SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. PETER B. SKELOS,
Justice.

TRIAL/IAS PART 25
NASSAU COUNTY

NAVID SEDAGHATPOUR and ENAYATOLLAH SEDAGHATPOUR,

Plaintiff(s),

-against-

MOTION # 04/05/06
INDEX #2013/00
MOTION SUBMITTED:
May 1, 2002

WILLIAM J. ZACCARIA, ESQ., TRYLON REALTY OF GREAT NECK, INC., SUSAN BIBIAN, SANDY ROSEN, ROGERS AND TAYLOR APPRAISERS, INC., GIOSEPHINE MORRONE and GARY P. TAYLOR

Defendant(s).

The following papers read on this motion:

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Notice of Motion/Order to Show Cause.....1, 2, 3
Cross Motions/Answering Affidavits.......4, 5, 6
Reply Affidavits.........................7, 8, 9
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On the court's own motion, this matter was recalendared for May 1, 2002 and the motions submitted for decision on that day. The seven defendants, being sued by the plaintiffs on various theories of liability, are seeking summary judgment against the plaintiffs and the dismissal of all cross-claims. For the reasons that follow, the motions are granted.

The plaintiffs purchased a home at 8 Sycamore Drive, Great Neck, NY for $675,000 on August 12, 1999. Two weeks later they discovered that the property was not connected to a sewer but instead had three cesspools which needed repair or replacement. Plaintiffs now claim that they never would have purchased the home if they had been aware of this fact, and

are seeking "monetary damages and damages for mental anguish emotional distress and anxiety."

The house was purchased under the name of Enayatollah Sedaghatpour, and his son, Navid. Mashid Sedaghatpour, wife of Enayatollah and mother of Navid, provides the only substantive affidavit in opposition to the motions, although the named plaintiffs aver that they have read same and affirm the facts stated therein.

According to Mrs. Sedaghatpour, the plaintiffs engaged the services of defendant Trylon Realty of Great Neck when they began searching for a home in 1995. Defendants Bibian and Rosen are agents employed by Trylon (collectively "the Trylon defendants"). Over the next four years plaintiffs were shown approximately 50 homes by defendant Bibian, who conversed with Mrs. Sedaghatpour in both Farsi, her native language, and in English. Mrs. Sedaghatpour adamantly insists that she informed Ms. Bibian that she would only consider homes connected to a municipal sewer system. She states that this was one of the first inquiries she would make when informed of a new listing. This was important to the family for purposes of convenience and for "certain religious and cultural principles that are significant for us." Plaintiffs do not elaborate on these religious and cultural concerns.

Mrs. Sedaghatpour claims that when first shown the subject property in April 1999 by Bibian and Rosen, she asked about the sewer connection and was assured by Bibian that the home was connected to a sewer line. Mrs. Sedaghatpour claims that in her presence, Ms. Bibian made the same representation to the inspector for the first mortgage company contacted. Bibian apparently made the same representation to defendant Morrone, a real estate appraiser employed by defendant Rogers & Taylor Appraisers, Inc. (collectively "the R&T defendants"). R&T was retained by the second lender plaintiffs approached, and this misrepresentation is

incorporated into R&T's appraisal report prepared for the lender.

Plaintiffs hired defendant Zaccaria to represent their interests in purchasing the property. At his request, a title report was prepared that clearly indicates the home has a cesspool rather than a sewer connection. Mrs. Sedaghatpour claims that she was not present for this inspection and was not told when it was taking place despite her stated desire to be present for same. Furthermore, she contends that neither Bibian nor Zaccaria reviewed this title report with plaintiffs prior to the closing. Ms. Sedaghatpour insists that had plaintiffs known of the existence of a cesspool rather than a sewer connection at any time prior to the closing, they would not have purchased the house.

The Trylon defendants claim that the listing agreement showing a sewer connection was a typographical error. The Trylon defendants attribute this oversight to the fact that the sewer issue was never raised by the plaintiffs in all of the years that they were working to find plaintiffs a home. This stands in sharp contrast to Mrs. Sedaghatpour's contention that a sewer connection was a "condition precedent" to a home purchase.

Claims Against Zaccaria

Plaintiffs accuse Zaccaria of negligent and careless conduct and breach of fiduciary duty in failing to discover and advise plaintiffs that the premises was not connected to a municipal sewer system, in failing to advise plaintiffs of the correct amount of municipal taxes that would be due and owing on the property, in failing to adequately explain the terms and conditions of the sales contract and closing documents, and in failing to disclose that he was also representing the interest of the mortgage lender.

In his affidavit, Zaccaria denies that plaintiffs ever mentioned the need for a municipal sewer connection as a condition precedent to the sale. He denies that he was ever asked to

investigate this issue. He states that "[w]hen plaintiffs retained my services, they were fully aware of the material condition of 8 Sycamore Drive and were satisfied that whatever conditions they required in a home were met by these premises." He avers that he disclosed his previous representation of the mortgage lender to plaintiffs and agreed to have an attorney from his office represent the lender at the same closing in order to accommodate plaintiffs' desire to prevent further delay. He insists that plaintiffs waived any conflict. He further avers that he made the customary adjustment in the closing documents for oil remaining in the fuel tank and made standard statements regarding closing costs and tax estimates.

A prima facie case of malpractice requires proof of the defendant's negligence, that such negligence was the proximate cause of the plaintiff's loss, and actual damages (*Shopsin v Siben & Siben*, 268 AD2d 578). "For a defendant in a legal malpractice action to succeed on a motion for summary judgment, evidence must be submitted in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements" (*id.*). Zaccaria's affidavit provides sufficient evidence to establish his entitlement to summary judgment. Plaintiffs have failed to create a triable issue of fact in rebuttal.

In her affidavit, Mrs. Sedaghatpour does not affirmatively state that she informed Zaccaria that connection to a municipal sewer system was a condition precedent to the purchase of the home. There is no indication whatsoever that Zaccaria was aware of this alleged prerequisite. This was not a condition to closing listed in the contract of sale that plaintiffs signed on May 20, 1999. As such, any failure by Zaccaria to inform plaintiffs that the property utilized a cesspool, a task outside the scope for he was retained, can hardly be deemed malpractice (*see, e.g., Darby & Darby, P.C. v VSI International, Inc.*, 268 AD2d 270, 271-72).

Moreover, Zaccaria ordered a title report which clearly indicated that the property had a

cesspool rather than a sewer connection. The settlement statement and HUD-1 forms prepared by Zaccaria clearly indicated that sewer taxes on the property were $0.00. Plaintiffs signed these closing documents and are charged with knowledge of their contents (*Martino v Kaschak*, 208 AD2d 698). They cannot be excused from any failure to read and understand the contract and closing documents simply because they possess limited English language skills (*Kassab v Marco Shoes Inc.*, 282 AD2d 316; *Shklovskiy v Khan*, 273 AD2d 371, 372; *Sofio v Hughes*, 162 AD2d 518, 520). It was incumbent upon plaintiffs to have the contents and meaning of the documents explained to them (*id.*). If, as Mrs. Sedaghatpour contends, Mr. Zaccaria ignored plaintiffs' repeated requests to review the documents, plaintiffs should have sought other counsel or should have withheld their signatures until the documents were explained to their satisfaction. Such forbearance would have been reasonable before closing on a house for $675,000.00, especially when plaintiffs felt so strongly about the presence of a sewer connection as a precondition to purchase. There is simply no evidence of negligent conduct on the part of Zaccaria to sustain a cause of action for malpractice. As such, Zacarria is entitled to summary judgment on the first cause of action.

To the extent that the plaintiffs' breach of fiduciary duty claim arises from the same facts as the malpractice claim, Zaccaria is likewise entitled to summary judgment on the second cause of action (*Best v Law Firm of Queller & Fisher*, 278 AD2d 441, 442; *Mecca v Shang*, 258 AD2d 569, 570). Zaccaria's dual representation of the mortgage lender and the plaintiffs does not alter this outcome. Dual representation is not necessarily a breach of fiduciary duty (DR 5-105; 22 NYCRR §1200.24). Mr. Zaccaria avers that he informed plaintiffs of the implications of the simultaneous representation and that they agreed to same. Mrs. Sedaghatpour does not deny this in her affidavit. Moreover, plaintiffs do not allege, nor does

it appear that plaintiffs suffered any damages whatsoever as a result of this dual representation. The court deems plaintiffs' remaining allegations against Mr. Zaccaria without merit.

Claims Against Trylon Defendants

Plaintiffs charge Trylon Realty and its agents Bibian and Rosen with deceptive business practices in violation of General Business Law §349 and negligent representation. These defendants insist that the doctrine of caveat emptor operates to bar recovery by the plaintiffs. That doctrine "imposes no duty on the part of a seller to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment. To maintain a cause of action to recover damages for active concealment in the context of a fraudulent nondisclosure, the plaintiffs must show, in effect, that the seller thwarted the plaintiffs' effort to fulfill their responsibilities fixed by the doctrine of caveat emptor" (*see Platzman v Morris*, 283 AD2d 561, 562 [citations omitted]). In short, "the buyer has the duty to satisfy himself as to the quality of his bargain" (*London v Courduff*, 141 AD2d 803, 804). The Trylon defendants fail to acknowledge, however, that this doctrine is inapplicable when there is a confidential or fiduciary relationship between the parties (*see Glazer v LoPresti*, 278 AD2d 198). This appears to be the case here.

There is no evidence or allegation that any of the named defendants represented the sellers in this real estate transaction. Indeed, the Trylon defendants had been working for years to find plaintiffs a suitable home. Thus, there appears to be at the very least a "special relationship" between the plaintiffs and the Trylon defendants sufficient to state a cause of action for negligent misrepresentation (*see Grammer v Turits*, 271 AD2d 644, 645; *Houlihan/Lawrence, Inc. v Duval*, 228 AD2d 560, 561-62). Moreover, it appears that a fiduciary relationship existed between plaintiffs and the Trylon defendants sufficient to state a

cause of action for fraud (*see Precision Glass Tinting, Inc. v Long*, 293 AD2d 594). As such, the doctrine of caveat emptor will not apply to bar recovery by the plaintiffs. Nonetheless, the Trylon defendants are entitled to summary judgment on these causes of action.

In order to prove fraud, the plaintiffs must establish that the defendants made a material misrepresentation of fact which was known to be false or made with reckless disregard for its truth, that such statement was made to induce the plaintiffs to rely on same, and that plaintiffs suffered actual damages as a result of such justifiable reliance (*Berger-Vespa v Rondack Building Inspectors Inc.*, 293 AD2d 838, 840; *Hausler v Spectra Realty, Inc.*, 188 AD2d 722, 723). A party alleging fraud in the inducement bears the burden of proving these elements by clear and convincing evidence (*Callahan v Miller*, 194 AD2d 904, 905). Similarly, to sustain a cause of action for negligent misrepresentation, plaintiffs are required to demonstrate that defendants had a duty, based on some special relationship, to impart correct information, that the information given was false or incorrect and that plaintiffs reasonably relied upon the information provided (*Berger-Vespa, supra* at 841; *Hausler, supra* at 724).

Both Bibian and Rosen aver that plaintiffs made no mention to them of the need for a sewer connection as a condition precedent to the purchase of the subject premises or any other premises. They further aver that they made no intentionally false representations whatsoever regarding the nature of the waste disposal system at the subject premises. They describe the reference to a sewer connection on the real estate listing as a "typographical error," but insist they did nothing to prevent plaintiffs from ascertaining the truth about this fact. In this regard, Bibian states: "Prior to entering into the Contract of Sale for their home, the plaintiffs had visited the house approximately 15 times, and hired several different appraisers, two contractors and an engineer to inspect and evaluate the subject property. I had no involvement

with the hiring of any of these inspectors, engineers or appraisers." She continues that "the experts retained to examine and inspect the property provided written reports which clearly set forth the precise nature of the waste disposal system." Significantly, Mrs. Sedaghatpour does not dispute this allegation in her affidavit. Bibian concludes that it was plaintiffs' responsibility to resolve any confusion that may have existed regarding the type of waste management system in place at the premises.

The court agrees that plaintiffs were not justified in relying on any incorrect or false representations that may have been made by the Trylon defendants. Plaintiffs had unfettered opportunity to inspect the premises to their full satisfaction. By her own admission, Mrs. Sedaghatpour was very involved in the inspections and appraisals that took place prior to the closing, and even lamented the fact that she was not present for the post-contract R&T appraisal and the title inspection performed by Barretta LLC. However, despite the purported importance of a sewer connection, plaintiffs did not insist that such a connection be confirmed *prior* to entering the contract of sale on May 20, 1999. Plaintiffs hired Envirotech Inspection Services in April 1999 to initially inspect the premises and report on major deficiencies and significant observations, yet this report explicitly excluded a review of water and sewerage systems. Indeed, as the section entitled "waste lines" states on page 6 of the Envirotech report, "city sewer service, septic systems and all underground pipes are not a part of this inspection." As indicated above, plaintiffs likewise failed to review the Barretta title report which clearly indicated that the house had a cesspool rather than a sewer connection. "A party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament" (*Rodas v Manitaras*, 159 AD2d 341, 343; *Bando v Achenbaum*, 234 AD2d 242, 244).

> The general rule is that "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Danann Realty Corp. v Harris*, 5 NY2d 317 322, quoting *Schumaker v Mather*, 133 NY 590, 596).

Here, it simply does not appear that plaintiffs used the means available to them either prior to signing the contract or prior to the closing itself to confirm the method of waste disposal in place at the subject premises. Mrs. Sedaghatpour readily admits that a plumber fixing a routine clog informed her of the existence of the cesspool and showed her the openings in the basement and the front yard just two weeks after the closing. She was able to confirm that the residence was not connected to a municipal sewer system with a simple call to town hall. In the absence of justifiable reliance on any statement made by the Trylon defendants relative to a sewer connection, plaintiffs' causes of action based on fraud or negligence must fail (*see Dyke v Peck*, 279 AD2d 841, 843-44; *Glazer v LoPreste*, 278 AD2d 198, 199; *Callahan v Miller*, 194 AD2d 904, 905-06).

Claims Against the R&T Defendants

Plaintiffs charge R&T and its appraisers Morrone and Taylor with breach of fiduciary duty, deceptive business practices in violation of General Business Law §349 and negligent representation all arising from their failure to accurately report the existence of a cesspool rather than a sewer connection in their appraisal report. Like the Trylon defendants, the R&T defendants raise the defense of caveat emptor, and just as above, the court concludes that this defense is not available to the appraisers. While it is true that the R&T defendants never had contact with the plaintiffs, as they were hired by the lending institution evaluating plaintiffs'

mortgage application, it still appears that a relationship approaching privity existed between these parties. As the Appellate Division explained in *Houlihan/Lawrence Inc. v Duval*, 228 AD2d 560, 561, "there may be liability for negligent misrepresentation where there is a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant's understanding of their reliance." The preparation of an appraisal report which will be relied upon by a lender in extending credit to a known party is one such relationship. In such a situation, as in the present case, the relying party is the potential mortgagor for whose use the representation is intended (*see Caramonte v Barton*, 114 AD2d 680, 681-82). Accordingly, the doctrine of caveat emptor is not applicable to this case.

Nevertheless, the R&T defendants are clearly entitled to summary judgment on all claims asserted against them for the same reasons warranting summary judgment in favor of the Trylon defendants. Here, both Morrone and Taylor aver that they were not aware of plaintiffs' desire to purchase residential property connected to a municipal sewer system. It is clear that none of the R&T defendants ever came into contact with the plaintiffs. In preparing her appraisal report, Morrone states that she relied on a representation made by Bibian as to the existence of a sewer connection. Significantly, both Morrone and Taylor state that this information was irrelevant to their appraisal of the property as "the appraised value of the subject premises would not be affected by the type of waste disposal system utilized." There is simply no indication in Mrs. Sedaghatpour's affidavit that the plaintiffs relied upon the R&T appraisal in any fashion in deciding to purchase the property. As such, plaintiffs' causes of action against the R&T defendants must be dismissed (*see Dyke v Peck*, 279 AD2d 841, 843-

44; *Glazer v LoPreste*, 278 AD2d 198, 199; *Callahan v Miller*, 194 AD2d 904, 905-06).

ORDERED that the motions by all defendants seeking summary judgment dismissing all claims and cross-claims asserted against them are granted. All claims and cross-claims asserted against the various defendants are dismissed and this matter is hereby disposed.

Dated: August 14, 2002

PETER B. SKELOS, J.S.C.