amended complaint; one showing redline additions and changes. Plaintiff argues that since the facts already contained in the original complaint plead a claim for public nuisance, the defendants are unable to claim any surprise by the amendment.

As to the defendants' motion, plaintiff argues that numerous issues of fact exist and that the motion is premature. Plaintiff asserts that despite serving various notices for discovery and inspection on the defendants, no responses to such demands have been received and only the Berkshire defendants requested an extension of time to respond. Plaintiff argues that the Coldwell defendants did not provide or comply with the requested discovery and that by this premature motion, he is required to respond without such discovery.

Plaintiff argues that this is not a case of caveat emptor but of negligent and fraudulent misrepresentation. Plaintiff further argues that its conduct is not frivolous and sanctions are not warranted. Plaintiff submits an affidavit attesting that the complaint as filed states what he believes occurred and that he is seeking discovery that remains outstanding. He states that all the statements made in the complaint are accurate and true to the best of his knowledge and that he is willing to sign a verification if his cross motion is granted.

In reply the Coldwell defendants argue that plaintiff should not be entitled to discovery on the mere hope of ascertaining facts to support his frivolous claims. In opposition to the cross motion, plaintiff argues that the amendments are devoid of merit and palpably insufficient.

The defendants Berkshire Hathaway HomeServices-Hudson Valley Properties and Michael Kahns oppose plaintiff's cross motion to amend arguing that a cause of action for private nuisance is devoid of merit because plaintiff does not contend that they invaded his property.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

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eliminate any material issues of fact from the case (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (see *Zuckerman v New York*, 49 NY2d at 562).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see *Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (see *Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]).

"The essential elements of a cause of action 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 Dept 2007]).

Here, the Coldwell defendants and O'Connor failed to demonstrate entitlement to summary judgment dismissing the complaint. The listing for the property, which was prepared by O'Connor on behalf of Coldwell and attached to the complaint, describes the property as "quiet". In viewing the evidence in the light most favorable to plaintiff, issues of fact exist including, but not limited to, whether the alleged misrepresentation of the property as "quiet" was false, known to be false by the defendants and made for the purpose of inducing plaintiff to rely upon it. Moreover, it cannot be said that the plaintiff's reliance on the alleged misrepresentation was unreasonable as a matter of law.

Since the defendants failed to establish, prima facie, their entitlement to judgment as a matter of law, the burden never shifted to the plaintiff, and the defendants' motion is denied without regard to the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Vision Accomplished, Inc. v Lowe Props., LLC*, 131 AD3d 1163, 1164 [2d Dept 2015]).

In any event, the plaintiff demonstrated that the motion is premature. "A party who contends that a summary judgment motion is premature is required to demonstrate

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that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]; see CPLR 3212 [f]; *Suero-Sosa v Cardona*, 112 AD3d 706, 708 [2d Dept 2013]). That burden has been met here.

In light of the foregoing, the Court declines to grant the defendants' request for sanctions.

As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing party and where the amendment is not palpably insufficient or patently devoid of merit (see *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; CPLR 3025[b]; *Assevero v Hamilton & Church Props., LLC*, 154 AD3d 728 [2d Dept 2017]; *Schelchere v Halls*, 120 AD3d 788 [2d Dept 2014]).

"[A] party seeking leave to amend a pleading need not make an evidentiary showing of merit, and leave to amend will be granted unless such insufficiency or lack of merit is clear and free from doubt [internal citations omitted]" (*Stein v Doukas*, 128 AD3d 803, 805 [2d Dept 2015]; see *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). The decision whether to grant leave to amend a complaint is committed to the sound discretion of the court (*Davis v South Nassau Communities Hosp.*, 26 NY3d at 580; *Castagne v Barouh*, 249 AD2d 257 [2d Dept 1998]).

Here, there is no prejudice to the defendants to the proposed amendment of the complaint particularly since no discovery has taken place. The Court finds that the proposed amendment is not clearly lacking in merit.

Accordingly, it is

ORDERED that the motion of the defendants Coldwell Banker Real Estate LLC and Karen O'Connor as Agent for Coldwell Banker Real Estate LLC, for summary judgment dismissing the complaint insofar as asserted against them pursuant to CPLR 3212 is DENIED (motion sequence #1); and it is further

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ORDERED that the plaintiff's cross motion for leave to amend the complaint pursuant to CPLR 3025(b) is **GRANTED** in entirety (motion sequence #2); and the amended complaint attached to plaintiff's cross motion papers shall be deemed served upon service of a copy of this order with notice of entry within twenty days hereof; and it is further

ORDERED that the defendants shall answer the second amended complaint within 20 days from the date of said service.

Counsel for all parties are directed to appear in the **Preliminary Conference Part, room 800**, for further proceedings, at a date and time to be provided.

Dated: White Plains, New York
May 13, 2020



HON. WILLIAM J. GIACOMO, J.S.C.