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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Lee Rosenblum, Et Al.

INDEX NO. 109723/10

MOTION DATE

- v -

MOTION SEQ. NO. 3

Marc J. Glogoff, Et Al.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for RR

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 11 2011
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: AUG 10 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Lee Rosenblum and Gail Rosenblum,

Plaintiff (s),

-against-

Marc J. Glogoff and Andrea Glogoff,

Defendant (s).

----------x

Decision/ Order
Index No.: 109723/10
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltfs' n/m (RR) w/EFH affirm, exhs	1
Defs' opp w/MJC affirm, exhs	2
Pltf's reply w/EFH affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiffs, the purchasers of a coop apartment, for rescission of the contract of sale, fraud, breach of contract and a declaratory judgment. Defendants, the sellers of the apartment brought motion for summary judgment which the court granted in its decision and order dated May 26, 2011 ("prior order"). Plaintiffs now seek to reargue the prior order granting the defendants' motion on the basis that the court overlooked relevant and key facts and misapplied controlling principles of law. The motion is opposed by defendants.

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the court's discretion (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]). It may be granted

only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 [1st Dept 1992]). It is not a vehicle to permit a party to argue again the very questions previously decided (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]; *see also* Frisenda v. X Large Enterprises Inc., 280 A.D.2d 514 [2nd Dept. 2001] and Rodney v. New York Pyrotechnic Products Co., Inc., 112 A.D.2d 410 [2d Dept. 1985]) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced (Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737 [2nd Dept. 2006]).

For the reasons that follow, the court will permit reargument but adheres to the decision it made granting summary judgment to the defendants.

Arguments Presented

Plaintiffs entered into a contract of sale in April 2010 to purchase Unit 4A at 320 East 57th, New York, New York ("apartment") from defendants. The apartment is a coop unit. In accordance with the contract, plaintiffs paid a contract deposit of $90,000. The closing was scheduled for July 26, 2010 but plaintiffs failed to appear. Thus, defendants seek a declaration that they can keep the $90,000 down payment as liquidated damages. Plaintiffs contends that there was a material misrepresentation made about the condition of the apartment in that they were told by defendants' agent that the apartment had "through wall air conditioning" in each room when, in fact, only two of the rooms have air conditioning.

In the court's prior order, the court decided that defendants had proved that the sale of the apartment had been an arm's length real estate transaction and that even if

there had been a misrepresentation about the apartment having air conditioning, not only was there a merger clause in the contract of sale, plaintiffs had the means to discover the truth "by the exercise of ordinary intelligence." Notably, Mr. Rosenblum admitted he had never heard of "through wall" air condition but he did not further investigate or inquire what that meant or ask to see any of the units that he believed provided the apartment with air conditioning. According to Mr. Rosenblum he did not turn on any of the units because it was the winter and he accepted the representation the apartment had air conditioning.

Plaintiffs identify a number of errors they claim the court made in its prior order. Some of the errors pertain to incorrect statements about whose broker made which statements and when visits were made to the apartment and by whom. Among the mistakes alleged are that Toby Gamsu works for Brown Harris & Stevens, not the Corcoran Group and that she was not the seller's broker but the broker the plaintiffs went to when they were first interested in purchasing an apartment. The Rosenblum also contend that the existence of a pipe in the cabinet has nothing to do with the fact that no air conditioning exists in that room and that Ms. Gamsu made no such statement to the court in her affidavit. Thus, the plaintiffs contend the reason no through wall air conditioning is permitted in apartment 4A is because it would affect the building facade, having nothing to do with the presence or absence of a pipe in any cabinet. Another "error" pertains to words that the used to paraphrase a statement made by Mr. Rosenblum in his sworn affidavit. Plaintiffs' attorney claims the statement shows a fundamental misunderstanding by the court of what the plaintiffs claims are and tend to resolve issues of fact when it is the province of the jury to decide them. Even allowing

that the court made factual errors, none of them are significant or command a different decision on the defendant's underlying motion.

In support of their claim, that the court misapplied the law, plaintiffs argue that the contract of sale specifically represents that there is air conditioning in the apartment because it is "personalty" and personalty is included in the sale. This argument, however, was already decided by the court. The contract makes no representation that the apartment *has* any kind of air conditioning in the apartment only that if it does, it is personalty. The clause plaintiffs rely on simply defines what personalty is - - "to the extent existing in the Unit. . ." The sconces were the only specifically identified personalty addressed in the contract.

The court disagrees with plaintiffs that it impermissibly shifted the burden of proof from defendants to plaintiffs. To the contrary, the court took Mr. Rosenblum's statements at face value. He admitted he had "never heard of the term thru-wall air conditioning." When he asked about air conditioning and Ms. Goldberg pointed to a cabinet, Mr. Rosenblum did not ask anything else or investigate further. He merely stated in his sworn affidavit that it was February and the air conditioning could not be activated. It was only after plaintiffs signed the contract that they actually opened the cabinet door and looked in.

Although factual disputes are for the trier of fact to decide, when an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (*See*: Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]). Defendants met their burden on the motion for summary judgment which was to establish their defense based upon the existence of a sales

contract for the apartment and the plaintiffs failure to close. Once satisfied, the burden shifted to plaintiffs who had to present triable issues of fact tending to support the material elements of their cause of action for fraud. Those elements are "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (Eurycleia Partners L.P. v. Seward & Kissel, 12 NY3d 553 [2009]; *also* McPherson v. Husbands, 54 AD3d 735 [2nd Dept 2008]). The plaintiffs did not meet their burden. Plaintiffs only mustered statements – in their attorney's affirmation – that Ms. Goldberg must have known about the lack of air conditioning in apartment 4A and lied about it because she lives in the building. A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts (Zuckerman v. City of New York, 49 N.Y.2d 557, 563-64 [1980]) or by conjecture and shadowy semblances of issues (Central Nat. Bank of New York v. Chalet Food Corp., 145 A.D.2d 350 [1st Dept. 1988]). Thus, the court did not, as advanced by plaintiffs, resolve issue of credibility on a flat record. The plaintiffs simply did not provide any triable issues of fact that would otherwise support their fraud claim.

Other arguments by the plaintiffs that the absence of an affidavit by Ms. Goldberg is key because Mr. Glogoff did not hear what Ms. Goldberg told the plaintiffs twist the burden of proof. The defendants' burden was to establish the contract and breach thereof, which they did successfully.

Since plaintiffs have failed to show that any of the factual errors they have identified command a different result on the underlying motion or that the court misapplied the law, the court grants reargument to the extent of correcting any factual

errors, but upon reargument the court adheres to its prior order granting summary judgment to the defendants. All stays on defendants proceeding in collecting the $90,000 on deposit with the Clerk of the Court are vacated forthwith and defendants may proceed with the necessary steps to have the money released to them.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that all stays on defendants obtaining the release of the monies on deposit with the Clerk of the Court in connection with this action shall be deemed vacated on the Fifth (5) Day after defendants have served plaintiffs with a copy of this decision/order with Notice of Entry; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 10, 2011

So Ordered:

Hon. Judith J. Gische, J.S.C.