

**Siena v Self**

2023 NY Slip Op 32835(U)

August 14, 2023

Supreme Court, New York County

Docket Number: Index No. 654918/2022

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 E. FRANK PART 11M**

*Justice*

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CRAIG SIENA, ERICA SIENA

Plaintiff,

- v -

ALEXANDRA SELF,

Defendant.

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INDEX NO. 654918/2022

MOTION DATE 04/05/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

This action arises out of alleged fraudulent misrepresentations regarding the working condition of a fireplace and dryer located in a cooperative apartment. Defendant moves to dismiss the complaint pursuant to CPLR § 3211(a)(1) and/or CPLR § 3211(a)(7). Plaintiff opposes the instant motion. For the reasons, set forth below the motion to dismiss is granted.

*Factual Allegations*

The parties entered into a contract, dated November 6, 2020, for the purchase of the shares in apartment 3D of the residential building located at 125 East 84th Street, New York, NY 10028. The closing took place on March 9, 2021.

The verified complaint contains three causes of action against, fraud, fraudulent concealment, and fraudulent inducement. Plaintiffs allege that representations were made that the fireplace and dryer were operable, that defendant knew these representations were false and the plaintiffs relied on the misrepresentations to their detriment.

The complaint cites to the alleged observed condition of the fireplace as the basis of defendant’s misrepresentations. Specifically, plaintiffs contend upon their inspection of the

premises there was wood that appeared to be burned and ash in the fireplace. Plaintiffs contend that this was purposefully done to create the impression of an operable fireplace. Moreover, the real estate listing advertised the apartment as having a wood burning fireplace. *See* NYSCEF Doc. 15. The complaint further alleges that plaintiffs were told that the fireplace was operable, however neither the complaint nor the opposition papers identify who made those statements.

Plaintiffs contend that the dryer is inoperable, contrary to the representations made by defendant, in that it does not vent properly<sup>1</sup>.

### 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].

“In a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim” (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

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

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<sup>1</sup> The Court notes that the condition and operability of the dryer is governed by the specific terms in the contract and thus any allegations of fraud regarding the dryer are not actionable.

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.* Further, CPLR § 3016(b) provides that when a cause of action is based upon fraud “the circumstances constituting the wrong shall be stated in detail.”

### Discussion

In support of its motion, defendant cites to the language in the contract of sale, Sections 7.1 and 14.1, that specifically state as follows:

7.1 Seller makes no representation as to the physical condition or state of repair of the Unit, the Personalty,<sup>3</sup> the Included Interests, or the Premises. Purchaser has inspected or waived inspection of the Unit, the Personalty and the Included Interests and shall take the same “as is”, as of the date of this Contract, except for reasonable wear and tear. However, at the time of Closing, the appliances shall be in working order and required smoke detector(s) shall be installed and operable. ...

14.1 All prior oral or written representations, understandings and agreements had between the Parties with respect to the subject matter of this Contract, and with the Escrowee as to ¶ 27, are merged in this Contract, which alone fully and completely expresses the Parties’ and Escrowee’s agreement.

See NYSCEF Doc. 7.

Further, defendant contends that the operability of the fireplace could have been discovered with plaintiffs’ exercise of due diligence. Defendant also relies on the rider of the contract, which explicitly provides

R2. Premises As-Is. Purchaser has examined the Unit and is familiar with its physical condition. Seller does not make any representation, warranty, promise, statement, estimate, inducement, expressed or implied, oral or written, as to the physical condition, operation, maintenance, the use to which the Unit may be put, or any other matter or thing affecting or related to the Unit, except as specifically set forth in this Contract.

*Id.*

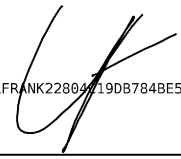
In opposition, plaintiffs rely on *TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75 [1st Dept 2015], however that case is distinguishable from the instant matter. In *TIAA*, the First Department held that buyer's breach of contract claim was not barred because the seller prevented the buyer from "gaining a true understanding of the condition of the property." *Id.* Further, *TIAA* involved alleged misrepresentations made before execution of the contract as well as misrepresentations merged into the contract.

Here, the Court finds that the contract and its disclaimers, establish a complete defense as to plaintiffs' fraud claims. Notably, absent from the contract is any mention of a fireplace, whether operable or not. Thus, 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 defendant's request for attorneys' fees, the Court declines to grant that relief. Although, the Court finds that plaintiffs' complaint fails to state a cause of action, the provision in the contract that awards attorneys' fees relates to disputes arising out of the contract, as plaintiffs have conceded that this is not a breach of contract action, the Court finds that the provision in the contract has not been triggered. 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.

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8/14/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED  DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT  REFERENCE