98 Gates Ave. Corp. v Bryan
2021 NY Slip Op 30752(U)
March 12, 2021
Supreme Court, Kings County
Docket Number: 504940/2020
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

X

98 GATES AVENUE CORP.

Plaintiff,

-against-

LEON A. BRYAN JR. a/k/a MILTON ROSS GUMBS,

Defendant.

X

DECISION / ORDER
Index No. 504940/2020
Motion Seq. No. 1
Date Submitted: 3/12/21

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion to dismiss

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	4-10
Affirmation in Opposition and Exhibits Annexed.....	17-22
Reply Affirmation…….....	23

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This is an action for breach of contract, fraud, breach of fiduciary duty, and other causes of action with regard to plaintiff's purchase of defendant's interest in a building in Brooklyn. The defendant moves, pre-answer, to dismiss the complaint for failing to state a cause of action (CPLR 3211[a] [7]) and founded on documentary evidence (CPLR 3211 [a] [1]). For the reasons which follow the motion is granted and the complaint is dismissed.

Plaintiff is the surviving son of Leon Bryan Sr., who died testate in 1981 in New York County, NY. According to the documents and other items in the motion papers, including many deeds which have been recorded, defendant received a letter from plaintiff's principal (E-File Doc 9) soliciting him to sell his interest in the property at issue, a house located at 98

Gates Avenue, Brooklyn, NY. The letter states that the writer (plaintiff) would pay all cash for defendant's interest in "your father share property." Defendant agreed, and a contract of sale was drawn. It is located at E-File Doc 7. It is dated April 8, 2019. It states that defendant, the "sole heir and distribute [sic] of Leon A. Bryan, deceased," as seller, was selling "seller's fifty percent interest" in the house for the sum Five Hundred Thousand Dollars. On April 11, 2019, defendant's attorney executed the deed, with a power of attorney from defendant dated April 8, 2019, which was also recorded. It reflects that defendant lives in North Carolina. Thus, from contract to closing was a period of four days. While the contract of sale states that he was selling his 50% interest, this is not mentioned in the deed, which does not reference any percentages, and just states that defendant was making the conveyance as "sole heir" of Leon A. Bryan, Sr. and recites that Leon A. Bryan Sr. was conveyed title by deed dated February 1979.

Plaintiff's attorney acknowledged at oral argument that plaintiff did not purchase any title insurance for the transaction, and that he thought that ordering a title search was sufficient due diligence in a transaction where the contract of sale states that defendant was selling his 50% interest in the property as his father's "sole surviving heir." While the last deed to his father did state that his father owned fifty percent of the property, his father, who was a physician with many assets and several pieces of real estate, left a will, which was probated in New York County in 1981. His executor was his sister, defendant's aunt. She was appointed as Executor, but never executed a deed which carried out the provision in the will that devised this piece of real estate as part of his residuary estate. The will, E-File Document 20, left one half of his residuary estate to defendant and the other half to his siblings. Thus, defendant was devised one-quarter of the house (half of a half), not one half.

According to the website maintained by the City of New York, Department of Finance, known as ACRIS, plaintiff was able to purchase the remainder of the property by deeds dated August 5, 2019 and February 5, 2020. The amounts paid to the other two sellers total Five Hundred Nine Thousand, Nine Hundred and Ninety Dollars. This action was commenced in February 2020, after plaintiff obtained title to 100% of the property. On April 7, plaintiff, who had paid One Million Dollars for the property, plus some closing costs, conveyed the entire property to a buyer for $2,695,000.

While it is not clear that defendant did knowingly misrepresent his interest in the property, as he has not resided in the property at any point that is discernable,[1] and his father's sisters and their children seems to have been the occupants until recently, plaintiff claims that this misrepresentation, if proven, is actionable because plaintiff would only have paid Two Hundred Fifty Thousand Dollars for 25%. But what is the value of obtaining defendant's interest as the first seller? Surely the other relatives were not interested in co-owning with plaintiff, so the sale by defendant started a chain reaction resulting in the sales by the other two owners. Counsel does not believe that the principle of caveat emptor, let the buyer beware, has any relevance herein, nor does he think the buyer's lawyer had any obligation to go to the Surrogate's Court in the county listed on the death certificate to see if a will had been probated.

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 plaintiffs 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, 638 NE2d 511, 614 NYS.2d 972 [1994]). Here, the court finds that, accepting every fact alleged as true, plaintiff cannot

[1] His address on the 1981 Probate petition was in Queens, and his father died a resident of Manhattan. Defendant was the only child of Leon A. Bryan Sr. The petition (Doc 20) annexes a Divorce Decree from 1958.

maintain an action for breach of contract, fraud, or any of the other causes of action contained in the complaint.

New York adheres to the doctrine of caveat emptor and imposes 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's length (*see Rector v Calamus Group, Inc.,* 17 AD3d 960 [3rd Dept 2005]; *London v Courduff*, 141 AD2d 803 [2nd Dept 1988], *appeal dismissed* 73 NY2d 809 [1988]). Thus, to prevail on a fraudulent non-disclosure claim in the real estate context, the plaintiff must demonstrate that the defendant breached an affirmative duty to disclose which arose as of the result of the seller's having taken steps to actively conceal a condition (*see Jablonski v Rapalje*, 14 AD3d 484 [2nd Dept 1985]; *Platzman v Morris*, 283 AD2d 561 [2nd Dept 2001]; *Bethka v Jensen*, 250 AD2d 887 [3d Dept 1998]; *Gabberty v Pisarz*, 10 Misc 3d 1010 [Sup Ct, Nassau County 2005]). In fact, these cases all address allegedly concealed building conditions, not allegedly concealed ownership interests. Here, the information plaintiff alleges was concealed was a matter of public record, unlike a faulty thermostat or a leaky basement. Plaintiff's failure to conduct any due diligence to determine if defendant actually was an intestate distributee of a valuable piece of property almost 30 years after his father had died is the problem, not defendant's desire to sell his interest, whatever it was. In a recent case, where it was claimed that the seller concealed the Landmark status of the property, also a matter of public record, the Second Department concludes that the purchaser was responsible for determining the landmark status of the property (*see McDonald v O'Connor*, 189 AD3d 1208 [2d Dept 2020]).

This concept is not new or novel. The Court of Appeals states, in 1854, that "The practice has now become universal, both in England and in this country, for purchasers to protect themselves by procuring the insertion of express covenants in their deeds of conveyance; and it is found to be most consonant to justice to apply the maxim *caveat emptor* to such cases, and to require the purchaser to look to his express covenants alone"

(*Burwell v Jackson*, 9 NY 535, 541 [1854]).

Even more on point is a case from 1827, where the court says:

"He may have been incautious and indiscreet in completing the purchase without sufficient inquiry and due precautionary measures for his security; but that was imputable either to his negligence or to his confidence in the representation of Peter the vendor; and the consequence of a failure of title would have fallen upon himself alone. . . Purchasers are too apt to disregard the caution of the law, *caveat emptor*; and to rely upon the apparent ownership of the possessor and his assurances of his title, without instituting proper inquiries into its validity. . . The purchaser takes the title at his own risk; and if it proves defective, and the true owner uses due diligence and interposes his claim in time, the purchaser must lose his estate (*Clapp v Bromagham*, 9 Cow [NY] 530, 558 [1827])."

Accordingly, it is **ORDERED** that the motion is granted, and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: March 12, 2021

E N T E R :

Hon. Debra Silber, J.S.C.