Yarmeisch v Hamlet at Wind Watch Golf Club Home Owners Assn., Inc.
2012 NY Slip Op 30605(U)
February 22, 2012
Supreme Court, Suffolk County
Docket Number: 37150/2010
Judge: Joseph C. Pastoressa
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Index No: 37150/2010

SUPREME COURT OF THE STATE OF NEW YORK
IAS/TRIAL PART 34- SUFFOLK COUNTY

COPY

PRESENT:
HON. JOSEPH C. PASTORESSA

Motion Seq: #001-**MG**

ALAN YARMEISCH and HELENE YARMEISCH,

Plaintiff(s),

-against -

THE HAMLET AT WIND WATCH GOLF CLUB HOME OWNERS ASSOCIATION, INC. , THE HAMLET AT WINDWATCH HOME OWNERS ASSOCIATIONS, INC. , HAMLET WINDWATCH DEVELOPMENT, LLC, HAMLET WINDWATCH, LLC, ELLIOT MONTER, GERALD MONTER, MARILYN MONTER, DONALD V. VICTORSON, individually, "JOHN DOE" AND "JANE DOE" 1 THROUGH 100, REPRESENTING MEMBERS OF THE BOARD OF DIRECTORS OF THE HAMLET AT WIND WATCH GOLD CLUB HOME OWNERS ASSOCIATION, INC., "JOHN DOE" AND "JANE DOE" 1 THROUGH 100, REPRESENTING MEMBERS OF THE BOARD OF DIRECTORS OF THE HAMLET AT THE WIND WATCH HOME OWNERS ASSOCIATION, INC. , HOLIDAY ORGANIZATION, INC. , HOLIDAY MANAGEMENT ASSOCIATES, INC. , HOLCOM INCORPORATED, FAIRFIELD PROPERTY SERVICES, PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE, JUDITH MANOWITZ, and ROBERT MANOWITZ,

Defendant(s).

______________________________________X

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Upon the foregoing papers, the defendants Judith Manowitz and Robert Manowitz (hereinafter "Manowitz") move for an order dismissing the plaintiffs' verified complaint against them pursuant to CPLR 3211. It is

ORDERED, that the defendant Manowitz's motion to dismiss the plaintiffs' complaint against them is granted.

This is an action to recover damages in connection with the purchase of a condominium unit located at 77 Wind Watch Dive, Hauppauge, New York (hereinafter "subject premises"). The plaintiffs Helene Yarmeisch and Alan Yarmeisch ("purchasers") entered into a purchase agreement with the defendant Judith Manowitz ("seller") on or about September 18, 2006 regarding the subject premises. The plaintiffs verified complaint avers that they sustained damages as a result of the defendants fraudulent misrepresentation and/or negligent misrepresentation of information relating to a substantial and material defect of an "enormous foundation fracture" to the subject premises causing water damage, which was only discovered in the spring of 2008 subsequent to the purchase of the subject premises in May of 2007. The plaintiff Helene Yarmeisch (hereinafter "HY") avers that after the contract of sale was entered into but prior to the closing on the subject premises she and her contractor, Peter Nicolosi of Nicolosi Contracting, Inc,. along with the seller's agent, went to the subject premises on April 17, 2007 to discuss proposed renovations. The plaintiff HY avers that while in the basement of the subject premises "we noticed water on the basement carpet under the first window in the basement". The plaintiff HY inquired of the seller's realtor about the extent of the water damage at which point the seller's agent called the seller on her cell phone, whereby the seller "informed us that this was the first time anything like this happened and that there was no water intrusion issue". The plaintiffs' claim that the representation of no water damage to the basement was false as evidenced by a check dated August 10, 2006 to Long Island Water Proofing for removal and installation of two window wells and installation of drainage pipe and a drywell. [1]

The plaintiffs allege the following seven causes of action: (1) misrepresentation; (2) fraud; (3) breach of habitability; (4) violation of General Business Law § 349; (5) negligence; (6) breach of fiduciary duty; and (7) unjust enrichment.

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[1] It is undisputed that the parties did not utilize a disclosure statement pursuant to Real Property Law §§462, 465.

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The defendant Manowitz contends that the doctrine of caveat emptor and the merger clause included in the contract of sale of the subject premises bars any allegations of fraudulent inducement claims raised by the plaintiffs. The contract of sale states in pertinent part the following:

> 10. No Other Representations: .... Purchaser has inspected the Unit, its fixtures, appliances, and equipment and personal property, if any, included in this sale, as well as the Common Elements of the Condominium, and knows the condition thereof and,.... agrees to accept the same "as is," i.e., in the condition they are in on the date hereof,.... has considered or waived consideration of all matters pertaining to this Contract and to the purchase to be made hereunder and does not rely on any representations made by any broker or by Seller or anyone acting or purporting to act on behalf of Seller as to any matter which might influence or affect the decision to execute this Contract or to buy the Unit....
>
> 24. Entire Contract: All prior understandings and agreements between Seller and Purchaser are merged in this Contract and this Contract and this Contract supercedes any and all understandings and agreements between the parties and constitutes the entire agreement between them with respect to the subject matter thereof.
>
> 37. Condition of Premises. Purchasers have inspected the Premises and any personal property included in this sale and are fully familiar with their physical condition and state of repair. Purchasers agree to take the same "as is" and in their present condition, subject to reasonable use, wear, tear and deterioration between now and the Closing Date.
>
> Purchasers acknowledge that neither Sellers nor any representative or agent of Sellers have any representation or warranty (expressed or implied) as to the physical condition, state of repair, expenses or operation of the Premises or any matter or thing affecting or relating to the Premises or this contract.... Sellers shall not be liable or bound in any manner by any oral or written statement, representation, warranty, agreement, or information relating to the Premises or this contract furnished by any real estate broker, agent or other person, unless specifically set forth herein

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction (see, CPLR §3026). The court accepts the facts as alleged in the complaint as true, accords plaintiffs the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (see, Nonnon v City of New York, 9 NY3d 825). In assessing a motion under CPLR §3211 a court may freely consider affidavits submitted by the plaintiffs to remedy any defects in the complaint (see, Rovello v Orofino Realty Co., 40 NY2d

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633) and the criterion is whether the proponent of the pleading had a cause of action, not whether he has stated one (see, Allen v City of New York, 49 AD3d 1126). In order to prevail on a motion to dismiss a complaint pursuant to CPLR §3211(a)(1) the documentary evidence submitted must resolve all factual issues and conclusively dispose of the plaintiffs' claims as a matter of law (see, Wright v Evanston Insurance Company, 14 AD3d 505; Arnav Indus. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, 96 NY2d 300; Leon v Martinez, 84 NY2d 83; Klein v Gutman, 12 AD3d 348; cf. Key Y. Sung v Kyung Ip Hong 254 AD2d 271).

The elements of a cause of action for fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (see, Introna v Huntington Learning Centers, Inc., 78 AD3d 896; Jabolonski v Rapalji, 14 AD3d 484). Moreover, "[w]ith regard to the plaintiff's reliance on the alleged misrepresentation, the plaintiff must establish not only that he or she actually relied on the misrepresentation, but that this reliance was reasonable or justifiable" (Daly v Kochanowicz, 67 AD3d 78, 89). Here, accepting all the facts alleged in the complaint to be true including those contained in plaintiff HY's affidavit in opposition to the motion and according the plaintiffs the benefit of every possible inference, the plaintiffs failed to make out a cause of action alleging fraud (see, Daly v Kochanowicz, supra; Laxer v Edelman, 75 AD3d 584). The plaintiffs reliance on any representation by the defendant Manowitz (seller) that the subject premises had no water problems was not reasonable or justifiable. Any reliance on alleged statements by the defendant Manowitz (seller) that "this was the first time anything like this happened and that there was no water intrusion issue" was unreasonable and unjustifiable in light of plaintiff HY's inspection of the subject premises prior to closing on the property, whereby she witnessed evidence of water intrusion in the basement. Accordingly, in the absence of reasonable or justifiable reliance, the plaintiffs failed to state a cause of action to recover damages for fraud or misrepresentation against the defendant Manowitz (seller).

New York adheres to the doctrine of caveat emptor and imposes no liability on a seller or the seller's agent 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's agent which constitutes active concealment of a defective condition (see, Laxer v Edelman, 75 AD3d 584; Simone v Homecheck Real Estate Serv. Inc., 42 AD3d 518). Moreover, even proof of active concealment will not suffice when the plaintiff should have known of the defect (see, Richardson v United Funding, Inc., 16 AD3d 570). 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 (see, Rozen v 7 Calf Cr., LLC, 52 AD3d 590; Daly v Kochanowicz, supra; Glazer v LoPreste, 278 AD2d 198). In the case at bar, the plaintiffs failed to state a cause of action to recover for active concealment. The plaintiffs' averments allege that the defendant Manowitz (seller) expressly denied that there was a "water intrusion issue" in the basement, however, other than this denial, the plaintiffs averments contain no additional allegations of conduct that would have "thwarted" the plaintiffs' efforts to fulfill their responsibilities in accordance with the doctrine of caveat emptor (see, Daly v Kochanowicz, supra). The defendant Manowitz (seller) here allegedly represented to the plaintiffs that there had never been water problems in the basement, however, there is no evidence in the record to suggest that the plaintiffs made any attempts, prior to closing on the subject premises, to investigate what caused the basement to contain water. In addition, 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; Roland v McGraime, 22 AD3d 824; Fabozzi v. Coppa, 5 AD3d 722; Platzman v Morris, 283 AD2d 561; Masters v Visual Bldg. Inspections, 227 AD2d 597). Here, the specific provisions in the contract of sale disavowed the plaintiffs reliance upon the oral representations made by the defendant Manowitz (seller), and therefore, barred any allegations of fraudulent misrepresentation (see, Bedowitz v Farrell Development Co., Inc., 289 AD2d 432). The plaintiffs expressly represented in the contract for sale and the rider for the contract that they had not relied on any statements by the defendant Manowitz (seller) regarding the condition of the premises, and that representation destroyed the allegations in the complaint that the agreement was executed in reliance upon such statements (see, Danann Realty Corp. v. Harris, supra).

A cause of action based on negligent misrepresentation requires proof that a 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 (see, Berger-Vespa v Rondack Bldg. Inspectors, 293 AD2d 838). "There may be liability . . . where there is a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant's understanding of their reliance" (Houlihan/Lawrence, Inc. v Duval, 228 AD2d 560, 561). Here, the plaintiffs expressly represented in the contract that they had not relied on any statements by the de fendant Manowitz (seller) with regard to the condition of the premises, and that representation vitiated the allegations of the plaintiffs (see, Tarantul v Cherkassky, 84 AD3d 933; Laxer v Edelman, 75 AD3d 584; Bedowitz v Farrell Development Co., Inc., 289 AD2d 432). In addition, the plaintiffs expressly represented in the rider to the contract that they have inspected the subject property and agreed to take it "as is" and that the defendant Manowitz (seller) have not made any representations as to the "physical conditions" and "state of repair" of the subject property. Accordingly, the plaintiffs negligent misrepresentation claim against the defendant Manowitz is dismissed.

General Business Law § 349 is a broad consumer protection statute that declares deceptive acts or practices in the conduct of any business, trade or commerce to be unlawful (see, Flax v Lincoln Nat. Life Ins. Co., 54 AD3d 992). As a threshold matter, in order to satisfy General Business Law § 349 plaintiffs' claims must be predicated on a deceptive act or practice that is recurring in nature and consumer oriented (see, United Knitwear Co., Inc. v North Sea Ins. Co., 203 AD2d 358). Deceptive acts or practices may be considered consumer oriented when they have a broad impact on consumers at large. Here, the plaintiffs failed to allege that the defendant Manowitz engaged in deceptive business practices directed at members of the public who purchase real property (see, Stutman v Chemical Bank, 95 NY2d 24; Mancuso v Rubin, supra). Therefore, the plaintiffs cause of action for violation of General Business Law § 349 is dismissed against the defendant Manowitz.

The plaintiffs claim of negligence against the defendant Manowitz is dismissed for failure to allege a legal duty independent of the contract of sale (see, Heffez v L& G General Construction, Inc., 56 AD3d 526). Similarly, with respect to the seventh cause of action, which seeks to recover under the theory of unjust enrichment, "the existence of a valid and enforceable written contract

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governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter" (Yenrab, Inc. v 794 Linden Realty, LLC, 68 AD3d 755, 758). Here, the contract of sale precludes the plaintiffs from recovering against the defendant Manowitz on a theory of negligence and unjust enrichment. Accordingly, the fifth and seventh cause of action against the defendant Manowitz are dismissed.[2] Moreover, the defendant Manowitz demonstrated that the defendant Robert Manowitz was not a signatory to the purchase agreement and did not own any interest of the subject premises and therefore is not a proper party to the action (see, Wiernik v Kurth, 59 AD3d 535).

This shall constitute the decision and order of the court.

Dated: February 22, 2012

HON. JOSEPH C. PASTORESSA

FINAL DISPOSITION ____ NON-FINAL DISPOSITION X

H:\\CPLR3211.Yarmeisch.8.15.11

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[2] The plaintiffs third cause of action (Breach of Habitability) and sixth cause of action (Breach of Fiduciary Duty) do not contain averments against the defendant Manowitz and therefore are not applicable to the movant.