438 W. 20 St., LLC. v Bares
2016 NY Slip Op 31452(U)
July 25, 2016
Supreme Court, New York County
Docket Number: 654331/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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438 WEST 20 STREET, LLC.,

Plaintiff,

-against-

ANDREW BARES, ALLA KORMILITSYNA a/k/a ALLA BARES, DAF CONTRACTING, LTD, THOMAS VAIL d/b/a VAIL ASSOCIATES ARCHITECTS and PROFESSIONAL HOME INSPECTIONS, INC.,

Defendants.

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DECISION AND ORDER

Index No. 654331/2015

Mot. Seq. No. 001 & 003

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, fraud, negligence and gross negligence, 438 West 20 Street, LLC ("plaintiff") seeks damages in the sum of $3,000,000 against each of Andrew Bares and Alla Bares (together, the "sellers"), DAF Contracting, LTD (the "contractor"), Thomas Vail d/b/a Vail Associates Architects (the "architect"), and Professional Home Inspections Inc. (the "home inspector").

Sellers move for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) based upon documentary evidence and failure to state a claim. (Mot. Seq. 001). The Architect moves for an order dismissing plaintiff's complaint pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7) based upon documentary evidence and failure to state a claim. (Mot. Seq. 003).

<u>Facts</u>

Plaintiff alleges that during negotiations for the purchase of real property located at 438 West 20th Street in New York County (the "Townhouse"), Sellers had allegedly represented to plaintiff that the Townhouse's structural elements, including the electrical, plumbing, flooring and appliances had been completely gut renovated with top of the line workmanship. Prior to signing the purchase contract, plaintiff hired the Home Inspector to inspect the Townhouse.

On December 18, 2014, Plaintiff and the Sellers entered into a written contract of sale (the "contract") with an "as is" and merger provision for the purchase of the Townhouse for $7,732,344.00. See Bares Affidavit 8, 10.

Plaintiff alleges that soon after the closing on January 13, 2015, multiple latent structural and non-structural defects were found within the Townhouse, including holes and mold underneath the floors and the brick structural walls, the failure to install joists and an elevator shaft in accordance to NYC building code and as provided for in the Architect's plans, and installation of the gas meter room which could potentially allow dangerous carbon monoxide to enter the Townhouse. See Complaint ¶¶ 22-32.

Plaintiff further alleges that the Home Inspector did not inform them of any of these dangerous and potentially dangerous deadly issues in relation to the gas meter room. Plaintiff discovered that many of the plans, filings and documents given to plaintiff by Sellers and/or submitted by the Architect to the Department of

Buildings, Department of Environmental Protection and other Landmarks agencies, substantially deviated from the work actually done by or on behalf of Sellers.

Analysis

Standard for a motion to dismiss

On a motion to dismiss based on the ground that the defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. See Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines

only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

First Cause of Action as to Plaintiff's Claim for Fraud as Against the Sellers

Seller's motion to dismiss plaintiff's first cause of action for fraud in the inducement is denied.

A specific merger clause in an agreement entered into by both parties is sufficient to bar any claims of misrepresentation. Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 320 (1959). Where a merger clause is merely general and not specific in its coverage of the exact representations at issue, the parole evidence rule will not bar a claim for fraud in the inducement of contract. See id (citing Sabo v. Delman, 3 N.Y.2d 155, 164 (1957)). A general misrepresentation clause in the contract will not preclude a claim for fraud in the inducement. Sabo, 3 N.Y. 2d at 161.

The distinction between general and specific representation clauses is dispositive under New York law. Danann also makes clear that a merger clause stating no reliance on any representations outside of the contract does preclude a fraud claim on such representations. Danann, 5 N.Y.2d at 323. The responsibilities of caveat emptor also require reasonable diligence. See Jablonski v. Rapalje, 14 A.D.3d 484, 485 (2d Dept 2005); see also Hi Tor Industrial Park, Inc. v. Chemical Bank, 114 A.D.2d 838 (2d Dept 1985).

A claim of fraud turns on whether the defendant actively concealed anything from the plaintiff. "A contractual promise made with the undisclosed intention not to perform it constitutes fraud and, despite the so-called merger clause, the plaintiff is free to prove that he was induced by false and fraudulent misrepresentations... [which] are questions necessarily reserved for trial." Sabo, 3 N.Y.2d at 161.

In this case, plaintiff and sellers entered into the contract which states,

> Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state or repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition, state or repair, use, cost of operation or any other matter related to the Premises or the other property included in the sale given or made by Seller or its representatives, and shall accept the same "as is" in their present condition and state of repair, subject to repair, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of closing.

See Bares Affidavit ¶ 8. In addition, the contract states that "[a]ll prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation. Neither party relying upon any statement made by anyone else that is not set forth in this contract." Id. at ¶ 10.

This court finds the First Department's ruling in TIAA Global Investments, LLC v. One Astoria Square LLC, 127 A.D.3d 75 (1st Dept 2015), to be applicable to the circumstances in this case. In TIAA Global Investments, the parties entered into a similar merger clause, and the court held that the contractual right contained in the merger clause, which allowed the purchasing party a 'virtually unlimited right' to conduct investigations, studies, and inspections of the property did not relieve the defendant of the requirement that knowledge of the defects not be peculiarly within the defendant's knowledge. See Id. at 87-88.

The court was persuaded by the Third Department's holding in Schooley v. Mannion 241 A.D.2d 677 (3d Dept 1997), where the court found a proper cause of action for fraud, overturning a dismissal, even though there were specific merger clauses in the contract because (1) the defect of the insulation was particularly within the defendant's/seller's knowledge and (2) reasonable diligence does not include

breaking down walls to inspect hidden insulation. See Id. More specifically, the court held

> [E]ven if the contract had contained specific disclaimers, the fact that the alleged defect regarding insulation was peculiarly within [the defendant's] knowledge would be sufficient to salvage plaintiffs' cause of action. It is significant that [the defendant] is alleged to have recently gutted and renovated the entire property and that insulation is a nonvisible component, not easily verified without destructive testing.

Id. at 678 (cited in TIAA Global Investments, 127 A.D.3d at 88).

Plaintiff here has made a legally sufficient argument to survive a motion to dismiss with respect to having performed reasonable diligence despite the existence of a merger clause. Plaintiff argues that defendant had 'peculiar knowledge' of the flaws within the structure of the townhouse, citing as evidence the suit that defendants themselves instigated against a neighboring structure whose construction damaged the soundness of the townhouse. The alleged structural defects included the mold underneath the flooring, a large hole in the brick structural wall behind the sheet rock, and a hole beneath a bathtub. See Complaint ¶¶ 22-32. Since these defects were hidden beneath the floors and walls, covered up just like insulation, any amount of diligence required to discover such flaws would not be reasonable. See Superior Technical Resources Inc. v. Lawson Software Inc., 851 N.Y.S.2d 74 (N.Y. Sup. Ct. 2007) (citing Warner Theatre Associates Limited Partnership v. Metropolitan Life Ins. Co., 149 F.3d 134, 136 (2d Cir 1998)). Due diligence does not require a party "prior to taking possession of the building, to do the requisite testing, some of it

possibly destructive, that would [be] necessary to reveal the alleged defects." TIAA Global Investments, 127 A.D.3d at 88. Since efforts to discover these structural defects would, inevitably, entail possible destructive testing to the Townhouse's walls and floors, such investigation is not within the reasonable diligence required.

Plaintiff has made a legally sufficient argument that the contract and merger clause in the rider entered into between plaintiff and defendant is not specific in reference to the actual physical conditions at issue. The plaintiff argues that the contract speaks in generalizations about the premises, whereas the law requires exacts. To bring this fraud claim, plaintiff has satisfied the requirement of showing a merger clause to not be specific with regard to the facts in dispute.

Plaintiff has made a legally cognizable claim for fraudulent inducement and the motion to dismiss is denied.

Second Cause of Action as to Plaintiff's Claim for Fraud as Against the Architect

Architect's motion to dismiss plaintiff's second cause of action for fraud in the inducement is granted.

In order to establish a cause of action for fraud, a plaintiff must plead a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance and damages. Eurycleia Partners, LP v. Seward & Kissel LLP, 12 N.Y.3d 553 (2009); see also Barclay Arms, Inc. v. Barclay Arms Assocs., 74 N.Y.2d 644, 647 (1989); Chanel Master Corp. v. Aluminum Ltd. Sales, 4 N.Y.2d

403 (1958). To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury. Sokolow, Dunaud, Mercadier & Carreras, LLC v. Lacher, 299 A.D.2d 64 (1st Dept 2002). Establishing reliance is "essential to a claim for fraud." Valassis Commn's, Inc. v. Weimer, 304 A.D.2d 448, 449 (1st Dept 2003).

In a fraud claim which produces economic injury sustained as a result of another's negligent misrepresentation, privity is an element. See Parrott v. Coopers & Lybrand LLP, 95 N.Y.2d 479, 483 (2000); see, e.g., Ossining Union Free School Dist. v. Anderson LaRocca Anderson, 73 N.Y.2d 417, 419-25 (2000); cf. John Blair Commc'ns., Inc. v. Reliance Capital Group, L.P., 157 A.D.2d 490, 492 (1st Dept 1990) ("privity ... is not an element of intentional fraud."). This rule has applied in cases involving may professions including architects. See, e.g., Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 80 N.Y.2d 377 (1992), rearg. denied 81 N.Y.2d 955 (lawyers); Ossining Union Free School Dist., 73 N.Y.2d at 417 (engineering consultants); Bri-Den Const. Co. v. Kapell & Kostow Architects, P.C., 56 A.D.3d 355 (1st Dept 2008), appeal denied 12 N.Y.3d 703 (2009) (no privity between architect and bidder); Sutton Apts Corp. v. Brandhurst 100 Devl LLC, 107 A.D.3d 646, 648-49 (1st Dept 2013) ("The tort claims against the architect fail for lack of contractual privity, or the functional equivalency of privity").

Even in cases where plaintiff sufficiently pled a cause of action for intentional fraud, the facts need to show that plaintiff actually relied on defendant's alleged misrepresentation. See John Blair Commc'ns. Inc., 157 A.D.2d at 492 ("a party who commits intentional fraud is liable to any person who is intended to rely upon the misrepresentation ... and who does in fact so rely").

Plaintiff's reliance on Wax NJ-2 in order to show privity in this case is misplaced. In the case of self-certification projects, as is the case here, "liability ... need not end at the boundary of privity, and may extend to others who are harmed when a professional fails to perform a duty." Wax NJ-2, LLC, v. JFB Constr. & Dev., 111 F. Supp.3d 434, 454 (S.D.N.Y. 2015) (in the context of a franchisee); see also 27 Jefferson Ave., Inc. v. Emergi, 846 N.Y.2d 868, 871 (N.Y. Sup. Ct. Kings Cnty. Nov. 19, 2007) ("Where a regulation imposes a duty for the benefit of an adjacent property owner, that owner may maintain an action against [the non-compliant party]") (in the context of a purchaser). However, in discussing the privity issue, the court in Wax NJ-2 referred to cases that involved adjacent property owners damaged by an architect's improper certifications for underpinning activities during construction. The court went on further to note that "none of these cases consider whether the obligation to undertake a self-certification inspection can give rise to privately enforceable duties to third parties other than owners of adjoining buildings[]." Id. at 455. Contrary to plaintiff's analysis, the court held that although

liability on a self-certification project need not end at the boundary of privity, the cases of privity tend to arise in the context of harm to property adjoining the one for which the professional took on self-certification obligations. Id. at 454. Plaintiff has failed to show that liability extends to a third party, without the benefit of privity or a relationship so close to that as privity, when, as here, an unknown third-party subsequently purchases the property.

Although plaintiff has adequately established that the Architect had signed off or self-certified to the Department of Buildings that the work set forth in the plans had been completed, when in fact it was not, plaintiff has failed to establish that they relied on the material misrepresentation of fact in making their decision to purchase the Townhouse. See John Blari Commc'ns, Inc., 157 A.D.2d at 492. Plaintiff admits that the latent defects were found once the sheetrock was removed, well after the time that the contract was signed and after the Home Inspector had completed the inspection. See Complaint ¶¶ 22-32. Plaintiff does not raise any facts which suggest that they relied upon the Architect's plans prior to purchasing the Townhouse. Accord Bri–Den Constr. Co., 56 A.D.3d at 355 ("prequalified bidders were simply not known at the time of the complained-of conduct"); Ford v. Sivilli, 2 A.D.3d 773, 774–75 (2d Dept 2003) (no privity because "plaintiffs were part of an indeterminate class of persons who, presently, or in the future may rely upon [the architect's] alleged misrepresentations, which are not the equivalent of known parties");

Westpac Banking Corp. v. Deschamps, 66 N.Y.2d 16, 19 (1985) (although defendant may have known that the financial statements it prepared were for obtaining a loan, no privity where defendant did not know that client was showing its reports to plaintiff, rather than a class of potential lenders); cf. Ossining Union Free School Dist., 73 N.Y.2d at 417 (finding privity where defendants allegedly undertook their work in the knowledge that it was for plaintiff alone and had various types of contact directly with plaintiff alone) (all internal citations and quotations omitted). Therefore, plaintiff could not have been induced to purchase the Townhouse through statements made by the Architect regardless of the absence of privity.

For all of the foregoing reasons, defendant's motion to dismiss as to plaintiff's second cause of action as to the fraud claim against the architect is granted.

Fifth and Sixth Causes of Action as to Plaintiff's Claim for Negligence and Gross Negligence as Against the Architect

Architect's motion to dismiss plaintiff's fifth and sixth causes of action for negligence and gross negligence is granted.

To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach. Elmaliach v. Bank of China Ltd., 110 A.D.3d 192 (2013). It has long been the law

in New York that a plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship "so close as to approach that of privity." Sykes v. RFD Third Ave. 1 Assoc., LLC, 15 N.Y.3d 370 (2010) (citing Ultramares Corp. v. Touche, 255 NY 170, 182-83 [1931, Cardozo, Ch. J.]); see also Sutton Apts. Corp., 107 A.D.3d at 648-49 (upholding an architect's motion to dismiss for lack of contractual privity).

Plaintiff does not deny that privity must exist in order to maintain a negligence and gross negligence claim, rather plaintiff relies on Wax NJ-2 to establish that there is contractual privity between plaintiff and Architect. However, as discussed, *supra*, plaintiff has not adequately established that the holding in the case stands for the proposition that liability extends to an unknown third party who is harmed sometime in the unknown future, rather than to adjoining buildings, as stated in the case. As such, the plaintiff has failed to allege a contractual relationship with Thomas Vail.

Similar to this case, the court in Board of Managers of the Greenbelt Condominium v. 361 Manhattan Avenue LLC, et al., N.Y. Slip Op. 31958(U) (N.Y. Sup. Ct. Kings Cnty. Jul. 24, 2014), held that an architect does not owe a legal duty to a purchaser of a building where there is an absence of privity and the party is not a third-party beneficiary to the contract. As discussed, plaintiff is not in contractual privity with the Architect and is not a third-party beneficiary to the contract between Architect and Sellers.

A cause of action for gross negligence further requires a plaintiff to plead that the defendant engaged in a "conduct that evinces a reckless disregard for the rights of others of 'smacks' of intentional wrongdoing." Colnaghi, USA v. Jewelers Protection Servs., Ltd., 81 N.Y.2d 821, 823 (1993) (citation omitted). The claim for gross negligence relies upon the same elements as negligence except for the additional element of reckless disregard. As defendant's motion to dismiss has been granted for negligence for failing to establish privity, defendant's motion to dismiss must also be granted for plaintiff's sixth cause of action for failure to establish privity.

Therefore, defendant's motion to dismiss plaintiff's fifth and sixth causes of action is granted.

Accordingly it is,

ORDERED that the sellers' motion to dismiss plaintiff's first cause of action as to the fraud claim be denied; and it is further

ORDERED that the architect's motion to dismiss plaintiff's second cause of action as to the fraud claim be granted; and it is further

ORDERED that the architect's motion to dismiss plaintiff's fifth and sixth causes of action as to the claims for negligence and gross negligence be granted.

Date: July 25, 2016
New York, New York

Anil C. Singh