

**Whitney Lane Holdings, LLC v Don Realty, LLC**

2007 NY Slip Op 34527(U)

July 3, 2007

Supreme Court, Saratoga County

Docket Number: 2006-2874

Judge: Stephen A. Ferradino

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT COUNTY OF SARATOGA

WHITNEY LANE HOLDINGS, LLC

Plaintiff,

-against-

**DECISION and ORDER**  
RJI #45-1-2006-1581  
Index # 2006-2874

DON REALTY, LLC; DONOVAN and ADRIANA LITTLE FIELD  
(a/k/a ADRIANNA LITTLE FIELD) by their guardian MATTER J. SGAMBETTERA,  
ESQ. and DDA & A REALTY, LLC

Defendants.

APPEARANCES:

Gleason, Dunn, Walsh & O'Shea  
Attorneys for the Plaintiff  
40 Beaver Street  
Albany, New York 12207

Sgambettera & Associates, P.C.  
Attorneys for the Defendants  
323 Ushers Rd., P.O. Box 1550  
Clifton Park, New York 12065

STEPHEN A. FERRADINO, J.

2007 JUL 18 PM 12: 09  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

FILED

The defendants have requested an order of this Court pursuant to CPLR §3212 granting summary judgment. The plaintiff has opposed the motion.

This matter arises out of a commercial real estate transaction. The plaintiff purchased property commonly know as North County Commons from the defendants. The sale was subject to a standard form contract for the purchase and sale of real estate. The plaintiff made a cash payment at the time of the closing held on November 4, 2004. On November 5, 2004 the plaintiff executed, acknowledged and delivered to DDA & A Realty, LLC an Amended and Restated Promissary Note in the principle sum of three

million five hundred thousand dollars. The plaintiff executed, acknowledged and delivered to DDA & A Realty, LLC a Purchase Money Mortgage to secure its obligation to make payments pursuant to the terms of the promissary note. The plaintiff agreed to make monthly interest only payments for 24 months and a single payment for the unpaid principal on December 1, 2006. The plaintiff made the monthly payments. In October 2006 the plaintiff sought to extend the December 1, 2006 maturity date of the note for six months. The parties entered into discussions but were unable to negotiate terms acceptable to all parties. The plaintiff failed to make the single payment due on December 1, 2006 pursuant to the terms of the Amended and Restated Promissary Note.

DLL Family, LLC, the holder of the note by assignment, commenced an action to accelerate the mortgage and assign a court appointed receiver. A receiver has been assigned and is acting in that capacity. In the companion foreclosure action DLL Family, LLC v Whitney Holdings, LLC the Court granted summary judgment and assigned a referee to compute.

Two days before its default, Whitney Lane, LLC the plaintiff in the above-captioned matter commenced an action against the defendants by filing a summons and complaint on November 30, 2006. The plaintiff alleges the defendants were aware of eminent domain proceedings planned by the Town of Clifton Park (hereinafter Town) to acquire property for the reconstruction and widening of Vischers Ferry Road. The Town proceeded with its plans and took land from the plaintiff. The plaintiff claims the reconstruction project impeded its ability to lease available properties causing it to incur significant monetary damages that contributed to its default on the note. The plaintiff claims the defendants failure to disclose knowledge of the Town's plans constitutes a

willful and material misrepresentation that resulted in a fraudulently induced contract between the parties.

The essential elements of a cause of action for fraud are “representation of a material existing fact, falsity, scienter, deception and injury.” *Channel Master Corp. v Aluminum Ltd. Sales*, 4 N.Y.2d 403, 407 (1958) . To establish its cause of action the plaintiff must allege a misrepresentation or material omission by defendants, on which it relied, that induced it to purchase the property. Such a claim must set forth with particularity the misrepresentation(s) or omission(s) constituting the wrong. CPLR § 3016[b]. The plaintiff must show that it actually relied on the purported fraudulent statements or material omission and that its reliance was reasonable or justifiable. See, *KNK Enterprises, Inc. v. Harriman Enterprises, Inc.*, 33 A.D.3d 872 (2d Dept. 2006). However the plaintiff may not claim reliance on an alleged omission that it could have discovered through the exercise of due diligence. *Id.* The plaintiff places great emphasis on the difficulty it would have experienced discovering the fact the town was planning to widen the road and take land. However the more important question is if the defendants had knowledge of the Town’s plans, did the defendants have a duty to disclose that information.

In New York State a seller of real property is under no duty to speak when the parties deal at arm’s length. 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. *Perin v Mardine Realty Co.*, 5 AD2d 685 (2d Dept. 1957), *affd* 6 NY2d 920. The plaintiff/buyer in this case is a sophisticated purchaser familiar with commercial transactions. The plaintiff and defendants participated in an arm’s length transaction

and both parties were represented by counsel. The plaintiff had the responsibility to satisfy himself as to the quality of his bargain by exercising due diligence in finding out all it could about the property and the surrounding area. See, *Glazer v LoPreste*, 278 AD2d 198 (2d Dept. 2000). It was not the defendants obligation to educate the plaintiff, anticipate its potential concerns or seek out information that is not asked for by the plaintiff. The defendants claim they did not have actual knowledge at the time of the sale of the Town's plans. Their claim is uncontroverted. Nor is there evidence that the plaintiff made any query that the defendants did not respond to, or responded to untruthfully that would have revealed the Town's plans at the time the parties entered into the purchase and sale agreement. The record is devoid of any proof that the defendant either fraudulently concealed information or made a specific material misrepresentation which the plaintiff relied upon to its detriment. Furthermore there is no allegation that the defendants impeded or thwarted any effort by the plaintiff that would have led to the discovery of the information the plaintiff claims the defendants failed to reveal. In the absence of such proof the plaintiff may not maintain it action against the defendants. See, *New York University v Continental Ins. Co.*, 87 NY2d 308, 318 (1995).

The case of *Jae Heung Yoo v Se Kwang Kim*, 289 AD2d 451 (2d Dept. 2001) is instructive. In that case the purchaser of a bakery paid the seller a portion of the purchase price and the seller held a note for the balance owed. The purchaser defaulted on the note. The purchaser alleged the seller fraudulently concealed from him a planned subway construction project by the New York City Transit Authority and the Metropolitan Transit Authority in front of the bakery. The purchaser contended that

because of the construction he was unable to pay the note and was forced to vacate the premises. As in the instant case, the purchaser was unable to demonstrate a confidential relationship or active concealment or a material misrepresentation by the seller. Finally the purchaser was unable to plead his claim with any particularity. As a result the Court dismissed the case. This case is factually similar and calls for the same result. Absent proof of the required allegations in evidentiary form, any cause of action against the defendants should be dismissed. See, *Mills v Dulin*, 192 AD2d 1001( 3d Dept. 1993). The defendants' motion for summary judgment is granted.

Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the order of the Court. The original papers shall be forwarded to the attorney for the defendants for filing and entry.

Dated: July 3, 2007

Malta, New York

**ENTERED**  
 Kathleen A. Marchione  
*Kathleen A. Marchione*  
 Saratoga County Clerk

*Stephen A. Ferradino*  
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 STEPHEN A. FERRADINO, J.S.

SARATOGA COUNTY  
 CLERK'S OFFICE  
 BALSSTON SPA, NY

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ENTERED

Papers Received and Considered:

- Notice of Motion dated February 20, 2007
- Affidavit of Matthew J. Sgambettera, Esq., sworn to January 29, 2007 with attached Exhibits A-L
- Affirmation of Gregory J. Sanda, Esq., sworn to February 20, 2007
- Affidavit of Allsion DiLallo, signed January 17, 2007 with attached Exhibits
- Memorandum of Law in Support if Defendant's Motion for Summary Judgment and Motion to Dismiss

Affidavit of Brendan C. O'Shea, Esq., sworn to March 13, 2007 with attached Exhibits A-C

Affidavit of Navid Aminzadeh, Esq., sworn to March 13, 2007

Affidavit of Edward J. Salvo, Jr., Esq., sworn to March 13, 2007

Affidavit of Arman Noghereh and Steven M. Medinger, sworn to March 13, 2007 and March 12, 2007 with attached Exhibits A-H

Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss and Motion for Summary Judgment

Reply Affidavit of Gregory J. Sanda, Esq., sworn to April 11, 2007 with attached Exhibits A - B