

Lerner v Douglas Elliman Real Estate, Inc.
2018 NY Slip Op 30280(U)
February 15, 2018
Supreme Court, New York County
Docket Number: 154000/2013
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN

PART 33

Justice

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Stephanie Freund Lerner
Plaintiff,

INDEX NO. 154000/2013

MOTION DATE 1/31/2018

- v -

DOUGLAS ELLIMAN REAL ESTATE, INC., PRUDENTIAL
DOUGLAS ELLIMAN REAL ESTATE, INC., JACKIE TEPLITSKY

MOTION SEQ. NO. 002 003

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is ordered that defendants' motion for summary judgment is granted; and plaintiff's cross-motion is denied.

Plaintiff seeks to recover damages she allegedly sustained from the sale of her residential condominium located at 200 East End Avenue, in the city, state, and county of New York, in December 2009, which was sold at a lesser price due to the defendant brokers' erroneous measurement of the unit. Defendants moved in motion sequence 002 (MS2) pursuant to CPLR 3212 to dismiss the Amended Complaint, but the action was marked off the calendar by order dated September 16, 2016, due to the suspension of plaintiff's attorney. Upon restoration of the action, defendants filed an amended notice of motion in motion sequence 003 (MS3) seeking the same relief. Plaintiff, by new counsel, opposes the motion and cross-moves to strike the note of issue, reopen discovery and leave to amend the Amended Complaint.

Facts

In June 2009, plaintiff and her estranged husband, Mark J. Lerner, who is not a party in this suit, was in the middle of divorce proceedings. On July 7, 2009, Mark Lerner, the listed owner of the apartment at 200 East End Ave, executed an

exclusive real estate brokerage agreement with defendants to sell the apartment, which was the marital property, for \$3,000,000 (MS2 – Pltf’s Mot, Cole Aff, Exh D). Plaintiff remained in the apartment and her estranged husband was to pay the maintenance. But, since Mark Lerner had not paid the maintenance, the Cooperative commenced eviction proceedings against plaintiff. The Cooperative and plaintiff settled the eviction matter with an agreement that plaintiff will have a contract of sale of the apartment by September 30, 2009 (MS3 – Pltf’s Cross-Motion, Lerner Aff at ¶ 7).

Defendants listed the apartment for sale, however, they described the apartment as having 2,471 square feet in size. In August or September 2009, plaintiff informed defendants that they had incorrectly measured the indoor square footage by 632 square feet, which diminished the 3,103 square feet by 20%. Defendants hired an architect to remeasure the apartment on September 28, 2009 and corrected the description (*id.* at ¶ 8; MS2 – Deft’s Mot, Teplitzky Aff at ¶ 8).

In the meantime, plaintiff obtained an extension of time to sell the apartment. A court order dated November 30, 2009, reduced the amount of the sale price of the apartment, stating: “1. The parties agree to sell the marital premises (200 East End Ave., Apts A, P, E) for no lower than \$2.2 million dollars, with the understanding that the broker will endeavor to sell the premises for \$2.3 million.” (MS2 – Deft’s Mot., Cole Aff, Exh E). The apartment went into contract with the actual buyer at the end of December 2009 for a sale price of \$2.3 million (*id.*, Teplitzky Aff at ¶¶ 12-13).

Plaintiff claims that defendants were negligent in listing apartment with a diminished square footage, describing the condition of the apartment as poor, and failing to show the apartment in the height of the warm season when the apartment’s key feature – a 2,300 square foot terrace – could be highlighted. Plaintiff asserts that defendants’ negligence yielded a reduced sales price and seeks consequential damages in the amount of \$4.5 million, and punitive damages in the amount of \$5 million (MS2 – Cole Aff, Exh A - Amended Complaint).

Plaintiff’s Cross-Motion to Amend the Amended Complaint, etc. (MS3)

Plaintiff’s cross-motion will be addressed first as it essentially seeks a “do-over” of the action. Plaintiff submits that because her prior attorney was suspended, disbarred, and ultimately incarcerated, her prior attorney did not zealously prosecute her case (MS3 - Pltf’s Cross-Mot, Lerner Aff. at ¶ 6). Plaintiff’s new attorney claims that the files he received contained nothing of substance, and surmised that the prior attorney failed to request documentary discovery. Hence, plaintiff seeks to strike the note of issue, reopen discovery, and amend the Amended Complaint. No proposed second amended complaint was supplied.

Plaintiff's prior attorney had pleaded guilty to stealing about \$500,000 from funds and awards that belonged to his clients from September 2012 to November 2015 (MS3 - Pltf's Cross-Motion, Lerner Aff, Exh A). Plaintiff asks this court to surmise that her former attorney could not have been represented her zealously based on his unlawful activity.

This court declines to entertain plaintiff's speculation, and notes that plaintiff did not and does not assert a legal malpractice claim against the former attorney, nor point to any facts relevant to her case that are indicative of a poor representation of her case. Further, plaintiff's claim that her prior attorney failed to engage in discovery is belied by the record. Indeed, there were interrogatories, bill of particulars, discovery demands, compliance conferences, examinations before trial, and a motion by plaintiff's prior attorney to strike defendants' answer for non-compliance with discovery orders. While plaintiff argues that there are e-mails missing from the files, those e-mails pertain to defendants' miscalculation of the square footage of her triplex apartment. Since defendants had admitted to the error, and the apartment was sold after the error was discovered and resolved, there is no issue of fact for which the emails would be needed.

As to plaintiff's request for leave to amend the Amended Complaint, CPLR § 3025 provides that courts shall freely grant leave for a party to amend their pleadings "unless the proposed amendment is palpably insufficient or patently devoid of merit" or will prejudice or surprise the opposing party (*MBIA Ins. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Here, there is no proposed amendment, nor is there an argument based on facts to grant leave for plaintiff to amend the Amended Complaint. Her claims against defendants and the facts supporting the claims remain the same. Plaintiff cannot go on a fishing expedition to find a cause of action so to add to her complaint.

Accordingly, plaintiff's cross-motion to strike the note of issue, to reopen discovery, and to amend the Amended Complaint is denied.

Defendants' Motion for Summary Judgment

Plaintiff's first cause of action is for negligence. The negligent acts alleged are defendants' miscalculation of the square footage of her unit that resulted in the apartment being shown only twelve times during the warmer months when the expansive view from her terrace can be highlighted. Her second cause of action is for punitive damages.

Defendants argue that the miscalculation was not the proximate cause of the lower price in the sale of the unit. Defendants add that the actual buyer did not rely on the incorrect square footage to bargain for a reduced price. The square footage was corrected in October 2009; the actual buyer was procured in December 2009 (MS2 - Memo of Law, pp 1-2), and that the real estate market in 2009 was difficult

because of the real estate crash in 2009 (MS2 – Teplitzky Aff at ¶¶ 5-6). Defendants stress that in the divorce proceedings and the intervening eviction proceedings, the plaintiff and her estranged husband agreed to a \$2.2 million sale price for the subject apartment. Defendants procured a purchaser one month after the court order for a sale price of \$2.3 million.

Plaintiff argues that defendants’ miss the point that the diminished value was due to the loss of time – time she could have used for bargaining purposes. By the time she “accepted the offer at \$2.3 [m]illion, she had no choice, otherwise she would lost [sic] her interest in the Apartment without any compensation” (MS3 – Memo in Opp and in Support of Cross-Mot, p 3). Plaintiff characterizes the ultimate sale at \$2.3 million as an intervening act that did not sever the causal connection between defendants’ negligence and plaintiff’s damages (*id.*).

Discussion

Plaintiff asserts this negligence cause of action alleging only economic harm. As stated by the Court of Appeals, “[i]t is well settled that loss of a purely economic sort may not be compensated in a negligence . . . action.” (*Schiavone Construction Co. v. Elgood Mayo Corp.*, 56 NY2d 667, [1982]; see *Travelers Insurance Co v Ferco, Inc.*, 122 AD2d 718, 719 [1st Dept 1986]). Accordingly, plaintiff’s first cause of action is dismissed.

Plaintiff’s second cause of action is for punitive damages based on allegations of defendants’ intentional and reckless acts, along with the negligence allegations. Although plaintiff does not mention what acts warrant punitive damages, her claim essentially sounds in intentional infliction of economic harm, which New York does not recognize (see *Meridian Capital Partners, Inc. v Fifth Avenue 58/59 Acquisition Co. LP*, 60 AD3d 434, 434 [1st Dept 2009]). Thus, plaintiff’s second cause of action is dismissed.

Accordingly, as defendants’ motion to dismiss the complaint is granted and plaintiff’s cross-motion is denied in its entirety, the action is dismissed.

This constitutes the decision and order of the court. Enter judgment.

2/15/2018
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>	FIDUCIARY APPOINTMENT

APPROPRIATE: DENIED OTHER

CHECK IF APPROPRIATE: REFERENCE