

Francamore v US Bancorp
2024 NY Slip Op 34996(U)
January 12, 2024
Supreme Court, Westchester County
Docket Number: Index No. 58959-2023
Judge: Hal B. Greenwald
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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GINA FRANCAMORE,

Plaintiff,

DECISION & ORDER

Index No.: 58959-2023

-against-

US BANCORP, D/B/A U.S. BANK NATIONAL ASSOCIATION;
U.S. BANK NATIONAL ASSOCIATION, HUDSON HOMES
MANAGEMENT, LLC, HUDSON ADVISOR, L.P. D/B/A
HUDSON HOMES MANAGEMENT, LLC., KELLER
WILLIAMS REALTY PARTNERS, AKELA HOLDINGS,
LLC D/B/A KELLER WILLIAMS REALTY PARTNERS,
LOUIS CARDILLO D/B/A KELLER WILLIAMS REALTY
PARTNERS, ANNETTE CICINELLI, ALLSTATE INSURANCE
CO., SUEZ WATER COMPANY, THOMAS COMELLA,
CARNELL ASSOCIATES, INC.,

Motion Sequence #1

Defendants.

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GREENWALD, H.

The Court has reviewed and/or read the following NYSCEF documents in reaching the within Decision and Order: 1,4,15,18,22-25,35,37,38,40-46 .

BRIEF PROCEDURAL HISTORY

As succinctly stated in paragraph 1 of plaintiff’s Verified Complaint (NYSCEF#1):

1. In substance, this complaint seeks redress for breach of contract, negligence, fraudulent misrepresentation, breach of good faith and fair dealing and breach of warranty, both express and implied arising out of the purchase of Plaintiffs’ residence.

Plaintiff commenced the action by the filing of a Summons and Verified Complaint on April 3, 2023. The Comella/Carnell defendants filed their Answer on May 18, 2023; Veolva Water (Suez) on June 6, 2023. The Verified Complaint consisted of 71 pages, 450 numbered paragraphs and eight causes of action. Cause of Action #7 for negligence and Cause of Action #8 for fraudulent misrepresentation were asserted against the moving defendants.

THE INSTANT MOTION

In lieu of filing an Answer defendants U.S. Bank National Association, as Trustee for LSF10 Master Participation Trust (incorrectly sued herein as “U.S. Bancorp. d/b/a U.S. Bank, National Association” and “U.S. Bank National Association”, collectively referred to herein as “U.S. Bank Trustee”) and Hudson Homes Management, LLC, (incorrectly sued herein as “Hudson Advisor, L.P. d/b/a Hudson Homes Management, LLC”), hereinafter “Hudson” and together with U.S. Bank Trustee referred to herein collectively as the “moving defendants”) filed the instant motion (motion sequence #1) on July 19, 2023 seeking an Order dismissing Plaintiff’s Verified Complaint as against these moving defendants.

SUPPORTING AFFIDAVIT

In support of the instant motion there is the Affidavit of Janet Gioello, the Litigation Representative of Fay Servicing, LLC who claims to be authorized to make her affidavit on behalf of the moving defendants. She further claims that “Fay maintains quality control and verification procedures as part of the boarding process to censure the accuracy of its records concerning REO properties. It is the regular practice of Fay to integrate records into Fay's Records, and to rely upon the accuracy of those records in providing its REO servicing functions, including records relating to REO properties.”. At Paragraph 7 of her Affidavit, she claims: “U.S. Bank Trustee was, at one time, the mortgagee of the Property. Upon the mortgage default of the Property's previous owner, U.S. Bank took title to the Property and conveyed its interest to Hudson.”. There are no documents offered to substantiate any of what Gioello claims. There is no Affidavit or Affirmation in support from any other entity.

THE UNDERLYING CONTRACT OF SALE

There are no documents attached to the Verified Complaint, or to the Answers currently interposed. The only document provided to the Court is a purported Contract of Sale (NYSCEF #24) (the Contract) annexed to the motion papers. Note that the Contract is a pre-printed form known as a Residential Contract of Sale that consists of 28 numbered paragraphs plus a Rider that contains paragraphs 29- 56 as well as a 7-page REAL ESTATE PURCHASE ADDENDUM consisting of another 18 paragraphs, initialed by purchaser and seller on each page. (Collectively The Contract)

It can be gleaned from the Contract and the allegations contained in the Verified Complaint that plaintiff purchased a single-family dwelling located at 144 Hilburn Ave., Scarsdale, New York (the subject property). The Contract is dated January 11, 2022, and is between plaintiff as purchaser and defendant Hudson Homes Management, LLC as seller. The Closing of titled was set for February 22, 2022. (Paragraph 15). The proposed purchase price appears to be \$681,000 with 10% as a downpayment (\$68,100). The transaction was to be an “all cash” deal, meaning there was no mortgage contingency as paragraph 8 labeled “mortgage commitment contingency” was stricken. Paragraph 12 entitled “condition of property” has not

been modified confirming that Purchaser is “fully aware of the physical condition and state of repair of the Premises...”. Further Purchaser may inspect the premises; however, it is being sold in “as is” condition. Just after the signature lines on the Printed Contract there is the following statement: ****Home is being sold AS-IS****

THE RIDER

The opening Paragraph 29 of the Rider explains that if there is a conflict between the printed Contract and the Rider, the Rider controls. Paragraph 33 identified as “Condition of premises states:

33. Condition of Premises: Seller makes no representations as to the use and occupancy status of the Premises. Purchaser has inspected the Premises and and (sic) any personal property included in the sale and are fully familiar with their condition and state of repair. Purchaser (sic) agrees to take the same AS IS and in their present condition. Neither seller nor their agents make any representations or warranties of any kind or nature to the condition of the premises. Seller shall not be bound or held liable in any manner for any oral or written statement, representation, agreement or information relating to the Premises.

THE REAL ESTATE PURCHASE ADDENDUM

Most importantly, is the fully executed and initialed REAL ESTATE PURCHASE ADDENDUM (the Addendum). Paragraph 2 confirms that the February 22, 2022, is a firm closing date and time is of the essence. Paragraph 3 confirms this is a “Cash” transaction not subject to any financing contingency. Paragraph 5 allows Purchaser to inspect the premises, but states that **“...IN NO EVENT WILL SELLER BE OBLIGATED TO MAKE REPAIRS IN EXCESS OF \$ -0- “**.

Paragraph 7 is the main basis for these moving defendants to assert their motion for dismissal. and informs the Purchaser that the subject property was acquired by foreclosure or similar type of civil court action and Seller knows nothing about the subject property and accordingly, does not make any warranties or guarantees about the condition of the subject property. If that is not enough, seller specifically ***“... negates and disclaims any representations, warranties, promises, covenants, agreements of guarantees implied or express, oral or written with respect to...the physical condition of the property...the conformity of the property to any zoning or building code requirements...the habitability or fitness of the property for a particular purpose...”*** Finally, the Addendum states **IT IS THE EXPRESS INTENTION OF SELLER AND PURCHASER (sic) THAT THE ONLY WARRANTIES, REPRESENTATIONS OR STATEMENTS (IF ANY) MADE BY SELLER AND RELIED UPON BY PURCHASER ARE THOSE THAT MAY BE CONTAINED IN THIS ADDENDUM.** There are none.

Paragraph 17 of the Addendum contains multiple Waivers by the Purchaser such as the right to maintain an action for specific performance, record a lis pendens, invoke any equitable remedy that would prevent the seller from selling the property to another buyer, seek rescission of this agreement, proceed with any claims or losses due to any repair or treatment of the property or other defects.

Paragraph 20 contains an indemnification clause in favor of the Seller.

Paragraph 38 simply states "Home is being sold AS IS."

THE MEMORANDUM OF LAW

For some unknown reason the Notice of Motion herein claims its is moving "for an Order pursuant to **CPLR 2201**, for an order dismissing Plaintiff's complaint...". (Emphasis added). CPLR 2201 is the wrong statute, it seeks a stay. For some other unknown reason, the moving defendants' counsel has failed to correct this application or even offer an Attorney Affirmation advising that there was a *de minimis error*, in the Notice of Motion. Instead, a Memorandum of Law is filed in support of the instant motion (NYSCEF #25). The "Authorities" listed on page 4 of the MOL cite to CPLR 3013; 3016(b) and 3211(a)(1). On page 5 counsel claims the MOL is submitted in support of the motion to dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7)? Which is it? Does the Court have to guess? Consistency would be helpful. It appears the instant motion is seeking dismissal.

The moving defendants' MOL cites several cases, but the Court will refer to only those that, in this Court's opinion, are relevant. *Behar v Glickenhau Westchester Dev., Inc.* 122 AD3d 784 (2nd Dept. 2014) concerned a motion made by defendant pursuant to CPLR 3211 (a)(1) and (a)(7) for dismissal. The trial court granted dismissal. Plaintiff had purchased property adjacent to a golf course and subsequently a large oak tree fell in a storm "...created a gap in the tree canopy that had formed a barrier against the incursion of golf balls struck from the second tee.". The Second Department found that any information concerning the incursion of golf balls was readily available in the public record, and the documentary evidence demonstrated that the defendant did nothing to conceal this information and affirmed the dismissal.

In *Dormitory Auth. of the State of N.Y. v Samson Constr. Co.* 30 NY3d 704 (2018) the Court of Appeals, in this construction matter, found that the cause of action for negligence and the cause of action for breach of contract against *Samson* were identical. Further this matter was complicated because the City of New York also had claims, that were contested, as an intended third-party beneficiary (not in privity under contract). The Court found that the negligence claim was duplicative of the breach of contract theory, that there was no separate legal duty from the contract that would sustain a negligence claim.

The MOL importantly stresses that plaintiff fails to acknowledge the existence of the Contract of Sale, Rider and Addendum, all of which add up to the simple fact that the subject property was conveyed to her “AS IS”, with absolutely no representations made by these moving defendants. From a contractual viewpoint, there is no breach, even though this is not even being plead by plaintiff. What is plead is a tort, “negligence”. Viewing the Verified Complaint in its most favorable light still does not convince this court that there has been any “negligence” on the part of these moving defendants. There was no “negligence” because there was no duty as between the Seller and the Purchaser, as demonstrated by the strict terms of the Contract, Rider and especially the Addendum. This was a completely “AS IS” sale and the purchaser had an opportunity to inspect the subject property. As a consequence of the foregoing, it is moving defendants’ position that the complaint should be dismissed pursuant to CPLR 3211 (a)(1) and (a)(7)

PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS

Plaintiff filed both her Affidavit in Opposition (NYSCEF #41) and Memorandum of Law in Opposition on October 6, 2023. The Franciamore Affidavit begins with stating that she signed the Contract *prior to inspecting the home*. (Emphasis in original). She believes the property had been foreclosed sometime in 2019, that the home was *allegedly* winterized, that defendant Hudson was the property manager of the home, that defendant collectively known as Keller Williams were the listing agent “...acting on behalf of defendants U.S. Bancorp. d/b/a U.S. Bank National Association, U.S. Bank National Association.”; the specific real estate agent was defendant Annette Cicinelli. Plaintiff states an inspection was performed by “my inspector and myself” on January 11, 2022, accompanied by defendant Cicinelli. It is claimed in paragraph 7 of the Affidavit that Defendant Cicinelli stated during the inspection by “repeatedly representing that the house had been winterized and there was nothing to worry about concerning the plumbing and pipes in the home. Defendant Cicinelli informed me that the bank had conducted an inspection prior to my down payment and that the house was winterized.” Plaintiff claims the representation that the house was winterized was a material misrepresentation. On the day of the closing February 22, 2023, plaintiff went to the house with a representative of defendant Suez water to turn on the water. Immediately thereafter, the home was flooded to the extent that the home had to be rebuilt from the studs up and plaintiff has claimed she expended \$200K for repairs.

Plaintiff also filed a MOL in Opposition claiming that defendants breached paragraphs 12, 16(e) and 5(a) of the Addendum. Additionally, there were material misrepresentations of the defendants “...*by their agent, servant and employee, Annette Cicinelli, when she repeatedly told the Plaintiff that the property had been winterized. The same defendants, by their agent, servants and employee, Annette Cicinelli, made a material omission by failing to have the home de-winterized so a proper inspection could take place by Plaintiff's engineer and then re-winterize the home.*”

Plaintiff claims that paragraph 12 and 16 and paragraph 5 of the addendum “work in tandem” (MOL page 9). Paragraph 12 says the purchaser is entitled to an inspection and is buying the house “as is” in its present condition subject to paragraph 16. Paragraph 16 sets forth certain conditions precedent that must be fulfilled for the Purchase to purchase the house specified in sub-paragraph (e) as follows:

(e) All plumbing (including water supply and septic systems (if any), heating and air conditioning, if any, electrical and mechanical systems, equipment and machinery in the building(s) located on the property and all appliances which are included in this sale being in working order as of the date of Closing”.

The last sentence in paragraph 5(a) which provides for an inspection to be done by the purchaser within 5 days of the Acknowledgment date critically states in an innocuous sentence amidst a very length and detailed Contract, Rider and Addendum, the following:

If the Seller has winterized this Property and the Purchaser desires to have the Property inspected, the Seller's listing agent will have the Property de-winterized prior to inspection and re-winterized after inspection.

Well, was the “Property” winterized as claimed by the real estate agent or not. If it was then this paragraph provided for it to be de-winterized to allow for a proper inspection. If it was not winterized, why not? What was disclosed? By whom? When? To whom? These are questions raised by plaintiff in her submissions.

MOVING DEFENDANTS’ REPLY

The moving defendants continue to assert that the two causes of action asserted against them specifically, C/A #7 for negligence (Verified Complaint paragraphs 341 – 395) and C/A#8 for fraudulent misrepresentation (Verified Complaint paragraphs 396 – 450) cannot be sustained, when read in the context of the written Contract, Rider and Addendum. Further, the moving defendants verily dispute that allegations contained in the above paragraphs that assert they had a duty of care to plaintiff, that they made any representations other than those contained in the aforesaid Contract, Rider and Addendum. Said defendants seek dismissal of the action that the documentary evidence) the Contract, Rider and Addendum utterly refute plaintiff’s allegations in her Verified Complaint as asserted against the moving defendants.

As set forth in *Behar* Supra:

“A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law”

(Mendelovitz v Cohen, 37 AD3d 670, 670 [2007]; see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]).

“When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1180-1181 [2010]; see Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). “In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Sokol v Leader, 74 AD3d at 1181 [internal quotation marks omitted]; see Nonnon v City of New York, 9 NY3d 825, 827 [2007]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]).

The documentary evidence herein refutes plaintiff’s claim in C/A#7 and supports the moving defendants’ defense against fraudulent misrepresentation in C/A#8.

By reason of all he foregoing it is

ORDERED that the motion made pursuant to CPLR 3211 (a)(1) and (a)(7) (Motion Sequence #1) by the moving defendants U.S. Bank Trustee and Hudson seeking dismissal of plaintiff’s Verified Complaint, specifically causes of action #7 and #8 is **granted**.

Any relief not specifically granted is **denied**.

This constitutes the Decision and Order of the Court.

Dated: January 12, 2024,

ENTER



Hon. Hal B. Greenwald, J.S.C.