

Beizer v Hirsch

2012 NY Slip Op 30693(U)

March 8, 2012

Supreme Court, Queens County

Docket Number: 31557/10

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

HARRIET BEIZER,

Plaintiff,

-against-

MITCHELL HIRSCH, et al.,
Defendants.

Index No. 31557/10

Motion
Date January 10, 2012

Motion
Cal. No. 6

Motion
Sequence No. 3

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Upon the foregoing papers it is ordered that this motion by defendants, Dana Wallace, III, Janet Ruhl as Representative of the Estate of Fred Brown (deceased) and Janet Ruhl as Representative of the Estate of Minerva Brown (deceased) to dismiss the plaintiff, Harriet Beizer's Complaint as against them pursuant to CPLR 3211(a) and 3212, and for costs and sanctions is hereby decided as follows:

Plaintiff asserts only one cause of action, which cause of action is for fraud.

This action arises out of a 2001 real estate transaction in which Fred Brown, now deceased and Minerva Brown, now deceased ("the Browns") sold real property to the plaintiff and her partner Kathleen Swedish ("Swedish"). Defendant, Dana Wallace, III was undisputedly the real estate broker for the transaction. The Verified Complaint alleges that Mitchell Hirsch, who is a member of Hirsch and Hirsch LLP, represented the Browns on July 30, 2001 in a real estate transaction in which a 60' X 100' parcel of improved land was transferred from the Browns to plaintiff and her partner Swedish and that plaintiff had her own attorney in this transaction. Plaintiff alleges that: said real

estate transaction gave plaintiff and Swedish a right of first refusal to purchase the adjacent 60' X 100' unimproved parcel from the Browns if the Browns could not obtain a building permit for the property. In a decision/order dated September 6, 2011, this Court granted summary judgment to defendants, Mitchell Hirsch, Scott Hirsch, Hirsch and Hirsch [incorrectly sued herein as Hirsch and Hirsch (a partnership)] and Hirsch and Hirsch LLP and dismissed the action as against them.

Regarding the moving defendants, Dana Wallace, III, Janet Ruhl as Representative of the Estate of Fred Brown (deceased) and Janet Ruhl as Representative of the Estate of Minerva Brown (deceased), plaintiff, alleges, in relevant part:

Fred Brown and Minerva Brown and/or Mitchell Hirsch and/or Scott Hirsch and Hirsch and Hirsch and/or Dana Wallace III, materially misrepresented to Beizer by way of the Beizer Swedish-Browns contract that they had a right of first refusal in the same property that was already contracted to another, to wit, Cynthia Fields.

Fred Brown and Minerva Brown and/or Mitchell Hirsch and/or Scott Hirsch and Hirsch and Hirsch and/or Dana Wallace III, materially omitted telling Beizer before she negotiated the right of first refusal, that the same property in which Beizer and Swedish had a right of first refusal was already contracted to another, to wit, Cynthia Fields.

Fred Brown and Minerva Brown and/or Mitchell Hirsch and/or Scott Hirsch and Hirsch and Hirsch and/or Dana Wallace III, knew at the time that Beizer and Swedish and the Browns executed the contract, that the same property in which Beizer and Swedish had a right of first refusal was already contracted to another, to wit, Cynthia Fields.

Fred Brown and Minerva Brown and/or Mitchell Hirsch and/or Scott Hirsch and Hirsch and Hirsch and/or Dana Wallace III, induced Beizer to enter into the contract by promising her a right of first refusal for land that was already contracted to another, to wit, Cynthia Fields.

Fred Brown and Minerva Brown, with the knowledge and facilitation of Mitchell Hirsch and/or Scott Hirsch and/or Hirsch and Hirsch and/or Hirsch and Hirsch LLP and/or Dana Wallace III, closed with Harriet Beizer and Kathleen Swedish, purporting to sell them the entire 120' x 100' parcel originally owned by them (the Browns).

Fred Brown and Minerva Brown with the knowledge and facilitation

of Mitchell Hirsch and/or Scott Hirsch and/or Hirsch and Hirsch and/or Hirsch and Hirsch LLP and/or Dana Wallace III, closed with Harriet Beizer and Kathleen Swedish, purporting to sell them the entire 120' x 100' parcel originally owned by the Browns knowing that a 60' x 100' portion of said property was already conveyed to Cynthia Fields approximately 2 weeks earlier.

Fred Brown and Minerva Brown with the knowledge and facilitation of Mitchell Hirsch and/or Scott Hirsch and/or Hirsch and Hirsch and/or Hirsch and Hirsch LLP and/or Dana Wallace III, tendered a deed to Harriet Beizer and Kathleen Swedish that contained the metes and bounds of the full 120' x 100' property knowing that a 60' x 100' portion of said property was already conveyed to Cynthia Fields approximately 2 weeks earlier.

Beizer and Swedish justifiably relied on the contractual conveyance of the right of first refusal that they indeed had a right of first refusal in the property.

Beizer was injured as a result of this fraud.

That branch of moving defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint as against moving defendants for failure to state a cause of action is granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The Court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

To state a cause of action for fraud, plaintiff must demonstrate that defendant knowingly misrepresented a material fact, upon which plaintiff justifiably relied, resulting in an injury (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). CPLR 3016(b) states that in an action for fraud, "the circumstances constituting the wrong shall be stated in detail". It is well settled that a claim for fraud must satisfy the specificity and particularity requirements of 3016(b) and allege the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception (see, *Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 NY2d 644, 647 [1989]; *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 NY2d 403 [1958]). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Central Asia v. ABN Amro Bank N.V.*, 301 AD2d 373 [1st Dept 2003]). Applying these principles in this case, the court decides that the Complaint does not adequately state a cause of action for fraudulent concealment against moving defendants because plaintiff fails to allege that the moving defendants had a duty to disclose material information and that they failed to do so.

Accordingly, plaintiff's Complaint fails to state a cause of action against moving defendants, Dana Wallace, III, Janet Ruhl as Representative of the Estate of Fred Brown (deceased) and Janet Ruhl as Representative of the Estate of Minerva Brown (deceased) for fraud, and as such, the complaint must be dismissed as against them.

That branch of moving defendants' motion for an order dismissing plaintiff's claim for punitive damages is granted. Plaintiff's last allegation in her Verified Complaint is that she is entitled to punitive damages from defendants for perpetrating fraud in the amount of \$2,000,000.00, or the punitive amount to be determined by a jury, whichever is greater, up to the constitutional maximum. As the Court has determined that the Complaint must be dismissed against the moving defendants, the claim for punitive damages must also be dismissed. Accordingly, this branch of moving defendants' motion is hereby granted.

That branch of moving defendants' motion for an order awarding costs and sanctions due to plaintiff's commencement and maintenance of a frivolous action is hereby denied. Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is

completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false". The Court finds that the moving defendants have not demonstrated that plaintiff's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have moving defendants established sufficient cause to warrant sanctions (see, *Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the plaintiff has not risen to the level of frivolous. Accordingly, this branch of moving defendants', Dana Wallace, III, Janet Ruhl as Representative of the Estate of Fred Brown (deceased) and Janet Ruhl as Representative of the Estate of Minerva Brown (deceased) motion is denied.

This constitutes the decision and order of the Court.

Dated: March 8, 2012

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Howard G. Lane, J.S.C.