SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. VICTOR M. ORT
Justice

TRIAL/IAS PART 37

BARBARA KEMPISTY AND JOHN KEMPISTY
Plaintiffs

NASSAU COUNTY
INDEX NO. 015968/97
MOTION DATE: 03/30/01
MOTION SEQUENCE: 005-006

-against-

JANET LAUDONE, DOUGLAS LAUDONE, DEBORAH H. WEIN, PRO REALTY GROUP,
Defendants

DOUGLAS LAUDONE AND JANET LAUDONE,
Third-Party Plaintiffs

-against-

RELIANCE UTILITIES, "X" CORPORATION, PETROLEUM HEAT AND POWER CO., INC., "Y" CORPORATION, STAR GAS AND POWER, L.P. AND "Z" CORPORATION,

The following papers read on this motion:

Notice of Motion	1-9
Memorandum of Law in Support of Defendants/Third-party Plaintiffs Douglas and Janet Laudone's Motion for Summary Judgment	10-37
Notice of Cross-Motion for Summary Judgment	38-42
Memorandum of law in Support of Defendants Deborah H. Wein and Pro Realty Group's Cross-Motion for Summary Judgment	43-57
Affirmation in Opposition	58-120

Reply Affidavit in Further Support of the Motion for Summary Judgment of Defendant/Third-party Plaintiffs Douglas and Janet Laudone	121-133
Reply Affirmation	134-138
Sur-Reply Affirmation	139-143
Sur-Reply Affirmation	144-148

This is an action for fraudulent concealment, rescission of a contract of sale of real property, and for damages under § 181 of the Navigation Law. Defendants Douglas and Janet Laudone are moving and defendants Deborah Wein and Pro Realty Group are cross-moving for summary judgment dismissing the complaint. Alternatively, defendants Douglas and Janet Laudone seek renewal and reargument of their prior motion to dismiss the complaint based on spoliation of evidence.

On July 22, 1996 plaintiffs John Kempisty and Barbara Kempisty entered into a contract of sale to purchase a residential property known as 7 Seabreeze Road from defendants Douglas and Janet Laudone. The property is situated on a navigable canal in the Village of Massapequa. Defendant Pro Realty Group was the real estate broker in connection with the transaction. Defendant Deborah Wein was Pro Realty's sales agent who showed the house to plaintiffs. The contract provided in paragraph 21 that the purchaser had inspected the buildings and personal property on the premises and agreed to purchase them "as is" and in their present condition.

Prior to entering into the contract, plaintiffs had engaged Long Island Home Consultants to conduct an inspection of the property. LIHC issued a written report, finding that the house was generally well constructed and very well maintained but noting that the condition and quantity of buried oil tanks outside the house could not be determined at the time of inspection.

Although the report recommended that the purchaser test the tank and/or surrounding soil for possible leaks, plaintiffs did not have any such test performed prior to the closing.

Title to the property closed on September 24, 1996. Approximately three weeks after they took title, plaintiffs discovered that the oil tank was leaking. At the direction of the Environmental Protection Agency, oil spill remediation work was performed including excavation of the oil tank and surrounding soil and installation of ground water monitoring wells and ventilation units. The approximate cost of the work was $29,000, although a portion of the cost was apparently covered by insurance. Plaintiffs bring this action for damages and rescission of the contract. Plaintiffs allege that both before and after the contract, defendants utilized various air freshening devices to conceal the smell of oil and thwart plaintiffs' efforts to inspect the property.

The essential elements of a fraud claim are misrepresentation or nondisclosure of a material fact, falsity, scienter, and deception or reliance. Barclay Arms, Inc. v. Barclay Arms Associates, 74 N.Y.2d 644 (1989). The seller of real property is under no 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 purchaser, does not amount to a concealment which is actionable as fraud. London v. Courduff, 141 A.D.2d 803 (2d Dep't 1988). Pursuant to the doctrine of caveat emptor, the purchaser is under an obligation diligently to inspect the premises for defects. Jee Foo Realty Corp. v. Lemle, 259 A.D.2d 401 (2d Dep't 1999). Where, however, the seller affirmatively thwarts the purchaser's performance of its obligation to inspect diligently, a purchaser of real property may pursue a claim for fraud based on the active concealment of the seller. Id.

Since the parties dealt at arms' length in this real estate transaction, the Laudones were under no duty to volunteer the existence of a leak in their underground oil tank. Although the Kempisty's were under a duty to inspect the premises diligently, plaintiffs have (at least for the purposes of this motion) made a showing that the sellers affirmatively thwarted them from performing a thorough inspection by disguising the noxious odor which permeated the premises. Thus, plaintiffs' allegations of active concealment of the defect in the oil tank satisfy the materiality, falsity, and scienter requirements.

With respect to the reliance element, it is a much closer question. It is not necessary for defendant's concealment of a material fact to have been the exclusive cause of plaintiff's action or non-action for plaintiff to establish the element of reliance. Rather, it is sufficient that but for the failure to disclose, plaintiff would not have acted as he did, that is the nondisclosure was a substantial factor in inducing plaintiff's course of conduct. Curiale v. Peat, Marwick, Mitchell &Co., 214 A.D.2d 16 (1st Dep't 1995). The reliance must be justifiable, both in the sense that the party claiming to have been defrauded was justified in believing the representation and that he was justified in acting upon it. LoGalbo v. Plishkin, Rubano & Baum, 197 A.D.2d 675 (2d Dep't 1993). It may very well be that faced with an independent report recommending testing of the tanks, plaintiffs were not justified in relying upon the fresh scent supplied to the premises by the defendants. Nevertheless, since an issue of fact exists concerning whether the element of reliance is satisfied, defendants' motions for summary judgment must be denied as to the first, second, third, and fourth causes of action in the amended complaint.

The court reaches a like conclusion as to plaintiffs' claim under the Navigation Law. Section 181 of the Navigation Law provides:

> 1. Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section.
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> * * *
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> 5. Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

In White v. Long, 85 N.Y.2d 564 (1995), the Court of Appeals held that a property owner, deemed a pollutant-discharger under the Navigation Law, has a cause of action for the cost of cleaning up the site against a previous owner who actually caused the discharge. The court reasoned that the assurance that a cause of action is available against other potentially liable parties will provide an incentive to the current owner to effect the cleanup as soon as possible. 85 N.Y.2d at 569. Since the oil leak was discovered only a few weeks after plaintiffs moved in, the court may infer that plaintiffs are innocent owners who did not cause the discharge of petroleum onto their property. Indeed, the testimony of Joseph Palumbo, the Laudones' neighbor, that he smelled "heavy oil fumes" on the property during a severe winter storm in December, 1992, suggests that the discharge occurred several years before plaintiffs took title and that defendants' acts or omissions contributed to causing the discharge. See Hilltop Nyack Corp. v. TRMI Holdings, 264 A.D.2d 503 (2d Dep't 1999); Barclays Bank v. Tank Specialists, Inc., 236 A.D.2d 570 (2d Dep't 1997). Accordingly, defendants Janet and Douglas Laudone's motion for summary judgment dismissing the complaint is denied as to the fifth cause of action asserting a claim for violation of § 181 of the Navigation Law.

By order dated May 28, 1998, Hon. Howard Levitt denied defendants Douglas and Janet Laudone's motion to dismiss the complaint pursuant to CPLR 3126 for plaintiffs' spoliation of

evidence. Defendants now seek to renew and reargue that motion. Defendants contend that the excavation and disposal of the oil tank and surrounding soil in November, 1996 has impaired their ability to defend the action. Where a party deliberately destroys evidence, the court has discretion to impose a sanction, including prohibiting that party from introducing evidence in support or in opposition to a claim, deeming issues to which the information is relevant resolved in favor of the other party, or striking the pleading of the party who destroyed the evidence. CPLR 3126; Hyosung v. Woodcrest Fabrics, Inc. 106 A.D.2d 298 (1st Dep't 1984). In deciding whether a sanction is appropriate, the court may consider both the good faith of the party destroying evidence and the prejudice to the other party. Squiteri v. New York, 248 A.D.2d 201 (1st Dep't 1998). The court is also encouraged to devise sanctions which are "as narrowly tailored as possible to the circumstances of the individual case." DiDomenico v. C & S Aeromatik Supplies, Inc., 252 A.D.2d 41 (2d Dep't 1998). Where evidence is destroyed by the defendant in good faith in response to an emergency situation affecting the public safety, the extreme sanction of dismissal of the complaint is not appropriate. See Conderman v. Rochester Gas & Electric Corp., 262 A.D.2d 1068 (4th Dep't 1999)(fallen utility pole).

In the case at bar, the oil tank and surrounding soil were disposed of by plaintiffs in good faith pursuant to the directive of the Environmental Protection Agency. In view of the public interest in disposing of a damaged fuel tank leaking a toxic substance, the court will not impose a sanction merely because the tank and surrounding soil were disposed of prior to the commencement of the action in May, 1997. However, it appears from the testimony of Paul Napolitano, the environmental scientist who tested the soil when the tank was excavated, that his report concerning the soil borings is missing. While plaintiffs were justified in disposing of the

defective oil tank and contaminated soil, all reports concerning the disposal should have been preserved in order to protect the Laudones' ability to defend the action. Accordingly, the motion to renew the motion to dismiss for spoliation of evidence is granted. Upon renewal, defendants' motion to strike the complaint is denied without prejudice to an application to the trial court for an adverse inference charge based on plaintiffs' failure to produce the soil boring report. See PJI 1:77.

SO ORDERED

Dated: April 20, 2001

Victor M. Ort, JSC

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