At an IAS Term, Part 42 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of May, 2002

P R E S E N T:

HON. IRA B. HARKAVY,
Justice.

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RALPH CHASE REALTY, LLC,

Plaintiff,

- against - Index No. 15002/00

UNITED PARCEL SERVICE, INC.,

Defendant.

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UNITED PARCEL SERVICE, INC.,

Third-Party Plaintiff,

-against- Index No. 76144/00

ABRAHAM LESER, individually, and CHASE RALPH REALTY CORP.,

Third-Party Defendants.

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The following papers numbered 1 to 14 read on this motion:

	Papers Numbered	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3	7-9
Opposing Affidavits (Affirmations)	4-5	10-13
Reply Affidavits (Affirmations)	6	14
_____ Affidavit (Affirmation)		
Other Papers		

Upon the foregoing papers in this action by plaintiff Ralph Chase Realty, LLC ("plaintiff") against defendant United Parcel Service, Inc. ("UPS") seeking recovery of damages for remediating an environmental condition upon real property, and in this third-party action by UPS, as a third-party plaintiff, against third-party defendants Abraham Leser, individually ("Leser"), and Chase Ralph Realty Corp. ("Corp.") for a declaratory judgment and indemnification, Leser and Corp. move for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing UPS' third-party complaint as against them based upon documentary evidence and the failure to state a cause of action, and, pursuant to CPLR 3212(b), granting them summary judgment dismissing the answer and affirmative defenses interposed by plaintiff in response to their cross claims against it. UPS cross-moves for summary judgment dismissing plaintiff's complaint as against it and for summary judgment in its favor on its third-party claims for a declaratory judgment and indemnification as against Leser and Corp.

UPS was the owner of the subject real property, located at 8213 Ralph Avenue, in Brooklyn, New York, until it sold such property, on October 4, 1994 to Corp. Corp., as mortgagor, executed a purchase money mortgage in favor of UPS, as mortgagee, on the property. At the time of the sale of the real property by UPS to Corp., certain adverse environmental conditions existed on such property. Therefore, in connection with these conditions, UPS and Corp. entered into an Easement Agreement dated October 4, 1994. The Easement Agreement, in paragraph 1, noted that located on the property were 10 wells for the purpose of monitoring the environmental conditions, and it granted UPS and its

successors and assigns an easement to enter upon the property for certain purposes, including the maintenance and sampling of these existing wells, the investigation and remediation of the environmental conditions to the extent required by the New York State Department of Environmental Conservation (the "DEC"), and installation and maintenance of a 55-gallon drum to hold liquid removed from the wells.

The Easement Agreement, in paragraph 4, further provided that UPS shall indemnify Corp. from liability for the remediation of the environmental conditions as required by law. It also provided, in paragraphs 5 and 6, that the easement granted to UPS and the rights and privileges granted under the Easement Agreement were "exclusive," that UPS' easement and its rights thereunder would be binding upon future owners of the property, and that the easement "shall inure to the benefit of and be enforceable by [UPS], and its successors and assigns." It additionally stated, in paragraphs 6 and 7, that the easement and UPS' indemnification of Corp. would continue in full force and effect until terminated in accordance with certain terms of the easement, and that upon the termination of the agreement, UPS would release all of its easement rights. Paragraph 10 of the Easement Agreement gave UPS the right to enforce its easement by injunction or specific performance. Said Easement Agreement was recorded on October 27, 1994.

Following Corp.'s default on its mortgage obligation to UPS, UPS initiated a foreclosure action against Corp., which resulted in the renegotiation between UPS and Corp. of UPS' obligations concerning the remediation of the environmental problems on the subject

real property. Corp. and UPS, consequently, entered into a Cancellation Agreement dated October 24, 1996, whereby the parties agreed that the obligations and responsibilities of UPS under the Easement Agreement were completed, terminated, and transferred to Corp.; that the reasons for the easement and the necessity thereof had been concluded; and that the easement was, therefore, cancelled. Corp. and Leser, the president of Corp., by General Releases executed by them on October 24, 1996, also released and discharged UPS from its prior agreement and agreed to be responsible for the clean-up of any environmental problems of the subject real property and to hold UPS harmless and indemnify it from all liabilities in regard to any environmental issues.

Subsequently, Corp. entered into negotiations with plaintiff to sell the subject property to it. Leser avers that during the course of these negotiations, he told plaintiff's principals about the existing environmental problems on the property, and directed plaintiff to conduct its own environmental testing in order to determine the nature and extent of these problems. He states that he also informed the principals of plaintiff of the Cancellation Agreement and the General Releases, and advised them that it would be plaintiff's obligation to correct, at its own cost and expense, the environmental problems which existed at the property, and that prior to the execution of the contract of sale, the parties would agree as to the approximate cost of correcting the environmental problems, and that Corp. would then reduce the purchase price of the property by this amount. He asserts that plaintiff agreed that upon

receiving this credit, it would have the sole responsibility to correct the environmental problems.

Leser claims that, thereafter, plaintiff notified him that it had conducted the environmental tests at the property and had determined that the cost of correcting the environmental problems was $500,000, and that he, therefore, agreed to reduce the purchase price by this amount. The parties entered into a contract of sale dated November 26, 1997, which provided that the purchase price was $2.5 million. Leser asserts that this price resulted from the subtraction of the $500,000 credit from the originally agreed purchase price of $3 million. An Addendum to the Contract of Sale, handwritten by Harry L. Klein, Esq., the attorney for plaintiff, and executed by both Mr. Klein and Leonard Ledereich, Esq., the attorney for Corp., contains certain terms relating to the sale of the property, and states "see attached Closing Statement." The attached "Closing Statement and Adjustments" lists the purchase price of the property as $3 million, and states that the "credit for DEC Environment Claims/Contamination was $500,000.

On May 1, 2001, plaintiff commenced this action against UPS, alleging a claim under the Navigation Law and causes of action for negligence and nuisance based upon UPS' alleged failure to properly clean, remove, or contain the environmental condition at the property. Plaintiff's complaint seeks damages from UPS in the amount of $500,000 for its having to remediate this condition. UPS, consequently, brought the third-party action against Leser and Corp., seeking a declaratory judgment that based upon the Cancellation Agreement

and General Releases, Corp. and Leser were responsible for the remediation of the property raised in connection with plaintiff's action as against it, and that, pursuant to such Cancellation Agreement and General Releases, it is entitled to indemnification from them for any amount in which it is held liable to plaintiff in said action.

Leser and Corp., in their answer to the third-party complaint, interposed an affirmative defense and cross claims against plaintiff, which assert that they informed plaintiff of the Cancellation Agreement and General Releases, that as a condition of the sale of the property plaintiff agreed to correct the environmental problems at its own cost and expense in consideration of the $500,000 credit to the purchase price, and that plaintiff is, therefore, solely responsible to bear the cost for cleaning the environmental problems at the property. Their cross claims seek a declaratory judgment to this effect. Plaintiff's reply to the cross claims generally denies them and asserts the defenses of failure to state a cause of action and the Statute of Frauds.

In opposition to the instant motion by Leser and Corp. and the cross motion by UPS, plaintiff has submitted the affirmation of its attorney, Harry L. Klein, Esq., who, as noted above, represented plaintiff in connection with its purchase of the subject property, and the affidavit of Steven Zakheim, plaintiff's sole member. They both state that at the time of plaintiff's purchase of the property, they believed that the Easement Agreement, which obligated UPS to remedy the environmental condition at the property, was still in effect, and that plaintiff would not have purchased the property if it had known otherwise. They deny

that they were ever told by Leser about the Cancellation Agreement and General Releases, and claim that they were only aware of the existence of the Easement Agreement. Plaintiff contends that it had a right to rely upon this Easement Agreement since it was a recorded document.

Plaintiff's contention is without merit. While it is true that the Easement Agreement was recorded and the Cancellation Agreement and General Releases were not, there is no provision in the Easement Agreement providing for the enforceability of the remediation of environmental conditions by UPS or indemnification from UPS for such remediation by third parties or future owners of the property. Rather, the terms of the Easement Agreement are express and (as previously noted) specifically provide that such agreement was for the benefit of UPS and that the easement granted thereunder was enforceable by UPS and UPS' future assigns. It did not confer any benefits to any other parties, such as plaintiff, who was a stranger to the contract (see, Smith v Fitzsimmons, 180 AD2d 177, 180). Indeed, as discussed above, the Easement Agreement provided only for indemnification from UPS to Corp., and stated that "the rights and privileges granted [t]here in [we]re exclusive."

Where a "contract is clear and unambiguous . . . [t]he court, through a strained or unreasonable interpretation, is not permitted to make a new agreement for the parties" (Johnson v Colter, 251 App Div 697, 699; see also, 43A NY Jur 2d, Deeds, § 112). "[O]rdinary knowledge on the part of a purchaser of the existence of [an agreement

encumbering property] is sufficient to put him [or her] on notice as to its extent" (91 NY Jur 2d, Real Property Sales and Exchanges, § 91).

Furthermore, while the Cancellation Agreement and the General Releases were not recorded, plaintiff was aware of the Easement Agreement, its terms, and the rights afforded thereunder, and that it contained provisions providing for its termination. It, therefore, had a duty to inquire whether its terms were still in effect, and, in the exercise of reasonable diligence, it could have acquired knowledge of the Easement Agreement's termination (see, 91 NY Jur 2d, Real Property Sales and Exchanges, § 91). Plaintiff, however, does not state that it ever inquired from UPS as to whether the Easement Agreement was still operative or effective.

Additionally, it is undisputed that due to the execution of the Cancellation Agreement and the General Releases, Corp. could not enforce any duty undertaken by UPS in the Easement Agreement to remediate the environmental condition at the property. "The purchaser of land succeeds to the same rights as those possessed by the vendor and is bound by the same limitations" (91 NY Jur 2d, Real Property Sales and Exchanges, § 127; see also, Matter of Creamer v Young, 16 Misc 2d 676, 679). Thus, plaintiff, as the vendee under the contract of sale, could not have acquired any greater rights in the property than that possessed by its vendor, Corp.

Plaintiff's argument that it relied upon alleged misrepresentations by Corp. that the Easement Agreement was still in effect and that UPS would remediate the environmental

condition at the property, is rejected . Such reliance upon any alleged misrepresentations is refuted by the express language of paragraph 21 of the contract of sale, which states that plaintiff agreed to purchase the property "as is" and in its "present condition," and by paragraph 22 of said contract, which states that the contract constitutes the parties' "full agreement," and that it was "entered into after full investigation, neither party relying upon any statements made by anyone that are not set forth in this contract" (see, Mandracchia v McKee, 16 Misc 2d 337, 339; 91 NY Jur 2d, Real Property Sales and Exchanges, § 116).

Plaintiff, in opposition to the motion and cross motion, also relies upon a proposal to the contract of sale by its attorney, which would have provided that Corp. would assign to it, all of its right, title, and interest in the Easement Agreement. Such reliance, however, is misplaced since no such assignment ever took place; this proposal was never added to or made a part of the contract or executed by the parties, and was, thus, apparently rejected.

Plaintiff's argument that it believed that an assignment of the Easement Agreement to it was unnecessary because UPS' easement ran with the land, and, therefore, could be enforced by it against UPS, is unavailing. While the Easement Agreement may have ran with the land to the extent that it expressly provided in paragraph 6 thereof, that it could be enforced by UPS and would inure to its benefit, and that Corp. warranted that it and any of Corp.'s successors and assigns would "forever defend the Easement and the rights granted [t]hereunder unto [UPS]," it did not grant any rights to plaintiff, a stranger to the agreement, as against UPS (see, 43 NY Jur 2d, Deeds, §§ 62-63).

Plaintiff further contends that the fact that the policy issued by Stewart Title Insurance Company ("Stewart") excepted from coverage the recorded Easement and that the Addendum to the Contract of Sale provided that Corp. did not agree to clear this exception to title, demonstrates that Corp. represented that the Easement Agreement was effective and enforceable. Such contention is devoid of merit. The exception taken by Stewart only evidences that it excluded from its policy of insurance coverage any loss or damages which might arise to plaintiff by reason of the easement that had been granted to UPS. The fact that Corp., in the Addendum to the Contract of Sale, undertook no responsibility to clear Stewart's exception did not impose any obligation upon it or confer any rights upon plaintiff.

Plaintiff also denies that it was advised by Leser that it would be responsible to correct the environmental problems at its own cost and expense, or that it had received a credit for such remediation. Plaintiff, however, has failed to offer any satisfactory explanation or allegations refuting the plain and unambiguous language of the Closing Statements and Adjustments to the contract of sale, which, as discussed above, expressly stated that the purchase price was $3 million and that the "Credit for DEC Environment Claims/Contamination" given to plaintiff was $500,000 (see, CPLR 3211[a][1], 3212[b]). Plaintiff's attorney does not deny executing the Addendum to the Contract of Sale, on behalf of plaintiff, which referred to and included therein this statement.

While plaintiff attempts to argue that the original purchase price was $2.5 million and that the $3 million figure was merely concocted in the event of condemnation of the property

by the City of New York, the agreement between Leser and Steven Zakheim regarding condemnation, submitted by plaintiff, does not support this argument. Rather, this agreement lists the consideration expected to be awarded by the City as $3 million, the property's base as $2.5 million, repairs of 0, and "Environment Tests" by Steven Zakheim as $20,000.. Thus, this agreement only indicates that "Environment Tests" in the amount of $20,000 were undertaken by Steven Zakheim with respect to the property and appears to show that the property's base was $2.5 million, without any repairs being made.

Therefore, inasmuch as the documentary evidence demonstrates that plaintiff has no viable claim as against UPS and no triable issue of fact exists with respect thereto, UPS is entitled to summary judgment dismissing plaintiff's complaint as against it (see, CPLR 3212[b]). While, pursuant to the express terms of the Cancellation Agreement and General Releases, UPS would be entitled to a declaratory judgment granting it indemnification from Leser and Corp. for any claim by plaintiff against it in this action, since the court finds that plaintiff cannot assert a cognizable claim against it, such an order is unnecessary (see generally, Cohen v Chase Manhattan Bank, 280 AD2d 511). Additionally, in view of the foregoing, dismissal of UPS' third-party action against Leser and Corp. and an order striking plaintiff's defenses in response to the cross claims of Leser and Corp., is warranted (see, CPLR 3212[b]; Bournazos v Malfitano, 275 AD2d 437, 438; Perrone v Ilion Main St. Corp., 254 AD2d 784; Pittinger v Long Is. R.R., 233 AD2d 430).

Accordingly, the motion by Leser and Corp. for summary judgment dismissing the third-party complaint as against them and plaintiff's defenses to their cross claims, is granted. UPS' cross motion for summary judgment is granted insofar as it seeks dismissal of plaintiff's complaint as against it and is rendered moot insofar as it seeks summary judgment in its favor on its third-party claims as against Leser and Corp.

This constitutes the decision, order, and judgment of the court.

ENTER,

J. S. C.

IRA B. HARKAVY
Justice of the Supreme Court