Kafiluddi v John Paul Builders, LLC
2013 NY Slip Op 31781(U)
August 6, 2013
Sup Ct, Albany County
Docket Number: 1001-13
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

RONNY KAFILUDDI and KAMLAWATIE KAFILUDDI,

Plaintiffs,

-against-

JOHN PAUL BUILDERS, LLC and KENNETH RAYMOND,

Defendants.

DECISION and ORDER
INDEX NO. 1001-13
RJI NO. 01-13-110310

Supreme Court Albany County All Purpose Term, June 27, 2013
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

After Plaintiffs purchased 35 East Cobble Hill Road, Loudonville, New York (hereinafter "the Property") from John Paul Builders, LLC (hereinafter "JPB") in 2010 they encountered

numerous water infiltration issues and an HVAC problem.

To recover their damages Plaintiffs commenced this action against JPB, setting forth causes of action sounding in: breach of contract, fraud[1], and Deceptive Business Acts and Practices (GBL §349[a]). Plaintiffs also set forth a cause of action against Kenneth Raymond (hereinafter "Raymond"), alleging Raymond breached the warranty he gave to them in connection with their purchase of the Property. Issue was joined by Raymond, who included a cross-claim against JPB for contribution. JPB has not yet answered, but instead moves to dismiss both the complaint and the cross-claim. Plaintiffs and Raymond oppose JPB's motion. On this record, while JPB demonstrated its entitlement to dismissal of Plaintiffs' claims, it failed to establish its entitlement to dismissal of Raymond's cross-claim.

JPB first demonstrated that Plaintiffs' fraud claim fails to comply with CPLR §3016(b)'s particularity requirement.

According to CPLR §3016(b), in pleading a fraud cause of action "the circumstances constituting the wrong shall be stated in detail." (Lanzi v Brooks, 43 NY2d 778 [1977]). While "section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (Pludeman v N. Leasing Sys., Inc., 10 NY3d 486, 492 [2008]), "bare and conclusory allegations, without any supporting detail" are insufficient. (Stein v Doukas, 98 AD3d 1024 [2d Dept 2012]).

Here, Plaintiffs' complaint failed to raise a reasonable inference of fraud with factual allegations. A fraud cause of action requires allegations that "defendants knowingly

[1] The Complaint denominates this cause of action "Fraud and Misrepresentation," but it will hereinafter be referred to as the "fraud" cause of action.

misrepresented a material fact upon which plaintiffs justifiably relied, causing their damages." (Pettis v Haag, 84 AD3d 1553, 1555 [3d Dept 2011]; Revell v Guido, 101 AD3d 1454 [3d Dept 2012]). Plaintiffs' Complaint alleges that "JPB represented to the [Plaintiffs]" that there were "no known material defects" in seven specific component parts of the Property. In addition it alleged, "JPB represented" that the HVAC "system would properly function in the uninsulated portion of the... [P]roperty." Absent from the Complaint are any details of such representations. It fails to allege when, where, by or to whom the representations were made. Nor does it state whether the representations were oral or in writing. Then, in conclusory fashion, the Complaint merely states that "JPB knew or should have known that the [above] representations... were materially false." Plaintiffs again offer no facts or details. The Complaint is otherwise silent on the issue of JPB's knowledge. Such bare allegations fail to state the circumstances constituting JPB's alleged "wrong" with sufficient factual detail to raise a reasonable inference of fraud.

Accordingly, Plaintiffs' fraud cause of action is dismissed because it fails to comply with CPLR §3016(b).

JPB similarly demonstrated that Plaintiffs failed to state a fraud cause of action.

Upon this CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action "the complaint is liberally construed, the facts alleged [in the complaint and any submission submitted in opposition to the dismissal motions] are accepted as true, plaintiff[is] accorded every favorable inference and the court determines only whether the facts alleged in the complaint fit within any cognizable legal theory." (Nelson v Lattner Enterprises of N.Y., __AD3d__ [3d Dept 2013], quoting Lazic v Currier, 69 AD3d 1213 [3d Dept 2010][internal quotation marks omitted]; Torok v Moore's Flatwork & Foundations, LLC, 106 AD3d 1421 [3d Dept 2013]).

Considering Plaintiffs' complaint, as supplemented by their opposition papers, they wholly failed to make any justifiable reliance allegation or showing. As set froth above, justifiable reliance is an element of a fraud cause of action but "does not exist where a party has the means to discover [a falsehood] by the exercise of ordinary intelligence, and fails to make use of those means." (Pettis v Haag, supra at 1555, quoting Kurtz v Foy, 65 AD3d 741 [3d Dept 2009]). Conspicuously absent from Plaintiffs' submissions is any allegation that their reliance was justified or even reasonable. Instead, both the Complaint and their opposition papers state only that Plaintiffs "relied upon the representations made by JPB," without including the requisite "justifiably" language. Moreover, Plaintiffs offered no facts or details to establish their inability to discover the alleged falsehoods or that the misrepresented facts were peculiarly within JPB's knowledge. Because Plaintiffs offered absolutely no allegations or proof of their justifiable reliance, Plaintiffs have no fraud cause of action against JPB.

The doctrine of caveat emptor likewise renders Plaintiffs' fraud claim defective. "Although New York traditionally adheres to the doctrine of caveat emptor in an arm's length real property transfer, a seller may be liable for failing to disclose information if the conduct constitutes active concealment." (Pettis v Haag, supra at 1554, quoting Klafehn v Morrison, 75 AD3d 808 [3d Dept 2010][internal quotation marks omitted]). On this record, Plaintiffs offered no allegations or other proof to show active concealment, i.e. that JPB "thwarted [their] efforts to fulfill [their] responsibilities fixed by the doctrine of caveat emptor." (Simone v Homecheck Real Estate Services, Inc., 42 AD3d 518, 520 [2d Dept 2007]; Klafehn v Morrison, supra).

Accordingly, Plaintiffs' fraud cause of action must also be dismissed pursuant to CPLR §3211(a)(7).

Turning to Plaintiffs' breach of contract claim, again JPB demonstrated its entitlement to dismissal for failure to state a cause of action.

"[U]nder the well-established doctrine of merger, provisions in a contract for the sale of real estate merge into the deed and are thereby extinguished absent the parties' demonstrated intent that a provision shall survive transfer of title." (Arnold v Wilkins, 61 AD3d 1236 [3d Dept 2009], quoting Hunt v Kojac, 245 AD2d 858 [3d Dept 1997]; Ka Foon Lo v Curis, 29 AD3d 525 [2d Dept 2006]).

Here, Plaintiffs' breach of contract claim is barred by the merger doctrine. Plaintiffs allege that they contracted with JPB to purchase the Property "free from any material, latent defects." Their breach of contract claim is then premised upon JPB's alleged breach of such provision. Although the Complaint explicitly states that Plaintiffs closed on their purchase of the Property in November 2010, Plaintiffs made no allegation that the parties intended the alleged "free from any material, latent defects" provision to survive closing. Accepting all of Plaintiffs' allegations as true,[2] because Plaintiffs did not allege that the parties intended the "free from any material, latent defects" provision to survive closing, it did not. Instead, it necessarily merged with the deed at the November 2010 closing. As such, even if JPB breached the "free from any material, latent defects" provision, the merger doctrine bars any cause of action based thereon.

Accordingly, Plaintiffs' breach of contract cause of action is dismissed pursuant to CPLR §3211(a)(7).

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[2] Contrary to Plaintiffs' allegations, but disregarded on this motion, the parties' Purchase and Sale Contract, last dated August 8, 2010, contains no language which required JPB to deliver the Property "free from any material, latent defects." Rather, such contract provided Plaintiffs with an opportunity to inspect the Property, explicitly stated that the Property was being "sold 'as is' without warranty as to condition," and that such written contract "contain[ed] all agreements."

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JPB also demonstrated its entitlement to dismissal of Plaintiffs' GBL §349(a) claim.

"A party seeking to recover under [GBL §349(a)] must, as a threshold [matter], allege that the defendant's acts or practices have a broad impact on consumers at large." (Kaufman v Medical Liability Mut. Ins. Co., 92 AD3d 1057, 1058 [3d Dept 2012] quoting Walsh v Liberty Mut. Ins. Co., 289 AD2d 842 [3d Dept 2001]; Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20 [1995]). A private "real estate transaction involving a single unique piece of property" does not fall within GBL §349(a)'s protections. (Canario v Gunn, 300 AD2d 332, 333 [2d Dept 2002]; Sentlowitz v Cardinal Dev., LLC, 63 AD3d 1137 [2d Dept 2009]; Kay v Pollak, 305 AD2d 637 [2d Dept 2003]).

Here, Plaintiffs have no GBL §349(a) cause of action because their claims are premised solely upon their private real estate purchase. This action involves only the Plaintiffs' purchase of the Property and its alleged defective condition. Such private dispute is unique to these parties, has no broad impact on consumers at large and, as such, does "not fall within the ambit of [GBL §349(a)]." (Canario v Gunn, supra at 333, quoting New York Univ. v Continental Ins. Co., supra).

Accordingly, Plaintiffs' GBL §349(a) cause of action is dismissed pursuant to CPLR §3211(a)(7).

Lastly, JPB failed to demonstrate its entitlement to dismissal of Raymond's cross-claim.

While Raymond's initial cross-claim sought "contribution from [JPB] under the common law and pursuant to New York CPLR §1401" his Reply papers modified his claim to one sounding in "common law indemnification." On this motion to dismiss, Raymond's correction is controlling. (Torok v Moore's Flatwork & Foundations, LLC, supra).

[* 7]

Common-law indemnification seeks to place an obligation where, in fairness, it belongs. As applicable here, "[i]t requires a showing that [the co-defendants] owed a duty to third parties[, the Plaintiffs], and that [the first defendant] discharged the duty which, as between [the co-defendants], should have been discharged by [the second defendant]." (Murray Bresky Consultants, Ltd. v. New York Compensation Manager's Inc., 106 AD3d 1255, 1258 [3d Dept 2013], quoting Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson, 294 AD2d 93, 98 n 2 [2002], affd 100 NY2d 202 [2003]).

Raymond's common law indemnification cross-claim is premised upon the warranty he gave to Plaintiffs. He specifically alleges that he gave such warranty "[f]or the benefit of and upon the concurrence of all parties at the [c]losing" of title to the Property. Accepting such allegation as true and considering it in a light most favorable to Raymond, as is required in this procedural context, Raymond has alleged that both he and JPB assumed a duty under the warranty. Upon such shared duty, Plaintiffs now seek to enforce the warranty against Raymond alone. On this record, JPB failed to demonstrate that it owes Plaintiffs no duty under the warranty, that the warranty is Raymond's sole responsibility or that fairness does not require it to discharge the warranty.

Accordingly, JPB's motion to dismiss Raymond's cross-claim is denied.

This Decision and Order is being returned to the attorney for the JPB. 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

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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: August 6, 2013
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 28, 2013; Affidavit of Thomas K. O'Gara, dated May 28, 2013, with attached Exhibits A-C.
2. Affidavit of Kenneth Raymond, dated June 3, 2013; Affirmation of Mary Elizabeth Slevin, dated June 5, 2013.
3. Affirmation of Douglas J. Rose, dated June 17, 2013.