

Septimo v Vivid Mtges. Inc.

2023 NY Slip Op 33413(U)

August 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 517987/2022

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
EULOGIA SEPTIMO,

Plaintiff,

Index No: 517987/2022

-against-

DECISION AND ORDER

VIVID MORTGAGES INC., TIKVA HOPE SEKEZI,
MY HOME ADVISORS, LLC., ORIN KRAIEM,
525 CHESTER STREET, LLC., YOSSI YAACOV,
a/k/a JOSEPH JACOBS, FIRST CAPITAL HOMES CORP.,
KOBI RANNAN, ROCK E. SMALL PLUMBING AND
HEATING, INC., ERROLL SMALL, AKEEB B. SHEKONI,
ASKON ARCHITECTS, P.C., RAVI CONSTRUCTION
and EXPEDITING SERVICES, INC., and TERREANCE E.
DOUGHERTY, ESQ.,

Defendants,

X

Recitation as required by CPLR 2219(a), of the papers considered in the separate motion by defendants My Home Advisors, LLC and Orin Kraiem [seq. no. 1], Vivid Mortgages Inc. and Tikva Home Sekezi [seq. no. 2], 525 Chester Street LLC, Yossi Yaacov a/k/a Joseph Jacobs, First Capital Homes Corp. Kobi Rannan [seq. no. 3], Rock E. Small Plumbing and Heating, Inc. and Erroll Small [seq. no. 4], Askon Architects, P.C. and Akeeb B. Shekoni [seq. no. 6] to dismiss the plaintiff’s complaint.

Papers	Motion papers.
Order to Show Cause/Motion and Affidavits Annexed.	9-11, 16-26, 35-43, 58-68, 72
Cross-motion and Affidavits annexed.....	
Answering Affidavits.....	48, 70-71, 76-77
Reply Papers.....	49, 73-75

Upon the foregoing cited papers, the Decision/Order on these motions:

In this action to recover damages, *inter alia*, for fraud, defendants My Home Advisors, LLC and Orin Kraiem [hereinafter the real estate broker defendants] move [seq. no. 1] for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint insofar as asserted against them. Defendants Vivid Mortgages Inc. and Tikva Hope Sekezi [hereinafter the mortgage broker defendants] separately move [seq. no. 2] pursuant to CPLR 3211(a)(7) to dismiss the plaintiff’s complaint insofar as asserted against them and for the imposition of sanctions. Likewise, defendant 525 Chester Street LLC [hereinafter the seller defendant] and its alleged principal defendant Yossi

Yaacov a/k/a Joseph Jacobs [hereinafter Yaacov], together with defendants First Capital Homes Corp. [hereinafter First Capital] and defendant Kobi Rannan [hereinafter Rannan], separately move [seq. no. 3] pursuant to CPLR 3211(a)(1) and (7) to dismiss the plaintiff's complaint insofar as asserted against them. Additionally, defendants Rock E. Small Plumbing and Heating, Inc. and Erroll Small [hereinafter the Plumbing defendants] separately move [seq. no. 4] (a) pursuant to CPLR 3211(a)(7) dismissing the complaint insofar as asserted against them and for the entry of judgment in their favor; (b) dismissing defendant Terreance E. Dougherty, Esq.'s [hereinafter Dougherty] cross-claims in their entirety with prejudice; (c) dismissing defendant Askon Architects, P.C.'s cross-claims in their entirety with prejudice; and (d) upon dismissal, amending the caption to delete the Plumbing defendants as named parties hereto. Lastly, defendants Askon Architects, P.C. and Akeeb B. Shekoni [hereinafter the Architect defendants] separately move [seq. no. 6] for an order pursuant to CPLR 3211(a)(7) dismissing the complaint insofar as asserted against them or, alternatively, pursuant to CPLR 3212 for summary judgment¹.

This action stems from the sale of real property located at 525 Chester Street, Brooklyn. Plaintiff alleges that the defendants – the seller, its principal, the real estate broker, mortgage broker, architects, contractors, and her attorney - acted in concert to defraud her into entering into the contract of sale and purposely deceived her by misrepresenting as to the habitability of the subject premises and by failing to disclose that the property had numerous defects including to the sewer line, plumbing, insulation, windows, doors, flooring, bathroom fixtures, the kitchen stove hood, the kitchen sink, the kitchen range, the chimney, the ladder and roof hatch, the flashing, the screens and roof vents, the water pipes, the leaders and gutters, the HVAC system, and the doorbells. Plaintiff commenced this action against the captioned defendants alleging causes of action for breach of contract (asserted only against defendants 525 Chester Street LLC, Yossi Yaacov a/k/a Joseph Jacobs), fraud, civil conspiracy, negligent misrepresentation, negligence, a violation of General Business Law § 349, professional negligence-legal malpractice (asserted only against defendant Dougherty), and breach of fiduciary duty (asserted only against Dougherty).

A motion to dismiss pursuant to CPLR 3211(a)(1) to dismiss a cause of action on the ground that a defense is founded on documentary evidence may be granted only when the documentary evidence submitted by the defendant “utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading

¹ Plaintiff's counsel in his affirmation dated August 9, 2023 advises the court that plaintiff does not oppose the Architect defendants' motion to dismiss.

as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Aviaev v Nissan Infiniti LT*, 150 AD3d 807, 807-808 [2d Dept 2017]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Everett v Eastchester Police Dept.*, 127 AD3d 1131, 1132 [2d Dept 2015] [internal citations omitted]).

Breach of contract

In support of their motion to dismiss the breach of contract action, the seller defendant and Yaakov submit a copy of the contract of sale that was executed by plaintiff and the seller defendant on September 16, 2020.

Section 12 of the contract of sale, states:

“Condition of Property. Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser’s own inspection and investigation thereof, and 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 condition, 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, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of closing (except as otherwise set forth in paragraph 16(e), without any reduction in the purchase price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract. Purchaser and its authorized representatives shall have the right, at reasonable times and upon reasonable notice (by telephone or otherwise) to Seller, to inspect the Premises before Closing.”

Additionally, the executed rider attached to and made a part of the contract of sale, states as follows:

“3. Purchase at AS-IS Condition: Subject to paragraph 16(e) of the printed part of the contract, the Purchaser represents and agrees that the Purchaser has fully and completely investigated, examined and inspected said Premises and the general property included in this sale and is purchasing the same “AS IS” on the date hereof, reasonable wear and tear excepted.

4. Entire Agreement, No Other Representations by Seller: This Contract of Sale as written contains all the terms of the agreement entered into between the parties, and the purchaser acknowledges that the Seller has made no representations and held out no inducements to the Purchaser other than those herein expressed, and the Seller is not liable or bound in any manner by expressed or implied warranties, guarantees, promises, statements, representations or information pertaining to the sale (of the Premises or personal property, except as herein specifically set forth. Notwithstanding the foregoing, Seller represents that the plumbing, heating and electrical systems and appliances in the Premise will be in working order and the roof shall be free of leaks at the time of Closing, however, it is agreed and understood by both parties that these representations shall not survive after the Closing. Seller is not required to make any repairs to the Premises and the personal property located therein prior to the Closing except as may be required in conjunction with the representations set forth in the preceding sentence.”

As an initial matter, the submission of the parties’ contract of sale, conclusively establishes that defendant Yaakov was not a party to such agreement and, therefore, is not liable for any breaches thereunder (*see Kollatz v KOS Building Group, LLC*, 188 AD3d 1175 [2d Dept 2020]).

Moreover, as the contract of sale specifically disclaimed the existence of warranties or representations, a cause of action for breach of contract cannot be maintained against the seller defendant (*see Bedowitz v Farrell Development Co., Inc.*, 289 AD2d 432 [2d Dept 2001]). Furthermore, the merger clause contained in the rider to the contract precludes the plaintiff from claiming that she relied on any alleged misrepresentations made by the seller defendant (*see Simone v Homecheck Real Estate Services, Inc.*, 42 AD3d 518 [2d Dept 2007]). In addition, since title to the property closed and the deed was delivered, the doctrine of merger extinguished any claim the plaintiff had regarding the contract of sale (*see Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661 [2d Dept 2011]). Also, although the contract of sale provided that the heating, air conditioning, electrical and mechanical systems would be in working order as of the date of closing, the contract further provided that it was agreed and understood by the parties, that these representations would not survive delivery of the deed (*see R. Vig Properties, LLC v Rahimzada*, 213 AD3d 871 [2d Dept 2023]).

Therefore, dismissal of plaintiff’s breach of contract cause of action against the seller defendant and Yaakov pursuant to CPLR 3211(a)(1) and (7) is warranted.

Fraud

In an action to recover damages for fraud, the plaintiff must allege “a misrepresentation or a material omission of fact which was false and known to be false by 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” (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 [1996]). Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy the specificity requirements of CPLR 3016(b) (*see Cruciate v O'Donnell & McLaughlin, Esqs.*, 149 AD3d 1034, 1035 [2d Dept 2017]).

In the context of real estate transactions, a claim of fraud must be analyzed within the doctrine of caveat emptor (*see Hecker v Paschke*, 133 AD3d 713 [2d Dept 2015]). “New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment” (*Id.* at 716 [internal quotation marks omitted]). “The mere silence of the seller, without some act or conduct which deceived the buyer, does not amount to a concealment that is actionable as fraud” (*Simone* at 520). While a seller's knowingly false representations on a property condition Disclosure Statement may be proof of a concealment to support a cause of action alleging fraud (*id.*), here there are no allegations that the seller defendant filed any such Disclosure Statement.

Further, a specific disclaimer of reliance on representations as to the condition of real estate precludes a claim of fraud by rendering any resulting reliance unjustified (*see Comora v Franklin*, 171 AD3d 851 [2d Dept 2019]), and, will also generally bar related fraud-based claims (*see Danann Realty Corp. v. Harris*, 5 NY2d 317 [1959]). Here, the contract of sale sets forth that the “Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof and that she and not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair ... or any other matter related to the Premises.” In light thereof, plaintiff cannot establish reliance upon any alleged misrepresentation or omission of material facts related to the condition of the premises (*see Comora* at 853-854). Further, any allegations of fraudulent misrepresentations and omissions by defendant real estate broker Orin Kraiem which occurred after the conveyance may not form the basis for the fraud claims, since the element of reliance is necessarily absent (*see High Tides, LLC v DeMichele*, 88 AD3d 954 [2d Dept 2011]).

With respect to the other moving defendants, affording the complaint a liberal construction and accepting the allegations in the complaint as true, the complaint fails to state a cause of action sounding in fraud against these defendants (*see Wilson v. Neighborhood Restore Hous.*, 129 A.D.3d 948, 949 [2d Dept 2015]). The complaint is

devoid of any allegations of specific misrepresentations or omissions by these defendants, made for the purpose of inducing reliance - and the conclusory allegations of fraud insofar as attributed to these defendants are insufficient to satisfy the pleading requirement of CPLR 3016(b) (*see High Tides, LLC* at 954).

Therefore, dismissal of plaintiff's cause of action sounding in fraud against all moving defendants pursuant to CPLR 3211(a)(1) and (7) is warranted (*see Schottland v Brown Harris Stevens Brooklyn, LLC*, 107 AD3d 684 [2d Dept 2013]).

Negligent misrepresentation

In order to prevail on a cause of action for negligent misrepresentation, the plaintiff must establish "that the defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information" (*Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2d Dept 2004]). "A special relationship does not arise out of an ordinary arm's length business transaction between two parties" (*US Express Leasing, Inc. v Elite Tech. [NY], Inc.*, 87 AD3d 494, 497 [1st Dept 2011]). Here, the complaint fails to allege facts demonstrating the existence of the requisite relationship between plaintiff and any of the moving defendants (*see High Tides, LLC* at 954), or of any false information that was imparted as to the condition of the property prior to the conveyance. Therefore, dismissal of plaintiff's cause of action for negligent misrepresentation against all moving defendants pursuant to CPLR 3211(a)(7) is warranted.

Negligence

The seller defendant demonstrates that the plaintiff fails to state a cause of action against it for negligence, as the allegations in the complaint sound in breach of contract rather than tort (*see Guoba v Sportsman Properties, Inc.*, 200 AD3d 658 [2d Dept 2021]). In addition, as the complaint fails to allege the existence of a special duty imposed on the other moving defendants, the complaint also fails to state a cause of action against them for negligence (*see JP Morgan Chase Bank, N.A. v Hall*, 122 AD3d 576 [2d Dept 2014]). Therefore, dismissal of plaintiff's cause of action for negligence against all moving defendants pursuant to CPLR 3211(a)(7) is warranted.

General Business Law § 349(a)

Further, the complaint fails to state a cause of action under General Business Law § 349(a). To assert a viable claim under this section, "a plaintiff must plead (1) that the challenged conduct was consumer-oriented, (2) that the conduct or statement was materially misleading, and (3) damages" (*Shovak v Long Island Commercial Bank*, 50 AD3d 1118, 1119 [2d Dept 2008]). Here, the complaint alleges a private dispute

between parties and does not set forth any conduct affecting the consuming public at large as required under section 349 (*see Veson Const., Inc. v Gerelli Ins. Agency, Inc.*, 97 AD3d 658 [2d Dept 2012]). Therefore, dismissal of plaintiff's cause of action for a violation of General Business Law § 349(a) as against all moving defendants pursuant to CPLR 3211(a)(7) is warranted.

Civil Conspiracy

Finally, "New York does not recognize civil conspiracy to commit a tort as an independent cause of action, and a cause of action alleging conspiracy to commit a tort stands or falls within the underlying tort" (*Williams v Williams*, 140 AD3d 1145, 1146 [2d Dept 2017]). Here, since the plaintiff's civil conspiracy claim is derivative of the underlying fraud claim alleged in the complaint, and since this claim is not viable, the cause of action asserted against the moving defendants for civil conspiracy to commit a tort also fails (*see Dickinson v Igoni*, 76 AD3d 943 [2d Dept 2010]). Therefore, dismissal of plaintiff's cause of action for civil conspiracy as against all moving defendants pursuant to CPLR 3211(a)(7) is warranted.

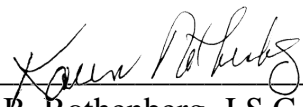
Conclusion

The moving defendants' respective motions [seq. nos. 1, 2, 3, 4, and 6] to dismiss the plaintiff's complaint as asserted against them are granted. That portion of the Plumbing defendants' motion to dismiss all cross-claims asserted against them is also granted. The portion of the Sekezi defendants' motion for the imposition of sanctions is denied.

This constitutes the decision/order of the Court

Dated: August 31, 2023

Enter,



Karen B. Rothenberg, J.S.C.