

Dille v Zoelle LLC
2023 NY Slip Op 30081(U)
January 11, 2023
Supreme Court, New York County
Docket Number: Index No. 157435/2022
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

KARA DILLE, AS TRUSTEE OF THE 37 WARREN
STREET PHCD TRUST,

Plaintiff,

- v -

ZOELLE LLC, CATHERINE L. JURACICH, CORCORAN
GROUP LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 31

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 32, 33, 34, 36

were read on this motion to/for

DISMISS

This action arises out of allegations of fraud in connection with a real estate transaction. Defendant, Zoelle LLC (Zoelle), moves for an order pursuant to CPLR § 3211(a)(1) and (7), to dismiss the complaint with prejudice. Zoelle also seeks an order directing that the escrowee, Howard Brickner Esq., immediately release the contract deposit of \$1.9 million to defendant Zoelle and seeks sanctions pursuant to 22 NYCRR 130-1.1(a), as against plaintiff. Defendants Catherine L. Juracich (“Juracich”) and Corcoran Group, LLC (“Corcoran”) have also moved to dismiss the complaint against them and similarly moved for sanctions against plaintiff. Plaintiff opposes the instant motions. For the reasons set forth below, Zoelle’s motion is granted in part and Juracich and Corcoran’s motion are granted in part.

Background

Plaintiff brings the instant action to recover the down payment for a condominium apartment. Plaintiff and Zoelle entered into a contract for the sale of the premises located at 37 Warren Street, New York, NY 10007, for the price of \$19,000,000. Plaintiff alleges that she entered into the contract based on the fraudulent representations of Zoelle and Juracich, that the building was secured with a full-time doorman. On March 10, 2022, Zoelle and plaintiff executed the contract for the premises with a closing date of “on or about” August 1, 2022. Counsel for Zoelle sent plaintiff’s counsel a letter providing for a “time is of the essence” closing date of September 7, 2022.

On August 16, 2022, plaintiff informed Zoelle that it was in default and that the contract was void based on the alleged fraud of employing a virtual doorman during certain hours. On August 18, 2022, counsel for Zoelle informed plaintiff she had no basis to cancel the contract, 13 days later the instant action was commenced.

Applicable Law

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994].

With respect to CPLR § 3211(a)(1), a motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff’s factual allegations, and conclusively establishes a defense as a matter of law. *See Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 327 [2002]. Furthermore, judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are “essentially

undeniable,” would qualify as “documentary evidence” in the proper case. *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010].

Moreover, “[t]o establish fraud, a plaintiff must show ‘a misrepresentation or a material omission of fact which was false and known to be false by [the] 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.’” *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83 at 85 [1st Dept 2017]. “The element of justifiable reliance is ‘essential’ to any fraud claim” [internal citations omitted]. *Id.*

Discussion

In support of its motion, defendant Zoelle cites to the language in the contract of sale, Section 7.2, that specifically states as follows:

The Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate broker "set-ups" or information pertaining to the above premises furnished by a real estate broker nor by any agent, employee, servant or other person employed by Seller, unless the same are specifically set forth herein.

See NYSCEF Doc. 3. Further, defendant contends that the existence of a virtual doorman could have been discovered with plaintiff’s exercise of due diligence. The condominium offering plan, which includes the existence of the virtual doorman, as well as the hours of operation, was readily available to the plaintiff, and waived by the same.

Here, the Court finds that condominium offering plan, which was undisputedly available to the plaintiff, establishes a complete defense as to plaintiff’s fraud claims. Notably, there is no requirement in the contract that the subject premises have a doorman, let alone a full-time doorman. Further plaintiff’s claim that her reliance on the building having a full-time doorman was the main reason she entered into the contract is belied by the facts that there is no mention of

a doorman in the contract of sale and that she discovered that the building did not have a physical doorman present on Mother's Day 2022¹, however waited over three months to bring this alleged fraud to Zoelle's attention. *See* NYSCEF Doc. 25, ¶ 21.

Further, the Court finds that the complaint fails to properly plead a cause of action for fraud and fraudulent inducement and deems the disclaimer provision in the contract to be a complete defense to these claims *see Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]. The Court has reviewed plaintiff's remaining contentions and finds them unavailing.

As to defendants' motions for sanctions, the Court declines to grant that relief. Although, the Court finds that plaintiff's complaint is without merit, the allegations and arguments in support are not so egregious to this Court as to warrant sanctions. Accordingly, it is hereby

ORDERED that plaintiff's complaint is dismissed in its entirety and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ADJUDGED AND DECLARED that defendant-seller, Zoelle LLC, is entitled to retain the Contract Deposit of \$1,900,000.00; and it is further

ORDERED that Howard Brickner Esq., who is serving as Escrowee, is hereby authorized and directed to release the Contract Deposit of \$1,900,000.00 to defendant seller Zoelle LLC.

1/11/2023		202301111143417LFRANKBA57906A1F8245D595AF127C7CA69974	
DATE		LYLE E. FRANK, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE

¹ Mother's Day 2022, was on Sunday, May 8, 2022.