SCANNED ON 6/1/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 109723/2010
ROSENBLUM, LEE
VS
GLOGOFF, MARC J.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUN 01 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/26/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Lee Rosenblum and Gail Rosenblum,

Plaintiff (s),

-against-

Marc J. Glogoff and Andrea Glogoff,

Defendant (s).

----------x

Decision/ Order
Index No.: 109723/10
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3212) w/MC affirm, MJG affid, exh	1
Pltfs' opp w/EFH affirm, LR affid, exhs	2
Defs' Reply w/MC affirm, MJG affid, exh	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiffs, the purchasers of a coop apartment, for rescission of the contract of sale, fraud, breach of contract and a declaratory judgment. Defendants, the sellers of the apartment, now move for summary judgment dismissing the complaint and on their counterclaim for a declaratory judgment and breach of contract. The note of issue has not yet been filed, but summary judgment relief is available since issue has been joined (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]). Therefore, this motion can and will be decided on the merits.

Background, Facts and Arguments Presented

Plaintiffs entered into a contract of sale in April 2010 to purchase Unit 4A at 320 East 57th, New York, New York ("apartment") from defendants. The apartment is a coop unit. In accordance with the contract, plaintiffs paid a contract deposit of $90,000. The closing was scheduled for July 26, 2010 but plaintiffs failed to appear. Thus, defendants seek a declaration that they can keep the $90,000 down payment as liquidated damages.

Plaintiffs contend that there was a material misrepresentation made about the condition of the apartment in that they were told the apartment had "through wall air conditioning" through out when, in fact, only two of the rooms had air conditioning. These air conditioning units do not cool the entire apartment. The building has windows which cannot otherwise accommodate air conditioning units and the only way to have air conditioning would be through those sleeves.

On behalf of plaintiffs, Mr. Rosenblum states in his sworn affidavit that when he and his wife first saw the apartment in February 2010 he asked Ms. Gasmsu, the seller's broker, about air conditioning in the apartment because he only noticed a small window unit in one of the bedrooms. Another broker who was present, Ms. Goldberg, assured him the apartment had "through wall" air conditioning, except for the kitchen. According to Mr. Rosenblum, Ms. Goldberg pointed to a cabinet and explained that it was where the heating and cooling came from, but that it could not be activated since it was February and it was too cold. Mr. Rosenblum assumed the cabinet had a unit inside or could accommodate one.

The plaintiffs returned to the apartment five days later and again spoke to Ms. Goldberg. She handed the plaintiffs an information sheet which states the following

under the heading "features": "Air Conditioning Thru-Wall." Below, the following is also printed: "All information furnished regarding property for sale . . . is from sources deemed reliable, but no warranty or representation is made as to the accuracy thereof and same is submitted subject to errors, omissions, change of price, rental or other conditions . . ." Plaintiffs returned to look at the apartment a third time, this time with Mr. Rosenblum's mother and a friend ("Ms. Taylor"). In April, 2010, the plaintiffs signed a contract to buy the apartment and paid a $90,000 down payment. The contract consists of a printed form; there is no rider.

Prior to closing, which was scheduled for June 25, 2010, plaintiffs did a walk through of the premises. They noticed the apartment was very hot and asked Ms. Schwimmer why. Ms. Schwimmer, who is also with the Corcoran Group, explained that she had just switched on the air conditioning and it would cool off soon. After 40 minutes, the apartment was still too warm and Mr. Rosenblum asked to look at the air conditioning unit. Ms. Schwimmer showed him a unit in the master bedroom. They then walked over to the living room opened the cabinet that Ms. Goldberg had earlier pointed out. There was no air conditioning unit inside, only a pipe. The pipe prevented any air conditioning unit from being put in.

Ms. Taylor, the family friend who also saw the apartment, recalls that she overheard the Rosenblums talking to Ms. Goldberg about the air conditioning. While that conversation was going on, Ms. Taylor went over to the cabinet which she thought had an air conditioning unit and opened it. She did not observe any vents but states that since she is unfamiliar with what a "through wall" air conditioning unit is or would look like, she really did not know what she was looking at.

Ms. Gamus, who works for Corcoran, has provided her sworn affidavit in support of the Roseblums' opposition to the defendants' motion. She states that Ms. Goldberg told the plaintiffs that the cabinet beneath the living room window was built to house a through wall air conditioning unit. Ms. Gamus states that she was present when Ms. Schwimmer opened the cabinet and discovered there was no air conditioning unit or hookup in that cabinet, only a pipe. Although there were also some vents in the dining room, that room is also without air conditioning. It was then plaintiffs also discovered that it is impermissible to add "through-wall" air-conditioning to any room facing 57th Street due to the rules of the cooperative corporation and/or the status of the building.

Upon discovering the apartment is only partly air conditioned, plaintiffs contacted the defendants and tried to cancel the contract and obtain a refund of their down payment. The defendants refused, responding with a "time of the essence" letter. Plaintiffs then commenced this action by order to show cause with a temporary restraining order ("TRO"). The TRO did not, however, seek a stay of the closing, only an order directing defendants to escrow of the down payment money. The closing proceeded without plaintiff and defendants declared them in default.

Defendants argue that nothing was concealed from plaintiffs. They could easily have opened any of the cabinets, if they had wanted to, but chose not to. Had they done so, plaintiff could easily have seen there was no unit in the living room cabinet and that no air conditioning could be put into it because of the pipe.

Plaintiffs contend that they were defrauded because the apartment was advertised as having "through wall air conditioning" in each room, which is untrue and that defendants' agents perpetuated the fraud by pointing to a cabinet they knew did not

and could not provided air conditioning. Plaintiffs claim that had they known the apartment was only partly air conditioned and that it is impermissible to add "through-wall" air-conditioning to any room facing 57th Street due to the rules of the cooperative corporation and/or the status of the building, they would not have entered into a contract to buy the apartment. They claim further that it is inconceivable anyone would pay so much money ($900,000) for an apartment without air conditioning. Plaintiffs state that the air conditioning could not be tested because it was the winter (i.e. April 2010), and defendants used this to their advantage by discouraging them from trying to turn it on.

Discussion

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

Except in very limited circumstances, none of which are present in this case, New York follows the well established doctrine of *caveat emptor*, placing the burden on the purchaser to inspect the premises before signing a contract. The doctrine of *caveat emptor* imposes no duty upon a seller to disclose any information concerning the property in an arm's length real estate transaction (Gizzi v. Hall, 300 A.D.2d 879 [3rd Dept 2002]). Moreover, where, as here, there is a merger clause stating that, to the effect, that prior oral and/or written representations are merged in the contract, parol

evidence is inadmissible to contradict, vary, amplify, etc., the terms of the written contract between the parties (W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157 [1990]; Gizzi v. Hall, 300 A.D.2d [3rd Dept.,2002])

Bedowitz v. Farrell Development Co., 289 AD2d 432 [2nd Dept 2001])

Once signed, a purchaser seeking to avoid its contract with the seller must establish that the seller engaged in fraud. The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553 [2009]; *also*: McPherson v. Husbands, 54 A.D.3d 735 [2nd Dept 2008]). Furthermore, where, as here the subject matter is real estate, the seller will not be held liable for the alleged misrepresentation, "if the facts misrepresented were not matters peculiarly within their knowledge and plaintiffs had the means to discover the truth by the exercise of ordinary intelligence" Joseph v. NRT Inc., 43 A.D.3d 312, 312 [1st Dept 2007]).

The contract of sale defines "personalty" as including air conditioning units, whether they are central air units or through windows or sleeves. The contract makes no representations about there being any kind of air conditioning in the apartment. In fact, the only personalty specifically addressed in the contract are sconces contained in the living room and bedroom.

Plaintiffs viewed the apartment three time before deciding to sign the contract. The first time in the apartment Mr. Rosenblum noticed a small air conditioner in one bedroom, prompting him to ask about how the apartment was cooled. According to his affidavit, he was told there were "through wall" units that cooled the apartment. Mr.

Rosenblum admits he had never heard of "through wall" unit and did not further investigate or inquire what that meant or ask to see any of the units.

Though Mr. Rosenblum also states the unit "could not be activated" because it was February, no one stopped him from opening any of the cabinets where they might have been an air conditioning unit or asking further questions about what "through wall air conditioning" is or how it works. He made no effort to see what the vents he saw were for or ask any of the brokers to turn the air conditioning units (he believed were) in the apartment on to see if they worked. Although Ms. Taylor noticed that the living room cabinet was empty. She either did not tell her friends what she had seen or told them and they failed to investigate further.

Most of the claims about the Corcoran staff having defrauded the plaintiffs are not contained Mr. Rosenblum's affidavit at all but stated in the affirmation of the their attorney ("Attorney Haber"). Attorney Haber states that Ms. Goldberg's statements about the air conditioning were false and she intended to defraud his clients because she lives in the building and "knew the factual situation regarding the air conditioning, that there is no unit in the living and dining rooms . . ." This is not evidence in admissible form, not only because the statements are made by a person who does not have personal knowledge of the facts, but also because it is entirely conjectural (Montes v. New York City Transit Authority, 46 A.D.3d 121 [1st Dept 2007]). Attorney Haber was not present and does not know what his clients and the brokers discussed.

Defendants have met their burden on this motion for summary judgment by establishing the existence of an enforceable contract with plaintiffs to buy defendants' apartment. Although defendants were ready to close and they later sent plaintiffs a

"time of the essence," giving them a reasonable time to perform, the plaintiffs failed to proceed to closing (ADC Orange, Inc. v. Coyote Acres, Inc., 7 NY3d 484 [2006]). Although sought court intervention, they failed to ask for the proper relief which would have been an order staying the closing. Instead, what they asked for (and obtained) was a TRO directing the defendants to hold their down payment $90,000 in escrow, which the defendants did. Therefore, plaintiffs defaulted by not closing which is a breach of the sales contract.

In opposition to defendants' motion, plaintiffs have failed to raise triable issues of fact. At best, the affidavits they provide only establish that the plaintiffs were not careful in examining the apartment they were about to buy and they failed to ask the right questions. There are, in fact, through wall air conditioning units in the apartment – just not in every room. The defendants had no duty to disclose that there was no unit in the living room or dining room or that there was a pipe in one of the cabinets preventing the installation of a unit. Plaintiffs were free to walk about and open any of the below window cabinets to see what the vents they saw were for and to make sure the "air conditioning" they thought was inside was working (Gizzi v. Hall, *supra*). The handout they received contains a disclaimer about the information being provided and even by Mr. Rosenblum's own account, Ms. Goldberg never prevented him from trying to turn on any of the air conditioning units he thought were present.

Plaintiff have not identified any conduct by the defendants (or their agents) which was deceptive and the acts described by plaintiff do not amount to a concealment that is actionable as a fraud (see, Moser v. Spizzirro, 31 A.D.2d 537 aff'd 25 N.Y.2d 941 [1968]). The sellers did not thwart the plaintiffs' effort to fulfill their responsibilities fixed

by the doctrine of caveat emptor (Kelley v. Larkin, 24 Misc.3d 1201(A) [Sup Ct N.Y. Co. 2009]) and plaintiffs had the means to discover the truth by the exercise of ordinary intelligence (Joseph v. NRT Inc., supra).

Although plaintiffs contend defendants' motion is premature because they have not had any depositions, plaintiff have not provided any specific details about what discovery they need that may reveal additional facts to support their opposition, thereby delaying determination of this motion for summary judgment (Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 [1st Dept 2004]).

Since there are no triable issues of fact, and this motion is timely, defendants' motion for summary judgment dismissing the complaint is granted as is their motion for summary on their counterclaims for liquidated damages in the amount of $90,000 (1st counterclaim) and a declaratory judgment that they are entitled to retain the down payment. Their 3rd counterclaim, which is for legal fees, is hereby severed and dismissed since the defendants have not moved with respect to this counterclaim nor have they identified any provision in their contract with plaintiffs which would require the plaintiffs to pay for their legal fees.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that defendant's motion for summary judgment on their 1st and 2nd counterclaims is granted; and it is further

ORDERED, DECLARED AND ADJUDGED that defendants may retain the $90,000 down payment which plaintiffs paid in connection with the contract of sale for Unit 4A at 320 East 57th, New York, New York; and it is further

ORDERED that the clerk shall enter judgment against plaintiffs Lee Rosenblum and Gail Rosenblum, jointly and severally, in the principal amount of $90,000, in favor of defendants Marc J. Glogoff and Andrea Glogoff; and it is further

ORDERED that the judgment shall be satisfied from the money presently on deposit with the Clerk of the Court; and it is further

ORDERED that within Ten (10) Days of service of a copy of this decision/order with Notice of Entry, plaintiffs shall take all necessary steps to have the money on deposit with the Clerk of the Court released, transferred, or otherwise paid to the defendants; and it is further

ORDERED that the 3rd counterclaim, which is for legal fees, is hereby severed and dismissed since the defendants have not moved with respect to this counterclaim nor have they identified any provision in their contract with plaintiffs which would require the plaintiffs to pay for their legal fees; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 26, 2011

So Ordered:

Hon. Judith J. Gische, JSC

FILED

JUN 01 2011

NEW YORK
COUNTY CLERK'S OFFICE