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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

TIMOTHY GOULD, et ano.,
Plaintiffs,

- against -

WRG ACQUISITION II, LLC, et ano.,
Defendants.

Index
No. 6128 2011

Motion
Date December 13, 2011

Motion
Cal. No. 16

Motion
Seq. No. 1

The following papers numbered 1 to 21 read on this motion by plaintiffs for an order granting partial summary judgment in their favor; and on this cross motion by defendants for an order granting summary judgment dismissing the complaint as to defendant Lee J. Deane (Deane), pursuant to CPLR 3212 and 1003, and dismissing the complaint as to WRG Acquisition II, LLC (WRG) pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-5
Opposing Affirmation - Exhibits.....	6-8
Reply Affidavit - Exhibits.....	9-12
Notice of Cross Motion - Affirmation - Exhibits.....	13-17
Opposing Affirmation - Exhibits.....	18-21
Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff Timothy Gould (Gould) entered into a contract of sale on February 2, 2010 to purchase a one-family home located at 118-11 229th Street, Cambria Heights, New York, from WRG, for the sum of $401,700.00. The closing took place on April 15, 2010, and

Deane, a member of WRG, executed the deed transferring the subject property to Gould, as to 99%, and to plaintiff Esther Chapparo (Chapparo), as to 1%, as tenants in common.

Plaintiffs commenced this action on March 14, 2011 by filing a summons with notice. A verified complaint was served on April 28, 2011, in which plaintiffs assert the following seven causes of action against defendants: (1) "breach of contract– fraud in the inducement"; (2) "breach of contract–common law fraud–aiding and abetting fraud–breach of fiduciary duty"; (3) "action and reliance–negligent misrepresentation"; (4)"rescission"; (5) "damages"; (6) "conversion"; and (7) "unjust enrichment." Plaintiffs allege the following: that, prior to entering into the contract of sale, and prior to the closing, Gould had inspected the premises on several occasions and observed that the basement had been painted twice and that new floors had been installed in other rooms; that shortly after they purchased the premises, the new flooring began to buckle, the painted areas faded, and a portion of the basement floor collapsed; that they discovered that the basement was severely contaminated with mold which was spreading throughout the premises; that defendants had been served with violations for the improper removal of asbestos from the premises; and that there was asbestos present in the premises. Plaintiffs aver that defendants concealed these conditions prior to the sale and that defendants, thereafter, failed to remedy them. Plaintiffs further state that these conditions are harmful to themselves and their family members.

Defendants have served their verified answer and interposed eleven affirmative defenses. Though plaintiffs do not state specifically the causes of action for which they seek summary judgment, it appears from the moving papers and the memorandum of law in support thereof that plaintiffs are seeking partial summary judgment in their favor on their causes of action sounding in fraud and fraudulent misrepresentation. Defendants cross move for summary judgment dismissing the complaint as to Deane on the grounds that he did not act in his individual capacity, and had no personal knowledge of any mold or asbestos in the subject premises. Defendants further seek dismissal of the complaint as to WRG on the grounds that plaintiffs' first, second, and third causes of action are barred by the contract's merger clause and the doctrine of caveat emptor. Defendants further assert that the fourth, fifth, sixth, and seventh causes of action are without any legal basis and are duplicative, and, therefore, must be dismissed.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once such proof has been offered, to defeat

summary judgment, "the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212, subd. [b])" (*Zuckerman*, 49 NY2d at 562).

The documentary evidence submitted by the parties establishes that Gould and WRG entered into the contract of sale and the rider thereto. Although these contracts are executed by a representative of WRG, they do not contain a signature line setting forth the name of said representative, and the signature is not legible. The April 15, 2010 deed conveying the subject property to plaintiffs states that the grantor is WRG, and is executed by "Lee Deane, member" of WRG. The acknowledgment also recites that "Lee Deane, member" executed the deed. Therefore, contrary to the allegations set forth in the complaint, WRG was the sole owner of the real property, and it contracted to sell said real property solely to Gould. There is no evidence that Deane executed the contract of sale or the rider in his individual capacity, or that he had any ownership interest in the real property. Furthermore, Chapparo was not a party to the contract of sale, or the rider to the contract of sale, and her ownership interest in the real property derives solely from the deed.

To the extent that plaintiffs' first, second, and fourth causes of action allege claims for breach of contract, fraudulent inducement to enter into a contract, and rescission of the contract, respectively, Chapparo cannot maintain these claims as she was not a party to the subject contract. Therefore, that branch of defendants' cross motion which seeks to dismiss the complaint is granted to the extent that Chapparo's claims for breach of contract, fraudulent inducement, and rescission are dismissed.

To the extent that Gould, in his first and second causes of action, seeks to recover damages for breach of contract, these claims cannot be maintained, as the contract expressly provided that the premises were being sold "as is" (*see Mancuso v Rubin*, 52 AD3d 580 [2008]; *Kasten v Golden*, 50 AD3d 1098 [2008]; *Rivietz v Wolohojian*, 38 AD3d 301 [2007]). In addition, these claims for breach of contract are barred by the doctrine of merger (*Mancuso v Rubin*, *supra*; *Ka Foon Lo v Curis*, 29 AD3d 525 [2006]; *Fabozzi v Coppa*, 5 AD3d 722 [2004]; *Rothstein v Equity Ventures*, 299 AD2d 472 [2002]).

Gould also alleges in his first cause of action that he was fraudulently induced into entering into the contract of sale. A cause of action alleging fraudulent inducement may not be maintained if specific disclaimer provisions in the contract of sale disavow reliance upon oral representations (*see Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]; *Laxer v Edelman*, 75 AD3d 584 [2010]; *Roland v McGraime*, 22 AD3d 824 [2005]; *Fabozzi v Coppa*, 5 AD3d 722 [2004]; *Platzman v Morris*, 283 AD2d 561 [2001]; *Masters v Visual Bldg. Inspections*, 227 AD2d 597 [1996]). Here, the specific provisions of the rider to the contract of sale bar the cause of action alleging fraudulent inducement. Gould expressly represented in the rider to the contract that he had not relied on any statements by the seller

or its representatives, or any other person or entity, regarding the condition of the premises, and that representation "destroy[ed] the allegations in plaintiff's complaint that the agreement was executed in reliance upon [such statements]" (*Danann Realty Corp. v Harris*, 5 NY2d at 320-321; *see also Laxer v Edelman*, *supra*; *cf. DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147 [2010]).

In view of the foregoing, that branch of defendants' motion which seeks to dismiss Gould's first and second causes of action is granted to the extent that these causes of action assert claims for breach of contract and fraudulent inducement to enter into a contract.

Plaintiffs' allegations regarding marketable title are insufficient to state a claim for fraud. Plaintiffs do not allege the existence of any defects with respect to the deed, encumbrances, or liens, that would render the real property unmarketable. The alleged concealed defects in the one-family house situated on the subject real property does not render title to the real property unmarketable (*see generally Regan v Lanze*, 40 NY2d 475 [1976]).

To the extent that the second cause of action alleges a claim for breach of fiduciary duty, it is well settled that the absence of a fiduciary relationship between the parties is fatal to claims for recovery of damages due to a breach of fiduciaries duties (*see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446 [2010]). It is equally well-established that, in the absence of special circumstances, arms length business transactions do not give rise to fiduciary or other confidential relationships between the parties thereto (*see Seldin v Smith*, 76 AD3d 623 [2010]; *Sebastian Holdings, Inc. v Deutsche Bank AG*, *supra*; *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491 [2006]). Here, as the relationship between seller and purchaser is alleged to be nothing more than that of an arm's length business arrangement, no fiduciary relationship exists. Therefore, that branch of defendants' cross motion which seeks to dismiss plaintiffs' second cause of action, to the extent that it asserts a claim for breach of fiduciary duty, is granted.

To the extent that plaintiffs' second cause of action alleges a claim for fraud, it is well settled that a cause of action alleging fraud requires a plaintiff to establish a misrepresentation or omission of material fact which the defendant knew was false, that the misrepresentation was made to induce the plaintiff's reliance, the plaintiff's justifiable reliance on the misrepresentation or material omission, and a resulting injury (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Hense v Baxter*, 79 AD3d 814, 816 [2010]; *Jablonski v Rapalje*, 14 AD3d 484, 487 [2005]; *Schomaker v Pecoraro*, 237 AD2d 424, 426 [1997]).

It is also well settled that "New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment" (*Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 520 [2007]; *see Margolin v I M Kapco, Inc.*, 89 AD3d 690, 691 [2011]; *Laxer v Edelman*, 75 AD3d 584 [2010]; *Daly v Kochanowicz*, 67 AD3d 78, 87 [2001]; *Platzman v Morris*, 283 AD2d 561, 562 [2001]; *cf.* Real Property Law §§ 462, 465). A plaintiff seeking to recover damages for active concealment must show that the defendant "thwarted" the plaintiff's efforts to fulfill his or her responsibilities imposed by the doctrine of caveat emptor (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 245 [2009] [internal quotation marks omitted]; *see Margolin v I M Kapco, Inc.*, *supra*; *Rozen v 7 Calf Cr., LLC*, 52 AD3d 590, 593 [2008]; *Matos v Crimmins*, 40 AD3d 1053, 1055 [2007]; *Jablonski v Rapalje*, 14 AD3d 484, 485 [2005]). However, the mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud (*see Slavin v Hamm*, 210 AD2d 831, 832 [1994]; *London v Courduff*, 141 AD2d 803, 804 [1998], lv dismissed 73 NY2d 809 [1998]).

A member, manager, or agent of a limited liability company is not liable in his or her personal capacity for debts, liabilities or obligations of the limited liability company, whether arising in tort, contract, or otherwise, solely by reason of being such member, manager or agent (Limited Liability Company Law § 609 [a]). Members and managers of limited liability companies, however, may be held personally liable if they participate in the commission of a tort in furtherance of company business (*see generally Kew Gardens Hills Apartment Owners, Inc. v Horing Welikson & Rosen, PC*, 35 AD3d 383 [2006]; *cf. Rothstein v Equity Ventures, LLC*, 299 AD2d 472 [2002]).

Plaintiffs allege in their complaint that the defendants knew of the mold condition and actively concealed it by painting over the affected areas. This allegation is sufficient to support a claim for fraud based upon active concealment.

With respect to the alleged asbestos condition, plaintiffs allege that the defendants had knowledge of the violations issued to the property with respect to the removal of asbestos, and failed to inform the plaintiffs of these violations. Although plaintiffs allege that this information was not otherwise available to them, they do not allege that the defendants actively concealed this information. As mere silence on the part of the seller is insufficient to rise to the level of active concealment, plaintiffs' claim with respect to the alleged asbestos condition is insufficient to state a claim for fraud.

Plaintiffs' motion for summary judgment on their second cause of action for fraud, and that branch of the defendants' cross motion which seeks to dismiss the claim of fraud

based on active concealment, are, respectively, denied. The parties have not conducted any discovery, and the affidavits submitted by Gould are insufficient to establish, as a matter of law, that WRG and Deane had knowledge of the mold condition and that they participated in the concealment of that condition. In addition, Deane's affidavit is insufficient to establish, as a matter of law, that he had no knowledge of the mold condition and the alleged concealment of said condition. Although Deane states that he was not the sole member of WRG, it is clear that WRG could only have acted through a member, managing member, or agent. WRG has not demonstrated its lack of knowledge of the mold condition and that it did not actively conceal this condition.

That branch of defendants' motion which seeks to dismiss the third cause of action for negligent misrepresentation is granted. It is well settled that "[a] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, [2007]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]; *Parrott v Coopers & Lybrand*, 95 NY2d 479, 483-484 [2000]). A special relationship may be established by "persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 180). Here, the pleadings fail to establish the existence of any relationship between the plaintiffs and the defendants that would support a claim for negligent misrepresentation.

That branch of defendants' cross motion which seeks to dismiss the fourth cause of action for rescission (with respect to Gould) is denied. Rescission is an appropriate remedy for fraud, as the transaction is voidable and damages may also be sought (*Copland v Nathaniel*, 164 Misc 2d 507, 512 [1995]; 1A Warren's Weed, New York Real Property, Contracts, § 26.04; 91 NY Jur 2d, Real Property Sales and Exchanges, § 37; Prosser and Keeton, Torts § 105 [5th ed]; CPLR 3002 [e]).

That branch of defendants' cross motion which seeks to dismiss the fifth cause of action for damages, is granted, as this claim is repetitive of the cause of action for fraud.

That branch of defendants' cross motion which seeks to dismiss the sixth cause of action for conversion is granted. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession *(Colavito v New York Organ Donor Network Inc.*, 8 NY3d 43, 49-50 [2006], citing *State of New York v Seventh Regiment Fund*

Inc., 98 NY2d 249 [2002]; *see also Soviero v Carroll Group Int'l., Inc.*, 27 AD3d 276 [2006].) Personal property may include money, if specifically identifiable (*see Peters Griffin Woodward. Inc. v WCSC, Inc.*, 88 AD2d 883 [1982]).

To establish a cause of action for conversion, a plaintiff must show ownership or superior rights to possession to a specific identifiable thing and must show that the defendant had exercised an unauthorized dominion over the thing in question to the alteration of its condition or to the exclusion of plaintiff's superior rights (*see Estate of Giustino v Estate of DelPizzo*, 21 AD3d 523 [2005]; *AMF, Inc. v ALGO Distributors, Ltd.*, 48 AD2d 352, 356-357 [1975]; *Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 [1975]). A conversion claim can only be maintained upon a showing that there has been a demand for the return of the property and a refusal to return same (*see J.S. Gourmet, Inc. v Bretton Woods Home Owners Ass'n, Inc.*, 11 AD3d 583, 585 [2004].) Moreover, a claim to recover damages for conversion cannot be predicated upon a mere breach of contract (*see MBL Life Assurance Corp. v 555 Realty Corp.*, 240 AD2d 375 [1997]; *Peters Griffin Woodward. Inc. v WCSC, Inc.*, *supra*).

Applying the foregoing standards to the complaint and proof at bar, it is clear that a conversion cause of action does not properly lie. Plaintiffs' repetition of the prior allegations of fraud and negligent misrepresentation does not state a claim for conversion based upon the seller's retention of the proceeds of sale, following the delivery of the deed to the subject premises. Rather, it is clear that plaintiffs' claim actually arises within a claim of breach of contract for which a conversion claim does not lie. Moreover, although plaintiffs allege that they requested that defendants return the purchase price, they do not allege that have a superior right to retain title to the subject property.

That branch of defendants' cross motion which seeks to dismiss the seventh cause of action for unjust enrichment is granted. "The theory of unjust enrichment lies as a quasi-contract claim" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). A cause of action predicated on a theory of implied contract or quasi-contract is not viable where there is an express agreement that governs the subject matter underlying the action (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). " 'A quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, *id.* at 388). Here, there is an express contract of sale that was signed by Gould and WRG, wherein Gould agreed to purchase the property from WRG. Therefore, that contract of sale governs the subject matter underlying the action even if the defendants fraudulently concealed the mold contamination. The existence of that contract precludes a claim under the theory of implied contract. As such, the complaint fails

to state a cause of action to recover damages for unjust enrichment (*see Scott v Fields*, ___ AD3d ___, 2012 NY App Div LEXIS 1015, 2012 NY Slip Op 00950 [2012]).

Accordingly, plaintiffs' motion for summary judgment is denied in its entirety. That branch of defendants' motion which seeks to dismiss all causes of action alleged by Chapparo is granted with the exception of the second cause of action, but only to the extent that it alleges a claim for fraud based upon active concealment with respect to the mold condition only. That branch of defendants' motion which seeks to dismiss all causes of action alleged by Gould is granted only to the first, third, fifth, sixth, and seventh causes of action. That branch of the motion which seeks dismissal of the second cause of action is granted, with the exception of that portion which alleges a claim for fraud based upon active concealment with respect to the mold condition.

Dated: February 22, 2012

J.S.C.