

Rivers v Rotundi

2012 NY Slip Op 32636(U)

October 18, 2012

Sup Ct, Albany County

Docket Number: 1468-10

Judge: Joseph C. Teresi

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KURT C. RIVERS and BRIDGET CIAMPOLILLO,

Plaintiffs,

-against-

ALICE A. ROTUNDI, DOMINICK ROTUNDI,
MERRILL GREENBERG, CAPITAL ASSET
MANAGEMENT, PAUL C. DOYLE and
PAUL C. DOYLE ASSOCIATES,

Defendants.

DECISION and ORDER
INDEX NO. 1468-10
RJI NO. 01-11-102704

Supreme Court Albany County All Purpose Term, October 12, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Linnan & Fallon, LP
James Linnan, Esq.
Attorneys for Plaintiffs
61 Columbia Street
Albany, New York 12210

Maynard O'Connor Smith & Catalinotto, LLP
Justin Gray, Esq.
Attorneys for Defendants Alice A. Rotondi and Dominick M. Rotondi
6 Tower Place
Albany, New York 12203

Conway & Kirby, LLP
Kimberly Boucher Furnish, Esq.
Attorneys for Defendants Paul C. Doyle and Paul C. Doyle Associates
9 Cornell Road
Latham, New York 12110

TERESI, J.:

After purchasing 2 Woodrow Court, Troy, New York (hereinafter "the premises") from

Alice Rotondi¹, Plaintiffs allegedly discovered numerous structural and mechanical defects. They commenced this fraud/negligence action as a result. Issue was joined, discovery is complete and a trial date certain has been set. The Rotondis now move for summary judgment dismissing Plaintiffs' fraud cause of action against them, and seek an order precluding Plaintiffs from offering expert testimony at the trial of this matter. Doyle² too moves for summary judgment dismissing Plaintiffs' negligence claim against him, and for partial summary judgment on his limitation of liability defense. Plaintiffs oppose the motions. Because the Rotondis and Doyle demonstrated their entitlement to summary judgment dismissing the complaint against them, and no issue of material fact was raised, summary judgment is granted. Thus, the preclusion motion and partial summary judgment motions are moot.

“On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (Vega v Restani Const. Corp., 18 NY3d 499, 503 [2012], quoting Ortiz v. Varsity Holdings, LLC, 18 NY3d 335 [2011][internal quotation marks omitted]). First, “the moving party bears the burden of establishing that no material issues of triable fact exist and that it is entitled to judgment as a matter of law.” (U.W. Marx, Inc. v Koko Contr., Inc., 97 AD3d 893 [3d Dept 2012]). Once this burden has been met, the burden shifts to the non-movant “to produce competent evidence in admissible form establishing the existence of material issues of fact requiring a trial.” (Bergstrom v McChesney, 92 AD3d 1125, 1126 [3d Dept 2012]).

Considering the Rotondis' motion first, traditionally a seller of real property had “no

¹ Alice and Dominick Rotondi will hereinafter be referred to collectively as “the Rotondis.”

² “Doyle” will hereinafter refer to Paul C. Doyle and Paul C. Doyle Associates collectively.

duty... to disclose any information concerning the property in an arm's length real estate transaction.” (Meyers v Rosen, 69 AD3d 1095, 1096 [3d Dept 2010], quoting Stoian v Reed, 66 AD3d 1279 [3d Dept 2009]). Now, however, “Real Property Law article 14 codifies a seller's disclosure obligations for certain residential real property transfers.” (Klafehn v Morrison, 75 AD3d 808, 810 [3d Dept 2010]). A false representation made pursuant to Real Property Law article 14 in a property condition disclosure statement (hereinafter “PCDS”) “may be proof of [actionable] active concealment.” (Simone v Homecheck Real Estate Services, Inc., 42 AD3d 518, 520 [2d Dept 2007]). “To prevail upon [an active concealment] claim, plaintiffs must demonstrate that the false representation prevented fulfillment of their own obligations imposed by the doctrine of caveat emptor and that they justifiably relied upon the false representation.” (Pettis v Haag, 84 AD3d 1553, 1554-55 [3d Dept 2011]). Similarly, a fraud cause of action requires proof that “defendants knowingly misrepresented a material fact upon which plaintiffs justifiably relied, causing their damages.” (Id.)

On this record, the Rotondis established their entitlement to summary judgment of Plaintiffs' fraud/active concealment claim.

Contrary to the complaint's allegations, the Rotondis first established that Plaintiffs' claim is not based upon any oral statements. According to Mr. Rivers' deposition testimony, he met the Rotondis once, at the closing of title. At the closing, the Rotondis' only statements were: “hope you love the house” and “enjoy the house.” They said nothing about the condition of the premises, and Mr. Rivers asked them no questions about its condition. Ms. Ciampolillo, at her deposition, confirmed Mr. Rivers' allegations. As the statements the Rotondis allegedly made contain no “material facts,” they cannot be the basis for a fraud/active concealment claim.

Additionally, Mr. Rivers stated that he met the Rotondis' real estate broker, Merrill Greenberg, once and "didn't rely on anything that he was saying." Ms. Ciampolillo also recalled her single meeting with Mr. Greenberg. She stated that he made no specific representations about the premises, but rather offered his generalized opinion that the "house was fine." Plaintiffs' depositions established that, like the Rotondis, Mr. Greenberg made no material factual representations about the premises. As such, Plaintiffs fraud/active concealment claim cannot be based on an oral representation made by the Rotondis or their realtor.

While the Plaintiffs' claims are necessarily based upon a written misrepresentation, Mr. Rotondi did not make such statement. At his deposition Mr. Rivers stated that he received just one written document concerning the premises' condition, the PCDS. Plaintiffs thereby limited their claim against the Rotondis to a "misrepresentation" contained in the PCDS. However, the PCDS is signed by Ms. Rotondi alone. Because Mr. Rotondi did not make the statement upon which Plaintiffs' fraud/active concealment claim is premised, Mr. Rotondi demonstrated his entitlement to summary judgment dismissing the complaint against him.

Ms. Rotondi also demonstrated that Plaintiffs did not reasonably rely on any material representation she made in the PCDS. Only those question posed in the "Structural" and "Mechanical Systems & Services" sections of the PCDS are relevant to Plaintiffs' fraud/active concealment claims. In those sections, Ms Rotondi answered each relevant question "unknown." Simply put, relying on "unknown" information is not reasonable. Ms. Ciampolillo, at her deposition, explicitly acknowledged that she did not rely upon the PCDS' "statements that had unknowns." She thereby admitted that she did not reasonably rely upon any of the PCDS' representations that are relevant to this action. Similarly, after evading direct questions

concerning his reliance on the PCDS, Mr. Rivers characterized his reliance as “very minimal.” He offered no explanation as to how he could rely on “unknown” information. Moreover, neither Plaintiff obtained any clarification of the “unknown” answers. Ms. Ciampolillo stated that she sought no additional information from her attorney or her realtor. Although Mr. Rivers requested additional information from his realtor, when his realtor received no answer from Mr. Greenberg the issue was dropped. This proof demonstrates, as a matter of law, that Plaintiffs did not reasonably rely upon any material misrepresentations the Rotondis made. In addition, such proof also shows that the Rotondis made no misrepresentation that prevented Plaintiffs from fulfilling their caveat emptor obligations.

With the burden shifted, Plaintiffs raised no material issue of fact. First, because their attorney’s affidavit was not based upon “personal knowledge of the operative facts [it is of no]... probative value.” (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]; Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]). Plaintiffs’ reliance on Mr. Rotondi’s deposition testimony is also unavailing. Although he testified to the limited assistance he gave Ms. Rotondi in her answering the PCDS’ questions, at no point did he state that he personally filled out or signed the PCDS. As such, Plaintiffs failed to proffer a single statement made by Mr. Rotondi that they could have relied on. Nor did Plaintiffs raise an issue of fact relative to their “reasonable reliance.” Mr. Rivers affidavit failed to specify which PCDS statements Plaintiffs relied on and offered no “reasonable reliance” explanation. While he identified numerous structural defects that he discovered at the premises post-closing, he did not correlate those issues with a specific PCDS misrepresentation that he reasonably relied on. Instead, in an overly generalized and conclusory manner, Mr. Rivers claimed to “rel[y] on the

contents of the [PCDS.]” Such proof falls far short of raising a triable issue of fact.

Accordingly, the Rotondis’ motion for summary judgment is granted and their motion to preclude is denied as moot.

Turning to Doyle’s motion, he too demonstrated his entitlement to summary judgment.

In support of his motion, Doyle submitted his own affidavit. He recalled his January 28, 2009 inspection of the premises, and characterized it as exhaustive. He visually inspected the premises’ exterior and its interior, from basement to attic. Doyle provided Plaintiffs with his notes, instructions and an information supplement. His notes indicated six substantial defects, three dangerous conditions, the need to obtain both estimates for repairs and a second opinion on a “floor sag” issue. Such visual inspection was reportedly performed in accord with the American Society of Home Inspectors (ASHI) guidelines, the applicable standard of care for this type of inspection. Upon such proof, Doyle demonstrated his prima facie entitlement to summary judgment dismissing Plaintiffs’ negligence claim against him.

With the burden shifted, Plaintiffs did not challenge Doyle’s prima facie showing and failed to raise a triable issue of fact. Again, Plaintiffs’ attorney’s affidavit raises no issue of fact. (2 North Street Corp. v Getty Saugerties Corp., supra; Groboski v Godfroy, supra). Nor did Mr. River’s affidavit. He denied “experience with the structural components of houses,” he minimized his “experience in construction and remodeling” and made no allegation that he has any knowledge of the home inspection industry’s standards. With such background, he neither established the standard of care that applied to Doyle’s home inspection, Doyle’s breach of the applicable standard of care or raised a triable issue of fact.

Plaintiffs’ expert proof is similarly unavailing. Plaintiffs submitted the report and

affidavit of their professional engineer Michael Kenneally. While his report does not address the condition of the premises at the time of Doyle's inspection, his affidavit does. The affidavit is reportedly based solely on Kenneally's "February 18, 2012 inspection³ and the photographs [he] reviewed." However, "the photographs [he] reviewed" were not submitted. Nor did Plaintiffs establish the date such photographs were taken, who took the photographs, the number of photographs reviewed or even describe what the photographs depicted. Because "[a]n expert's opinion must generally be based on facts found in the record or personally known to the witness" (Adair v Tully-Kuzman, 91 AD3d 1228, 1229 [3d Dept 2012]) and the photographs were not made part of this record, Kenneally's opinions are inadmissible. Moreover, even if Kenneally's observations were admissible he established neither his qualifications to offer an opinion about home inspections nor the standard of care applicable to a home inspector. He neither addressed the ASHI standards nor alleged Doyle's breached of them. As such, Kenneally's allegations of Doyle's breach are unsupported, of no evidentiary value and fail to raise a triable issue of fact. (470 Owners Corp. v Richard L. Heimer, P.E., P.C., 258 AD2d 558 [2d Dept 1999]).

Accordingly, Doyle's motion for summary judgment dismissing the complaint against him is granted and his motion for partial summary judgment is denied as moot.

This Decision and Order is being returned to the attorney for the Rotondis. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

³ Such inspection occurred more than three years after Doyle's.

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 18, 2012
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 21, 2012; Affidavit of Justin Gray, dated August 21, 2012, with attached Exhibits A-S.
2. Affidavit of Shawn May, dated October 5, 2012, with attached Exhibits A-H.
3. Affidavit of Justin Gray, dated October 10, 2012, with attached Exhibit A.
5. Notice of Motion, dated August 17, 2012; Affidavit of Kimberly Boucher Furnish, dated August 17, 2012, with attached Exhibits A-V.
6. Affidavit of Shawn May, dated October 5, 2012, with attached Exhibits A-F.