Fisher v Mor
2021 NY Slip Op 30153(U)
January 15, 2021
Supreme Court, New York County
Docket Number: 654802/2020
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 14**

Justice

---X

JESSICA FISHER,

Plaintiff,

- v -

OREN MOR, HADAR LAOR

Defendant.

---X

INDEX NO. 654802/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by defendants for summary judgment is granted in part and denied in part and the cross-motion by plaintiff for summary judgment is granted in part and denied in part.

Background

This case is about a failed sale of a condominium apartment in Manhattan. Defendants own the condo and plaintiff contends that she attempted to buy the premises with the goal of making extensive alterations to meet her specific requirements. Plaintiff claims that she suffers from various medical ailments, including allergy-induced asthma, which require her to investigate an apartment's HVAC units and sound proofing. Plaintiff alleges that she was told she would have unfettered access to the apartment prior to the closing so that she could perform various inspections. Despite purported oral representations about her access to the apartment,

plaintiff claims that her request for an asbestos inspection was denied. She claims that this is a routine inspection and required in order to submit any alteration plans.

Plaintiff alleges that defendants breached the agreement for the sale of the property and refused to return her down payment. She brings five causes of action: for a declaratory judgment that she is entitled to a return of the deposit (including interest), breach of the covenant of good faith and fair dealing, breach of a vendee's lien, unjust enrichment, and breach of contract.

Defendants offer a different account. They claim that the contract of sale contained specific terms, but immediately after it was signed plaintiff started making numerous demands about the apartment that were not in the contract. They insist that plaintiff breached the contract by refusing to close under the terms of the contract. In addition to dismissal, defendants also seek removal of the notice of pendency on the ground that this case would not affect title to the property; plaintiff does not want the apartment, she just wants the deposit back.

Defendant Laor details a time-consuming process for the sale of the apartment that involved discussions throughout 2020 (NYSCEF Doc. No. 12). According to defendants, plaintiff was very interested in the HVAC unit and demanded on numerous occasions that it be repaired. A draft contract was provided in April 2020; plaintiff visited the premises a dozen times before she finally signed the contract of sale on August 5, 2020.

Defendant Laor claims that after the contract was signed, the buildings' HVAC servicing company came to inspect and found that the unit's system was working properly. Defendants observe that plaintiff and her contractor came to the apartment on August 13, 2020 and wanted to do an asbestos test, which involved taking samples from the air conditioning duct with a chisel. Apparently, the broker denied this request and said they could only visually inspect the property.

Defendants explain that, even though plaintiff wasn't entitled, their attorney offered to permit plaintiff to do this test on certain conditions, including that plaintiff could not use the result of the test as a basis to back out of the contract. Plaintiff refused to sign. Defendants point out that although she visited the apartment 12 times prior to signing the contract, she never asked to chisel the duct before she signed, nor did she reserve the right to chisel the duct in the contract. All obligations in the contract with regard to the HVAC system were fulfilled by the defendants.

Both defendants and plaintiff move for summary judgment. Defendants claim that plaintiff is not entitled to a return of her deposit because she did not close, even after receiving a time of the essence letter. Plaintiff cross-moves for summary judgment on the ground that defendants breached the terms of the contract.

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 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]).

As an initial matter, the Court observes that the motion is fully briefed. The parties entered into a briefing schedule (NYSCEF Doc. No. 40) and now plaintiff apparently wants the opportunity to put in more papers. If plaintiff wanted to reply to her cross-motion, then she should have included that in the stipulation. Moreover, this part's rules do not permit the filing of letters without permission from the Court.

The Contract of Sale

The Court's analysis begins with the contract of sale for the apartment. It provides, in part, that the Seller "will have the HVAC in the Unit Serviced by the building's licensed contractor (the "HVAC Contractor") and repaired to the original state of working as intended and to investigate if the refrigerant is low. If the refrigerant is low, the HVAC Contractor shall take such steps as are reasonably required to determine if the low refrigerant is a result of a leak in the HVAC system. . . The cost and expense of the inspection shall be borne by the Seller. Purchaser shall be permitted access for Trademark Mechanical or other HVAC company chosen by Purchaser to confirm that the HVAC is delivered in the condition as set forth herein. Trademark Mechanical or the other HVAC company chosen by Purchaser shall provide all necessary

insurance requests to the managing agent and Condominium for the purpose of such HVAC inspection" (NYSCEF Doc. No. 22, ¶ 2.3).

Nothing in this paragraph or anywhere else in the contract required defendants to permit plaintiff to do intrusive testing that required chiseling into the HVAC duct. The above provision permitted inspections of the HVAC system by HVAC contractors to make sure the system worked well; it did not allow an asbestos testing company to take samples within the HVAC system. The Court observes that the subsequent HVAC report notes that there was no freon leak, the equipment was fully functional and "up to manufacturers specifications" (NYSCEF Doc. No. 24).

To the extent that plaintiff relies on paragraph 9 of contract or paragraph 65 of the rider, those provisions do not compel the conclusion that plaintiff was entitled to do asbestos testing. Paragraph 9 permits plaintiff to perform an inspection and to take measurements (NYSCEF Doc. No. 22, ¶ 9). Paragraph 95 also mentions that plaintiff would have a maximum of five visits for inspections and taking measurements (*id.* ¶ 65). No reasonable interpretation of this paragraph permits the intrusive testing plaintiff demanded.

Moreover, paragraph 7.2 states that "Purchaser has inspected or waived inspection of the Unit, its fixtures, appliances and equipment and the Personal Property, if any, included in this sale . . . and knows the condition therefor and, subject to ¶2.5 accept the same 'as is,' i.e., in the condition they are in" (*id.* ¶ 7.2). And the contract contains a merger clause, paragraph 22, which states the agreement "constitutes the entire agreement between them with respect to the subject matter hereof" (*id.* ¶ 22). Simply put, the Court must consider the terms of the contract and there is no obligation placed on defendants to permit asbestos testing.

The Court is not concerned with the concessions that defendants may have explored to try and save the deal after the contract was signed. These do not constitute agreements upon which plaintiff can recover. Nor does defendants' references to them require the imposition of sanctions; defendants added them in an attempt to provide context. Both sides' papers are flooded with extra information which make no difference in the Court's arguments-- the fluff is certainly not sanctionable. The plaintiff is suing for breach of contract and that contract governs.

Plaintiff's affidavit makes clear that she requires certain specifications in her living arrangements because of her disabilities (NYSCEF Doc. No. 42).). This Court recognizes that plaintiff is completely entitled to make the HVAC system in her future home a priority; she details how an HVAC specialist inspected the HVAC unit in the apartment in April 2020 and discovered it apparently had a potential refrigerant leak (*id*. at 3-4). But the fact is that plaintiff reduced the deal to a writing when she finally signed the contract in August 2020 and both parties must be held to that writing.

The Court cannot permit plaintiff to add provisions to the contract of sale simply because every one of her demands was not immediately heeded. Every buyer has varying demands and "must haves." For plaintiff, it appears that she requires an apartment that is free of sound and has constant airflow to accommodate her asthma. If that necessitated testing for asbestos, then plaintiff should not have signed the contract unless she was given the right to perform the test; she did not. The contract only contains one mention of asbestos: defendants represented in the second rider that they had no knowledge of asbestos in the unit (NYSCEF Doc. No. 22 at 30).

The Court also finds it important to view the timeline of events preceding the signing of the contract. There is no doubt that plaintiff was very interested in the HVAC unit from the beginning of the parties' discussions in early 2020. Throughout the summer, plaintiff visited the

apartment numerous times and defendants made many concessions and accommodations to facilitate a deal for an apartment worth nearly $4 million. The time for making demands to defendants was before plaintiff signed the contract; and plaintiff did make many demands – testing for asbestos was not one of them.

Plaintiff's Causes of Action

Based on the Court's reading of the contract, the Court grants the portion of defendants' motion to dismiss plaintiff's five causes of action. The Court cannot interpret the contract to require defendants to permit plaintiff to perform HVAC asbestos testing. That this may have been a necessary part of plaintiff's future alteration plans (defendants dispute this point) is of no moment. There is no specific provision allowing asbestos testing. A generalized provision about an *inspection* and taking measurements is demonstrably different from allowing a plaintiff to potentially damage the property by doing intrusive *testing* and chiseling around to look for asbestos prior to the closing. Besides, plaintiff did not even provide for a remedy in the event she found asbestos – so not only did she lack the right to do the testing, she did not have the right to do anything about it based on any test results.

Defendants tried to save the deal; they shared with plaintiff that there had been an asbestos-related inspection in March 2019 that found no asbestos-containing materials in the unit (NYSCEF Doc. No. 27). Defendants offered various solutions which allowed the test, but plaintiff refused all potential resolutions and instead demanded that she be allowed to do a test that the contract did not allow her to do.

The Court is unable to find that any of plaintiff's causes of action, all of which arise out of the retention of the deposit, survive defendants' motion. The facts on this motion demonstrate

that plaintiff refused to close because defendants did not permit her to conduct a test that she was not entitled to conduct under the contract.

Notice of Pendency

Because the Court is dismissing plaintiff's causes of action, it also vacates the notice of pendency. Even if some of plaintiff's causes of action remained, the Court would still strike the lis pendens. CPLR 6501 provides that "A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property." A notice of pendency is "an extraordinary privilege because of the relative ease by which it can be obtained and its powerful effect on the alienability of real property" (*In re Sakow*, 97 NY2d 436, 441, 741 NYS2d 175 [2002] [internal quotations omitted]).

"Where, as here, the motion for cancellation of a notice of pendency is premised on the ground that the action is not within the scope of CPLR 6501, determination of the motion is confined to the face of the complaint, not the underlying transaction or the merits of the claim" (*Chelsea West 23rd St. LLC v 128 West 23rd St., LLC*, 2014 WL 2932591 [Sup Ct, NY County 2014]).

The plaintiff in this case only seeks the return of her deposit; that does not affect the title, possession, or use and enjoyment of the condo unit. Plaintiff's amended complaint does not seek to force the closing of the sale for the apartment. She doesn't want it – she wants her money back. The filing of the notice of pendency was improper under these circumstances and it is vacated.

Defendants' Counterclaims/ Plaintiff's Cross-Motion

The Court observes that defendants' notice of motion states that defendants demand "judgment in favor of defendants on their Second Counterclaim with an Order directing release of the escrowed funds in the amount of $387,500" (NYSCEF Doc. No. 10). But the second counterclaim alleges slander of title and seeks only $250,000 (NYSCEF Doc. No. 8 at 5). Moreover, defendants' moving papers do not contain any specific references to the counterclaims or why defendants are entitled to summary judgment on them. For this reason, defendants' demand for attorneys' fees pursuant to the contract must wait until there has been a resolution on their remaining counterclaims. The request to release the $387,500 from escrow, however, is granted. As the Court holds that plaintiff is not entitled to it, there is no reason to keep it in escrow.

The branch of plaintiff's cross-motion to dismiss the second counterclaim for slander of title is granted. "[I]t has been held that a notice of pendency is an "undeniably true statement", and that therefore the filing of a notice of pendency does not give rise to a cause of action for slander of title" (*35-45 May Assoc. v Mayloc Assoc.*, 162 AD2d 389, 389-90, 162 AD2d 389 [1st Dept 1990][dismissing a counterclaim for slander of title). The fact that plaintiff filed it improperly, as the Court found above, does not give rise to the counterclaim of slander of title.

Plaintiff's cross-motion also seeks to dismiss the first counterclaim, which alleges that this case was brought in bad faith. Because defendants did not specifically oppose this portion of the cross-motion, the Court dismisses the first counterclaim.

The Court observes that any detailed discussion about defendants' affirmative defenses is moot given that the Court granted defendants' motion for summary judgment dismissing plaintiff's claims.

Summary

The Court recognizes that there has not been any discovery exchanged in this case; in fact, there has not even been a preliminary conference. But this case, despite the parties' voluminous briefs, is straightforward. Plaintiff signed a contract for the sale of an apartment and then refused to close. Plaintiff's justification for not closing was based on her demanding testing which she was not entitled to perform under the contract.

According to defendants, plaintiff's argument that the testing was necessary for her alteration plans is a red herring because the board of the building would not have approved any alteration plans until after the closing. Undoubtedly, plaintiff has very specific preferences about what she wants in a new apartment. Many of these seem to come from her various ailments. That does not permit plaintiff or this Court to create new provisions to the contract. If it was truly important to plaintiff, she should have added it to all her demands she made before signing the contract, and if defendants refused plaintiff should not have signed the contract.

This Court is charged with interpreting the terms of the parties' agreement; it is not up to the Court to add provisions that are not there. This is not a case where plaintiff had the right to cancel if she found asbestos but forgot to include a provision for testing. Here, there is no provision in the contract which allows asbestos testing and no provision allowing any remedy if asbestos was found. Clearly, the Court cannot add a provision to the contract that simply was not there.

Accordingly, it is hereby

ORDERED that the cross-motion by plaintiff for summary judgment is granted only to the extent that the first and second counterclaims are dismissed and denied as to the remaining requests for relief; and it is further

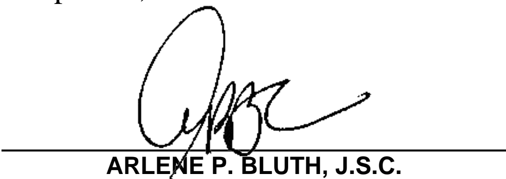
ORDERED that the motion by defendants for summary judgment is granted to the extent that plaintiff's causes of action against defendants are dismissed; and it is further

ORDERED that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel the notice of pendency filed in this case; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the escrow agent is hereby directed to release the $387,500 plus interest (if any) to the defendants upon receipt of this Decision and Order.

Remote Conference as to remaining counterclaims: April 30, 2021.



1/15/2021			
DATE		ARLENE P. BLUTH, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED	[X] NON-FINAL DISPOSITION	
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APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
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