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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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FRANK PULSIFER and JEANINE PULSIFER,

Plaintiff,

Index No. 10975/01

against

Motion No. 001

JOSEPH ARDITO, ESQ. and ARDITO & ARDITO,

Defendants.

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The court has considered the following papers on this motion:

Notice of Motion and supporting papers.....1
 Affidavits/affirmations in opposition.....2
 Reply affidavits/affirmations.....3

This action was commenced on or about July 17, 2001 by the plaintiffs, Frank and Jeanine Pulsifer, against their former attorney, Joseph Ardito and the law firm of Ardito & Ardito ("Ardito"). The plaintiffs' complaint contains a single cause of action alleging legal malpractice on the part of Ardito [and his law firm] stemming from his representation of the plaintiffs in connection with their purchase of the premises located at 160 East Maujer Street, Valley Stream, New York. The plaintiffs allege that Ardito deviated from accepted legal standards in failing to insert a termite clause in the residential contract of sale, in failing to disclose the termite report and or engineer's report, in allowing the contract to proceed to closing under the circumstances and in failing to advise the plaintiffs of the existence of termites and/or termite damage at the premises prior to the closing. Issue was joined in this matter by service of Ardito's verified answer dated August 30,

2001.

In their verified bill of particulars, the plaintiffs amplify the allegations in the complaint by claiming that Ardito failed to disclose to plaintiffs the contents of a termite report which plaintiffs allege was given to Ardito at the closing by Ann Marie Ver Pault (“Ver Pault”), a real estate agent from Century 21-Fisher Friendly who had brokered the sale on behalf of the seller, Jola A. Marcario (“Marcario”), the Executrix for the Estate of Helen C. Williamson. The plaintiffs claim that Ardito should not have allowed the closing to proceed without “first discussing with plaintiffs the findings in the termite report.”

Mr. Ardito avers that he made every effort to include a standard termite clause in the residential contract of sale. He contends, however, that Marvin Korobow, the seller’s attorney, told him that the seller refused to pay for any termite treatment at the premises and further refused to permit the inclusion of a termite clause in the residential contract of sale. According to Ver Pault, the seller, Marcario, specifically told her that the premises would be sold “as is,” and the contract of sale so provides. Mr. Ardito contends he subsequently advised the plaintiffs of the seller’s unwillingness to pay for treatment or have a termite clause inserted in the contract. Plaintiffs deny being so advised.

Defendant alleges the plaintiffs knew about the presence of wood destroying insects at the Maujer Street premises via an engineer’s inspection completed some two months before the closing and before they executed the contract of sale for the premises. More particularly, defendant alleges the engineer’s report plainly apprised the plaintiffs that the inspection had been limited only to visual observations that it did not extend behind walls

and that the plaintiffs, having been so informed, nevertheless executed the contract of sale and proceeded with the closing some two months later after it was agreed by the parties that the broker, Ver Pault, would pay for the cost of termite treatment.

Based upon those facts, defendant Ardito argues that he is entitled to summary judgment dismissing plaintiffs' complaint. He contends that plaintiffs cannot establish that he was negligent during the course of his representation of the plaintiffs and that they cannot establish that "but for" the alleged negligence, they would not have purchased the Maujer Street premises as a result of which they now claim damages.

The uncontested facts are as follows. On or about May 2, 1999, the plaintiffs executed a sales agreement/binder with Ver Pault for the purchase of the Maujer Street premises for a purchase price of \$195,500.00. On or about May 7, 1999 the plaintiffs' offer to purchase the Maujer Street premises for \$195,500.00 was accepted by Marcario. At or about this time, the plaintiffs retained defendant to represent them in connection with the contract and closing of title for the purchase of the Maujer Street premises. On May 17, 1999, a fax was forwarded by Ver Pault to Ardito and Marvin Korobow, Esq. ("Korobow"), counsel for Marcario, advising that Marcario had accepted the Pulsifers' offer to purchase the property and that an engineer would inspect the premises. Thereafter, on May 22, 1999, the plaintiffs retained William J. Hotz, P.E. ("Hotz") to conduct an engineer's inspection of the premises.

Prior to conducting the inspection, the plaintiffs signed a pre-inspection agreement with Hotz acknowledging that he would conduct an inspection of the premises for the

purpose of informing them of major deficiencies in the condition of the property. The agreement specifically indicated that the inspection would include an evaluation of the structural condition and basement of the Maujer Street premises. However, as indicated in the pre-inspection agreement, the plaintiffs were further advised that Hotz' inspection would be of readily accessible areas of the premises and, as such, was limited to visual observations of apparent conditions existing at the time of the inspection only. Hotz would not report on obscured or concealed defects and would not remove furniture, lift carpeting, remove panels or dismantle any items or equipment. The pre-inspection agreement and release was duly executed by Jeanine Pulsifer and Hotz on the day of the inspection, May 22, 1999. Hotz conducted his inspection in the presence of the plaintiff, Jeanine Pulsifer. Her mother, sister and brother-in-law were also present, as was the real estate broker, Ann Marie Ver Pault.

During the inspection, Hotz advised Jeanine Pulsifer that he had found evidence of wood destroying insects in the finished basement of the premises. Hotz pointed out the areas where treatment would be necessary. Upon completion of the inspection, Hotz prepared a "Building Analysis Report" for the plaintiffs. In this report, Hotz specifically advised the plaintiffs that he had found "signs of carpenter ants...in the basement (spray and treat)." Additionally, in the "Remarks" section of the inspection report, Hotz specifically advised the plaintiffs:

Insect Boring Activity and Rot

If there is an inaccessible basement or crawl space, there is a possibility that past or present termite activity and/or rot exists in

this area. Since no visual inspection can be made, it is not possible to make a determination of this damage if it exists.

Insect Boring Inspection

No inspection is made by this company to detect past or present insect boring activity or rot. We recommend you contact a qualified exterminator should you desire more information or a possible examination of the building and/or warranty.

In connection with his inspection, Hotz further provided the plaintiffs with a “Wood Destroying Insect Information” report. In this report, Hotz initially noted that it was “difficult to carefully examine [the] corners of basement and finished portion of same.” Hotz indicated that upon a careful visual inspection of the readily accessible areas of the premises, “visible evidence of wood destroying insects was observed.” Further, Hotz specifically noted the existence of “possible carpenter ants corpses in [the] northwest corner of basement.”

According to their bill of particulars, upon being so advised with regard to the discovery of wood destroying insects at the Maujer Street premises, the plaintiffs admit that they “were not happy with the document entitled ‘Wood Destroying Insect Information - Existing Construction.’” Plaintiff denies that she was advised of the specific locations of the insects. However, plaintiff was aware of the evidence of wood destroying insects and that a further inspection was recommended and that another company could take corrective measures. In fact a further inspection was performed, as was the treatment to rid the house of the active infestation.

As previously noted, the seller refused to include a termite clause in the contract of

sale. Rather than risk losing the sale, on May 23, 1999, one day after the building inspection by Hotz had been completed, Ver Pault spoke with Jeanine Pulsifer and advised her that she [Ver Pault] would provide treatment for the premises. Pulsifer agreed. Ver Pault retained Jon Legakes to conduct a termite inspection and report and to treat the premises, if necessary.

Jon Legakes prepared an estimate in the amount of \$850.00 for termite spraying and treatment at the Maujer Street premises. Included along with the treatment was a provision for a one year warranty transferable to the plaintiffs. On or about June 11, 1999, Ver Pault faxed correspondence to Ardito confirming her agreement to pay Legakes the \$850.00 for termite treatment at the premises.

Thereafter, on June 18, 1999, and *prior* to any treatment having been rendered by Legakes, the plaintiffs executed a contract of sale for the Maujer Street premises. Pursuant to the contract of sale, the plaintiffs acknowledged that they were fully aware of the physical condition and state of repair of the premises, had thoroughly inspected the premises and accepted the condition thereof. Clearly, the plaintiffs accepted the physical condition of the premises “as is,” with full knowledge that there was evidence of wood destroying insects.

On August 22, 1999, Legakes performed his inspection and treated the premises for the presence of termites and provided a one year warranty transferable to the plaintiffs. The report specifically noted that “the termite problem [had been] fully treated and [was] now inactive.” Additionally, in his report, Legakes stated that he did not observe any

visible damage, although he did indicate that his inspection, in accordance with the industry standard, did not allow for an assessment of structural damage.

On August 23, 1999, Ver Pault faxed correspondence and copies of Legakes' Termite Control Agreement and Report to Ardito. Therein, Ver Pault advised Ardito, "[T]he following pages are regarding 160 E. Maujer Street, Valley Stream and the termite treatment/guarantee for the premises. The work has been done and paid for, as per my agreement. I will bring the original guarantee and paperwork to the closing." Plaintiffs did not receive a copy of this report until after the closing. They received the report upon their discovery of the structural damage. Since the closing of title was not contingent on the delivery of a termite report, or the inspector's findings, the timing of the delivery of the report is of no import.

Jon Legakes, the person who performed the termite inspection, submitted an affidavit in support of the defendant's motion wherein he avers as follows:

I prepared a report in connection with my inspection and treatment of the premises wherein I indicated that the termite problem had been fully treated and was inactive. I also indicated that based upon a visual inspection of the readily accessible areas of the premises, I did not observe any visible damage.

However, to assess the extent and severity of any possible hidden structural damage to the premises would have required the breaking apart, dismantling and removal of objects at the premises including but not limited to moldings, floor coverings, wall coverings, sidings, ceilings, insulation, floors, furniture, appliances and/or personal possessions. Naturally, those areas of the seller's home would have to be reconstructed upon completion of the assessment. Such an endeavor is an expensive undertaking costing thousands of dollars.

The inspection that I performed, and the *industry standard*, is a visual inspection of accessible areas of the premises and specifically excludes the

breaking apart or dismantling of objects. The report that I prepared in connection with my inspection of the Maujer Street premises indicated that it was not a structural damage report and that no guarantee was made as to the existence or non-existence of structural damage to the home.

There is no proof but that Mr. Legakes' inspection was the industry standard.

Plaintiffs offer no proof that the terms of the so-called "standard termite clause" would allow for a more invasive or extensive inspection or an inspection and report of a nature other than that which was conducted by Mr. Legakes. There is no proof that the standard termite clause would have permitted the type of inspection which would have allowed for the discovery of the structural damages complained of by the plaintiffs. The plaintiffs offer no proof in support of their claim that they executed the contract of sale with the understanding that the termite issue was still outstanding, and that the sale was contingent upon there being no termites. To the contrary, it is clear that they were satisfied that the broker would underwrite the cost of the inspection, report and termite treatment.

It is clear from the plain language of the contract of sale that the plaintiffs accepted the Maujer Street property "as is" and acknowledged that they "were fully aware of the physical condition and state of repair of the premises, had thoroughly inspected the premises and accepted the condition thereof." The merger clause contained in the contract of sale clearly states that "all 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.”

Mrs. Pulsifer further admits to having had a conversation with Ver Pault prior to the closing wherein Ver Pault advised her that “the termite inspection was completed and everything was fine.” Therefore, prior to closing on the premises, the plaintiffs were aware that the additional [Legakes] inspection had been completed.

In addition to her awareness that the additional termite inspection had been completed, Jeanine Pulsifer also concedes her awareness of the existence of Legakes’ termite report made in connection with the inspection. In fact, she indicates that she had requested that Ver Pault fax her a copy of it prior to the closing. Although the plaintiff claims to have requested a copy of the Legakes report at this time, Ver Pault could not provide her with it due to the fact that her fax machine was broken. However, Ver Pault advised Mrs. Pulsifer that she would bring a copy of the report to the closing. Although the report was not produced at the closing, there is no evidence that the report contained any facts to give the Pulsifer’s cause to cancel the closing, even if the contract was not an “as is” contract. The report revealed no evidence of damage or active infestation.

The plaintiff claims that at the closing she assumed that Ardito reviewed the report and that no termites were found, and thus proceeded with the closing. In any event, having executed the contract of sale, the plaintiffs were “bound by its terms, absent a valid excuse for having failed to read it” (*see, Gillman v Chase Manhattan Bank* 73 NY2d 1). No such excuse has been proffered.

Although plaintiff states in her affidavit that plaintiffs “would not have purchased the premises if I had been made aware of the extensive termite damage,” the Legakes

report did not note any visible damage. There is no proof that an inspection pursuant to a standard clause would have revealed the structural damages about which the plaintiffs now complain. The only way the plaintiffs learned of the alleged “extensive termite damage” was when they undertook to renovate the premises one month post-closing. Again, the plaintiffs were bound by the terms of the contract of sale. Plaintiffs failed to submit proof that the absence of a termite clause in the circumstances of this case was a departure from practice. In addition, plaintiffs fail to submit proof of the contents of the so-called “standard termite clause,” or that the absence of the report at the closing was a substantial contributing factor to the damages alleged by the plaintiffs.

The plaintiffs have failed to submit an expert’s affidavit that contradicts or challenges Legakes’ statement that the industry standard with regard to termite inspection is a visual inspection of readily accessible areas of the premises and specifically excludes the breaking apart or dismantling of objects. As indicated by Legakes, the breaking apart or dismantling of items is not the industry standard. Absent a termite clause which would have permitted plaintiffs to conduct an invasive and expensive inspection, cancel the contract of sale, or compel repairs, plaintiffs cannot establish that the failure to produce the report at the closing was a substantial contributing factor causing the damages they allegedly sustained.

As the plaintiffs have not submitted any evidence in contravention of the above facts, they have failed to establish any negligence on the part of Ardito. Further, they have failed to establish that “but for” any alleged negligence on the part of Ardito, they would have known of the structural damage to the premises and would not have purchased the

premises.

As more fully stated in his affidavit, Ardito attempted to include the termite clause in the contract of sale. However, the seller refused to permit the inclusion of the clause, nor would she pay for any treatment. The plaintiffs, being fully aware of Hotz' findings and that a termite clause had not been included in the contract of sale, still chose to execute it, and further, proceeded to close on the premises. The plaintiffs have failed to come forward with any expert evidence to show that Ardito deviated from the applicable standard of care (*Greene v Payne, Wood & Littlejohn* 197 AD2d 664, 603 NYS2d 883 [2nd Dept. 1993]; *Thaler & Thaler v Gupta* 208 AD2d 1130, 617 NYS2d 605 [3rd Dept 1994]; *Brown v Samalin & Bock* 168 AD2d 531, 563 NYS2d 426 [2nd Dept. 1990]).

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: June 28, 2002
Mineola, New York



J.S.C.

ENTERED
JUL 02 2002
NASSAU COUNTY
COUNTY CLERKS OFFICE