

Dickerson v Bailey

2021 NY Slip Op 33542(U)

June 1, 2021

Supreme Court, Steuben County

Docket Number: Index No. E2019-0938CV

Judge: Patrick F. McAllister

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At a Regular Motion Term of the Supreme Court held in and for the County of Steuben in the Village of Bath, New York on the 26th day of May 2021

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

Index No. E2019-0938CV

JUSTIN DICKERSON,

Plaintiff,

-v-

DECISION and ORDER

DOUGLAS BAILEY, SHERRY L. ROBERTS,
and STANLEY OLEVNIK,

Defendants.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

The Defendant, Shirley Roberts, is asking for summary judgment dismissing the claims against her. Shirley Roberts is represented by Roy Rotenberg, Esq.. The Plaintiff is represented by Richard Franco, Esq. Kevin Connell, Esq. represents Defendant Douglas Bailey. The court heard oral argument on May 26, 2021 and reserved decision.

In support of the Defendant's motion for summary judgment the court received and reviewed the following submissions:

- Notice of Motion;
- Affirmation by Roy Rotenberg affirmed May 4, 2021;
- Verified Complaint;
- Answer;
- Affidavit of Stanley Olevik sworn to October 7, 2019
[attachments: e-mail,
Home Inspection Report,
Property Condition Disclosure Statement,
Inspection Waiver,
Decision and Order of Justice Wiggins,
Verified Answer of Bailey, and
(portion) of EBT of Dickerson]

Affidavit of Sherry Roberts sworn to April 29, 2021
[attachment: Home Inspection Report, and
e-mail];
Defendant Sherry Roberts' Memorandum of Law; and
Defendant Sherry L. Roberts' Reply Memorandum of Law in Support of her Motion
for Summary Judgment.

In opposition to the motion for summary judgment the court received and reviewed the following submissions:

Affirmation in Opposition to Defendant's Motion for Summary Judgment by
Richard Franco affirmed May 19, 2021; and
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary
Judgment.

Background:

The Plaintiff bought property from the Defendant Bailey. Defendant Roberts was the seller's real estate agent. Defendant Olevnik was the buyer's real estate agent. The Plaintiff claims he was not told about certain problems with the house including insect infestation, water damages and a mold/mildew problem and that these misrepresentation or failures to disclose caused significant injury and harm to the Plaintiff.

Discussion:

In bringing this motion for summary judgment, Defendant Sherry Roberts relies in part on a motion brought by Defendant Olevnik several months ago. Judge Wiggins dismissed the action against Defendant Olevnik and found that the Home Inspection Report had been provided to the Plaintiff by the real estate agents. The primary allegation in the complaint against the real estate agents is that the Plaintiff did not receive the report. In addition the Plaintiff is now claiming that Roberts showed him only a portion of the Home Inspection Report and that by doing so he was misled into putting a purchase offer on the property.

In saying that the court should not rely on Judge Wiggins Decision and Order when making this decision the Plaintiff cites Bernard v. Grenci 48 AD3d 722 (Second Dept. 2008) to say that law of the case does not apply since the standards are different for summary judgment (Roberts' motion) and motions to dismiss (Olevnik motion). Defendant says the law of the case does apply because the cases cited by the Plaintiff are based on failure to state of cause of action and not a motion to dismiss based on documentary evidence, the difference being CPLR 3211(a)(7) verses CPLR 3211(a)(1).

The second cause of action against Defendant Roberts focuses on a disclosure form signed by Defendant Bailey. That form specifically states "The following are representations

made by the seller and are not the representation of the seller's agent". Therefore, the Defendant Roberts says this cause of action needs to be dismissed as against her because it was the seller and not her that were making those disclosures

Summary judgment is essentially an expedited remedy to avoid needless trials and delays where no genuine issue of fact remains to be resolved at trial. CPLR § 3212. The remedy is based "in the interests of justice". Halpern v. Lavine (1946 Sup App T) 60 NYS2d 121.

Summary judgment does not go to credibility. 73 Am Jur 2d, Summary Judgment §36; Heller v Hicks Nurseries 198 AD2d 330 (Second Dept.,1993). This expedited remedy is proper if there is no dispute as to the facts and if the only issue is the legal conclusion to be drawn from the facts. Bagshaw v. Network Serv. Mgmt., Inc., 4 AD3d 831 (Fourth Dept. 2004). Summary judgment may be granted if the opposing party fails to deny any of the moving party's factual allegations, and contests the motion only on legal grounds (Brickman v. Niagara Fruit Co. [1971] 65 Misc 2d 483); or if the record of undisputed facts is sufficient for the court to resolve the case as a matter of law (Central School Dist. v. Cohen [1969] 60 Misc 2d 337). Because it is a drastic remedy, summary judgment should be denied when the court has doubt (except as to damages) concerning whether a material and triable issue of fact exists. Rotuba Extruderes, Inc. v. Ceppos 46 NY2d 223 (1978).

The party moving for summary judgment has the initial burden of setting forth evidentiary facts that establish the cause of action or defense sufficiently to entitle that party to judgment as a matter of law. McCabe v. CSX Transport, Inc., 27 AD3d 1150 (Fourth Dept., 2006). To meet this burden, the moving papers must contain evidence confirming that there is no material and triable issue of fact. Royal v. Brooklyn Union Gas Co., 122 AD2d 132 (Second Dept. 1986). Anything less requires dismissal of the motion regardless of the contents of the opposing party's papers. Filkins v. Village of Elbridge, 24 AD3d 1293 (Fourth Dept., 2005); Silverman v. Sciartelli, 2 AD3d 1463 (Fourth Dept. 2003). To make such a showing, the moving party's supporting papers must include allegations in affidavit format, made with personal knowledge of the underlying facts (C.P.L.R. §3212[b]), together with a copy of the pleadings, and other available proof such as depositions and written admissions. Proof must be in evidentiary form. Foremost Ins. Co. v. Moore, 103 AD2d 1042 (Fourth Dept.,1984). Conclusory statements are inadequate (Cicarelli v. Cotira, Inc., 24 AD3d 1276 [Fourth Dept., 2005]) as are hearsay allegations (Central School Dist. v. Cohen, 60 Misc 2d 337 [1969]).

Once the moving party establishes its entitlement to summary judgment through the tender of admissible evidence, then the burden shifts to the non-moving party to raise an issue of fact. Hunt v. Kostarellis, 27 AD3d 1178 (Fourth Dept. 2006).

This court finds that the Plaintiff was provided a complete copy of the Home Inspection Report prior to his signing the purchase offer. That report specifically highlighted as potential problems with the property the bulk of the issues the Plaintiff is now claiming are defects in the

property. Defendant Roberts claims that since the full report was given to the Plaintiff prior to him having signed the purchase offer there is no way the Plaintiff could claim he justifiably relied upon any verbal misrepresentations. In any event Defendant Roberts denies having made any verbal misrepresentations. Having been provided with a copy of the full report the burden shifted to the Plaintiff to demonstrate there is a material issue of fact. This court finds the Plaintiff has failed to do so.

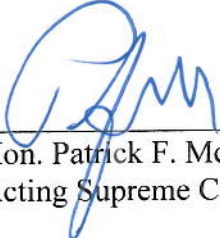
As to the second cause of action, the disclosure form, many (perhaps most) of the Plaintiff's alleged defects are from the disclosure form and the Plaintiff had checked "Unknown" as to those conditions. In Malach v. Cheng Lung Chuang, 194 Misc2d 651 (Civil Ct., Richmond Co. 2002) the court ruled that by checking "unknown" the buyers were alerted and that the buyer had a duty to investigate further. The burden shifts to the Plaintiff to prove the seller had actual knowledge of the defects and failed to disclose. Upon review of the EBT testimony of Donald R. Krause (a neighbor who the Plaintiff had relied upon to oppose the prior motion by Defendant Olevnick) who was deposed on February 26, 2021, it is clear that most, if not all of the defects, such as water running under the house and a fire in one room in the house occurred well before Defendant Bailey became the owner of the property. Therefore, it is unlikely that Bailey had actual knowledge of these issues. As to issues such as a leak in the roof which caused water to run down inside the house the testimony of Donald Krause was that Defendant Bailey had hired contractors to fix the roof and done the work himself to repair the interior damage caused by those problems, prior to putting the property up for sale.

The Plaintiff has failed to show that Defendant Roberts somehow mislead the Plaintiff by providing the disclosure statement. Further RPL §466 states: that if the seller's agent informs the seller of the obligation to complete the disclosure form "the agent shall have no further duties under this article and shall not be liable to any party for a violation of this article". Therefore, it is clear that this cause of action must be dismissed as against Defendant Roberts.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is

ORDERED, ADJUDGED, and DECREED that the motion for Summary Judgment brought by Defendant Sherry Roberts be, and hereby is granted.

Dated: June 1, 2021



Hon. Patrick F. McAllister
Acting Supreme Court Justice