SHORT FORM ORDER

INDEX No. 09-16352
CAL No. 10-00996OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 7-20-11 (#002)
MOTION DATE 10-12-11 (#003)
ADJ. DATE 1-18-12
Mot. Seq. # 002 - MD
 # 003 - MG

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SCOTT T. DECLUE and JEYCE DECLUE,

Plaintiffs,

- against -

GEORGE P. HABERKORN, JANICE HABERKORN, DARIN GARTNER, PETER J. BRENNAN, JR. and THEA HABERKORN HASKELL,

Defendant.

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Upon the following papers numbered 1 to 50 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause (002)and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 24; Replying Affidavits and supporting papers 25 - 26; Notice of Motion/ Order to Show Cause (003)and supporting papers 27 - 39; Answering Affidavits and supporting papers 40 - 48; Replying Affidavits and supporting papers 49 - 50; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (002) of plaintiffs for an order pursuant to CPLR 3212 granting summary judgment, and the motion (003) of defendant Darin Gartner for an order pursuant to CPLR 3211 and 3212 granting summary judgement, are consolidated for the purposes of this determination; and, it is further

ORDERED that the motion of the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment on their first and second causes of action, striking the affirmative defenses of defendant Darin Gartner, and setting the matter down for a hearing on damages is denied; and, it is further

ORDERED that the motion of the defendant Darin Gartner for an order pursuant to CPLR 3211 and 3212 granting summary judgment and dismissal of plaintiffs' claims and any cross claims asserted against him is granted.

The plaintiffs commenced this action to recover monetary damages from defendants for the alleged encroachment of a retaining wall and fence upon their property. On May 30, 2008, plaintiffs purchased property known as 15 Birch Hill Road, Mount Sinai, New York ("15 Birch Hill Road") from defendants George P. Haberkorn and Janice Haberkorn ("the Haberkorns"), and received a Bargain and Sale Deed with covenants against grantor's acts in connection therewith. Defendant Darin Gartner ("Gartner") is the owner of property known as 19 Birch Hill Road, Mount Sinai, New York (the property next to and directly abutting the south side of plaintiff's property). Defendant Thea Haberkorn Haskell ("Haskell") is the daughter of the Haberkorns and was the broker in connection with the sale of 15 Birch Hill Road from her parents, the Haberkorns, to the plaintiffs. Defendant Peter J. Brennan, Jr. ("Brennan"), who has not appeared in connection with the motions before the court, was the land surveyor who prepared surveys for the plaintiffs in connection with and after the purchase of the 15 Birch Hill Road property.

The plaintiffs obtained a survey, guaranteed to them, from defendant Brennan which was updated by him on April 16, 2008, prior to their closing of title on 15 Birch Hill Road on May 30, 2008. This survey did not show a retaining wall or fence on the south side of the property. In late July, 2008 plaintiffs were informed by defendant Brennan that a retaining wall and fence were encroaching upon their property in the south portion of the back yard. Defendant Brennan prepared and guaranteed a survey to them dated July 29, 2008 which located this retaining wall and fence. Shortly thereafter, plaintiffs commenced this action against the Haberkorns on a first cause of action for breach of the covenant against incumbrances in the deed and seeking monetary damages as a result of same; against defendant Gartner on a second cause of action pursuant to article 15 of RPAPL for unlawful trespass, encroachment and wrongful encumbrance (and seek a removal of the encumbrance [which, in effect, was pursuant to RPAPL §871 for an injunction compelling the plaintiff to remove the retaining wall and fence allegedly encroaching upon their real property] as well as monetary damages); against defendant Brennan on a third cause of action for negligence in preparation of the April 16, 2008 survey (and seek monetary damages); and, against defendant Haskell on a fourth cause of action for fraudulently concealing the existence of the unlawful trespass and wrongful encroachment to plaintiffs (and seek monetary damages).

Plaintiffs now move for summary judgment on the first and second causes of action and against defendant Gartner's affirmative defenses, claiming that there are no questions of fact. Plaintiffs maintain that since the retaining wall and fence were located on the property prior to their acquiring a deed from the Haberkorns, there is no question that the title to their property was encumbered in violation of the covenants against grantors' acts contained in the deed and that defendant Gartner wrongfully caused the said encumbrance. In support of their motion, plaintiffs submit, *inter alia*, copies of the pleadings, the deed, the April 16, 2008 and July 29, 2008 surveys, and portions of the transcripts of the examinations before trial of defendant George P. Haberkorn and defendant Darin Gartner. Defendant Gartner seeks an order dismissing

the cause of action against him, as well as all cross claims against him, on the ground that he had permission to replace an old retaining wall with the present one and that plaintiffs have failed to demonstrate that the benefit to be gained by compelling the removal of the retaining wall and fence would outweigh the harm caused to him by removing the retaining wall and fence. In support of his motion he includes, *inter alia*, copies of the pleadings and the transcripts of the examinations before trial of plaintiffs and defendants George P. Haberkorn and Darin Gartner.

From the deposition testimony of both plaintiff Scott T. Declue and his wife, plaintiff Jeyce Declue, it is clear that neither of them observed the retaining wall on the south side of their back yard prior to the time they purchased the property, despite the fact that they both viewed the premises before signing a contract to purchase it and again before the closing of title on May 30, 2008. Plaintiff Jeyce Declue indicated that although she saw a wrought iron fence, she did not know it was on her property since "[w]e didn't know where the property lines were" and that she first learned the retaining wall was on her property approximately one month after they closed, when the surveyor, defendant Brennan, came to stake out the yard so that plaintiffs could install a fence. She did not explore the perimeter of the property before purchasing it, nor did she have any conversations with the Haberkorns regarding the condition of the property, the boundary lines, or the retaining walls. Similarly, she had no conversations with defendant Haskell about the retaining wall or the boundary lines prior to the purchase. Plaintiff Scott T. Declue testified during his deposition that he did see the fence which sits atop the retaining wall prior to the closing of title but that he did not observe the retaining wall until after July 16 or 17, 2008. He testified that the retaining wall is "a nice wall" and that the "neighbor's house would fall down if the wall wasn't there...everything is pitched on a hill, so if the wall wasn't there...the house would fall down...it would seem like the drainage would just kind of wash everything out of there." Plaintiffs indicated that they obtained title insurance from non-party First American at the closing and that the contract for the purchase of this property contained a clause which stated that "purchaser agrees to deliver to the attorney for the seller a list of any objections or violations which may appear on any proper examination of title."

Defendant George Haberkorn testified that there had been a railroad tie retaining wall built by his former neighbor, Phil Seiden, in the mid 1970s because both properties were suffering from an erosion problem. Some time in the early 2000's the new owner of the property next door, defendant Gartner, replaced the old railroad tie retaining wall, which was rotting, with a brick wall. Defendant Gartner had a contractor build the wall and install a fence, the new wall was put in generally the same spot, within an inch or two, of the old one. Prior to the work being done by the contractor, defendant George Haberkorn signed a paper indicating that he permitted the old retaining wall to be replaced by the new one. Mr. Haberkorn contends that the new retaining wall is an improvement, "it looked prettier", the old wall had been starting to fall down. Defendant Gartner testified at his examination before trial that he paid $8,960.00 for the new, "Nicolock Sierra Wall" and $1,175.00 to have the old wall torn down. Without the wall, he indicated that there would be water runoff problems as his property is at a higher grade than plaintiffs' next door. Defendant Gartner insists that it is "obvious that you needed the wall... the land would have collapsed had you removed the wall." He averred that the contractor, non-party Kelly Brothers, sought permission from defendant Haberkorn to replace the retaining wall since it was close to the property line, and that defendant, George Haberkorn signed a document granting permission for them to do so. Finally, defendant Gartner stated that he first learned that the retaining wall might be encroaching upon plaintiffs' property when plaintiff Scott Declue called him some time after he purchased the property from the Haberkorns.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

"New York adheres to the doctrine of caveat emptor and imposes no duty on the seller to disclose any information concerning 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" (***Platzman v Morris***, 283 AD2d 561, 562, 724 NYS2d 502 [2d Dept 2001]; *see* ***Bernardi v Spyratos***, 79 AD3d 684, 912 NYS2d 627 [2d Dept 2010]). 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* ***Matos v Crimmins***, 40 AD3d 1053, 1054, 837 NYS2d 234 [2d Dept 2007]). "To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor" (***Jablonski v Rapalje***, 14 AD3d 484, 485, 788 NYS2d 158 [2d Dept 2005]; *see* ***Matos v Crimmins***, 40 AD3d 1054-1055). Where the purchaser has the means available to them of knowing the condition, by the exercise of ordinary intelligence, it is their responsibility to make use of those means, and a failure to do so will prevent them from asserting that they were induced into entering into the transaction through misrepresentations (***McPherson v Husbands***, 54 AD3d 735, 864 NYS2d 444 [2d Dept 2008]). Finally, in order to obtain injunctive relief, plaintiffs must show that there is an encroachment and that the benefit they would gain from its removal would outweigh the harm that would result to the defendants if the relief were granted (***Broser v Schubach***, 85 AD3d 957, 925 NYS2d 875 [2d Dept 2011]; ***Town of Fishkill v Turner***, 60 AD3d 932, 876 NYS2d 92 [2d Dept 2009]).

It is clear that the condition which may encumber title (at this point plaintiffs have failed to offer any evidence that the title is unmarketable, title was transferred to them and they obtained title insurance at the time they acquired the deed which suggests, to the contrary, that the title is marketable) was one that was open and obvious at the time plaintiffs purchased the property. That they failed to inspect the premises or observe that which was readily visible, is a failure on their part, and must defeat any claim on their part for fraud or failure to disclose by the sellers or broker. Questions of fact remain as to whether the retaining wall actually encumbers title to plaintiffs' property and whether an action on such an encumbrance survived delivery of the deed (it may have merged with the contract). Accordingly, plaintiffs' motion for summary judgment on the first cause of action must be denied.

Inasmuch as defendants Gartner and George Haberkorn both testified that the retaining wall was built

with permission, there can be no cause of action for unlawful trespass or wrongful encumbrance against defendant Gartner. Similarly, since plaintiffs' testimony clearly indicates that the retaining wall is necessary to prevent the "house from falling down," plaintiffs have failed to show that the removal of the wall, which is a "nice wall," would outweigh the benefits of keeping the wall in its present state. Accordingly, plaintiffs' motion for summary judgment on the second cause of action must be denied and defendant Gartner's motion for summary judgment dismissing plaintiffs' claims and all cross claims against him are granted. The action is severed and continued as against the remaining defendants.

The foregoing constitutes the Order of this Court.

Dated: March 23, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION