

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

TRECIA DiBIAS and ROY EDWARD DiBIAS,

Plaintiffs,

SUBMISSION DATE: 12/03/03

INDEX No.: 12856/01

-against-

A.V.P. EXTERMINATORS, INC., DOUGLAS
W. MUNCY, TED KAPLAN APPRAISALS, ABBEY
REAL ESTATE CORP., and PATRICIA GARABRANT, MOTION SEQUENCE #5, 6

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, defendant Ted Kaplan Appraisals motion for an order awarding summary judgment in favor of the moving defendants and for sanctions as against plaintiffs and plaintiffs' counsel pursuant to 22 NYCRR 130-1.1 is decided as follows. Defendant Patricia Garabrant's cross motion for an order awarding summary judgment is denied.

The instant action involves the purchase of real property located in Levittown, New York. Plaintiffs are the purchaser of a single family home that was sold by defendant Patricia Garabrant. The home was listed with defendant Abbey Real Estate. Defendant Douglas Muncy was hired by plaintiffs to conduct an inspection of the premises. A termite inspection was performed on behalf of the plaintiffs by defendant A.V.P. Exterminators, Inc. Defendant Ted Kaplan Appraisals were hired by plaintiffs' mortgage lender to prepare an appraisal of the property. After plaintiffs took possession of the home, they discovered extensive termite damage to the property.

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The instant action was commenced by the filing of a summons and complaint on or about August 17, 2001. Issue was joined as to the various defendants by service of their respective answers. The action has been certified ready for trial.

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). The goal of summary judgment is to issue find, rather than to issue determine. Hantz v. Fleischman, 155 A.D.2d 415, 457 N.Y.S.2d 350 (2d Dep't 1989). A motion for summary judgment should be granted if the evidence presented demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Baly v. Chrysler Credit Corp., 94 A.D.2d 781, 463 N.Y.S.2d 233 (2d Dep't 1983). "In determining a motion for summary judgment, the court must ascertain whether there are any triable issues of fact in the proof laid bare by the parties' submissions of affidavits based on personal knowledge and documentary evidence, rather than in conclusory or speculative affidavits." Id. citing Behar v. Ordovery, 92 A.D.2d 557.

In the instant action, the court finds that summary judgment is appropriate as to defendant Ted Kaplan Appraisals. Kaplan was hired by Land Record Resource Company on behalf of Bethpage Federal Credit Union to prepare an appraisal of the property prior to the closing. The appraisal was conducted on August 18, 1998. The appraisal contained a clause that said the appraisal was performed and excluded adjustments for an hidden and non-apparent conditions. In order for plaintiff to recover from defendant, there must be a showing of a special relationship between plaintiff and Kaplan. See, Chambers v. Executive Mortgage, 229 A.D.2d 416, 645 N.Y.S.2d 91 (2d Dept 1996). See, also, Diamond v. Precision Tank Testing, 2001 NY Slip Op 40141U; 2001 N.Y.Misc LEXIS 348 (City Court of White Plains 2001). The court finds that defendant Kaplan did not owe a duty to plaintiff, accordingly the action is dismissed as to Kaplan. Furthermore, Kaplan's application for sanctions is denied.

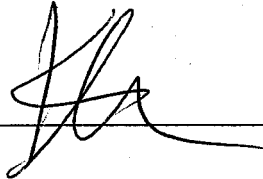
As to the cross motion by defendant Garabrant, the court finds that issues of fact exist as to whether defendant had prior knowledge of the hidden damage. The opponents to the motion have shown that Garabrant, prior to the property being put on the market for sale, hired the termite baiting company prior to the property being placed on the market, claiming she entered into the contract solely for a selling point. However, defendant never advertised

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nor informed potential purchasers of the treatments. Plaintiff claims she had no knowledge of the termite condition. Accordingly, issues of fact exist and the matter must be submitted to a trier of fact.

This decision constitutes the order of the court.

Dated: JAN 29 2004



J.S.C.
HON. KENNETH A. DAVIS

ENTERED

FEB 13 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE