

Dickerson v Bailey
2021 NY Slip Op 33525(U)
September 23, 2021
Supreme Court, Steuben County
Docket Number: Index No. E2019-0938CV
Judge: Patrick F. McAllister
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At a Regular Motion Term of the Supreme Court held in and for the County of Steuben in the Village of Bath, New York on the 22nd day of September 2021

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

Index No. E2019-0938CV

JUSTIN DICKERSON,

Plaintiff,

-v-

DECISION and ORDER

DOUGLAS BAILEY, SHERRY L. ROBERTS,
and STANLEY OLEVNIK,

Defendants.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

The Defendant, Douglas Bailey, moves the court for summary judgment dismissing the remaining claims against him. Kevin Connell, Esq. represents the Defendant, Douglas Bailey; and the firm of Davidson Fink represents the Plaintiff. The court heard oral argument on September 22, 2021 and reserved decision.

In support of the Defendant's motion the court received and reviewed the following submissions:

- Notice of Motion;
- Affirmation in Support of Defendant's Motion for Summary Judgment by Kevin Connell affirmed May 25, 2021
- [attachments: Summons and Complaint,
- Notice of Motion and Motion,
- Decision and Order by Judge Wiggins,
- Home Inspection Report,
- Waiver of Inspection,
- Property Condition Disclosure Statement,
- Purchase and Sale Contract,
- Letter,
- Deposition of Plaintiff, and

Deposition of Krause];
Plaintiff's Memorandum of Law in Opposition to defendant Bailey's Motion for
Summary Judgment; and
Reply Affirmation in Support of Defendant's Motion for Summary Judgment by
Kevin Connell affirmed August 2, 2021
[attachments: Notice of Motion (by Sherry L. Roberts)
Affirmation by Roy Rotenberg,
Defendant Sherry Roberts' Memorandum of Law in Support of
Her Motion for Summary Judgment,
Decision and Order dated June 1, 2021,
(portion) EBT of Douglas Bailey].

In opposition to the summary judgment motion the court received and reviewed the
following submissions:

Plaintiff's Memorandum of Law in Opposition to Defendant Bailey's Motion for
Summary Judgment

Background:

The Plaintiff bought property from Defendant Bailey. Ms. Roberts was the seller's real
estate agent. Mr. Olevnik was the buyer's real estate agent and cousin of the Plaintiff. The
Plaintiff claims he was not told about certain problems with the house including insect
infestation, water damages and mold/mildew problem.

Judge Wiggins found that the Home Inspection report had been provided to the Plaintiff
by the real estate agents. Judge Wiggins dismissed some of the claims against Defendant
Bailey but denied summary judgment on some claims. The parties have now completed more
discovery. The Defendant is again seeking Summary Judgment.

Summary Judgment:

Summary judgment is essentially an expedited remedy to avoid needless trials and
delays where no genuine issue of fact remains to be resolved at trial. CPLR § 3212. The
remedy is based "in the interests of justice". Halpern v. Lavine (1946 Sup App T) 60 NYS2d
121.

Summary judgment does not go to credibility. 73 Am Jur 2d, Summary Judgment §36;
Heller v Hicks Nurseries 198 AD2d 330 (Second Dept.,1993). This expedited remedy is
proper if there is no dispute as to the facts and if the only issue is the legal conclusion to be
drawn from the facts. Bagshaw v. Network Serv. Mgmt., Inc., 4 AD3d 831 (Fourth Dept.
2004). Summary judgment may be granted if the opposing party fails to deny any of the
moving party's factual allegations, and contests the motion only on legal grounds (Brickman v.

Niagara Fruit Co. [1971] 65 Misc 2d 483); or if the record of undisputed facts is sufficient for the court to resolve the case as a matter of law (Central School Dist. v. Cohen [1969] 60 Misc 2d 337).

Because it is a drastic remedy, summary judgment should be denied when the court has doubt (except as to damages) concerning whether a material and triable issue of fact exists. Rotuba Extruderes, Inc. v. Ceppos 46 NY2d 223 (1978).

The party moving for summary judgment has the initial burden of setting forth evidentiary facts that establish the cause of action or defense sufficiently to entitle that party to judgment as a matter of law. McCabe v. CSX Transport, Inc., 27 AD3d 1150 (Fourth Dept., 2006). To meet this burden, the moving papers must contain evidence confirming that there is no material and triable issue of fact. Royal v. Brooklyn Union Gas Co., 122 AD2d 132 (Second Dept. 1986). Anything less requires dismissal of the motion regardless of the contents of the opposing party's papers. Filkins v. Village of Elbridge, 24 AD3d 1293 (Fourth Dept., 2005); Silverman v. Sciartelli, 2 AD3d 1463 (Fourth Dept. 2003). To make such a showing, the moving party's supporting papers must include allegations in affidavit format, made with personal knowledge of the underlying facts (C.P.L.R. §3212[b]), together with a copy of the pleadings, and other available proof such as depositions and written admissions. Proof must be in evidentiary form. Foremost Ins. Co. v. Moore, 103 AD2d 1042 (Fourth Dept., 1984). Conclusory statements are inadequate (Ciccarelli v. Cotira, Inc., 24 AD3d 1276 [Fourth Dept., 2005]) as are hearsay allegations (Central School Dist. v. Cohen, 60 Misc 2d 337 [1969]).

Once the moving party establishes its entitlement to summary judgment through the tender of admissible evidence, then the burden shifts to the non-moving party to raise an issue of fact. Hunt v. Kostarellis, 27 AD3d 1178 (Fourth Dept. 2006).

Discussion:

Under the Doctrine of Caveat Emptor the Plaintiff cannot prevail unless Mr. Bailey engaged in active concealment. As noted in this court's previous Decision, most if not all of Krause's information about the condition of the house precedes Mr. Bailey ownership of the house. That included such things as pooling of water during the 72 flood and a fire in the living room in 1975. Mr. Krause was aware of a leaky roof, but that was prior to the house being roofed in 2013. So Mr. Krause provides little to no proof to show that Bailey knew of defects and didn't disclose them That leaves only the conditions set forth in the inspection report. The Defendant takes the position that since the entire report was disclosed the buyer was put on notice of these alleged defects and waived those issues by failing to take further investigative action.

Mr. Bailey says he had Lowe's install the roof so he was confident that the soffits and air floor would have been properly installed. He was not personally aware of any defects. Mr. Bailey said he had the house painted by someone else so he was not personally aware of any of

the alleged defects. If Mr. Bailey was aware of defects and took efforts to hide these defects from the buyer then the Plaintiff has a cause of action. If Mr. Bailey was aware of these defects and did not disclose the defects then the Plaintiff has a cause of action. But it appears that the only "knowledge" Mr. Bailey had of these defects were the notifications of those potential problems that were set forth in the inspection report and that report was provided to the Plaintiff prior to him purchasing the property.

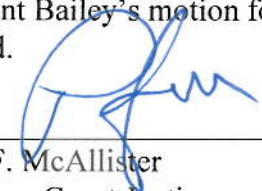
That leaves only the Plaintiff's claim under Real Property Law §465 which deals with the Property Condition Disclosure Statement. In order to recover for fraudulent misrepresentation in that statement the plaintiff would need to prove (a) that there was a misrepresentation or omission of a material fact; (b) that the misrepresentation was made for the purpose of inducing the plaintiff to rely on it; (c) that the plaintiff justifiably relied upon the misrepresentation; and (d) that the plaintiff suffered damages. See, Renkas v. Sweers, 10 Misc.3d 1076[A], 814 N.Y.S.2d 892 (Monroe Co. Sup. Ct 2005). There really is no dispute that the Plaintiff suffered damages and that the Plaintiff relied upon that statement. The question is whether or not there is an issue of fact as to whether or not the misrepresentation or omission was known to be false and whether or not the Plaintiff justifiably relied upon the misrepresentation or omission.

On the Property Condition Disclosure Statement Mr. Bailey marked "unknown" as to several items. A false representation on a disclosure statement may constitute active concealment if the seller had actual knowledge. Kazmark v. Waslyn, 167 AD3d 1386 (Third Dept. 2018). The Plaintiff believes the Defendant knew about these conditions. However, neither Mr. Krause nor any other witness has been presented to show that Mr. Bailey had actual knowledge. Mr. Bailey says he had no actual knowledge and the only knowledge he had was what was contained in the inspection report and he fully disclosed that report. In Kazmark the seller actually had checked "no" not "unknown" and even then that court granted summary judgment dismissing the action because there was no proof of active concealment. Kazmark also says that constructive knowledge does not apply to Real Property Law §465 claims. By checking "unknown" Mr. Bailey put the Plaintiff on notice that he needed to do further inspection if he had a concern. Therefore, this court must conclude as the court did in Kazmark that the Plaintiff's proof is insufficient to meet his burden of raising a triable issue of fact.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is

ORDERED, ADJUDGED, and DECREED that Defendant Bailey's motion for summary judgment dismissing this action be, and hereby is granted.

Dated: September 23, 2021



Hon. Patrick F. McAllister
Acting Supreme Court Justice

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