

<p>Beizer v Hirsch</p>
<p>2011 NY Slip Op 33316(U)</p>
<p>September 6, 2011</p>
<p>Supreme Court, Queens County</p>
<p>Docket Number: 31557/10</p>
<p>Judge: Howard G. Lane</p>
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice**IAS PART 6**

 HARRIET BEIZER,
 Plaintiff,
 -against-
 MITCHELL HIRSCH, et al.,
 Defendants.

Index No. 31557/10
 Motion
 Date July 19, 2011
 Motion
 Cal. No. 3
 Motion
 Sequence No. 2

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Upon the foregoing papers it is ordered that this motion by defendants, Mitchell Hirsch, Scott Hirsch, Hirsch and Hirsch [incorrectly sued herein as Hirsch and Hirsch (a partnership)] and Hirsch and Hirsch LLP pursuant to CPLR 3211(a) for an order: dismissing the Complaint of plaintiff, Harriet Beizer, dismissing plaintiff's claim for punitive damages, and awarding costs and sanctions due to plaintiff's frivolous commencement and maintenance of this action is hereby decided as follows:

This action arises out of a 2001 real estate transaction in which Fred Brown, now deceased and Minerva Brown, now deceased ("the Browns") sold real property to the plaintiff and her partner Kathleen Swedish ("Swedish"). The Verified Complaint alleges that defendant Mitchell Hirsch, who is a member of defendant, Hirsch and Hirsch LLP, represented the Browns on July 30, 2001 in a real estate transaction in which a 60' X 100' parcel of improved land was transferred from the Browns to plaintiff and her partner Swedish and that plaintiff had her own attorney in this transaction. Plaintiff alleges that: said real estate transaction gave plaintiff and Swedish a right of first refusal to purchase the adjacent 60' X 100' unimproved parcel from the Browns if the Browns could not obtain a building permit for the property, Mitchell Hirsch concealed a prior conveyance of the same 60' X 100' unimproved parcel to Cynthia Fields

("Fields"), Mitchell Hirsch fraudulently drafted a deed purporting to sell an entire 120' X 100' parcel to plaintiff and Swedish, Scott Hirsch concealed from plaintiff a contract of sale between the Browns and Fields, Mitchell Hirsch fraudulently concealed that no building permit was ever obtained and no subdivision was ever effected, Scott Hirsch, Hirsch and Hirsch, and Hirsch and Hirsch LLP actively misrepresented that a building permit was obtained although it was not, moving defendants fraudulently represented the metes and bounds of the property being sold to Beizer and Swedish on the deed knowing that they would later claim the deed was a "mistake" in order to cheat plaintiff and Swedish out of their right of first refusal and to sell them a property that was not subdivided and no building permit was issued, the moving defendants materially misrepresented to plaintiff that plaintiff and Swedish had a right of first refusal in property that was already contracted to Fields, moving defendants "materially omitted" telling plaintiff before she negotiated the right of first refusal that the same property in which plaintiff and Swedish had a right of first refusal was already contracted to Fields, plaintiff justifiably relied on the contractual conveyance of the right of first refusal, plaintiff was injured as a result of this fraud, in that she is now left with a 60' X 100' property that is not subdivided and needs a new septic system. Plaintiff asserts only one cause of action, which cause of action is for fraud. Moving defendants now move to dismiss the plaintiff's Complaint against them.

A. CPLR 3211(a) (1)

That branch of moving defendants' motion to dismiss plaintiff's cause of action for fraud pursuant to CPLR 3211(a) (1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a) (1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006] [internal citations

omitted]).

"To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v. John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*) (internal citations omitted).

The documentary evidence submitted in the instant matter consists of a Residential Contract of Sale between the Browns and plaintiff and Swedish, a Residential Contract of Sale between the Browns and Cynthia Fields, a deed from the Browns to plaintiff and Swedish and a deed from the Browns to Fields. This documentary evidence is insufficient to dispose of the cause of action for fraud. While moving defendants also submit affidavits and deposition testimony in support of this branch of the motion, such documentation is not considered "documentary evidence" within the intended scope of CPLR 3211(a) (*Suchmacher v. Manana Grocery*, 73 AD3d 1017 [2d Dept 2010] [internal citations omitted]; see, *Fontanetta, supra*).

The documentary evidence that forms the basis of a 3211(a) (1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the Residential Contracts of Sale and Deeds are insufficient to dispose of the cause of action, as factual issues remain. Accordingly, this branch of the motion is denied.

B. CPLR 3211(a) (7)

That branch of moving defendants' motion which is for an order pursuant to CPLR 3211(a) (7) dismissing the complaint against moving defendants for failure to state a cause of action is granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a) (7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a) (7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East*,

Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc., supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

To state a cause of action for fraud, plaintiff must demonstrate that defendant knowingly misrepresented a material fact, upon which plaintiff justifiably relied, resulting in an injury (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). CPLR 3016(b) states that in an action for fraud, "the circumstances constituting the wrong shall be stated in detail". It is well settled that a claim for fraud must satisfy the specificity and particularity requirements of 3016(b) and allege the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception (see, *Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 NY2d 644, 647 [1989]; *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 NY2d 403 [1958]). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Central Asia v. ABN Amro Bank N.V.*, 301 AD2d 373 [1st Dept 2003]). Applying these principles in this case, the court decides that the Complaint does not adequately state a cause of action for fraudulent concealment against moving defendants because plaintiff fails to allege that the defendant had a duty to disclose material information and that it failed to do so.

Accordingly, this branch of moving defendants' motion is granted.

C. CPLR 3211(a)(5)

That branch of moving defendants' motion to dismiss plaintiff's cause of action pursuant to CPLR 3211(a)(5) on the grounds that the action may not be maintained because of the expiration of the statute of limitations applicable to such

claims is granted.

Pursuant to CPLR 213(8), the statute of limitations for the commencement of an action based upon fraud is that "the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it". As the Court previously stated, plaintiff failed to allege with specificity in the Complaint when the misrepresentation was communicated to her. While plaintiff does allege in the Complaint that the moving defendants committed a fraud in 2001 by failing to apprise her that the property in which she claims to have had a right of first refusal was already contracted to another person, ie. Cynthia Fields, the action was not commenced until December 22, 2010, and is thus time barred. While plaintiff alleges in her affidavit that she did not discover the fraud until late January 2009, when she first learned of the contents of the contract between the Browns and Fields, such an allegation is absent from the Complaint itself, and an affidavit is inadmissible proof for this branch of the motion, as the allegation in the affidavit falls outside of the four corners of the Complaint (see, *Given v. County of Suffolk, supra*).

Accordingly, this branch of moving defendants' motion is granted.

D. Punitive Damages

That branch of moving defendants' motion for an order dismissing plaintiff's claim for punitive damages is granted.

Plaintiff's last allegation in her Verified Complaint is that she is entitled to punitive damages from defendants for perpetrating fraud in the amount of \$2,000,000.00, or the punitive amount to be determined by a jury, whichever is greater, up to the constitutional maximum. As the Court has determined that the Complaint must be dismissed against the moving defendants, the claim for punitive damages must also be dismissed.

Accordingly, this branch of moving defendants' motion is granted.

E. Costs and Sanctions

That branch of moving defendants' motion for an order awarding costs and sanctions due to plaintiff's commencement and maintenance of a frivolous action is hereby denied.

Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false". The court finds that the moving defendants have not demonstrated that plaintiff's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have moving defendants established sufficient cause to warrant sanctions (see, *Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the plaintiff has not risen to the level of frivolous. Accordingly, this branch of moving defendants' motion is denied.

This constitutes the decision and order of the Court.

Dated: September 6, 2011

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Howard G. Lane, J.S.C.