SCAN

SHORT FORM ORDER *mod,mg*

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

ROBERT LEPLEY and MARTHA CHAMBERLAIN,

Plaintiff(s),

-against-

MOTION DATE:5/15/06
INDEX NO.:18219/02
SEQ. NO.2,3
CAL. NO. 2005H4652

DOUBLE EAGLE REALTY, LLC, PETER LOPIPERO, PETER T. ROACH AND ASSOCIATES, P.C., PETER T. ROACH, ESQ. , in his official capacity and individual capacity, THE LAW OFFICES OF ISAAC DORFMAN and ISAAC DORFMAN, ESQ., in his official and legal capacity,

Defendant(s)

The following papers read on this motion :

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Upon the foregoing papers, it is ordered that this motion by defendants Double Eagle Realty LLC., Peter Lopipero, Peter T. Roach and Associates, P.C. and Peter T. Roach, Esq. (hereinafter referred to as "Double Eagle Realty defendants") for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the plaintiffs' complaint and all cross claims against them is disposed of as follows.

Motion by defendants Law Offices of Isaac Dorfman and Isaac

Dorfman, Esq. (hereinafter referred to as the "Dorfman defendants") for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the plaintiffs' complaint and all cross claims against them is granted.

This action arises out of the plaintiffs' purchase of a house, located at 709 Clemons Street in Bellmore, New York. Defendant Double Eagle Realty, LLC was the seller of the house purchased by the plaintiffs. Defendant Peter Lopipero was an agent of Double Eagle Realty, LLC. Defendant Peter T. Roach and Associates, P.C. is a law firm and represented Double Eagle Realty, LLC at the closing. Defendant Peter T. Roach, Esq. is a principal and/or shareholder in defendant, Double Eagle Realty, LLC and also was the attorney that was present at the closing on behalf of Peter T. Roach and Associates, P.C. Defendant Peter T. Roach, Esq. is also the escrow agent of the sale proceeds of the house. The Dorfman defendants represented the plaintiffs in connection with their purchase of the subject house.

The plaintiffs set forth various causes of action against the Double Eagle Realty defendants alleging intentional misrepresentation, fraud in the inducement, breach of contract and breach of duty of good faith and fair dealing. Plaintiffs contend that the Double Eagle Realty defendants had an affirmative duty to reveal the source of an odor in the house, rather than wilfully concealing the cause of the odor by failing to repair a sump pump prior to the closing and thus prevent the discovery of the fact that the odor was caused by saturated cat urine. The plaintiffs also set forth a cause of action alleging legal malpractice in that the Dorfman defendants departed from generally accepted standards of practice in representing the plaintiffs in the purchase of the house.

On May 24, 2002, plaintiff Robert Lepley visited the subject house with his real estate agent and was shown the house by defendant Peter Lopipero, the agent of the seller, defendant Double Eagle Realty, LLC. Mr. Lepley did not detect any odors in the house on May 24, 2002. Plaintiff Martha Chamberlain visited the house later in the day on May 24, 2002 with the plaintiffs' son.

Thereafter, the plaintiffs decided to make an offer on the house.

On May 30, 2002, prior to executing the Contract of Sale, plaintiff Robert Lepley was present at the house with Jordan Ruzz, P.E. to conduct a formal inspection of the house. During the home inspection, Mr. Lepley noticed a mild odor in the kitchen. Mr. Lopipero and the engineer both acknowledged they smelled an odor. The engineer was not certain of the source of the odor.

When Mr. Lepley and the engineer went into the basement, the engineer took note of the deep ditch drainage system in the far corner of the basement and upon removing the cover, an odor emanated from the drainage pit. The engineer then told Mr. Lepley that the odor might be coming from the water in the drainage pit because the water had been there for quite some time. The engineer informed Mr. Lepley that to be sure about the smell coming from the drainage pit, the water would need to be pumped out. At the conclusion of the home inspection, the engineer gave an oral report to Mr. Lepley. The engineer's formal written report was not issued until June 6, 2006 and made no mention of any odor in the house, but did refer to the broken sump pump. The day after Mr. Lepley and the engineer's inspection of the house on May 31, 2002, the plaintiffs signed a contract of sale for the house.

The contract of sale contained the normal boiler plate clauses setting forth that the buyers have had an opportunity to inspect the premises, agreed to take same in "as is" condition, except the seller represented that the premises will be in substantially the same condition at the time of closing except for usual wear and tear between the date of the contract and the closing. Seller represented that the plumbing, heating and electrical systems in the dwelling will be in working order and the roof free of leaks at the time of closing. Further, that all prior understandings, agreement and warranties, oral or in writing, are merged into the contract, and neither party is relying on any statements made by anyone else not set forth in the contract. Both parties were represented by counsel of their choosing who joined in the negotiations at arms length. No part of the contract could be waived or changed except in writing. Paragraph 56 of the rider was

amended (by a handwritten addition) to reflect the agreement that if the closing did not take place on July 15, 2002 "or within four (4) weeks thereafter," then all apportionments would be made as of July 15, 2002. A new paragraph 59 to the rider (also handwritten) stated that "seller agrees to install a thermostat in the basement and replace the siding at the back of the house, and install new windows throughout the basement."

It is not disputed that neither the existence of the subject odor, nor Mr. Lepley's discussion of same with the engineer during the inspection of the house were brought to the Dorfman defendants' attention prior to the plaintiffs' execution and delivery of the contract of sale on May 31, 2002. After being present on May 30, 2002, for the home inspection, Mr. Lepley did not return to the house until June 14, 2002, when he showed the house to his father. Mr. Lepley noticed that the odor was stronger than it had been on May 30, 2002, and inquired of Mr. Lopipero about the odor, but Mr. Lopipero indicated that he did not know what the odor was and, in fact, Mr. Lopipero inquired of Mr. Lepley as to what he thought was causing the odor. Mr. Lepley then told Mr. Lopipero about the conversation the engineer had with him concerning the odor possibly originating from the drainage pit in the basement. While with Mr. Lopipero, Mr. Lepley and Mr. Lopipero lifted the lid from the drainage pit, the odor was strong and Mr. Lopipero stated that he believed the source of the odor to be the water in the drainage pit, thus appearing to validate the engineer's theory that it was possible that the drainage pit was the source of the odor because there was a considerable amount of stagnant water in the drainage pit.

Mr. Lepley requested of Mr. Lopipero that the sump pump be repaired and that the water be pumped out of the drainage pit before the closing. Mr. Lopipero assured Mr. Lepley that the sump pump would be repaired and that the water would be pumped out prior to the closing. Subsequent to his visit to the house on June 14, 2002, Mr. Lepley claims he contacted the Dorfman defendants to tell them about the odor and related to Mr. Dorfman the conversations he had with the engineer and Mr. Lopipero about the source of the odor being the drainage pit. Additionally, Mr. Lepley faxed a page from

the engineer's inspection report to the Dorfman defendants that was annotated by Mr. Lepley and indicated that Mr. Lepley believed that the sump pump was "causing a terrible odor." This was the first notice to the Dorfman defendants of an odor problem in the house. Mr. Lepley directed that the Dorfman defendants contact the seller's attorney to request that the sump pump be repaired and the water be pumped out of the drainage pit. The Dorfman defendants contacted the seller's attorney who advised the Dorfman defendants that the sump pump would be repaired and the water would be drained from the drainage pit prior to the closing.

On July 18, 2002, the day prior to the closing, the plaintiffs visited the house to do a pre-closing walk though inspection. The plaintiffs observed that the sump pump had not been repaired and that the water had not been drained from the drainage pit. Mr. Lopipero then told the plaintiffs that they could meet him at the house on July 19, 2000, the morning of the closing, at 7:30 a.m. to do the final inspection. Plaintiff Martha Chamberlain spoke with Mr. Dorfman on July 18, 2002, the day prior to the closing, to advise him that the sump pump had not been repaired and that the water had not been removed from the drainage pit and to request his advice. Ms. Chamberlain claims that Mr. Dorfman told her that the plaintiffs should not close and that they would be able to get their down payment returned. Ms. Chamberlain advised Mr. Dorfman that a moving company was coming to their prior home that they had sold on July 22, 2002, to pick up their furniture and move it to the subject house. Mr. Dorfman's testimony differs substantially from the testimony of the plaintiffs as to what advice was offered on the day before the closing and at the closing.

On July 19, 2002, the morning of the closing, Ms. Chamberlain allegedly advised Mr. Dorfman via telephone that she stopped at the house; the sump pump had not been repaired; and the water had not been pumped from the drainage pit as Mr. Lopipero had promised the day before. Mr. Lepley claims that Mr. Dorfman told his wife that the plaintiffs must close, otherwise they would lose their down payment. The Dorfman defendants dispute this version of the conversation. Mr. Dorfman testified that he told Mr. Lepley on the morning of the closing that the closing should be adjourned and

that they had more time because their mortgage commitment letter did not expire until July 30, 2002.

The plaintiffs, Mr. Dorfman and the Double Eagle defendants were all present at the closing on the afternoon of July 19, 2002, in addition to a representative from the title company, as well as several other individuals. There were long discussions at the closing regarding the odor. Ms. Chamberlain claims she spoke with the Dorfman defendants concerning the sump pump and informed him that plaintiffs did not want to close unless the odor issue was addressed. However, Ms. Chamberlain acknowledges that the seller, through its attorney Peter T. Roach, Esq., took the position that there was "no way" the buyers were getting their down payment back. When the plaintiffs complained at the closing about an odor, Mr. Roach was adamant that he would only agree to cure any defect with regard to plumbing, heating and electric but that he refused to do anything else. During the closing, the parties discussed the idea of creating an escrow to address the sump pump issue. Mr. Roach testified that it was Mr. Dorfman that requested that the escrow agreement include language whereby sellers would be required to cure the odor, but Mr. Roach told Mr. Dorfman he would not put such language in the escrow agreement. The parties negotiated an escrow agreement that provided that the sump pump would be repaired, the water would be pumped from the drainage pit, the basement would be cleaned, and that money would be held in escrow pending completion of the items in the escrow agreement. Plaintiffs claim that at the closing, Mr. Dorfman vacillated on whether the plaintiffs should or should not close, but that ultimately, Mr. Dorfman told them they must close otherwise they would lose their down payment. Mr. Lepley expressed several concerns to Mr. Dorfman at the closing; namely, he says he told Mr. Dorfman that if the closing did not go forward, the plaintiffs did not have a place to store their personal property because they had closed on the sale of the home in which they were residing, and had arranged for movers to pick up their belongings on July 22, 2002, or three days after the closing on the house. In this regard, Mr. Lepley testified that he told Mr. Dorfman:

Q. But you did state that to Mr. Dorfman?

A. Yes. Martha and I were-that was on of the things that we were concerned about and we brought it up often with Mr. Dorfman. We said, "Look, we've closed on our other house. We have movers picking up all of our stuff the following Monday after the closing. We're going to be in a big jam because it's going to cost us more money to get the movers to take stuff and put it in storage, and then hire the movers to take it out of storage when he move." And we were depleted of funds at that point. We sunk every last penny we had into this house. So we had our backs to a wall and we were very panicked. We were-we were trying to seek some kind of stable wisdom here on what we should do and we just kept getting vacillation. Well, you should close, you shouldn't close. Yes, close. No, don't close. And finally Mr. Dorfman finally made up his mind said "Yeah. You've got to close You're going to lose your $17,000 down payment. You know, you don't have any place to store your stuff. Movers coming. It's going to cost all this additional money to have the movers store it," and all of that.

When the issue of adjourning the closing was raised, Mr. Roach was adamant that he would not adjourn the closing to cure the odor. He suggested that the plaintiffs either cancel the closing and litigate the issue or go forward with the closing. The plaintiffs chose to go forward with the closing. Mr. Roach testified that he distinctly recalled a conversation at the closing wherein the plaintiffs elected to close rather than to unpack their personal belongings.

On a motion for summary judgment, the Court's function is to

decide whether there is a material factual issue to be tried, not to resolve it. Sillman v Twentieth Century Fox Films Corp., 3 NY2d 395, 404. A prima facie showing of a right to judgment is required before summary judgment can be granted to a movant. Alvarez v Prospect Hospital, 66 NY2d 320; **Winegrad v New York University Medical Center**, 64 NY2d 851; **Fox v Wyeth Laboratories, Inc.**, 129 AD2d 611; **Royal v Brooklyn Union Gas Co.**, 122 AD2d 133). The defendants have made an adequate prima facie show of entitlement to summary judgment.

Once a movant has shown a prima facie right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form (**Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.**, 46 NY2d 1065). Conclusory statements are insufficient (**Sofsky v Rosenberg**, 163 AD2d 240, aff'd 76 NY2d 927; **Zuckerman v City of New York**, 49 NY2d 557; see **Indig v Finkelstein**, 23 NY2d 728; **Werner v Nelkin**, 206 AD2d 422; **Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides**, 80 AD2d 781, app dism. 53 NY2d 1028; **Jim-Mar Corp. v Aquatic Construction, Ltd.**, 195 AD2d 868, lv app den. 82 NY2d 660).

The plaintiffs challenge the Double Eagle defendants' representations that the seller did not know that the origin of the odor was saturated cat urine that severely damaged the house. Plaintiffs contend the Double Eagle defendants intentionally concealed the source of the odor, which was latent and known only to them. Plaintiffs' allege the odor was not caused by the standing water in the collection pit located in the basement, but rather by the deposits of cat urine. Plaintiffs contend the defendants adopted the theory put forward by the engineer that the odor was due to the standing water, knowing said representation to be false. Plaintiffs also contend defendants maintained this alleged fraud by not fixing the sump pump until after plaintiffs closed on the premises. In support of their position, the attorneys for the plaintiffs state the defendants never disclosed they ordered and paid for the walls of the basement to be washed with commercial soap to remove cat odor, replacing 200 square feet of floor boards

in the living and dining room, and power washing the basement with commercial cleaners. The plaintiffs further allege the defendants knew the source of the odor to be from the cat urine based on the disclosure (which has not been refuted by any of the defendants) that when the Double Eagle Realty defendants purchased the house there were at least five large cat cages that could hold up to 15 cats each. The cages were placed outside five window flaps that opened from the cages directly into the basement. Mr. Lopipero caused the cat cages to be disposed of and removed. Plaintiffs also allege that defendant Lopipero knew that cat urine had severely contaminated the entire first floor of the house, because Mr. Lopipero had hired a construction company and had personally supervised the construction company in the removal of many boards in the first floor that had been "stained black with cat urine."

In New York the seller of real property is not under a duty to speak when the parties deal at arm's length. The mere silence of the seller, without some act or conduct which deceived the buyer, does not amount to a concealment that is actionable as fraud. The purchaser has a duty to satisfy himself as to the quality of his bargain pursuant to the doctrine of caveat emptor (see **London v Courduff**, 141 AD2d 803). However, the rule of caveat emptor is applied with certain restrictions, and is not permitted where it can be demonstrated that it was the duty of the vendor to acquaint the purchasers with a material fact known to the former and unknown to the latter (see **Scharf v Tiegerman**, 166 AD2d 697; see **Haberman v Greenspan**, 82 Misc.2d 263, 266, also C.J.S. Vendor and Purchaser, Section 57). In the within action, there is an issue of fact as to whether there was active concealment of an alleged latent defect i.e., the source of the odor. The plaintiffs contend that the defendants, acquainted with the facts, deliberately endeavored to put obstacles in the way of the buyers so as to prevent them from learning the source of the odor. There is a question of fact as to whether the Double Eagle Realty defendants intentionally and actively concealed the real source of the odor by not fixing the sump pump, and thus preventing the discovery of the fact that the odor was due to cat urine at the premises. Another issue of fact raised herein is whether the plaintiffs were justified in relying on the representations of the vendors, or did they have adequate

opportunity, and time through reasonable efforts or ability to independently ascertain the alleged source of the odor.

The issue of the alleged concealment of the source of the odor was framed once the contract was signed, and the seller agreed to repair the sump pump so that the standing water could be drained prior to the closing. Although the Double Eagle Realty defendants insist that all terms and conditions were merged into the written agreement, and no oral statements can be used to modify or alter its terms, it is not disputed by any party to this litigation that the Double Eagle Realty defendants orally agreed to repair the sump pump prior to the closing. Simply put, the plaintiffs contend that based upon their engineer's recommendations, only after repairing the sump pump could the source of the odor be determined, and the reason the sump pump was not repaired was that the Double Eagle Realty defendants did not want to disclose what they knew to be the true source of he odor.

It is the alleged concealment prior to the contract signing that gives rise to the threshold issue of fact that precludes the granting of the Double Eagle Realty defendants' motion for summary judgment. Assuming arguendo that the closing was adjourned a few days to allow for the repair of the sump pump, and a possible determination by the plaintiffs of the true source of the odor, what recourse would the plaintiffs have had? They could refuse to close, and sue for the return of the down payment; or close under protest, and then sue for fraud, intentional concealment and breach of contract as they are now doing.

At his deposition, Mr. Roach testified:

> "As I previously stated, at some time prior to the contract I was informed of some problem. I don't recall whether it was cat odor, cat urine, what it was, I was informed of some problem that I refused to accept responsibility for."

Double Eagle Realty LLC is a real estate investment company

that buys, renovates and resells real estate. Mr. Lopipero received a commission from Double Eagle when a house was sold. Mr. Lopipero testified that when Double Eagle purchased the house there was a distinct cat odor in the premises. However, when the house was inspected by the plaintiffs, he didn't recall there being a cat odor since they took steps to "take care of the problem." Whether Mr. Roach agreed to accept responsibility for the odor is not the issue before this Court, but rather whether he knew of the condition and intentionally concealed it from the plaintiffs, and whether they were reasonably justified in not discovering the condition themselves. Based upon the escrow agreement signed by the parties, and the position of the Double Eagle Realty defendants at the closing, there is a question of fact as to whether the sellers may have concealed the source of the odor prior to the signing of the contract to the detriment of the buyers.

The claim for intentional infliction of emotional distress (Fifth Cause of Action) is dismissed. Assuming the allegations in the complaint to be true, they do not rise to the level of outrageous conduct on the part of the Double Eagle Realty defendants (see **Howell v New York Post Co, Inc..**, 81 NY2d 115; **Murphy v American Home Products Corp.**, 58 NY2d 293.

The seller seeks summary judgment dismissing the seventh cause of action for punitive damages. The sellers allege there is no basis in law or fact for a claim of punitive damages relative to the facts and circumstances set forth in the pleadings and the parties' deposition testimony. There is no separate cause of action for punitive damages since punitive damages are but an incident of ordinary damages (see **APS Food Systems, Inc. v Ward Foods, Inc.**, 70 AD2d 483). To claim punitive damages incident to damages under another causes of action, the buyers must demonstrate grounds for punitive damages. The generally accepted principle on a punitive damages claim is that "punitive damages are awarded in tort actions where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime" (**Prozeralik v Capital Cities Communications, Inc.**, 82 NY2d 466. Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances

of aggravation or outrage, such as spite or malice, or fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton" (**Prozeralik**, supra at 479, citing Prosser and Keeton, Torts § 2, at 9-10 [5th ed. 1984]). The buyers have failed to present any evidence sufficient to raise an issue of fact to demonstrate that the conduct of the Seller rises to the level of high moral culpability to support a claim for punitive damages. The motion of the defendant-seller for summary judgment dismissing any claims for punitive damages is granted.

The Fifth and Seventh Causes of Action of the complaint are dismissed. Summary judgment is denied and plaintiff may proceed to trial on the First, Second, Third and Fourth Causes of Action.

To prevail in an action to recover for legal malpractice, a plaintiff must establish that (1) the defendant attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community, (2) the attorney's negligence was a proximate cause of the loss sustained, (3) the plaintiff incurred damages as a direct result of the attorney's actions, and (4) the plaintiff would have been successful if the attorney had exercised due care (see **Avery v Sirlin**, 26 AD3d 451).

The plaintiffs signed the contract prior to informing the Dorfman defendants of the odor problem. Only after plaintiffs signed the contract did they advise the Dorfman defendants that the engineer believed that the odor might be emanating from the sump pump; and the condition could be rectified by repairing the sump pump and removing the stagnant water from the drainage pit. In June, 2002, after Mr. Lepley and his father visited the house and smelled the odor, at the request of plaintiffs, the Dorfman defendants contacted the seller's attorney. The Dorfman defendants did not hear again about the issue of the odor until the day prior to the closing when the plaintiffs advised their attorney that the required repairs had not been made and the water had not been pumped from the drainage pit. When an attorney has several alternatives which might have been pursued, selection of one among

several reasonable courses of action does not constitute legal malpractice (see **Rosner v Paley**, 65 NY2d 736). The tone of the closing was set when defendant Peter T. Roach, the seller's attorney let everybody know that there was "no way" the plaintiffs would get their down payment back.

In deciding which advice to give, the Dorfman defendants had to decide between three different reasonable courses of action while weighing the facts and circumstances as described to him by the plaintiffs. First, Mr. Dorfman could have advised the plaintiffs to adjourn the closing so that the odor problem could be addressed. Second, Mr. Dorfman could have advised the plaintiffs to proceed with the closing subject to an escrow agreement. Third, Mr. Dorfman could have advised the plaintiffs not to proceed with the closing and litigate the sump pump/odor issue in a breach of contract action. Each of the three alternatives were reasonable courses of action, and the choice between the three required the Dorfman defendants to consider the facts and circumstances that existed at the time of the closing. On the one hand, if the closing was adjourned and did not proceed as planned on July 19, 2002, the plaintiffs would not have had a place to store their personal property nor would they have had a place to live. On the other hand, if the closing did not proceed and the issue of the sump pump/odor was litigated, the plaintiffs could lose their down payment, pending the outcome of the lawsuit, while not having a place to store their personal property, and not having a place to live. Additionally, if the closing proceeded subject to a $20,000 escrow agreement, theoretically, the amount in escrow was substantial enough to remedy the sump pump problem. Any of the three courses of action were reasonable and prudent under the circumstances and would have been consistent with the degree of care, skill and diligence commonly possessed by a member of the legal community in representing a purchaser in a real estate transaction. The plaintiffs and their expert criticize the choice made by the Dorfman defendants without demonstrating any alternative action that would have revealed a better result, or that the advice given by Mr. Dorfman was unreasonable under the circumstances (see **Rosner v Paley**, supra; **Grago v Robertson**, 49 AD2d 645; **Wexler v Shea & Gould**, 211 AD2d 450).

Regardless of the advice given to the plaintiffs by the Dorfman defendants, the parties would still be in court litigating the factual issues of the alleged concealment of a latent defect and justifiable reliance. The plaintiffs have failed to demonstrate that but for the alleged negligence of the Dorfman defendants, they would have achieved a more favorable result.

The Dorfman defendants' motion for summary judgment is granted. The complaint is dismissed against the Dorfman defendants. The Dorfman defendants' cross claim against the Double Eagle defendants for contribution and common-law indemnification is moot and therefore dismissed. The Dorfman defendants shall be deleted from the caption as party defendants.

Dated: JUN 05 2006

J.S.C.