

Striplin v AC&E Home Inspection Corp.

2018 NY Slip Op 30231(U)

January 10, 2018

Supreme Court, Suffolk County

Docket Number: 10124/2015

Judge: Joseph Farneti

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This opinion is uncorrected and not selected for official publication.

~~FURTHER~~

SHORT FORM ORDER

INDEX NO. 10124/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

PATRICK STRIPLIN and ROBYN ROCK,

Plaintiffs,

-against-

AC&E HOME INSPECTION CORP., CRAIG
M. BALABAN and PAULA BALABAN,

Defendants.

ORIG. RETURN DATE: OCTOBER 20, 2016
FINAL SUBMISSION DATE: DECEMBER 1, 2016
MTN. SEQ. #: 002
MOTION: MG

PLAINTIFFS' ATTORNEY:
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631-242-3369

ATTORNEY FOR DEFENDANTS
CRAIG M. BALABAN AND PAULA BALABAN:
KAREN E. GUNKEL, ESQ.
BY: TARA A. KAVANAGH, ESQ.
9 STATION COURT
BELLPORT, NEW YORK 11713
631-286-6165

DEFENDANT:
AC&E HOME INSPECTION CORP.
1293 MIDDLE COUNTRY ROAD
MIDDLE ISLAND, NEW YORK 11953

Upon the following papers numbered 1 to 6 read on this motion _____
FOR DISMISSAL

Notice of Motion and supporting papers 1-3; Affirmation and Affidavit in Opposition 4, 5;
Affirmation in Further Support 6; it is,

ORDERED that this motion by defendants CRAIG M. BALABAN and PAULA BALABAN (collectively "defendants") for an Order, pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiffs' complaint and, pursuant to CPLR 3212, for summary judgment in defendants' favor, is hereby **GRANTED** for the reasons forth hereinafter. The Court has received opposition to this motion from plaintiffs PATRICK STRIPLIN and ROBYN ROCK.

This action stems from the purchase of real property commonly known as 5 Mercedes Court, East Patchogue, New York, by plaintiffs from defendants in 2012. Plaintiffs assert four causes of action herein. The first three causes of action are claims against defendant AC&E HOME INSPECTION CORP. ("AC&E") sounding in negligence, gross negligence and violation of General Business Law § 349. The fourth cause of action is asserted against defendants and sounds in fraudulent inducement/concealment.

By Order dated March 29, 2016, this Court granted a motion by plaintiffs to supplement the summons and amend the complaint to add PAULA BALABAN and CRAIG BALABAN as party defendants, and to fix the default of AC&E based upon its failure to timely answer the summons and complaint. The Court held that the assessment of damages against AC&E shall be held in abeyance given the Court's ruling on plaintiffs' application to add party defendants.

Defendants have now filed the instant motion to dismiss and for summary judgment relative to the fourth cause of action. Defendants allege that there exists a defense based upon documentary evidence, and that the pleadings fail to state a cause of action against defendants for fraudulent inducement/concealment.

Defendants indicate that plaintiffs commenced this action in 2015, three years after closing on the purchase of the home from defendants. Prior to signing a contract of sale, plaintiffs had a home inspection performed by AC&E. Thereafter, plaintiffs and defendants entered into a contract of sale on or about July 13, 2012 ("Contract"). The closing was held on September 21, 2012. Defendants inform the Court that all parties were represented by counsel during the negotiation and execution of the Contract.

In 2015, plaintiffs allegedly became aware of the damage to the home when they listed the property for sale and the proposed buyer "expressed misgivings" as a result of the damage. Specifically, plaintiffs claim that the Acrylic Stucco Overframe or Exterior Insulation and Finish System known as "EIFS" on the home was damaged and allowed for water infiltration. Plaintiffs claim that defendants had concealed the damage from them by making "cosmetic repairs ... in an effort to hide the water damage which the property had suffered."

Defendants now argue, among other things, that the express terms of the Contract preclude plaintiffs' claim against defendants herein. Specifically, defendants allege that: (1) paragraph 12 of the Contract provides that plaintiffs entered into the Contract based solely upon their own inspection and investigation of the premises, and that plaintiffs accepted the premises "as is"; (2) paragraph 11 (c) of the Contract provides that none of the defendants' covenants, representations, warranties or other obligations shall survive closing; (3) paragraph 31 of the Rider to the Contract provides that acceptance of the deed by the plaintiffs shall be deemed full performance and discharge of every agreement and obligation on the part of the defendants; and (4) paragraph 54 of the Rider indicates that the plaintiffs have obtained a home inspection and that they are satisfied with the results thereof, and that if the defendants did not provide plaintiffs with a Property Condition Disclosure Statement then plaintiffs were entitled to a credit of \$500.00 at closing. Notably, plaintiffs received such a \$500.00 credit in lieu of the statement. Moreover, defendants indicate that the EIFS was disclosed in the MLS listing of the home. Finally, defendants contend that this action is untimely, as pursuant to paragraph 47 of the Rider, any action arising from the Contract must have been commenced within one year from the accrual of the claim. As the closing was held on September 21, 2012, defendants allege that this 2015 action is time-barred. In support of the motion, defendants have submitted, among other things, an affidavit of defendant CRAIG BALABAN and the Contract.

In opposition hereto, plaintiffs argue that they have sufficiently pleaded a cause of action for fraudulent inducement/concealment, and that there are questions of fact with respect to, among other things, whether defendants actively concealed the alleged damage to the home from water infiltration.

Where a defendant moves to dismiss an action pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 20 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 Ad3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 300 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

Furthermore, on a motion to dismiss for failure to state a claim pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most

favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 63 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether the plaintiff has a cause of action and not whether she may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 271 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]). In assessing a motion under CPLR 3211 (a) (7), a court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory (see *Olszewski v Waters of Orchard Park*, 303 AD2d 995 [2003]). Moreover, a plaintiff's affidavit "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." (*Rovello v Ornofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]).

Regarding the Fourth cause of action for fraud, an alleged breach of contract cannot be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract (see *Rich v New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382 [1882]; *Riffat v Continental Ins. Co.*, 104 AD2d 301 [1984]). The essential elements of a claim of fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Orlando v Kukielka*, 40 AD3d 829 [2007]; *Ross v DeLorenzo*, 28 AD3d 631 [2006]). A fraud claim does not lie where the only fraud alleged arises from the breach of a contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud (*Selinger Enters., Inc. v Cassuto*, 50 AD3d 766 [2008]). However, a misrepresentation of a material fact, which is collateral to a contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud (*Selinger Enters., Inc.*, 50 AD3d 766; *Mendelovitz v Cohen*, 37 AD3d 670 [2007]).

As held by the Second Department in *Rojas v Paine*, 101 AD3d 843 (2012) with respect to contracts for the sale of real property:

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. Mere silence on the part of the seller, without some affirmative act of deception, is not actionable as fraud. For concealment to be actionable as fraud, the plaintiff must show that the defendant "thwarted" the plaintiff's efforts to fulfill his or her responsibilities imposed by the doctrine of caveat emptor. Where the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him or her of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he or she must make use of those means, or he or she will not be heard to complain that he or she was induced to enter into the transaction by misrepresentations

(*Rojas*, 101 AD3d at 845 [citations omitted]; see *Laxer v Edelman*, 75 AD3d 584 [2010]; *Di Filippo v Hidden Ponds Associates*, 146 AD2d 737 [1989]).

Here, as discussed, plaintiffs' fraudulent inducement cause of action alleges that defendants concealed the leaks and water damage by making "cosmetic repairs" to the home. Plaintiffs do not allege any misrepresentations made by defendants to plaintiffs to induce them into signing the Contract, either orally or in the Property Condition Disclosure Statement (*cf. Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518 [2007]). Plaintiffs instead accepted a credit of \$500.00 from defendants in lieu of the statement. Although plaintiffs argue that the water damage was peculiarly within the defendants' knowledge and concealed by them, the plaintiffs had the means available to them of knowing by the exercise of ordinary intelligence the condition of the property, and indeed utilized those means by having a home inspection performed by AC&E. Plaintiffs have not alleged that defendants somehow thwarted their efforts to discover the condition of the property prior to signing the Contract (see *Rojas*, 101 AD3d 843; *Simone*, 42 AD3d 518).

Further, the Contract, provided that no representations would survive the closing, that plaintiffs had inspected the property and were satisfied with the results thereof, and that plaintiffs were taking the property "as is." Therefore, the Court finds that plaintiffs' fraudulent inducement/concealment cause of action must be dismissed.

Accordingly, this motion by defendants is **GRANTED**, and the claim against defendants, to wit: the Fourth cause of action in the complaint, is hereby dismissed.

In view of the foregoing, the parties are directed to appear for an Inquest on **February 15, 2018, at 10:00 a.m., in Part 37, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead**, in which plaintiffs shall present competent evidence in admissible form as to the damages sought against AC&E. Plaintiffs are reminded that a Note of Issue must be filed prior to the Inquest.

The foregoing constitutes the decision and Order of the Court.

Dated: January 10, 2018



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION