

**829 Greenwich St., LLC v Slorer**

2023 NY Slip Op 31567(U)

May 9, 2023

Supreme Court, New York County

Docket Number: Index No. 654937/2021

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LYLE FRANK **PART** **11M**

*Justice*

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829 GREENWICH STREET, LLC,

Plaintiff,

- v -

OLE SLOERER, SASHA SLOERER

Defendant.

-----X

**INDEX NO.** 654937/2021

**MOTION DATE** 02/16/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 40

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss the complaint is granted in its entirety.

**Facts**

Plaintiff is the assignee of the buyer the Youngs who contracted with defendants the sellers to buy the house located at 829 Greenwich Street. Before signing the contract, the buyers hired a home inspection company to inspect the premises and issue an inspection report. The report points to various water damages and possible signs of mold and moisture. As the assignee, plaintiff and the sellers closed the deal and plaintiff took title to the house. After moving into the house, the Youngs allegedly discovered extensive leakage and water damage. Plaintiff brought the suit against defendants, claiming defendants fraudulently induced plaintiff to enter and close the contract by misrepresenting the condition of the house. Defendants filed the motion to dismiss the entire complaint pursuant to CPLR § 3211(a)(1) & (a)(7), claiming the disclaimer clause within the contract bars plaintiff from bringing the suit.

**Motion to dismiss general standard**

On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boenheim*, 24 N.Y.3d 262, 268 (internal citations omitted). “[T]he court was not required to accept factual allegations that are *contradicted* by documentary evidence, or legal conclusions that are unsupportable in the face of undisputed facts.” *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006].

**CPLR § 3211(a)(1)**

Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (emphasis added). “[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff’s factual allegations.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable”. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].

**CPLR § 3211(a)(7)**

“In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” *Leon v. Martinez*, 84 N.Y.2d 83, 88. “What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading “will seldom if ever

warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that plaintiff has no cause of action”. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 [1st Dept 2014]. “[T]he Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim.” *Id.*

**Fraudulent Inducement to Enter into and Close Under the Contract (The First and Second Causes of Action)**

“For a fraudulent inducement cause of action to be viable, it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made *justifiably* relied on it and was damaged. *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 495 [1st Dept 2011].

Here, plaintiff failed to plead a sufficient fraudulent inducement claim. Even if the court agrees with plaintiff that the statements made by defendants in the Purchaser’s Rider constitute false representations with the intent to induce plaintiff to enter and close the contract, and the damages are actual, plaintiff still fails to persuade the court that it had justifiably relied on the misrepresentations to negotiate and close the deal. See NYSCEF Doc. No. 10 & 18.

First, the disclaimer clause inserted within the contract of sale directly disclaims plaintiff’s reliance on seller’s representations of the house condition. “A party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of a contract executed by the allegedly defrauded party.” *Perrotti* at 495. The disclaimer states, in pertinent part, that “Purchaser is entering into this contract based *solely upon* such inspection and investigation and *not upon any* information, data, statements or representations, written or oral, as to the physical conditions, state of repair, use, cost of operation or any other matter related to the Premises or the other property included in the sale,

given or made by Seller or its representatives, and shall accept the same ‘as is’ in their present condition and state of repair, ....” See NYSCEF Doc. No. 10, ¶ 12.

Words above unambiguously preclude seller’s representations, fraudulent or not, from becoming the inducement to buyer’s decision to contract. Two parties negotiating at arm’s length are free to specifically disclaim reliance on any representation by the other party. As long as it is recognized by both parties, the court sees no reason to interfere with the parties’ freedom of contract. Thus, the plaintiff’s claims for fraudulent inducement must fail pursuant to CPLR § 3211(a)(1) & (a)(7).

Plaintiff’s interpretation of the relation between the main contract and the Purchaser’s Rider is unavailing. The rider controls only if there are inconsistencies between the two. But there is no inconsistency between the disclaimer and the seller’s representations in the rider. Nothing in the rider says that buyer was relying on seller’s representations to make the decision. NYSCEF Doc. No. 10 & 29 at page 14. Therefore, the disclaimer is not superseded by the rider, thus effectively binding the two parties.

Second, the inspection report submitted by plaintiff only supports the sellers’ position. NYSCEF Doc. No. 10. The Court of Appeals has held on this issue that “if the facts represented are not matters peculiarly within the party’s knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.” *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010] (emphasis added).

Here, the representations made by defendants in the rider are *without* investigation or due diligence, as they are made to the best of seller’s knowledge. Here, the infra-red inspection of the

family room ceiling indicates possible signs of moisture and mold, and continuous monitoring of the area is warranted. The warning should have put plaintiff on alert and may justify a heightened inspection for mold and water damages.

**Breach of the Possession Agreement (The Third Cause of Action)**

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages. *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 58 [1st Dept 2013].

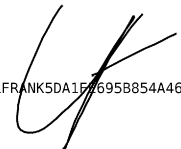
At issue here is the Post-Closing Possession Agreement that provides a free temporary dwelling for the seller from March 10, 2021, to June 16, 2021. Plaintiff claimed defendants breached the contract by failing to maintain the house “as required by the Contract” while residing there. NYSCEF Doc. No. 12, page 2, ¶ 11. The “Contract” refers to the contract of sale signed by both parties on January 26, 2021. *Id.* at page 1. The problem is nowhere in the contract can the court find the requirement imposed on seller during the temporary residence of the house. Accordingly, the court has no way to gauge whether defendants’ behavior fits in with the standard. Besides, plaintiff has not submitted any evidence to prove that the water damages and mold materialized during the temporary residence instead of the pre-closing period. Therefore, plaintiff has not sufficiently pleaded a breach of contract claim and the claim must be dismissed pursuant to CPLR § 3211(a)(7).

Based on the foregoing, it is hereby

ADJUDGED that defendants’ motion to dismiss pursuant to CPLR § 3211(a)(1) & (a)(7) is granted in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

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5/9/2023  
DATE

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LYLE E. FRANK, J.S.C.

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: