Ferrara v Amyot
2017 NY Slip Op 33066(U)
June 30, 2017
Supreme Court, Westchester County
Docket Number: 60535/2015
Judge: Sam D. Walker

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER , J.S.C.

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ROBERT FERRARA and JENNIFER FERRARA
Plaintiff,

-against-

Index No. 60535/2015
DECISION & ORDER
Seq 1 & 2

PAUL R. AMYOT, GAIL M. AMYOT, MARK'S INSPECTIONS, INC., MARK E. AAKJAR JR.,

Defendant.

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The following papers were considered on the defendants' motions, both seeking dismissal of the complaint:

PAPERS	NUMBERED
Notice of Motion/Affidavits(3)/Exhibits 1-14	1-18
Memorandum of Law	19
Affidavits in Opposition(3)/Affirmation/Exhibits1, A-R	20-41
Memorandum of Law in Opposition	42
Reply Affirmation/Reply Affidavit	43-44
Amended Memorandum of Law in Reply	45
Notice of Motion/Affidavit/Affirmation/Exhibits A-E	46-53
Affidavits in Opposition(4)/Affirmation/Exhibits A-R	54-75
Memorandum of Law in Opposition	76
Reply Affirmation/Exhibits A-F	77-83

Based upon the foregoing the motions are GRANTED.

Factual and Procedural Background

Robert Ferrara and Jennifer Ferrara (the "Ferraras") commenced this action on June 18, 2015, alleging that Paul R. Amyot and Gail M. Amyot (the "Amyots") knowingly and

actively concealed the structural damage affecting the premises they purchased from the Amyots and that Mark E. Aakjar Jr. ("Aakjar") provided an inspection report that negligently failed to disclose the defects affecting the exterior of the structure of the premises and failed to recommend further investigation prior to the Ferraras' purchase of the house.

The Amyots and Aakjar, together with his company, Mark's Inspections Inc., ("MII") now separately file motions for summary judgment seeking dismissal of the action. The Amyots argue that the law imposes no duty on a seller to disclose any information concerning the premises when the parties deal at arms length and that the mere silence of a seller, without some act or conduct that deceives the purchaser, does not amount to a concealment that is actionable in fraud. They further argue that to establish active concealment, the Ferraras must show that they justifiably relied on the Amyots representation. Aakjar argues that he is not liable for the obligations of MII, that the complaint is time barred because the services agreement modified the applicable statute of limitations, that the services agreement limits the liability of MII and that MII is entitled to an award of attorney's fees, pursuant to the services agreement.

In opposition, the Ferraras argue that they have produced sufficient proof to establish questions of fact to show that the Amyots were aware of both the initial and the continuing incremental settlement of the home and actively concealed the condition of the property from the Ferraras and that they justifiably relied upon the representation of the Amyots. The Ferraras also contend that Aakjar's conduct amounted to gross negligence and that the services agreement is illegal and its provisions should not be enforced. They further argue that the services agreement should not be enforced because Robert

Ferrara's signature on the agreement was a result of his unilateral mistake brought about by Aakjar's inequitable behavior.

In support of their motion, the Amyots rely on, among other things, their affidavits, the affidavit and report of Paul J. Angelides ("Angelides"), a licensed professional engineer, the depositions of the parties, the inspection report, house photos, the certificate of occupancy, and the contract of sale. In support of the motion Aakjar relies on, among other things, an attorney's affirmation, his affidavit, the Ferraras' depositions, the inspection report and the services contract.

Discussion

Generally speaking, in order to obtain summary judgment, the movant must establish its cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]); CPLR 3212[b]). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*see Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]).

The Amyots' motion for summary judgment

"New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises where the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" (*see Rojas v. Paine*, 101 AD3d 843,

844 [2d Dept 2012]; *see also Perez-Raringer v. Hellman*, 95 AD3d 853, 854 [2d Dept 2012]). "Mere silence on the part of the seller, without some affirmative act of deception, is not actionable as fraud" (*Id.*). 'For concealment to be actionable as fraud, the plaintiff must show that the defendant "thwarted" the [plaintiffs'] efforts to fulfill [their] responsibilities imposed by the doctrine of caveat emptor' (*Id.*)

Here the Amyots averred that they lived in the house from 1986 to 2014 and that there was always a tilt to the upstairs floor which existed the entire time that they owned the property. The Ferraras inquired about the tilt and the Amyots averred that they informed the Ferraras of this. The email communications between the parties confirms that the Ferraras were aware of the tilt. There is nothing in the email to the Ferraras that conceals the fact that the house was tilted or that thwarted the Ferraras' ability to fulfill their responsibilities imposed by the doctrine of caveat emptor. The Amyots also proffer that the Ferraras hired Aakjar independently to conduct an inspection and it was readily apparent, during the inspection, that the house was not level. Therefore, the Ferraras could have hired an engineer to investigate further.

Angelides, the engineer hired by the Amyots also submitted his report stating that based upon his inspection, research, in conjunction with his education, experience and training, he determined within a reasonable degree of engineering certainty, that prior repairs and retrofits had been performed as part of past work to level the buildig which had settled unevenly into the underlying supporting soil. He stated that he found no evidence that any repairs or retrofits to level the superstructure would have been performed during the period from the fall of 1986 to June 30, 2014, during which time the Amyots owned the

property. Therefore, based on the evidence, the Amyots have made out a prima facie case for summary judgment.

In opposition, the Ferraras failed to demonstrate by admissible evidence the existence of a factual issue requiring a trial. The Ferraras failed to present any proof to establish that the Amyots concealed the settlement issues with the house and that they did not exist at the time that the Amyots purchased the house. The fact that the Amyots placed magnets on the doors to keep them from closing, does not prove that the tilting became worse while the Amyots were living there and that they were concealing that the house was not settled. Angelides detailed many different factors in his report to establish that the settlement had concluded prior to the Amyots' purchase of the home.

Further, even if the house continued to settle after the Ferraras purchased the house, the Amyots did not prevent the Ferraras from hiring an engineer prior to purchasing the house to investigate the cause of the tilting and obtain more information about the issue. The Ferraras were aware of the issue and there was nothing preventing further investigation on their part. Therefore, the Amyots' motion for summary judgment dismissing the complaint against them, is granted.

Aakjar and MII's motion for summary judgment

Gross negligence is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing (*see Finsel v Wachala*, 79 AD3d 1402 [3d Dept 2010]; *see also Ryan v IM Kapco, Inc.*, 88 AD3d 682 [2d Dept 2011]). "Stated differently, a party is grossly negligent when it fails 'to exercise even slight care' or 'slight diligent'" (*see Ryan* @ 683). Here, the evidence does not establish that Aakjar was grossly negligent.'The

evidence established that the inspection "was not so defective as to evince a reckless indifference to the rights of others or a failure to exercise even slight care"' (*Id.*).

Further, with regard to the allegations against Aakjar individually, "corporations have a legal existence separate from that of their officers and shareholders, even when the corporation has a single shareholder who of necessity dominates the corporation" (*see Kok Choy Yeen v NWE Corp.*, 37 AD3d 547, 549 [2d Dept 2007])."[C]ourts will pierce the corporate veil only to prevent fraud, illegality or to achieve equity" (*see Treeline Mineola, LLC v Berg*, 21 AD3d 1028 [2d Dept 2005]). This is true even in situations, such as here, where the corporation is controlled or dominated by a single shareholder (*Id.*). In this case, the Ferraras failed to establish that Aakjar, through his control and dominion over MII, perpetrated a wrong or injustice against the plaintiffs such that this Court should intervene (*Id.*).

With regard to any allegation of ordinary negligence, the Ferraras signed a services agreement, which limited MII's liability to the inspection fee paid and reduced the statute of limitation to one year from the date of the inspection. There is no statute nor any public interest prohibiting such provision in the services agreement. Further, the time to commence an action may be shortened by written agreement pursuant to CPLR 201.

The Court also finds no merit in the allegation that the agreement was presented to Robert Ferrara in an inequitable manner. Mr. Ferrara admits that the signature on the agreement is his, but simply states that he exercised ordinary care in his conduct and cannot explain how his signature appeared on the agreement. The fact that Mr. Ferrara

does not recall signing the document does not make it unenforceable or inequitable. There is also no basis to allege fraud or other inequitable conduct.

Furthermore, after measuring the walls and determining that there was an issue with tilting or sloping of the house, Aakjar stated to Mr. Ferrara that most people would just walk out and Mr. Ferrara advised him to continue to take a look at the house. The Ferraras were aware that there was an issue and such issue was listed in the report. The fact that the report stated that repair should be "when needed", does not make the MII liable for negligence. Accordingly, Aakjar and MII's motion for summary judgment dismissing the complaint against them, is granted.

Since the agreement provides for attorney's fees if the client does not fully prevail, the Court will schedule the matter for a hearing on attorney's fees. The parties are directed to appear before this Court on August 16, 2017 at 10:00 a.m. in Courtroom 1403 for a hearing on attorney's fees.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
June 30, 2017

HON. SAM D. WALKER, J.S.C.