

Teague v Senno-James
2012 NY Slip Op 30719(U)
January 30, 2012
Supreme Court, Putnam County
Docket Number: 1319-2011
Judge: Lewis Jay Lubell
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Preliminary Conference March 5, 2012

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X
NANCY TEAGUE,

Plaintiff,

-against -

NANCY J. SENNO-JAMES, INTEGRITY HOME INSPECTION COMPANY, JOHN PETRILLO, and CENTURY 21 VJF REALTY INC.,

Defendants.
-----X

DECISION & ORDER

Index No. 1319-2011

Sequence No. 1

LUBELL, J.

The following papers were considered in connection with this motion by defendants John Petrillo and Century 21 VJF Realty for an Order dismissing the complaint as against them with prejudice or, in the alternative, for Summary Judgement dismissing the complaint and the Motion by defendant Integrity Home Inspection Company for an Order pursuant to CPLR §3211(a) dismissing the complaint on the account of plaintiff's alleged spoliation of evidence or, in the alternative, for summary judgment in its favor:

PAPERS	NUMBERED
Notice of Motion/Affirmation/Exhibits A-F	1
Memorandum of Law (Defendants')	2
Notice of Motion (Integrity)/Memorandum of Law/ Exhibits A-D	3
Affirmation in Opposition/Affidavit/Exhibits	4
Affidavit in Opposition (Nancy Teague)/ Exhibits A-G	5
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Plaintiff, Nancy Teague, brings this action for money damages against the seller, Nancy J. Senno-James (the "Seller"), the listing real estate agent and agency, John Petrillo (the "Agent") and Century 21 VJF Realty, Inc. (the "Agency"), respectively, as well as against her home inspection company, Integrity Homes Inspection Company (the "Inspector"), in connection with her purchase of the single family premises known by the street address of 23 Birch Drive, Brewster, New York, (the "Premises").

Among other things, plaintiff contends that the inspection report neglects to disclose several "critical material defects" to the Premises which were readily visible. These defects include, but are not limited to, an allegedly defective foundation, wall framings which were not properly affixed to floor framings, and the presence of asbestos shingles. As against the Seller, plaintiff contends that the Seller made materially false statements in the signed Disclosure Statement. Finally, as against the Agent and Agency, plaintiff avers that they had knowledge of material defects to the Premises and intentionally withheld such information from plaintiff.

In connection with the sale of the Premises, the Seller completed and executed a Property Condition Disclosure Statement (the "Disclosure Statement") in compliance with Article 14 of the Real Property Law. Thereafter, on April 27, 2010, the Premises was listed for sale by the Agent, a licensed real estate agent employed by the Agency.

Plaintiff was first shown the house in October 2010. Thereafter, plaintiff retained the services of the Inspector to inspect the Premises on her behalf. With the Agent and Seller present, the Inspector performed an inspection of the Premises on November 15, 2010. A written inspection report followed. The closing took place on March 1, 2011, whereupon plaintiff paid Seller \$295,000.00 for the Premises.

Post-closing, plaintiff met at the Premises with an architect and three contractors to discuss planned renovations. Among other things, plaintiff wanted to upgrade the kitchen and bathroom and possibly add another bathroom in place of an existing bedroom. Upon their inspection of the Premises, the architect and prospective contractors formed the opinion that the foundation was defective and/or missing in places, and there existed partially hidden asbestos shingles which needed to be remediated. Among other things, note was also made of the condition of the furnace, which had been duct taped.

Plaintiff contends that, upon reaching the conclusion that the foundation issues were of such magnitude that they could not

guarantee that renovations to the bathroom and kitchen would not cause yet further damage to the floors and walls of the Premises, the architect and contractors concluded that the most cost effective and safest method to resolve the structural issues was to demolish the structure, excavate, install a foundation and rebuild a house on the existing footprint.

Upon agreeing to proceed as such, plaintiff applied for required variances and permits to allow for the razing of the structure and the rebuilding in its place. Towards that end, the matter was placed on the May 16, 2011 Zoning Board of Appeals agenda on which date a public hearing was held.

Plaintiff, through her architect, James I. Nixon, presented various photographs of the then existing condition of the Premises as well as renderings of the proposed structure. Testimony was also given in support of the application; most particularly, the need to demolish the Premises. Upon review and consideration of the application, plaintiff received approval to raze the existing building and build a new one upon its footprint.

Plaintiff filed the Summons and Verified Complaint against Seller and Inspector on May 23, 2011. That same day, plaintiff's counsel sent a letter to Inspector advising that plaintiff was in the process of seeking a demolition permit and that immediate contact should be made with counsel's office to inspect the Premises, if such was desired.

The following day, May 24, 2011, Inspector was personally served with the Summons and Verified Complaint. He was also served through the Secretary of State on May 31, 2011. The Seller was personally served on May 27, 2007.

Thereafter, on June 14, 2011, a Supplemental Summons and Amended Verified Complaint naming the Agent and Agency as additional defendants were filed. Inspector served its Verified Answer with Cross-Claims against Seller on June 22, 2011. Seller served her Verified Answer on June 23, 2011.

In the meantime, a demolition permit was issued on June 23, 2011. Demolition commenced on July 6, 2011, on which date a buried and allegedly leaking 550-gallon oil tank was discovered hidden under the cement floor beneath the entranceway and adjacent room. A building permit was issued on July 11, 2011 for the proposed structure. On or about August 19, 2011, the Building Inspector signed off on the completion of the demolition.

In addition and during this period, on June 27, 2011,

plaintiff's counsel sent letters by way of facsimile transmission and regular mail to counsel for Seller and to attorney Aaron C. Bock, Esq., counsel to the Inspector, advising that plaintiff "must demolish the construction on site . . . scheduled for June 28th or June 30th . . . [so] that she can reconstruct a home on the premises." She further advised that she should be contacted if they wished to have the Premises inspected, noting however, that Plaintiff's architect and licensed engineers had made video and computer inspections of the Premises which are available to them. Another letter was directed to Seller's attorney by facsimile transmission on June 28, 2011 advising, among other things, that an inspection must occur on June 30, 2011 in the a.m.

Thereafter, from on or about July 13 through September 20, 2011, there was a flurry of service of pleadings to and from the various parties, culminating in the October 3, 2011, filing of a Request for Judicial Intervention. These motions were served around the same time.

There is no dispute that neither of the moving defendants inspected the Premises after having been advised of Plaintiff's claims. The exact reason for this is not yet clear. There is also no dispute that photographs were taken of the alleged defects and there may also exist a video of same. Testimony was also adduced before and documentary submitted to the ZBA, the current availability of which, by transcript or video, is not yet clear. There is also the Inspector's home inspection report. Plaintiff also contends that there may exist a previous home inspection report which had been prepared for a earlier prospective purchaser wherein reference is or may be made to some or all of the defects alleged herein.

Notwithstanding the history of this case as currently presented to the Court, a definitive conclusion cannot be reached as to why the Premises had to be demolished prior to any inspection by any of the defendants and why none of the defendants inspected the property prior to or even during its demolition, although seemingly notified.

Perhaps more importantly, these applications are made pre-discovery and without any indication that defendants have thoroughly reviewed available documentation, photos, videos and records of the alleged defects as may be depicted in the public record or otherwise through plaintiff. In fact, given the nature of this action, it would appear that some sort of expert showing would need to be made as to how and why plaintiff cannot establish a prima facie case or how and to what extent defendants will be prejudiced in defending against same, given what evidence is still available.

In sum, the Court is not satisfied from the papers currently before it that any aspect of the motions should be granted. The mere demolition of the Premises is not enough, in and of itself, to warrant the drastic remedy of dismissal of the action upon the current record. The Court is not persuaded that plaintiff intentionally sought to hide or destroy evidence to the prejudice of defendants (see Popfinger v. Terminix Intl. Co. Ltd. Partnership, 251 A.D.2d 564, 674 N.Y.S.2d 769), nor that it negligently did so (Barahona v. Trustees of Columbia Univ. in City of New York, 16 A.D.3d 445, 446 [2d Dept., 2005]). In fact, the Court is not quite sure of the extent of prejudice to defendants, if any. Among other things, defendants have failed to aver through expert submissions that an examination has been made of the existing and available evidence and, notwithstanding same, that they have been prejudiced in defending the action and to what extent.

In sum, upon the current record, the Court is not persuaded that there is any merit to any aspects of the motions as currently constituted.

Based upon the foregoing, it is hereby

ORDERED, that the motions be and are hereby denied without prejudice to re-application at the close of discovery; and, it is further

ORDERED, that the parties are directed to appear before the Court at 9:30 A.M. on March 5, 2012 for a Preliminary Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
January 30, 2012

S/

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