

Widlitz v Douglas Elliman, LLC
2019 NY Slip Op 31737(U)
June 21, 2019
Supreme Court, New York County
Docket Number: 154689/2016
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

-----X **INDEX NO.** 154689/2016

STACEY WIDLITZ,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 005, 006

- v -

DOUGLAS ELLIMAN, LLC, GODFREY LEE

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 154, 156, 182, 186, 189, 192

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 183, 187, 190, 193, 194, 195, 196, 197

were read on this motion to/for SUMMARY JUDGMENT

Motion sequence numbers 005 and 006 are consolidated for disposition. Motion sequence 005, defendant Godfrey Lee’s motion for summary judgment, is granted; all claims against him are severed and dismissed.

In motion sequence 006, the branch of defendant Douglas Elliman’s motion for summary judgment dismissing the amended complaint as against it pursuant to CPLR 3212 is denied. The branch of the motion for summary judgment dismissing co-defendant Godfrey Lee’s cross-claims is granted as Mr. Lee is no longer a cross-claimant. Plaintiff’s cross-motion for partial summary judgment on the negligent misrepresentation claim is granted. The branch of the cross-motion to allow it to be filed late was resolved by Order dated February 22, 2019 (NYSCEF Doc. No. 191).

Background

In this case, plaintiff wanted to buy an apartment and it was very important for her to have city views. She bought an apartment with northern windows on the twelfth floor in a building yet to be constructed with an address of 371 Broadway. Once the building was constructed, she realized that her windows faced another building (377 Broadway); that building, twelve stories high, has been there since 1929 and was certainly open and obvious. There were two “low rise” buildings between her building and 377 Broadway (those two building had the likely addresses of 373 and 375 Broadway).

Plaintiff sues the real estate brokers (“Elliman”) and her attorney (“Lee”) who was referred by the brokers. She blames the brokers for misrepresenting that her apartment would have views and blames the attorney for his lack of due diligence in not telling her that she would not have a view. Plaintiff claims that her primary requirement was that her apartment have expansive city views and that she retained defendant Elliman to assist her in finding a suitable apartment.

Plaintiff insists that because the building was under construction, she relied on Elliman’s representations concerning the view. She admits that she went to the construction site on or about August 19, 2014, but claims that she was unable to identify the specific location of the apartment (12B) within the building or how tall each floor of the condo would be. Plaintiff insists that she had a conversation with an Elliman agent on August 20, 2014 where she noted that she was relying on representations about the subject apartment’s city views and that Elliman’s agent confirmed the apartment had city views. Plaintiff claims she was told to refer to a link on Elliman’s website showing the listing, which contained views from the apartment captured by a drone.

Plaintiff contends that she submitted an offer to purchase the apartment on or about August 21, 2014 and was told by an agent for Elliman to retain defendant Lee (an attorney) to help her

conduct due diligence. She subsequently retained defendant Lee and claims that she told him she wanted city views. On September 11, 2014 plaintiff entered into an assignment agreement in which she was assigned the rights, title and interest of Hashem LLC for \$1.39 million. Hashem had previously entered into a contract of sale with the sponsor (Broadway 371 LLC) to purchase Unit 12B for \$1.1 million in June 2013; the scheduled closing in the original contract of sale (between Hashem and 371 Broadway) was July 2015. Because of construction delays, the closing was postponed until fall 2015 and eventually until 2016. Plaintiff claims that she wanted the right to rescind the contract due to the delay and insists that defendant Lee failed to inform her that she may have had this right.

Plaintiff insists that she was told numerous times from 2014 to 2016 that her apartment would have full city views. The closing was eventually scheduled for March 23, 2016, the same day that plaintiff claims she was able to visit the newly-constructed apartment for the first time. Plaintiff states that only brick walls could be seen when looking out from every room of the apartment.

Plaintiff did not complete the closing on March 23, 2016. In an effort to mitigate damages arising from the sales contract, she resolved her dispute for the defects in the apartment with Hashem and 371 Broadway for \$50,000. Plaintiff alleges that if she did not close, she would have lost her down payment of \$208,500. She fired defendant Lee a few days after the failed March 23, 2016 closing.

Plaintiff asserts claims against Lee for legal malpractice and breach of fiduciary duty. Plaintiff brings claims against Elliman for breach of fiduciary duty, fraudulent misrepresentation, and negligent misrepresentation. In motion sequence 005, Lee seeks summary judgment dismissing the claims for legal malpractice and breach of fiduciary duty and also seeks to dismiss

Elliman's claims against Lee for common law indemnification and contribution. In motion sequence 006 Elliman seeks summary judgment dismissing plaintiff's claims for breach of fiduciary duty, fraudulent misrepresentation, and negligent misrepresentation. Elliman also seeks to dismiss Lee's cross-claims for common law indemnification and contribution. Plaintiff makes a cross-motion for partial summary judgment on liability against Elliman on plaintiff's claim for negligent misrepresentation.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that

fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Motion Sequence 005

Defendant Lee seeks summary judgment on the legal malpractice and breach of fiduciary duty claims and seeks to dismiss co-defendant Elliman's cross-claims for indemnification and contribution.

Legal Malpractice

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 [2007] [internal quotations and citations omitted]).

Plaintiff alleges that Lee committed malpractice by failing to inform her about the apartment's views and because of Lee's alleged failure to advise her about any rights to rescind the purchase agreement. However, the deposition testimony and email exchanges between plaintiff and Lee indicate that plaintiff only asked Lee about any potential air rights that the neighboring buildings had and did not ask about the current status of the view of the apartment she was planning to purchase. Plaintiff states: "So I was concerned that the buildings next to the street, there are like

two buildings further north on that street, they were low rise, but I was concerned that potentially one of those could be knocked down and something could be built. That is what I asked him [Lee] to investigate” (NYSCEF Doc. No. 164 at pgs. 87-88). Plaintiff only asked Lee about potential rights that these buildings had with respect to building more stories in the future. This is not the equivalent of asking Lee to investigate whether it was true that her apartment would have city views.

Plaintiff's testimony does not indicate that she ever asked Lee to ascertain what her apartment views would look like, nor does it indicate that Lee made any misrepresentations which caused plaintiff damages. During her deposition plaintiff was asked and answered as follows:

“Q: What due diligence documents did you ask Godfrey Lee to review?

A: I asked him to review the offering plan, the marketing materials, and also to look into if there could ever be a building built higher or anything to obstruct the views, if there was any possibility in the future of something blocking the views

Q: So your concern there was not the existing conditions, it was could conditions change in the future?

A: My concern was would there be anything that I can't know that could change my view and make it different than what Douglas Elliman was telling me it was at the time”

NYSCEF Doc. No. 164 at pgs.118-119

This testimony indicates that plaintiff was concerned about possible changes to nearby buildings and wanted to determine whether either of the two low-rise buildings directly to her north (373 and 375 Broadway) could be built up in the future (what “could change my view”). It does not indicate that plaintiff was concerned about the view her apartment would have upon completion. She never claims to have asked her lawyer to double-check Elliman's representations. That makes sense: she claims she believed Elliman and the drone's picture and asked her lawyer to investigate air rights of her neighbors between her building and 377 Broadway. She believed she had a view-she wanted her lawyer to make sure that view would stay.

During Lee's deposition, he repeatedly stated that plaintiff never asked him to investigate whether her apartment had city views (NYSCEF Doc. No. 109 at pgs.135-137). Lee says that he was only asked whether the sponsor had purchased air rights north of the building. Lee looked in the Offering Plan to see if it made any representations regarding such air rights. He informed plaintiff that the Offering Plan only stated that an easement agreement for legal light and air was in place for the north façade of the building. Lee never told plaintiff that the Offering Plan made any representations about apartment views. Based on the deposition testimony and email exchanges, plaintiff does not have a claim for legal malpractice for failure to investigate city views.

Plaintiff's next basis for legal malpractice is that Lee failed to timely inform her of her alleged right to rescind her purchase agreement on May 15, 2015. In an email sent to Lee, plaintiff expressed concern that the construction was taking too long and asked if she could get out of her contract to purchase the apartment. In response Lee told plaintiff that since her arrangement with Hashem was an assignment, they would have to talk to Hashem directly. But plaintiff does not show that she ever followed up to request that Lee communicate with Hashem to try to cancel the arrangement. Therefore, this cannot serve as a basis for legal malpractice.

Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, plaintiffs must allege that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700, 924 NYS2d 77 [1st Dept 2011]). Plaintiff claims that because Lee received client referrals from Elliman, he improperly pressured plaintiff into signing her purchase agreement, thereby breaching his fiduciary duty to her.

The deposition testimony and email exchanges do not indicate that Lee was pressuring plaintiff to sign the purchase agreement. In one of his emails to plaintiff, he specifically tells her to take her time to review the terms of the purchase agreement and be comfortable with it before making a decision (NYSCEF Doc. No. 113). Plaintiff cannot point to anything to support her claim that Lee's loyalty was to anyone but her. Therefore, the claim for breach of fiduciary duty is dismissed.

Indemnification and Contribution

“Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). “[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident” (*Correia, v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

CPLR 1401 codified common law contribution and provides that “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.”

The branch of Lee's motion to dismiss Elliman's cross-claim for indemnification and contribution is granted in light of this Court's finding that Lee did nothing wrong.

Motion Sequence 006

Elliman seeks summary judgment on the fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty claims. Elliman claims that plaintiff cannot prevail on these causes of action because plaintiff did not rely on any statements made by Elliman in connection with her decision to purchase the apartment. Elliman also seeks summary judgment on cross-claims made by Lee for common law indemnification and contribution. Plaintiff cross-moves for summary judgment on the negligent misrepresentation claim.

Fraudulent misrepresentation

To prevail on a cause of action for fraudulent misrepresentation, plaintiff must plead a “material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages flowing therefrom” (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 162, 48 NYS3d 98 [1st Dept 2017]). Plaintiff claims that Elliman engaged in fraudulent misrepresentation when its agent told plaintiff that the apartment would have open city views when, in fact, it would not. Plaintiff claims that she relied on these “misrepresentations” in deciding to purchase the apartment. In response, Elliman contends that plaintiff did not rely on any statements made by Elliman and instead, relied on representations made by attorney Lee which induced plaintiff to purchase the property. Specifically, Elliman insists that plaintiff was convinced into signing the assignment agreement by her attorney and had not been in communication with Elliman in the days leading up to the signing. Elliman also argues that plaintiff cannot establish an intent to misrepresent because Elliman’s agent did not know the view would be obstructed and was just as shocked as plaintiff was upon discovering there was no city view.

The Court finds that there are sufficient issues of fact presented regarding whether Elliman misrepresented that the apartment had city views with knowledge of their falsity. Elliman's listing describes the apartment as having "Views: City Full" (NYSCEF Doc. No. 134, Douglas Elliman listing dated 3/23/2016). After plaintiff commenced this suit Elliman changed the listing by deleting "City Full." This change is acknowledged by Noam Gottlieb, an Elliman employee, during his deposition (NYSCEF Doc. No. 160 at pg. 314). Additionally, an email dated March 23, 2016 from Elliman's agent to plaintiff concedes that Elliman's listing "misrepresented" and "mis-advertised" the apartment as having full city views (NYSCEF Doc. No. 159). These actions are enough to raise triable issues of fact relating to whether Elliman misrepresented information to plaintiff with knowledge of the falsity.

Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, 863 NE2d 585, 587 [2007]). Plaintiff claims that she and Elliman had a special relationship based on plaintiff's retention of Elliman as her real estate agent. She says Elliman knew plaintiff would be relying on Elliman's representations of the view and that Elliman provided incorrect representations of the view which plaintiff reasonably relied upon in deciding to purchase the apartment. Elliman moves for summary judgment on this claim, insisting that plaintiff did not rely on any statements by Elliman in making her decision to enter into a contract to purchase the subject property. Plaintiff

cross-moves for summary judgment, alleging that Elliman's misrepresentations induced her into buying the apartment.

There is no question of fact here: Elliman repeatedly misrepresented that there were views in advertisements, in emails, and in drone pictures. Plaintiff repeatedly states in her deposition that she was explicitly told by the Elliman agent that apartment 12B would have city views and that she relied on these representations (NYSCEF Doc. No. 164 at pg.114). Plaintiff further stated that she viewed photos on Elliman's website which she testified Elliman's agent told her had been taken by a drone Elliman used (NYSCEF Doc. No. 108 at pgs.115-116). In an email exchange between plaintiff and the Elliman agent, the agent writes, "Your unit has full city and skyline views and there is always a premium on a view" (NYSCEF Doc. No. 158). She also writes, "You are really going to love your apartment especially since it has a view!" (*id.*).

Elliman denies that its representations were the reason plaintiff decided to buy the apartment, but that is clearly frivolous. Plaintiff wanted a view, and Elliman repeatedly and in many ways represented that the apartment had a view. The agent was shocked to find out that there was no view. Clearly, everyone dealing with plaintiff thought there was a view. Her agent had a duty to impart correct information to her, she relied on Elliman's representations and that information was incorrect. By granting plaintiff summary judgment on this cause of action for negligent misrepresentation, no one is saying that anyone did anything maliciously. It could be as simple as the drone operator took pictures from the roof rather than the apartment and everyone relied on those pictures. Still, the drone was Elliman's and Elliman used those pictures to market the apartment. The fact is that the view from plaintiff's apartment was not as it was represented to be by Elliman and plaintiff relied on those representations, which turned out not to be accurate.

Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, plaintiffs must allege that “(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct” (*Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699–700, 924 N.Y.S.2d 77 2011[1st Dept 2011]). Plaintiff alleges that Elliman owed plaintiff a fiduciary duty as her real estate agent and broker to act in plaintiff’s best interests. She insists that Elliman breached this duty when providing plaintiff “false” and “inaccurate” information regarding the city views (NYSCEF Doc. No. 104 at ¶127). In response Elliman claims that it is shielded from liability for breach of fiduciary duty because after plaintiff told Elliman’s agent that she was not pleased with the views, the Elliman agent told her to seek information from her attorney about her contractual rights pertaining to the view. The crux of Elliman’s argument is that once plaintiff hired an attorney, it was the attorney’s obligation to verify Elliman’s representations.

Here there are triable issues of fact that need to be determined by a jury. The testimony of plaintiff, Lee, Noam Gottlieb, and the emails sent from Elliman’s agent could indicate that Elliman engaged in misconduct in providing incorrect information to plaintiff and therefore breached its duties to her. One does not get off the hook for misconduct just because someone else gets a lawyer.

Indemnification and Contribution

Elliman’s motion for summary judgment dismissing co-defendant’s Lee’s cross-claims for common law indemnification and contribution from Lee is granted. Because the Court has granted Lee summary judgment and severed the claims against Lee, he cannot seek indemnification or contribution from Elliman.

Summary

The plaintiff's claims against her attorney do not survive summary judgment. She did not ask her attorney to do a site inspection and count the number of floors of the buildings to her north. She did not ask her attorney to figure out the height of her twelfth-floor apartment and compare it to the height of any building on her block. She did not even alert him that another building might block her view or ask him to double check Elliman's representations to her. Rather, she asked him about the possibility of the "low rise" buildings increasing their height in the future, and he gave her the answer.

Nor does her claim about rescission survive because she never asked Lee to speak to Hashem about such right. Lee did not breach his fiduciary duty to his client either; he did not pressure plaintiff to sign the purchase agreement. She wanted that apartment and he told her to take her time. Lee may have been referred by plaintiff's broker, but there is no evidence that his loyalty was to anyone but plaintiff.

Elliman's attempt to dismiss the breach of fiduciary duty and fraudulent misrepresentation claims fails because there are issues of fact; the jury will have to decide intention. However, plaintiff is granted summary judgment on her claim for negligent misrepresentation because knowledge of falsity or bad conduct are not elements of this cause of action. Rather, it is uncontested that having views was important to plaintiff, that Elliman represented that there were views in the listing and the drone photos and the emails, that those representations induced plaintiff to buy the apartment and those representations turned out to be false.

Accordingly, it is hereby

ORDERED that the motion by defendant Godfrey Lee (Motion Sequence 005) for summary judgment dismissing all claims against him is granted and all claims and cross-claims against this defendant are severed and dismissed; and it is further

ORDERED that in motion sequence 006, the branch of defendant Elliman's motion for summary judgment dismissing the fraudulent misrepresentation and breach of fiduciary duty claims is denied; the branch of the motion to dismiss Lee's cross-claims against Elliman is granted as Lee is no longer a cross-claimant; and it is further

ORDERED that the cross-motion by plaintiff for partial summary judgment on liability with respect to her claim for negligent misrepresentation against Elliman is granted.

6/21/19

DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> SUBMIT ORDER	