To be Argued by:
BRIAN M. QUINN
(Time Requested: 10 Minutes)

Case No.: 511369

New York Supreme Court

Appellate Division - Third Department

MICHAEL DEVINE,

Plaintiff-Appellant/Respondent,

-against-

CYNTHIA A. MEILI,

Defendant-Respondent/Cross-Appellant.

BRIEF FOR DEFENDANT-RESPONDENT

Columbia County Index No.: 1060-06

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PRELIMINARY STATEMENT

Plaintiff appeals from an order of the Supreme Court, Columbia County, which granted summary judgment dismissing the complaint. Defendant cross-appeals from that portion of the same order denying her attorneys' fees.

Plaintiff (buyer) seeks to recover $100,000 for damages from Defendant (seller) based on alleged fraud in an "as is" real property sale. To state a prima facie case, the doctrine of caveat emptor requires a showing that Defendant's conduct rose to the level of active concealment. Plaintiff's allegations, however, are conclusory and rest on mere speculation. For example, Plaintiff asserts that his inspector could not have discovered any of the alleged defects, yet he failed to submit any affidavit from his inspector or even a copy of his inspector's report, which he allegedly lost. Plaintiff also cannot demonstrate justifiable reliance or causation because he concedes that prior to closing his attorney read a March 13, 2001 letter referencing alleged defects and that it constituted material information capable of preventing all of his injuries.

In addition, Plaintiff inexcusably failed to timely notify Defendant about several theories of liability. For example, Plaintiff failed to assert allegations until summary judgment that Defendant interfered with a certain investigation regarding the March 13, 2001 letter. Although the new theories should not even be considered, they are nevertheless conclusory and contradict well-settled law, e.g., that no duty exists to disclose defects in an arm's length real estate transaction, that conclusory allegations of active concealment are insufficient to state a claim, that a buyer is deemed to know the information that his attorney possesses, and that a buyer cannot recover for defects readily ascertainable.

Plaintiff's allegations also contain factually erroneous and misleading statements. For example, Plaintiff initially alleged that he was unaware of defects to the sills, water damage, and "structural rot" and that the March 13, 2001 letter and "structural rot" were not readily ascertainable. Plaintiff, however, has since conceded that he knew about the sills and water damage to the first floor bathroom and that prior to closing his attorney read the March 13, 2001 letter referencing the "structural rot."

For the reasons that follow, this Court should affirm that portion of the order granting summary judgment and award Defendant costs and attorneys' fees.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 1994, Defendant and her late-husband purchased real property known as 10 Broad Street in the Village of Kinderhook. Defendant subsequently conducted a business there for 11 years. Over that time period, Defendant had some repairs done on the property, but did not have any work/repairs done in 2004 or 2005 [426, 430, 448-449, 538].[1]

In April 2005, Defendant decided to sell the property in response to the death of her husband. Defendant informed the real estate agent, Lynn Strunk, that the property was an old building and imperfect, but did not discuss specific defects with her because she was not asked and the property was being sold "as is" [449, 487, 490, 494, 499, 505-506].

In May 2005, Ms. Strunk listed the property for $249,000. The commercial listing expressly noted that it was built in 1840. Sometime thereafter, Plaintiff, a business owner, expressed interest in purchasing the property and hired an attorney, James E. Kleinbaum, to assist him ("Plaintiff's attorney"). Plaintiff also hired and paid a local inspector, Wendell Cook, who inspected the property on June 24, 2005 [304, 507-510, 566-567, 575-580, 610, 642].

According to Plaintiff, his inspector informed him that the property would be a good buy, but that there were some things about which to be concerned. According to Plaintiff, his inspector said that the sills would be a problem and that water damage existed in the first floor bathroom. In response, Plaintiff called a contractor, James Slovak, to provide him with an estimate about the cost to remodel the interior and fix the sills and water damage [579-581; Plaintiff's Brief, at 2 n 2].

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[1] Unless indicated otherwise, all page references are to the consecutively paginated three volumes of the Appendix.

Thereafter, according to Plaintiff, he asked Ms. Strunk for a reduction in price to about $165,000 due to the sills and water damage. According to Plaintiff, Ms. Strunk said that "she wouldn't go that low; that [Defendant] wouldn't go that low." In response, Plaintiff nevertheless agreed to purchase the property "as is" for $184,000 [297, 582-585].

The parties subsequently executed a contract containing a merger clause and providing that the "buildings on the premises are sold 'as is' without warranty as to condition, and the Purchaser agrees to take title to the buildings 'as is' and in their present condition[.]" The contract provided Plaintiff with the right to inspect the property and to terminate the contract if Defendant failed to correct any structural, mechanical, electrical, plumbing, roof covering, water, or sewer defects that would cost more than $1,000 to repair, provided Plaintiff brought the defects to Defendant's attorney's attention within a certain period of time. Notably, the contract (involving a property listed as commercial) contained no Property Disclosure Report [289; 298 ¶ 10; 300 ¶¶ 19, 22; 426; 610; 642 ¶ 4].

Prior to closing, by letter dated August 2, 2005, Plaintiff's title insurance company ("title agency") sent a letter to the Village of Kinderhook (Village Hall) requesting a certificate of occupancy and building violations search, together with a check in the amount of $25.00 [167]. In response, by letter dated August 8, 2005, John Florio, an inspector and officer of the Village of Kinderhook's Building Department ("Building Department"), (1) informed the title agency that no outstanding violations existed to date, but that he had not inspected the property [161, 306]; and (2) attached a March 13, 2001 letter and wrote:

> "A letter dated March 13, 2001 from the previous Building Inspector to the above current owner of record in regard to structural rot of this building is on file (along with supporting photographs) in this Department. No other information, any further action, or any indication of the issuance of a Building

> Permit is available or found in the file. Copy of letter attached" [107-109, 161, 306].

Thereafter, Plaintiff's title insurance company sent Plaintiff's attorney the title report, including the March 13, 2001 and August 8, 2005 letters. Upon reading the letters, the day before closing Plaintiff's attorney allegedly called Patrick M. Grattan ("Defendant's attorney), who informed Plaintiff's attorney that he had not discussed the matter with Defendant and that Defendant had not told him any information about it one way or the other. In response, Plaintiff's attorney determined that "no further investigation would be required." Plaintiff's attorney did not contact his client, the inspector, or the Building Department about the matter or investigate the photographs or other materials contained in the Building Department's records [589-593, 651-652, 942-950].

On August 17, 2005, the parties met for the first time at closing and transferred title. Thereafter, Plaintiff (via his agent, Mr. Slovak) apparently attempted to obtain a building permit on September 15, 2005 from the Village of Kinderhook to make intended renovations, but the Village denied the permit application on or about September 16, 2005 [110, 511]. By letter dated September 20, 2005, Glenn Smith, a Code Enforcement Officer, informed Plaintiff of the following:

> "Upon review of the property file, I noticed a document (3/13/2001) stating structural deficiencies exist in this building. Upon further review of the file and a physical inspection, I did not find any evidence that this condition was corrected. Further, your Title Agency . . . was issued a copy of this document on 8/8/2005 search request # 28-05.
>
> Based on the above findings, I will only issue a permit upon receipt of a document from a NYS licensed engineer, stating the soundness of this structure" [168].

By letter dated December 7, 2005, Mr. Smith notified Plaintiff that the present condition of the structure was unsafe and requested that immediate action be taken. In mid-December, Plaintiff (apparently represented by his current attorney, William Better) applied for a building permit to install a new wall, with an estimated cost of $2,000 to $2,500. On December 29, 2005, Plaintiff (represented by his current attorney) accepted a proposal for architectural services from William D. Wallace [139-140, 170-176].

Thereafter, Plaintiff allegedly spent up to $250,000 renovating the property. Allegedly, in connection therewith, several invoices (if not most) were sent to his current attorney, and numerous checks were written by his current attorney (Attorney Trust Account) to various individuals, including himself [192-265, 574].

By an amended summons with notice dated August 25, 2006, Plaintiff notified Defendant about his intention to sue her for $100,000 for fraud, breach of contract, and fraud in the inducement. The verified complaint, dated September 26, 2006, essentially asserts that (1) certain defects were "deliberately concealed by the Defendant including but not limited to rotten sills and structural water damage"; (2) the defects alleged in the March 13, 2001 letter were known to the Defendant but unknown to the Plaintiff prior to transfer of title; (3) the existence of the March 13, 2001 letter and the defects described therein were deliberately concealed by the Defendant from the Plaintiff and could not have been readily ascertained by Plaintiff prior to transfer of title; and (4) Defendant perpetrated a fraud by failing to disclose these material defects in the premises or to remedy the same [23, 27-34].

In her verified answer, Defendant denied liability and asserted the defenses of statute of limitations and failure to state a cause of action. In addition, as a defense and counterclaim, Defendant asserted that the action was frivolous and demanded costs and attorneys' fees pursuant to CPLR 8303-a [35a-37].

In October 2006, Defendant made numerous discovery demands, including a demand for a verified bill of particulars. In March 2008, Plaintiff responded by providing a list of witnesses and a laundry list of documents and bills and receipts, but apparently did not provide a verified bill of particulars [39-265].

By letter dated November 20, 2008, Plaintiff served a second set of discovery responses and provided Defendant with documents obtained from the Columbia County Clerk's Office. Specifically, Plaintiff sent Defendant, among other things, a verified cross petition ("cross petition") which was filed in 2002 on behalf of Defendant and sought damages (in 2002) against the owner of the neighboring property. Defendant's cross petition contained a May 2002 estimate ($12,650) from Quality Finish Company, Inc. for "Structural Work, Water Abatement" and a January 2002 letter from Alan Dick noting that he inspected the property and found a stress crack and a split rafter [326-391].

At her examinations before trial ("EBT"), conducted on November 24, 2009 and May 19, 2010, Defendant responded to numerous questions about the March 13, 2001 letter, the cross petition, and work/repairs performed. Defendant did not testify about any active concealment. In fact, according to Defendant, she did not have any repairs/work performed on the property in 2004 or 2005, and she did not decide to sell the property until April 2005 [417-558].

On May 19, 2010, Plaintiff testified at his EBT. According to Plaintiff, everything with the building was defective except the roof, windows, front door, and furnace. It was a complete

"A to Z replacement." The defects included "having to replace the common wall . . . [having to] tear out the entire first floor because of structural problems . . . . [replacing] the back wall of the building . . . . Replacing the chimney. Re-studding the entire building from front to back, top to bottom. Putting in a new rafter system up – throughout the entire second floor. Clearly new electrical, new plumbing, new drywall, new stairs, new back door, new windows. It – it went on. It was the entire thing" [568-574].

When asked about defects that were unknown to him prior to closing, Plaintiff responded: "I – the foundation walls were a surprise; the common wall between the two buildings. The – it just - the majority of it was a surprise. Having – the rafters were a surprise." Plaintiff testified that he was not claiming damages for the replacement of the electrical system or plumbing. He wanted to be paid, however, for the drywall, replacement of common wall and the back wall, having to gut the entire building top to bottom, repairing the foundation other than the common wall, and replacing the first floor and the rafter system. Plaintiff testified that he spent about $200,000 to $250,000 to renovate the building [568-574].

Plaintiff also testified that the sills and the water damage to the bathroom were not hidden defects. Plaintiff wants to be paid for the sills, however, even though he knew about them beforehand [579-580, 587].

Plaintiff also testified that the title report came back "clean," but did not remember whether he discussed it with his attorney, that Defendant hid the two lawsuits, and that Defendant did not disclose problems with the back walls, the corner post, the water, and the cracks in the foundation [568-574, 590].

In July 2010, Defendant sought summary judgment dismissing the complaint and requested costs and attorneys' fees [15-16]. In support of the motion, Defendant submitted,

among other things, the parties' "as is" contract and EBT transcripts [297-301, 417-608], numerous discovery materials [39-415], certified documents and photographs from the Building Department [884-941], materials evidencing that other inspectors and contractors discovered the alleged defects [168-169, 347-349, 884-941], an affidavit from Mr. Grattan confirming that Plaintiff had actual notice of the alleged defect in the form of the title report [942], and detailed memoranda of law [612-629, 951-959].[2]

In opposition, Plaintiff relied primarily upon many of these same materials and submitted an affirmation from his current attorney, affidavits from himself and Mr. Kleinbaum, and a memorandum of law [630-880]. Plaintiff did not submit any affidavit from his inspector or even his inspector's written report, which he allegedly lost [576-577, 873; Plaintiff's Brief, at 2 n 2]. In fact, Plaintiff did not submit any expert proof or expert affidavit and instead relied solely on rank hearsay to support his assertion that his inspector did not and could not have discovered any of the alleged defects. Plaintiff also acknowledged that prior to closing his attorney read the March 13, 2001 and August 8, 2005 letters referencing "structural rot" [32, 161, 169, 651-652].

Supreme Court, Columbia County (Czajka, J.), granted Defendant's motion seeking summary judgment dismissing the complaint, but denied Defendant's request for attorneys' fees [8-14]. Plaintiff now appeals, and Defendant cross-appeals [1, 4].

[2] Notably, the photographs obtained from the Building Department and filed with the County Clerk's Office in support of the motion included several premium color copies.

ARGUMENT

POINT I DEFENDANT DEMONSTRATED HER ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]). As set forth below, Defendant met her initial burden.

A. The Doctrine of Caveat Emptor Applies

"In New York, the doctrine of caveat emptor imposes no duty upon a vendor to disclose any information concerning the property in an arm's length real estate transaction" (Stoian v Reed, 66 AD3d 1278, 1279 [3d Dept 2009] [internal quotation marks and citations omitted]). Indeed, "the buyer has the duty to satisfy himself as to the quality of his bargain" (London v Courduff, 141 AD2d 803, 804 [2d Dept 1988]; see Slavin v Hamm, 210 AD2d 831, 832 [3d Dept 1994] ["Mere silence does not rise to the level of fraud"]; see also Rivietz v Wolohojian, 38 AD3d 301, 301-302 [1st Dept 2007]).

Here, it cannot be disputed that the parties acted at arm's length in the real estate transaction. Plaintiff hired an attorney to assist him, had the property inspected, and even conducted a final walk through. Plaintiff also negotiated and obtained a significant price reduction from the real estate agent. Consequently, Defendant had no duty to disclose the alleged defects, and Plaintiff cannot recover for mere nondisclosure [304, 507-510, 566-567, 575-580] (see Stoian, 66 AD3d at 1279-1280; London, 141 AD2d at 804).

B. The Verified Complaint Lacks Specificity

In support of her motion, Defendant asserted that the verified complaint lacked specificity and failed to state a claim (see CPLR 3016) [625-626, 952-954]. The court below, however, erroneously rejected this assertion concluding that it was "impossible" for Plaintiff to allege specificity [10-11]. Contrary to the holding of the court below, however, an "as is" buyer does not face an "impossible" burden of pleading active concealment, as he or she can rely upon evidence available prior to litigation, including affirmative misrepresentations, nondisclosure reports, and property inspections.

The doctrine of caveat emptor precludes a plaintiff from recovering for alleged fraud unless he proves that the defendant's conduct rose to the level of active concealment. To state a claim, a plaintiff is required to allege, with specificity, "the manner in which [the] conditions were concealed" (Mancuso v Rubin, 52 AD3d 580, 584 [2d Dept 2008]; see CPLR 3016) and how the defendant "affirmatively thwarted plaintiff purchaser's performance of its obligation, pursuant to the doctrine of caveat emptor, diligently to inspect the premises for defects" (Jee Foo Realty Corp. v Lemle, 259 AD2d 401, 402 [1st Dept 1999]; see CPLR 3016; see also Meyers v Rosen, 69 AD3d 1095, 1097 n [3d Dept 2010]; Mancuso, 52 AD3d at 584; Lanzi v Brooks, 54 AD2d 1057, 1058 [3d Dept 1976], affd 43 NY2d 778 [1977]). The "bare allegation that [a defendant] knew of a latent defect in the conveyed premises is insufficient to make out a prima facie claim for fraud based on active concealment" (Jee Foo Realty Corp., 259 AD2d at 402). Absent such specificity, the claim cannot be maintained (see Meyers, 69 AD3d at 1097 n; Daly v Kochanowicz, 67 AD3d 78, 89-91 [2d Dept 2009]; see also Mountain Lion Baseball, Inc. v Gaiman, 263 AD2d 636, 637-638 [3d Dept 1999]; Murphy v Liotta, 2009 NY Slip Op 31126U

[Sup Ct, Nassau County 2009] ["the defendants have made out their prima facie showing that the fraud claim is not pled with the requisite specificity"]).

Here, prior to bringing this lawsuit, Plaintiff hired an inspector to inspect the property, obtained a written inspection report, hired his current attorney to prepare for litigation, and renovated the property with the assistance of an expert that he intended to call at trial [139-140, 175, 304, 412-413, 509-510, 567, 575-580]. Yet, despite all this, Plaintiff did not even allege any specifics regarding any active concealment. The verified complaint simply contains bare-bone allegations, which do not even come close to satisfying the requirements imposed by CPLR 3016 [27-28] (see Meyers, 69 AD3d at 1097 n; Daly, 67 AD3d at 87-97; Mancuso, 52 AD3d at 584; Jae Heung Yoo, 289 AD2d at 451; Platzman v Morris, 283 AD2d 561, 562-563 [2d Dept 2001]; London, 141 AD2d at 804; Perin v Mardine Realty Co., 5 AD2d 685, 685 [2d Dept 1957]; see also Laxer v Edelman, 75 AD3d 584, 584-586 [2d Dept 2010]; MacBeth v New York Racing Asso., 141 AD2d 805, 806 [2d Dept 1988]; Williams v Upjohn Health Care Services, Inc., 119 AD2d 817, 819 [2d Dept 1986]; Apthorp Assoc., LLC v 390 W. End Assoc., L.L.C., 2009 NY Slip Op 50407U [Sup Ct, New York County 2009]).

C. Plaintiff's Case Rests on Conclusory Allegations

To state a prima facie case, Plaintiff was required to demonstrate that Defendant's conduct rose to the level of active concealment (see Stoian, 66 AD3d at 1279-1280; Anderson v Meador, 56 AD3d 1030, 1034-1035 [3d Dept 2008]). "In order to succeed, [Plaintiff was required to] show in effect that [Defendant] had thwarted [his] efforts to fulfill [his] responsibilities fixed by the doctrine of caveat emptor" (London, 141 AD2d at 804; see Meyers v Rosen, 69 AD3d at 1097 n). "Conclusory allegations regarding alleged concealed conditions,

without factual details as to the manner in which such concealment was undertaken, are insufficient to state a cause of action in this regard" (Stoian, 66 AD3d at 1279).

Here, the verified complaint alleges merely that Defendant failed to disclose information and in some unspecified way concealed the March 13, 2001 letter and the alleged defects. These allegations are conclusory and simply do not constitute active concealment within the context of fraudulent nondisclosure (see Stoian, 66 AD3d at 1279 ["factual details (must exist) as to the manner in which such concealment was undertaken"]; Mancuso, 52 AD3d at 584; see also CPLR 3016; Moser v Spizzirro, 31 AD2d 537, 537 [2d Dept 1968], affd without opn 25 NY2d 941 [1969]).

Moreover, despite knowing about all the alleged defects since 2005/2006, claiming $100,000 in damages in 2006, and being afforded years of discovery, Plaintiff improperly failed to notify Defendant until 2008 and 2010 that he intended to recover for a laundry list of additional unpleaded defects [27-28, 32, 49-50, 327, 560, 568-574, 625-626]. This deprived Defendant of years of discovery on these issues and hindered her ability to investigate the claims, especially considering that the building had already been renovated. No excuse existed for this delay (see e.g. Langan v St. Vincent's Hosp. of N.Y., 64 AD3d 632, 633 [2d Dept 2009] [plaintiff's inexcusable delay warranted Supreme Court's grant of summary judgment dismissing the complaint]; Yousefi v Rudeth Realty, LLC, 61 AD3d 677, 678 [2d Dept 2009] ["the plaintiffs' inexcusable delay in presenting the new theory of liability warranted the Supreme Court's rejection of the argument"]; Gallello v MARJ Distribs., Inc., 50 AD3d 734, 736 [2d Dept 2008] ["the plaintiff's protracted delay in presenting the new theory of liability warranted the Supreme Court's rejection of the argument"]; Pinn v Baker's Variety, 32 AD3d 463, 464 [2d

Dept 2006]).

In any event, even had these additional alleged defects been timely alleged, they were insufficient to establish a prima facie case, as they were based upon conclusory allegations of fraud and misrepresentation (see e.g. Jee Foo Realty Corp., 259 AD2d at 402). Indeed, as Defendant's EBT transcripts reveal, Defendant made no statements relating to the condition of the property and she had no work/repairs performed on the property near or around the time of the sale [395-558]. Plaintiff's bare-bone allegations that Defendant knew of the alleged defects, without more, were insufficient to demonstrate any active concealment (id.).

D. Plaintiff Had Notice of the Alleged Defects

It is well settled that a plaintiff cannot maintain an action for non-disclosure or fraudulent concealment if the defects were known or readily ascertainable (see e.g. Small v Lorillard Tobacco Co., 94 NY2d 43, 57 [1999] ["To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury" (emphasis added)]; McManus v Moise, 262 AD2d 370, 371 [2d Dept 1999] ["It is well settled that in a contract for the sale of real property, if . . . 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 or she must make use of those means, or he or she will not be heard to complain that he or she was induced to enter into the transaction by misrepresentations" (internal quotation marks and citation omitted)]; Industrial Risk Insurers v Ernst, 224 AD2d 389, 390 [2d Dept 1996] ["the parties dealt at arm's length, no confidential or fiduciary relationship existed, there was no active concealment of the facts by the appellants and the existence of the (undisclosed condition) could have easily been ascertained at all times by (plaintiff's subrogor),

its architect, and general contractor simply by examining the public records"]; Dwyer v Woollard, 205 AD 546, 547-549 [3d Dept 1923]; 60A NY Jur Fraud and Deceit § 160).

Here, the evidence reveals that the defects alleged in the verified complaint, i.e., the sills, water damage, and "structural rot," were known to Plaintiff prior to closing. Plaintiff, for example, testified at his EBT that his inspector informed him that the sills had problems and that the first floor bathroom had water damage. Plaintiff also hired a contractor who gave him an estimate for the sills and water damage, and he tried to get a price reduction from Ms. Strunk based on these defects. Indeed, Plaintiff even admitted that the sills and water damage to the bathroom were not hidden as a defect because he knew of them [587].

Moreover, the knowledge of Plaintiff's attorney "is imputed to [Plaintiff] and the latter is bound by such knowledge although the information [may have] never actually [been] communicated to [him]" (Skiff-Murray v Murray, 17 AD3d 807, 809-810 [3d Dept 2005]; see Bauer v CS-Graces, LLC, 48 AD3d 922, 924-925 [3d Dept 2008]). Here, Defendant demonstrated, and Plaintiff conceded, that prior to closing Plaintiff's attorney possessed and reviewed the March 13, 2001 and the August 8, 2005 letters. As such, the allegation that Plaintiff did not know of the March 13, 2001 letter and "structural rot" was totally without merit [27-28, 32, 107-109, 168, 306-313; see also 651-652] (see Bauer, 48AD3d at 924).

E. The March 13, 2001 Letter and Alleged Defects Were Matters of Public Record

In New York, "a duty exists to investigate available public records and [a plaintiff] cannot recover for a misrepresentation if he or she could have ascertained its falsity by a reasonable examination of such records" (60A NY Jur Fraud and Deceit § 160). Similarly, "where the claim of fraud is predicated on concealment . . . there can be no relief if the fact not

disclosed was a matter of public record" (id.).

Here, the March 13, 2001 letter referencing "structural rot" was not only known by Plaintiff's attorney [651-652], but was also readily discoverable by an examination of the public records [168, 884-941]. In response to the title agency's request, for example, the Village promptly responded that although no violations existed to date, (1) the March 13, 2001 letter existed, (2) the Village had not recently inspected the property, (3) photographs of the "structural rot" existed, and (4) no evidence existed that the "structural rot" had been remedied.

Had Plaintiff simply reviewed the Building Department's publicly available records or inquired further, he would have discovered the alleged defects. In fact, the Code Enforcement Officer deemed the property unsafe based solely on his review of the records and a physical inspection [168, 884-941]. "Under these circumstances, [Plaintiff] cannot now be heard to complain that [he has] been defrauded. It was [his] own lack of diligence that is responsible for [his] current predicament" (McManus, 262 AD2d at 371; see Industrial Risk Insurers, 224 AD2d at 390).

F. No Justifiable Reliance or Causation Exists

As mentioned above, Plaintiff knew or should have known about the alleged defects. Plaintiff hired an attorney, had the property inspected, obtained a title report, and could have discovered the alleged defects had he discussed the March 13, 2001 letter with his attorney or reviewed the Building Department's publicly available records. Under these circumstances, no justifiable reliance or causation exists (see Daly, 67 AD3d at 91; McManus, 262 AD2d at 371).

In addition, when he purchased the property, Plaintiff obtained a significant price reduction and knew that Defendant would not sell the property for a lower amount, regardless of

any defects. According to Plaintiff, Ms. Strunk expressly rejected his $165,000 counteroffer and informed him that Defendant would not go that low [583].

Plaintiff is now simply attempting to obtain a better bargain. Plaintiff did not sue to rescind the transaction; rather, Plaintiff allegedly spent up to $250,000 renovating the property before suing Defendant for $100,000. Plaintiff should not be rewarded for duplicitous conduct, which if permitted, would allow him to obtain more than his bargain [624-625, 957] (see Koppstein v Capitman, 35 NY2d 897, 899 [1974]; Danann Realty Corp. v Harris, 5 NY2d 317, 323 [1959]).

POINT II PLAINTIFF FAILED TO CREATE A TRIABLE ISSUE OF FACT

Upon the proponent's showing of entitlement to summary judgment, the burden shifts to the opponent to "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; see Zuckerman, 49 NY2d at 562). Specifically, the opponent "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman, 49 NY2d at 562). Plaintiff failed to create a triable issue of fact.

A. Plaintiff Failed to Submit Expert Proof and Relied Solely on Rank Hearsay

In opposition, Plaintiff was required to prove, among other things, that the alleged defects could not have been discovered by a reasonable inspection and that his inspector did not and could not have discovered the alleged defects [620-628, 955]. Plaintiff, however, did not submit any expert proof, any affidavit from his inspector, or even his inspector's written report, which he allegedly lost [576-577, 630-650, 873 955; Plaintiff's Brief, at 2 n 2]. In fact, Plaintiff did not even list or intend to call his inspector as a trial witness [326, 412]. As such, Plaintiff cannot recover because he failed to "produce evidentiary proof in admissible form sufficient to require a trial" [955] (see CPLR 3212 [b]; Zuckerman, 49 NY2d at 562).

Indeed, on this critical issue, Plaintiff relied solely upon rank hearsay, namely, his own assertions that his inspector said that only two defects existed [630-650, 955] (see Hausler v Spectra Realty, Inc., 188 AD2d 722, 724 [3d Dept 1992]; Prince, Richardson on Evidence § 8-101 [Farrell 2008]). "This statement satisfies none of the exceptions to the rule against the admission of hearsay evidence and is, accordingly, in violation of the requirement that proof

submitted by the opponent of a summary judgment motion must be in admissible form" (Davis v Golub Corp., 286 AD2d 821, 822 [3d Dept 2001]; see Dominy v Golub Corp., 286 AD2d 810, 811 [3d Dept 2001]; Walker v Golub Corp., 276 AD2d 955, 957 [3d Dept 2000]; Tkach v Golub Corp., 265 AD2d 632, 634 [3d Dept 1999]; Hausler, 188 AD2d at 724).

Since Plaintiff began preparing for litigation as early as 2005 and limited Defendant's opportunity to defend (e.g., by renovating the property prior to litigation and losing the inspection report), Plaintiff's sole reliance on rank hearsay on this critical issue was inexcusable [139-140, 170-176, 576-577, 873] (see Davis, 286 AD2d at 822; see also Raux v City of Utica, 59 AD3d 984, 985 [4th Dept 2009] ["here the sole basis for plaintiffs' opposition to the motion, other than speculation, was that hearsay statement"]; Rodriguez v Sixth President, Inc., 4 AD3d 406, 407 [2d Dept 2004] ["the plaintiff offered no evidence other than hearsay to support her allegation that a broken tile caused (the) accident"]; Narvaez v NYRAC, 290 AD2d 400, 401 [1st Dept 2002] [hearsay evidence "is insufficient to warrant denial of summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated"]).

Similarly, Plaintiff failed to demonstrate that the hearsay was "of sufficient probative force to defeat a motion for summary judgment" (Davis, 286 AD2d at 822 [internal quotation marks and citation omitted]), especially as the record reveals that the alleged defects were discovered by inspectors and contractors on other occasions and that the "structural rot" and water damage were evidenced in the title report and the Building Department's publicly available records [168-169, 306, 313, 347-349, 884-941, 942-950].

Accordingly, under these circumstances, Plaintiff failed to demonstrate the existence of a triable issue of fact.

B. Plaintiff Improperly Asserted Several New Theories of Liability

In addition, on summary judgment, Plaintiff improperly alleged several new theories, which he continues to rely upon [27-28, 40-42, 630-650; Plaintiff's Brief, at 11-14]. Plaintiff's inexcusable delay in notifying Defendant about these additional theories provided an additional basis to grant summary judgment [952-958].

For example, on summary judgment, Plaintiff untimely notified Defendant that he sought to recover for active concealment based on his observations in 2005 of "new drywall" that covered a very small portion of the building. Plaintiff also untimely sought to bootstrap the entire $100,000 in damages to this one alleged act of concealment. In addition, Plaintiff also untimely alleged that Defendant thwarted the ability of Plaintiff's attorney to investigate the March 13, 2001 letter [630-652].

If permitted, these new theories would unquestionably hinder Defendant's ability to investigate the matters. Plaintiff performed substantial renovations of the building prior to commencing this lawsuit, failed to preserve essential evidence, such as Mr. Cook's inspection report, and sought to rely upon statements made five years after the sale by his attorney, despite failing to list his attorney as a trial witness [326, 412]. Plaintiff's inexcusable delay in notifying Defendant about these additional theories provided an additional basis to grant summary judgment (see Langan, 64 AD3d at 633; Yousefi, 61 AD3d at 678; Gallello, 50 AD3d at 736; Pinn, 32 AD3d at 464; see also CPLR 3016).

C. Plaintiff's New Theories Rest on Conclusory Allegations

Moreover, even if considered, these new theories fall far short of creating a triable issue of fact. They rest on conclusory assertions and fail to demonstrate that Plaintiff justifiably relied upon any of Defendant's conduct or that such conduct caused Plaintiff's injuries [954-958].

1. The New Drywall

For example, the "new drywall" relied upon by Plaintiff refers to Defendant's testimony that she hired someone in 2003 to repair the side of the building and part of the corner post after an ice storm tore off part of the siding [395-411, 439-449, 630-650]. Plaintiff, however, merely speculates that such conduct constituted active concealment, especially as it was undertaken in response to property damage and performed on a small portion of the building two years prior to the sale [395-411, 439-449; 630-650; Plaintiff's Brief, at 11-14].

In addition, Plaintiff failed to demonstrate that the "new drywall" prevented him from discovering the rotten post or any of the other alleged defects. For example, since Plaintiff's attorney possessed letters referencing "structural rot" [32, 306, 651-652], Plaintiff could have readily discovered the alleged defects had his attorney simply contacted his inspector or the Building Department.

Similarly, since Plaintiff asserts that the entire building was defective, he cannot show justifiable reliance on the alleged fraudulent repairs. Plaintiff's predicament was caused by his failure to discover all of the other alleged defects throughout the rest of the building, among other things (see McPherson v Husbands, 54 AD3d 735, 736 [2d Dept 2008]; Rozen v 7 Calf Cr., LLC, 52 AD3d 590, 593 [2d Dept 2008]; Bennett v Citicorp Mortg., Inc., 8 AD3d 1050, 1051 [4th Dept 2004]; M & T Mortg. Corp. v Alleyne, 7 AD3d 761, 762 [2d Dept 2004]; Pais-Built

Homes, Inc. v Beckett, 297 AD2d 726, 727-728 [2d Dept 2002]; McManus, 262 AD2d at 371; Cohen v Cerier, 243 AD2d 670, 672 [2d Dept 1997]; Bando v Achenbaum, 234 AD2d 242, 244 [2d Dept 1996] ["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" (internal quotation marks and citations omitted)]).

2. The New Paint

In addition, Plaintiff seems to assert that "new paint" concealed the alleged defects [630-650; Plaintiff's Brief, at 11-14]. However, Plaintiff failed to demonstrate (or even allege) which specific defects were concealed by the paint, how the paint concealed the alleged defects, and how the paint thwarted his efforts to discover the alleged defects.

3. The Special Facts Doctrine

In addition, Plaintiff also attempts to rely upon the special facts doctrine [Plaintiff's Brief, at 11-14]. However, to invoke the doctrine, Plaintiff was required to show "that the material fact was information peculiarly within the knowledge of [Defendant], and that the information was such that could not have been discovered by [Plaintiff or his agents] through the exercise of ordinary intelligence" (Apthorp Assoc., LLC, 2009 NY Slip Op 50407U [internal quotation marks and citations omitted]).

Here, contrary to Plaintiff's conclusory assertions, the record reveals that the alleged defects were discovered by other inspectors and contractors and that the structural rot and water damage were evidenced by the title report and the public records [168-169, 347-349, 306, 313, 884-941, 942-950]. As such, Plaintiff's allegations are insufficient to invoke the special facts doctrine (see McPherson, 54 AD3d at 736; Rozen , 52 AD3d at 593; Bennett, 8 AD3d at 1051;

M & T Mortg. Corp., 7 AD3d at 762; Pais-Built Homes, Inc., 297 AD2d at 727-728; McManus, 262 AD2d at 371; Cohen, 243 AD2d at 672; Bando, 234 AD2d at 243-244).

4. The Attorney Affidavit

Similarly, Plaintiff attempts to belittle the existence of the March 13, 2001 and August 8, 2005 letters by submitting the affidavit of his attorney, who avers that he read the letters before closing, but decided not to take any action other than briefly calling Defendant's attorney, who informed Plaintiff's attorney that he had not discussed the matter with Defendant and that Defendant had not told him any information about it one way or the other [652]. Plaintiff's attorney avers that he made no efforts to even call Plaintiff, his inspector, or the Building Department and that he instead continued to rely on the prior one hour inspection, which was indisputably performed by someone without the information contained in the title report or the Building Department's records. As a matter of law, these allegations fail to demonstrate that Defendant "thwarted" Plaintiff's due diligence efforts, especially considering the ethical duties imposed on attorneys to investigate matters and exercise their independent judgment (see Stoian, 66 AD3d at 1279-1280; Bennett, 8 AD3d at 1051; Berger-Vespa v Rondack Bldg. Inspectors Inc., 293 AD2d 838, 841 [3d Dept 2002]; McManus, 262 AD2d at 371; Kurz v Nicolo, 125 AD2d 993, 993 [4th Dept 1996]; see also Richardson v United Funding, Inc., 16 AD3d 570, 571 [2d Dept 2005]; Shillington v Riley, 2009 NY Slip Op 31101U [Sup Ct, New York County 2009]).[3] Moreover, contrary to Plaintiff's contention, it is irrelevant whether Plaintiff's attorney read these letters only one day prior to closing, especially as no evidence exists that Defendant thwarted his ability to obtain the title report sooner.

[3] Notably, if Plaintiff's attorney wanted to place the risk of loss on Defendant for his own mistaken assumption, he should have expressly bargained for such relief.

Further, to the extent that Plaintiff attempts to assert some kind of "mutual mistake" claim, no basis exists for such relief considering Plaintiff's lack of due diligence. In any event, the remedy, if any, would have been recession rather than damages [957] (see Koppstein, 35 NY2d at 899; Danann Realty Corp., 5 NY2d at 323).

5. The $1,500 Recovered for Water Damage to the First Floor Bathroom

Further, Plaintiff seems to assert that a triable issue of fact exists because Defendant pocketed $1,500 in 2001 from a lawsuit involving water damage to the first floor bathroom [459a, 462-462; Plaintiff's Brief, at 4]. This fact is irrelevant (other than to show mere knowledge of the alleged defect). Plaintiff possesses no right to such funds, especially as he purchased the building "as is" in an arm's length transaction and admittedly knew about the first floor bathroom's water damage from his inspection [298, 580, 587].

6. No Justifiable Reliance or Causation

Moreover, as explained above, Plaintiff cannot claim justifiable reliance or causation. For example, Plaintiff asserts that the March 13, 2001 letter contained material information capable of preventing his injuries and concedes that prior to closing his attorney read it. Under these circumstances, no triable issues of fact exist (see Daly, 67 AD3d at 91; McManus, 262 AD2d at 371; Industrial Risk Insurers, 224 AD2d at 390; see also Wirsing v Donzi Mar. Inc., 30 AD3d 589, 590 [2d Dept 2006]; Arnold v New City Condominiums Corp., 78 AD2d 882, 883 [2d Dept 1980]).

POINT III DEFENDANT SHOULD BE AWARDED ATTORNEYS' FEES

A "defendant who defeats a frivolous civil claim is not without some possibility of recovering legal expenses" (Engel v CBS, Inc., 93 NY2d 195, 203 [1999]). If "an action to recover damages for personal injury, injury to property or wrongful death is found to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars" (id. [internal quotation marks omitted]; see CPLR 8303-a). "The courts' administrative rules [also] permit many courts, in the exercise of discretion, to award fees and costs and to impose sanctions for frivolous conduct" (Engel, 93 NY2d at 203; see 22 NYCRR 130-1.1).

Here, Defendant should have been and should be awarded costs and reasonable attorneys' fees pursuant to CPLR 8303-a or 22 NYCRR 130-1.1.[4] First, the verified complaint asserts material factual statements that are false and misleading. For example, the verified complaint alleges that Plaintiff was unaware of defects to the sills and water damage. In his EBT, however, Plaintiff admitted that he knew about the sills and water damage to the first floor bathroom. In addition, Plaintiff alleges that the March 13, 2001 letter was fraudulently concealed by Defendant despite the indisputable facts that the letter was contained in the Building Department's records, provided to the title agency, and read by Plaintiff's attorney prior to closing. Plaintiff also alleges that the March 13, 2001 letter and "structural rot" were not readily ascertainable despite his attorney possessing the March 13, 2001 letter referencing "structural rot" [27-28, 32, 161, 168, 587, 651-652, 884-941].

[4] Notably, in addition to challenging the determination of the court below, Defendant also requests that this Court exercise its own discretion and award costs and attorneys' fees.

Second, it is submitted that the verified complaint is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. For example, the allegations contradict well-settled law, e.g., that no duty exists to disclose defects in an arm's length real estate transaction, that conclusory allegations of active concealment are insufficient to state a cause of action, that a buyer is deemed to know the information that his attorney possesses, and that a buyer cannot recover for defects readily ascertainable.

This Court should also award attorneys' fees to compensate Defendant for having to defend against this lawsuit for years. While discovery permits "as is" buyers with the opportunity to investigate, it also renders the doctrine of caveat emptor somewhat meaningless. For example, it exposes "as is" sellers in arm's length transactions to years of discovery and frustration, all to the benefit of careless buyers.

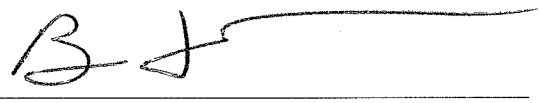
Accordingly, the Court should award Defendant costs and attorneys' fees.

CONCLUSION

For the reasons set forth above, Defendant Cynthia Meili respectfully requests that this Court (1) affirm that portion of the order which granted her summary judgment, (2) reverse that portion of the order that denied her attorneys' fees, (3) award her costs and reasonable attorneys' fees, and (4) provide such other further relief as the Court deems just and proper.

Dated: May 25, 2011
Albany, New York

TABNER, RYAN AND KENIRY, LLP



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