SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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AVINOAM JACOBI,

Plaintiff,

- v -

GREENDEV CORP., KDK CONSTRUCTION CORP., ACE INSPECTION AND TESTING SERVICES, INC., CHUBB GROUP OF COMPANIES, and SION ASSOC. NY LLC,

Defendants.

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INDEX NO. 153803/2019

MOTION DATE 09/11/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 83, 84, 95, 96, 97, 98, 99, 100, 101

were read on this motion for S/J, by Defendant Greendev; 3d Amend, by Plaintiff .

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion by defendant Greendev Corporation ("Greendev") for summary judgment dismissing the second amended complaint, and the cross-motion by plaintiff for leave to serve yet a third amended complaint, are determined as follows.

Preliminary Statement:

Presently pending before the court is what appears to be an unopposed motion by Greendev for summary judgment dismissing the first, second, and sixth causes of action in the second amended complaint for, *inter alia*, breach of contract, negligence, and nuisance. Instead of presenting substantive opposition to Greendev's motion, plaintiff has cross-moved for leave to serve a third amended complaint which replaces those challenged causes of action with different causes of action; to wit, "causes of action for Fraud, Constructive Fraud, Rescission or Reformation of the subject Contract in equity, and for Breach of Warranty" (Affirmation of

plaintiff's counsel, David I. Aboulafia, Esq., dated November 2, 2020 [NYSCEF Doc. No. 86] ¶ 5; *and compare* Second Amended Complaint [NYSCEF Doc. No. 66] *with* Proposed Third Amended Complaint [NYSCEF Doc. No. 93]). That cross-motion is opposed by Greendev. Based on this procedural posture, therefore: it appears that the motion-in-chief (Greendev's motion for summary judgment addressed to the Second Amended Complaint) should be granted (except insofar as it is preserved as a breach of contractual warranty in plaintiff's proposed third amended complaint [*see, infra*]), leaving plaintiff's cross-motion for leave to serve its proposed third amended complaint as the sole subject for decision at this time.

The Contract of Sale and Subsequent Closing:

On or about October 10, 2013, Greendev acquired title to that certain real property known as 2060 Ryer Avenue, Bronx, New York (the "Premises") by deed (NYSCEF Doc. No. 73). On or about April 26, 2017, Greendev and plaintiff entered into a Contract of Sale (the "Contract") to sell to plaintiff the Premises for the sum of $850,000 (NYSCEF Doc. No. 74). There are several vital provisions in the Contract that weigh heavily in terms of their relevance to this case. They are as follows:

Contract ¶ 27 (The "As-Is" Provision): Plaintiff agreed to accept the Premises in "as is" condition (*see*, NYSCEF Doc. No. 74 ¶ 27). By that provision, Greendev expressly disclaimed any representations "as to the physical condition, income, expense, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth." (*Id.*) That provision also states that plaintiff "has inspected said premises . . . ." (*Id.*)

Contract ¶ 22 (The Merger Clause): This clause states that the Contract is the entire, "full agreement" and that "[a]ll prior understandings and agreements . . . are merged in this contract" (NYSCEF Doc. No. 74 ¶ 22). It also provides that there are no prior understandings and agreements, and "neither party [is] relying upon any statements made by anyone else that are not set forth in this contract" (*id.*).

Contract ¶ 23 (The No Oral Modification Clause): This clause provides that "[t]his contract may not be changed or canceled except in writing." (NYSCEF Doc. No. 74 ¶ 23.)

Contract ¶ 46 (The Merger Doctrine Clause): This clause provides that "[t]he acceptance of a deed by the Purchaser shall be deemed full performance and discharge of every agreement, representation and obligation on the part of the Seller to be performed pursuant to the provisions of this agreement, except those, if any, which are herein specifically stated to survive the delivery of the deed." (NYSCEF Doc. No. 74 ¶ 46.)

Contract ¶ 42 (Specifically Stated Claims Clause): This clause provides that "[i]n no event shall any claim be made for damages unless the Closing shall have occurred and the breach shall be of a term or condition of the Contract that is specifically stated to survive Closing." (NYSCEF Doc. No. 74 ¶ 42.)

The sale closed and plaintiff took title to the Premises by deed dated September 25, 2017 (NYSCEF Doc. No. 47).

The gist of this action – as articulated in all three incarnations of the complaint – is that plaintiff's interests in the Premises were adversely affected by the lack of a dry well serving the Premises and resultant collapse of a retaining wall serving the Premises, and that such lack of a dry well caused plaintiff $170,000 in damages, and that Greendev is liable to plaintiff therefor.[1]

The General Standard for Amendment:

"[O]n a motion for leave to amend a pleading, the movant 'need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.'" (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011].) Where an amendment is "futile," the motion should be denied (*see*, *Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643 [1st Dept 2013]).

[1] The remaining defendants, independent contractors in their own stead, who have made no motions, are alleged to be a contractor (defendant KDK Construction Corp.), an inspector/engineer (defendant Ace Inspection & Testing Servs., Inc.), an architect (defendant Sion Assocs. NY LLC), and an insurer (defendant Illinois Union Ins. Co.), in connection with the Premises and in specific reference to the dry well (or lack thereof) lying at the heart of this lawsuit. The claims against the architect – defendant Sion Assocs. NY LLC – have been discontinued (*see*, NYSCEF Doc. No. 102).

The Breach of Warranty (Proposed) Amendment:

Under the proposed third amended complaint, plaintiff focuses on paragraph 4 (a) of the Contract, which states that, "The PREMISES are to be transferred subject to: (a) Laws and governmental regulations that affect the use and maintenance of the PREMISES, provided that they are not violated by the buildings and improvements erected on the PREMISES." It is plaintiff's position on its motion to amend that said provision – viewed by plaintiff as a warranty – retains post-closing liability on Greendev should it be discovered after the closing, as plaintiff alleges, that a building violation existed; to wit, the lack of a dry well. Plaintiff alleges that the New York City Department of Buildings ("DOB") "required that a dry well be installed underneath the surface of the backyard, designed to catch surface water and distribute it evenly and slowly" and that "DOB approved design drawings submitted by Greendev, its agents and/or contractors, certifying that such a dry well would be installed" (NYSCEF Doc. Nos. 86, 88, 91, 92). Plaintiff further alleges that the post-closing discovery of no dry well indicates that defendants' certification to DOB of the existence of a dry wall was false and, thus, actionable as a breach of the warranty implicit in section 4 (a) of the Contract (*supra*).

Greendev disagrees with the foregoing; arguing, without much explanation, that the warranty provision does not survive the closing. Greendev places heavy reliance on the "as is" provision of the Contract (NYSCEF Doc. No. 74 ¶ 27). But, a harmonization of the "as is" provision (¶ 27) with the warranty of no violations provision (¶ 4 [a]) leads to the reasonable understanding that the "as is" provision is limited to any conditions which do not constitute a DOB violation (*see, Gessin Elec. Contractors, Inc. v 95 Wall Assocs., LLC,* 74 AD3d 516, 518 [1st Dept 2010] ["The courts should construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms"]). Based on this construction, the court rejects Greendev's

position regarding plaintiff's proposed amendment asserting a breach of warranty claim, and grants plaintiff's cross-motion to make that amendment.

The Fraud (Proposed) Amendment:

Plaintiff's eighth proposed cause of action is a conclusory claim of fraud and fails to comply with CPLR 3016 (b). Specifically, "[w]here a cause of action is based in fraud, 'the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury.'" (*MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 290-291 [1st Dept], *lv denied* 28 NY3d 911 [2016].) Those allegations must be pled specifically, not generally (*id.*; CPLR 3016 [b]). The proposed third amended complaint fails to specifically plead these elements (*see*, Proposed Third Amended Complaint ¶¶ 46-49). In paragraph 48, plaintiff conclusorily avers that "this defendant otherwise made material misrepresentations and inducements to plaintiff. . . ." This is a conclusory allegation, and insufficient to plead fraud (*MP Cool, supra*, at 291 ["The complaint fails to allege fraud with sufficient specificity as to each individual defendant and the various time frames involved"]). At a minimum, plaintiff would need to plead specific "misrepresentations or omissions attributed directly" to Greendev, setting forth "[a]ctual specific false factual statements. . . ." (*Id.*)

Here, there are no such allegations. There is no dispute that Greendev never made any representation to plaintiff that there was a dry well upon the Premises; that Greendev was installing a dry well; or that Greendev would install a dry well. Instead, plaintiff seeks to hold Greendev responsible – in fraud, no less – for alleged misrepresentations allegedly made by non-moving defendants herein who are all independent contractors, to DOB, and that plaintiff, without notice to Greendev, relied upon those alleged third-party misrepresentations (*see*, Jacobi Affidavit [NYSCEF Doc. No. 87] ¶ 7 [Plaintiff "constantly reviewed the contents of the

electronic file maintained by the NYC Department of Buildings ('DOB') relative to the property" and "DOB files indicated that the City of New York approved design drawings, and required special inspections, from defendants Ace Testing and Scion, as agents for Greendev, with respect to a 'dry well' that was to be installed under the backyard of the property"]).

"Generally, however, a plaintiff cannot claim reliance on misrepresentations a defendant made to third parties" (*Wildenstein v 5H & Co., Inc.*, 97 AD3d 488, 490 [1st Dept 2012]). While a party can make a fraud claim based upon a third-party's transmission of the misrepresentation, it does not lie where the misrepresentation was not communicated to the plaintiff (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817 [2016]). Nothing in the record remotely suggests that anyone ever communicated any misrepresentation about the dry well to plaintiff. Quite to the contrary: plaintiff, instead, came to certain conclusions about the issue of a dry well from his own public record research (*see*, Jacobi Aff. [NYSCEF Doc. No. 26] ¶¶ 6-7).

Plaintiff seeks to make Greendev liable for alleged misrepresentations to a third-party by independent contractors; to wit, the non-moving defendants. "It is well settled that where an alleged defect or dangerous condition arises from the methods of an independent contractor and the owner of premises exercises no supervisory control over the operation, no liability attaches to the owner under either common law or under section 200 of the Labor Law" (*Balaj v Equitable Life Assurance Socy.*, 211 AD2d 487, 487 [1st Dept], *lv denied* 85 NY2d 811, *rearg denied* 86 NY2d 839 [1995]). Here, plaintiff is essentially asserting that an independent contractor hired by Greendev failed to install a dry well as it had represented on plans submitted to DOB. That does not translate into a cause of action against Greendev for fraud.

But perhaps even more importantly, plaintiff's broader problem is in being able to demonstrate justifiable reliance. Remarkably, plaintiff admits to knowing about the conditions

of the Premises "prior to . . . the close of sale" (Jacobi Aff. ¶ 6) due to his own public record research. "[A] plaintiff suing for fraud (and particularly a sophisticated plaintiff, such as Basis Yield) must establish that it 'has taken reasonable steps to protect itself against deception.'" (*Basis Yield Alpha Fund Master v Morgan Stanley*, 136 AD3d 136, 141 [1st Dept 2015]; *see also, Karfunkel v Sassower*, 105 AD3d 459 [1st Dept 2013]).[2]

Because no claim against Greendev for fraud could be sustained, the motion to amend such a claim into the case is denied.

The Breach of Confidential or Fiduciary Relationship (Proposed) Amendment:

Plaintiff's proposed cause of action against Greendev for constructive fraud is also insufficiently pled. Such a claim requires the same allegations as the proposed fraud claim; but also requires specific factual allegations as to the existence of a confidential or fiduciary relationship (*Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings LLC*, 149 AD3d 472 [1st Dept 2017]). Plaintiff also has to prove that Greendev owed him a confidential or fiduciary duty. Here, plaintiff relies upon a conclusory allegation of a "fiduciary or confidential relationship" without any supporting factual allegations (Proposed Third Complaint ¶ 51; *see*, CPLR 3016 [b]). This is plainly insufficient to establish a confidential or fiduciary relationship. "A fiduciary relationship arises 'between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). "A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (*id.*).

[2] Plaintiff's description of himself is in synch with an understanding that he is, in fact, a sophisticated purchaser (*see*, Jacobi Aff. [NYSCEF Doc. No. 87] ¶¶ 3, 6 [he "purchased several properties in the past"]).

Here, plaintiff makes absolutely no allegations as to the relationship between himself and Greendev from which this court could find or conclude any possible fiduciary relationship. Given the relationship of arms'-length seller and buyer, Greendev owed plaintiff no special duty of disclosure and, thus, no fiduciary or confidential relationship. This is especially so in light of the "as is" clause in the Contract. As a matter of law, "with respect to transactions in real estate, New York adheres to the doctrine of caveat emptor and imposes no duty upon the vendor to disclose any information concerning the premises unless there is a confidential or fiduciary duty or some conduct on the part of the seller which constitutes 'active concealment'" (*Stambovsky v Ackley*, 169 AD2d 254, 257 [1st Dept 1991]).

Thus, the proposed amendment of a constructive fraud claim based on confidential or fiduciary relationship could not succeed and should not be allowed.

The Reformation or Rescission (Proposed) Amendment:

The proposed amendment for "partial reformation" and "rescission" of the Contract cannot lie. As is undisputed, the parties closed on this transaction. As a result, the merger doctrine bars claims upon the extinguished Contract (*see, TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75 [1st Dept 2013] ["The merger doctrine in a real estate transaction provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract."]; *Ka Foon Lo v Curis*, 29 AD3d 525 [2d Dept 2006]; *Hunt v Kojac*, 245 AD2d 858, 858-59 [3d Dept 1997] ["Under the well-established doctrine of merger, provisions in a contract for the sale of real estate merge into the deed and are thereby extinguished absent the parties' demonstrated intent that a provision shall survive transfer of title."]). Hence, there is no longer a contract to "reform" or "rescind." And, in any event, this claim is effectively a restatement of plaintiff's proposed fiduciary breach claim,

since it avers that "defendant failed to disclose to plaintiff a condition upon the subject property, created or caused to be created by this defendant, that materially impaired the value of the subject contract and property . . . ." (Proposed Third Amended Complaint ¶ 55.) As explained above, no such claim exists in the context of an arms'-length seller and buyer relationship (*see, Stambovsky, supra*).

Plaintiff has argued in his motion papers that the alleged dry well problem brings the case into the realm of "latent defect," sufficient to override the otherwise applicable merger doctrine just discussed hereinabove. The court is bound, however, to follow the guidance of the Appellate Division, First Department, in *TIAA Global Invs., LLC v One Astoria Sq. LLC* (127 AD3d 75 [1st Dept 2013]), on this point, which rejected the argument being posited by plaintiff. As the First Department declared in that case: "Although plaintiff cites trial court opinions identifying a latency exception to the merger doctrine, the concept has not been adopted by any of the Appellate Divisions or by the Court of Appeals, and we are not adopting it here." (*Id.*, at 85.)

Moreover, plaintiff has admitted to his pre-closing knowledge of the purported existence of a dry well issue, by virtue of his independent public record research.

In addition, the relief sought by plaintiff in his prayer for relief in the proposed third amended complaint – on all his proposed causes of action – is monetary damages at law ($170,000) (*see*, NYSCEF Doc. No. 93), which is neither rescission or reformation in equity.

Therefore, this proposed equitable claim cannot lie.

<u>The Breach of Statutory or Implied Warranty (Proposed) Amendment</u>:

This proposed claim is without merit as any such claim is time-barred. GBL § 777-a creates a statutory "Housing merchant implied warranty" on every new construction in New

York. A prerequisite to a claim under NY GBL § 777-a is a written notice which "must be received by the builder prior to the commencement of any action" under NY GBL § 777-a. Here, of course, there was never any such written notice. Hence, this claim cannot be maintained.

Any such claim would be time-barred at this juncture. The Housing Merchant Implied Warranty provides different warranties relating to different systems at the Premises. There is a one-year warranty that "the home will be free from defects due to a failure to have been constructed in a skillful manner" (GBL § 777-a [1] [a]). As all parties agree, the retaining wall collapsed more than one year after the closing (NYSCEF Doc. No. 87 ¶ 5 collapse on November 30, 2018]; NYSCEF Doc. No. 75 [date of sale to plaintiff was September 25, 2017]). Even if this provision were applicable, it would be time-barred.

There is also a two-year warranty for "plumbing, electrical, heating, cooling and ventilation systems of the home" (GBL § 777-a [1] [b]). A retaining wall is not any of those systems and, thus, that warranty would not apply. There is a six-year warranty for "material defects" (GBL § 777-a [1] [c]). However, a "material defect" means "actual physical damage to the following load-bearing portions of the home caused by failure of such load-bearing portions which affects their load-bearing functions to the extent that the home becomes unsafe, unsanitary or otherwise unliveable: foundation systems and footings, beams, girders, lintels, columns, walls and partitions, floor systems, and roof framing systems" (GBL § 777 [4]). Since the "home" refers to the actual dwelling, in this case the failure of the retaining wall did not cause damage to the Premises and, thus, is not a "material defect." As for a common law warranty, it is admitted that Greendev did not, itself, install a dry well or do any work itself to the retaining wall. Plaintiff has sued all the non-moving independent contractor defendants for precisely that reason:

that other professionals performed services relative to both the dry well and retaining wall (*see*, Proposed Third Amended Complaint ¶ 10 ["That upon information and belief, the lower portion of this wall was a pre-existing wall over one hundred years old"]).

Accordingly, this proposed amended cause of action is without merit and should not be allowed.

The Negligence (Proposed) Amendment

The proposed third amended complaint appears to include a proposed claim for negligence against Greendev (and the other defendants) (*see*, Proposed Third Amended Complaint [NYSCEF Doc. No. 93] ¶¶ 36-38). Plaintiff's counsel articulates this as a duty to ensure that the Premises were compliant with "plans filed with DOB, and with reasonable care" (Aboulafia Aff. ¶ 25). However, there is no indication that Greendev directed or authorized any plan prepared by any of its co-defendants which misstated the existence of a dry well on the Premises. Again – insofar as Greendev warranted that there would be one, this court has sustained the proposed cause of action against Greendev for breach of such warranty. But that cause of action does not find its footing in negligence theory.

Accordingly, it is

ORDERED that the motion by defendant Greendev Corporation for summary judgment dismissing the claims asserted against it in the Second Amended Complaint is granted, as unopposed; and it is further

ORDERED that the cross-motion by plaintiff to serve and file a third amended complaint asserting claims against defendant Greendev Corporation is granted to the extent of a claim for breach of warranty under paragraph 4 (a) of the Contract of Sale between plaintiff and defendant Greendev Corporation; and it is further

ORDERED that plaintiff shall serve and file such third amended complaint, should it wish to do so, no later than 20 days from the date of filing hereof.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

1/7/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE