

Acheson v Pelliccia
2022 NY Slip Op 35244(U)
August 29, 2022
Supreme Court, Monroe County
Docket Number: Index No. E2021000287
Judge: Elena F. Cariola
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

LYNN ACHESON,

**DECISION, ORDER
& JUDGMENT**

Plaintiff,

v

Index No. E2021000287

MICHAEL PELLICCIA,

Defendant.

APPEARANCES: NATHAN A. VAN LOON, ESQ.
Attorney for Plaintiff

RICHARD C. BRISTER, ESQ.
Attorney for Defendant

Elena F. Cariola, J.

This action arises out of a Purchase and Sale Agreement ("PSA") entered into by the parties wherein Defendant agreed to sell certain real property ("Premises") to Plaintiff in "as is" condition. In conjunction with the sale of the Premises, and in accordance with Real Property Law § 462, Defendant completed a Property Condition Disclosure Statement ("PCDS") based upon his actual knowledge, answering "no" to the questions regarding (1) whether there was asbestos in the property, and (2) if there were any material defects in the sewage system. After closing on the Premises, Plaintiff obtained an asbestos survey and discovered the presence of asbestos in the basement and the

exterior siding. Additionally, following a sewer line backup in the basement of the Premises, it was determined that the underground sewer line needed to be replaced.

Now, before this Court is Defendant's motion, pursuant to CPLR § 3212, for an Order dismissing Plaintiff's complaint. In sum, Defendant avers that the record is devoid of any evidence to establish that he had actual knowledge of asbestos or other material defect relative to the Premises at the time he completed the PCDS. Plaintiff opposes, contending that Defendant has failed to meet his burden, or in the alternative, the existence of a material issue of fact precludes summary judgment.

Upon due consideration of Defendant's Notice of Motion for Summary Judgment, filed on March 15, 2022 (NYSCEF Docket No. 31), Affirmation in Support by Richard C. Brister, Esq. dated March 14, 2022 (NYSCEF Docket No. 32), Memorandum of Law in Support by Mr. Brister dated March 14, 2022 (NYSCEF Docket No. 40), Affirmation in Opposition by Nathan A. Van Loon, Esq. dated April 20, 2022 (NYSCEF Docket No. 42), Affirmation in Reply by Mr. Brister dated April 28, 2022 (NYSCEF Docket No. 50), and all exhibits attached to counsels' papers (NYSCEF Docket Nos. 33-39, 43-39), for the reasons which follow, Defendant's motion is granted in its entirety.

It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Oddo v City of Buffalo*, 159 AD3d 1519, 1520 [4th Dept 2018]; *Winegrad v New York Univ.*

Med. Ctr., 64 NY2d 851, 853 [1985]). The failure of the movant to make the prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; CPLR § 3212 [b]). The evidence must be viewed as true in a light most favorable to the non-moving party (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Dix v Pines Hotel*, 188 AD2d 1007 [4th Dept 1992]). Once the prima facie showing has been met, the burden shifts to the non-moving opposing party to submit evidentiary proof in admissible form sufficient to raise a triable issue of fact (*Alvarez*, 68 NY2d at 324). The court's function on a summary judgment motion is issue finding not issue determination (see *Patton v Matusik, Spadafora & Verrastro*, 16 AD3d 1072 [4th Dept 2005]). The court must carefully consider the material facts to determine whether any facts are genuinely in dispute (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to warrant denial of summary judgment (see *Zuckerman*, 49 NY2d at 562; see also *Christina v Erbsmehl*, 233 AD2d 909, 910 [4th Dept 1996]).

Plaintiff alleges claims seeking recovery for breach of the PSA and fraudulent inducement thereof based upon her supposition that Defendant had actual knowledge of the Premises' defects and that he intentionally withheld pertinent information in completing the PCDS. In support of her contention, Plaintiff argues, in the main, that knowledge of the defects must be imputed to Defendant inasmuch as Defendant made

improvements to the Premises, both personally and through use of professional services; to wit, in the late 1990's, Defendant himself enclosed the porch; in 2003, Defendant utilized Bayshore Mechanical to change out his furnace; and, in 2006, he retained GT Campbell to change out the water heater. Additionally, on approximately three occasions between 2011 and 2021, the Town of Irondequoit Department of Public Works ("Irondequoit DPW") snaked the main sewer line at Defendant's request when it was draining slowly, but not backed up. Plaintiff contends the general maintenance of and improvement to the Premises should have noticed Defendant of both the presence of asbestos and issues regarding the sewer line. Such ignorance, supposes Plaintiff, is highly improbable inasmuch as a reasonably diligent homeowner would likely discover these defects based upon familiarity with and general observations of the Premises. The Court disagrees. Based upon the record evidence, Defendant has made a prima facie showing of his entitlement to summary judgment, and Plaintiff has failed to demonstrate the existence of any material facts. To be certain, Defendant has established that the Premises were sold "as is" and that he had no knowledge of the defects relative to asbestos and the underground sewer pipe. He further demonstrated that the PCDS was based upon his actual knowledge of the Premises, and he engaged in no acts of concealment or deception.

"New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes

active concealment. A false representation in a disclosure statement may constitute active concealment. However, the disclosures required on the PCDS are based solely on the seller's actual knowledge. Accordingly, a claim under Real Property Law § 465 (2) must allege the seller's willful failure to comply with one or more of the obligations imposed on the seller under [Real Property Law] article 14, resulting in the buyer's damages, and a claim for willful failure to disclose under this provision must allege that the seller had *actual knowledge* of a condition that was misrepresented by the disclosure contained in the PCDS." (*Kazmark v Wasylu*, 167 AD3d 1386, 1387 [3d Dept 2018] [internal citations and quotations omitted] [emphasis added].) "Furthermore, '[t]he mere fact that [a] defendant undertook previous repair work on the house is not tantamount to concealment of a defective condition' " *Gallagher v Ruzzine*, 147 AD3d 1456, 1458 [4th Dept 2017] [internal citations omitted], *lv denied* 29 NY3d 919 [2017]).

Initially, with respect to Plaintiff's asbestos claims, nothing in the record suggests Defendant had any specialized knowledge regarding the characteristics of asbestos which would better enable him to identify its presence (*see generally Meyers v Rosen*, 69 AD3d 1095 [3d Dept 2010] [claim of misrepresented facts in PCDS dismissed without evidence defendant had specialized knowledge of latent defect; "to hold otherwise would graft a constructive knowledge standard onto Real Property Law § 465 (2)"]). Additionally, and of significant import to this Court, there is no indication that Defendant was advised of the presence of asbestos by the contractors who performed work inside

the Premises. It is also worth noting that in the approximate 34 years of Defendant's residency within the Premises, he never had an asbestos test conducted.

Likewise, with respect to the sewer line, while there was evidence to suggest Defendant was aware that it previously backed up into the basement washtub, there was also evidence establishing that Defendant arranged to make repairs and correct the condition. Notably, the back-up in the sewer line only caused slow drainage on three occasions, only one of which occurring within the past ten years. On one occasion where the Irondequoit DPW used a camera to snake the drain, no blockages, cave-ins, cracks, roots, or other obstructive or destructive objects were observed. (*See generally Klafehn v Morrison*, 75 AD3d 808 [3d Dept 2010] [vendors' failure to disclose to purchaser condition of waste water discharge lines in basement apartment was not fraudulent, even though vendors were aware that there was leakage problem in apartment nine years earlier, where vendors arranged to make repairs that corrected condition and thereafter received no further complaints]).

In sum, Defendant's general denial of the presence of asbestos and issues with the sewer line are wholly consistent with the totality of circumstances suggesting the defects were latent and unknown to Defendant. To the extent Plaintiff contends a determination on Defendant's credibility is an issue for the jury, the Court disagrees. Plaintiff's unsupported assertions that Plaintiff should have known about the defects are, at best, speculative, and provide no basis to deny summary judgment (*see generally Kazmark*, 167

AD3d 1386; *Meyers* 69 AD3d 1095). For all of these reasons, it cannot be said that Defendant had actual knowledge of the presence of asbestos and defects with the sewer line at the time he executed the PCDS and, therefore, Plaintiff's first cause of action alleging fraud must be dismissed.

Turning next to Plaintiff's breach of contract claim, it also must fail, where, as here, the PSA disclaims any warranty or misrepresentations made regarding the condition of the property and, as discussed above, there is no proof the Defendant *knowingly* misrepresented a material fact in the PCDS (*see generally Amiri v Gurusamy*, 74 Misc 3d 424 [NY Co Ct 2021]). To be certain, in the PSA, Plaintiff specifically and unequivocally agreed to purchase the Premises in "as is" condition. Furthermore, the document explicitly advised Plaintiff that the information contained therein does not constitute a warranty and it is not a substitute for inspections of the property, tests or public records. Defendant's answers pertaining to the condition of the Premises in the PCDS did not thwart the ability of Plaintiff to assess and determine the condition of the Premises or obtain any inspections thereof; nevertheless, Plaintiff opted to forego any formal inspection.

Accordingly, it is hereby

ORDERED and ADJUDGED that Defendant's motion for summary judgment pursuant to CPLR § 3212 is GRANTED in its entirety and the Complaint is accordingly dismissed.

Any prayers for relief not specifically addressed herein are DENIED.

This constitutes the Decision and Order of the Court.

Dated: August 29, 2022


HON. ELENA F. CARIOLA
Justice of the Supreme Court