

**SUPREME COURT- STATE OF NEW YORK  
PART 70, SUFFOLK COUNTY**

**PRESENT:  
HON. PAUL M. HENSLEY, AJSC**

REVOLUTIONARY ROAD  
PROPERTIES LLC,

Index No. 614640/2022  
Motion Date: 9/27/2022  
Submit Date: 10/18/2022

Plaintiff,

-against-

Motion Seq.: 001-MG

ROBERT SCHOEN,  
ELIZABETH C GIRARDI SCHOEN,  
TOMMY PANEBIANCO,  
REALTY CONNECT USA,

ATTORNEY FOR PLAINTIFF:  
Hang & Associates, PLLC  
Jian Hang, Esq.  
Ge Qu, Esq.  
136-20 38<sup>th</sup> Avenue, Suite 10G  
Flushing, New York 11354

Defendants.

ATTORNEY FOR DEFENDANTS:  
Klein Greco & Associates LLP  
Richard L. Klein, Esq.  
122 East 42<sup>nd</sup> Street, 4<sup>th</sup> Floor  
New York, New York 10168

Penino & Moynihan, LLP  
Stephen J. Penino, Esq.  
Henry Ling Ping Liao, Esq.  
Robert Charles Keidel, Esq.  
1025 Westchester Avenue, Suite 403  
White Plains, New York 10604

Upon the following papers read on defendants Robert Schoen and Elizabeth C. Girardi-Schoen's motion to dismiss plaintiff's complaint and any cross claim asserted against them pursuant to CPLR 3211: NYSCEF documents numbered 1 thru 25; it is

**ORDERED** defendant's Robert Schoen and Elizabeth C. Girardi-Schoen's motion to dismiss co-defendant's cross claim as asserted against them is granted without opposition: and it is further

**ORDERED** that the branch of defendants Robert Schoen and Elizabeth C. Girardi-Schoen's motion to dismiss plaintiff's complaint as asserted against them pursuant to CPLR § 3211 based upon documentary evidence is granted; and it is further

**ORDERED** that the remaining parties appear in Part 70, third floor, 210 Center Drive, Riverhead, New York on January 17, 2023 at 9:30 am for a preliminary/settlement conference.

Plaintiff, Revolutionary Road Properties, LLC, entered into a contract with defendants, Robert Schoen and Elizabeth C. Girardi-Schoen, on March 10, 2022, for the purchase of a parcel of vacant land commonly known as 74 Shore Road, Hampton Bays, New York. The contract price was \$300,000.00, and plaintiff put in escrow \$30,000.00 as a down payment. The contract required, at closing, a wire transfer, bank or certified check in the amount of \$270,000.00. Defendants Tommy Panebianco and Realty Connect USA, are alleged to be the sellers' real estate agents with regard to the sale. The sale was to close within 30 days or on or about April 10, 2022. After making several attempts to schedule a closing, on July 22, 2022, the Schoen's sent a "time is of essence letter." That letter scheduled the closing for August 5, 2022, at which plaintiff failed to appear or close. The Schoen's then retained the purchaser's down payment. On July 27, 2022, prior to the closing, plaintiff filed a summons and complaint alleging that it was induced by fraud to enter the purchase agreement; that defendants breached the covenant of good faith and fair dealing; and that defendants conspired to commit fraud. The essence of the complaint is that defendants represented to plaintiff that the vacant land had an expired building permit which could be renewed, and that without this representation plaintiff would not have signed the contract. Defendants Tommy Panebianco and Realty Connect USA answered on August 22, 2022, and cross claimed against the Schoen's. The defendants Schoen's have not yet answered, but move to dismiss both the cross claims and plaintiff's complaint pursuant to CPLR § 3211 based upon documentary evidence. In support of the motion, the Schoen's submit, among other things, an affirmation of counsel, an affidavit of Robert Schoen, and the real estate contract between the parties. In opposition, plaintiff submits an affirmation of counsel. Defendants Tommy Panebianco and Realty Connect USA, have not opposed the application to dismiss the cross claims.

CPLR § 3211 Motion to dismiss provides:

- (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
1. a defense is founded upon documentary evidence;

On a motion to dismiss under CPLR § 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference (*Simkin v Blank*, 19 NY3d 46, 945 NYS2d 222 [2012]). At the same time, however, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Simkin*, 19 NY3d 46, 945 NYS2d 222; *see also Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 53 NYS3d 598 [2017]). "The liberal construction and favorable inferences to which a plaintiff is entitled will nevertheless fail to save claims that are conclusively refuted by documentary evidence (*see* CPLR § 3211 [a] [1]). A motion to dismiss pursuant to CPLR § 3211 [a] [1], on the ground that the action is barred by documentary evidence, "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d

314, 326, 746 NYS2d 858 [2002], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; see also *Santander Consumer USA, Inc. v Kobi Auto Collision & Paint Ctr., Inc.*, 183 AD3d 984, 123 NYS3d 699 [3d Dept 2020], quoting *Goshen*).

Here, the documentary evidence submitted by the Schoen's pursuant to § 3211 (a) (1) is the contract for the sale of property between the parties. That document provides:

Notwithstanding anything contained herein to the contrary, Purchaser (Revolutionary Road Properties, LLC, plaintiff here) hereby agrees and acknowledges that Purchaser is taking the land in its strict "as is" condition as of the date of the Contract with all encumbrances and exceptions. Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate broker sets up, or information pertaining to the Premises furnished by any real estate broker, agent employee, servant, or other person, unless the same are specifically set forth herein. Seller makes no representations about how the premises can be used, what approvals may or may not be needed, the ability to build, zoning, profitability, or the like. Purchaser hereby acknowledges that it has done its due diligence on same. Purchaser acknowledges that the Premises is being delivered in strict "as is" condition and that seller has no obligation to make any repairs, improvements, alterations, additions, or any work to Premises of any kind.

The Schoen defendants maintain that this express language in the contract, along with the affidavit of Robert Schoen that no representations were made by the Schoens to the plaintiff, demonstrate that plaintiff could not have relied upon representations, which were not made by the Schoens, and therefore, the complaint should be dismissed. For the purpose of this motion, the Schoen affidavit is not relevant, because the Court, at this stage, must accept the allegations of the complaint to be true. In other words, for the purpose of this motion, representations of a prior expired building permit by the sellers or their agent were made, in fact made.

In opposition, plaintiff maintains that no documentary evidence was submitted pursuant to CPLR § 3211 (a) (1). To the contrary, the contract dated March 10, 2022, is documentary evidence. Plaintiff also argues that the contract does not "utterly refute" plaintiff's allegations in the complaint. Plaintiff's first cause of action alleges fraud in the inducement. "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421, 646 NYS2d 76 [1996]; see *Hecker v Paschke*, 133 AD3d 713, 716, 19 NYS3d 568 [2d Dept 2015]). In the context of real estate transactions, "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent 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 or the seller's agent which constitutes active concealment" (*Hecker v Paschke*, 133 AD3d at 716, 19 NYS3d 568 [internal quotation marks omitted]; see *Daly v Kochanowicz*, 67 AD3d 78, 91, 884 NYS2d 144 [2d Dept

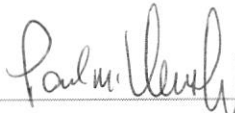
2009]; *Jablonski v Rapalje*, 14 AD3d 484, 485, 788 NYS2d 158 [2d Dept 2005]). “If however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property” (*Hecker v Paschke*, 133 AD3d at 716, 19 NYS3d 568 [internal quotation marks omitted]; see *Daly v Kochanowicz*, 67 AD3d at 91–92, 884 NYS2d 144; *Jablonski v Rapalje*, 14 A.D.3d at 485, 788 NYS2d 158). “To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor” (*Jablonski v Rapalje*, 14 AD3d at 485, 788 NYS2d 158; see *Daly v Kochanowicz*, 67 AD3d at 92, 884 NYS2d 144). The presence of disclaimers in a written agreement may preclude a claim of common-law fraud by rendering any resulting reliance unjustified (see *People v Credit Suisse Sec. [USA] LLC*, 31 NY3d 622, 644, 82 NYS3d 295 [2018]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 184 NYS2d 599 [1959]). Moreover, a specific disclaimer of reliance on representations as to the condition of real property will generally bar related fraud-based claims (see *Danann Realty Corp. v Harris*, 5 NY2d 317, 184 NYS2d 599 [1959]). Here, the contract of sale for the subject premises set forth, in plain language that the Purchaser was taking the land in its strick “as is” condition, that the seller was not liable or bound by any manner by any verbal or written statements made by any real estate broker or agent, and seller makes no representations about how the premises can be used, what approvals may or may not be needed, the ability to build, zoning, profitability, or the like. Purchaser acknowledged that it has done its due diligence on same.

Accepting the complaint as true, that the seller or their agent misrepresented or lied that a prior expired building permit existed for the vacant property, together with the language of the contract, plaintiff cannot establish reasonable reliance upon the misrepresentation, because they specifically waived it. Moreover, that information was publicly available and not in the exclusive control of defendants. The existence of a building permit, or lack of one, was available to plaintiffs through the exercise of due diligence. Accordingly, the first and third causes of actions as asserted against the moving defendants alleging fraud in the inducement and conspiracy to commit fraud are dismissed pursuant to CPLR § 3211(a) (1).

Plaintiff's second cause of action alleges breach of covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement (see *Frankini v. Landmark Constr. of Yonkers, Inc.*, 91 AD3d 593, 595, 937 NYS2d 80 [2d Dept 2012]; *P.T. & L. Contr. Corp. v Trataros Constr., Inc.*, 29 AD3d 763, 764, 816 NYS2d 508 [2d Dept 2006]). The implied covenant includes any promises which a reasonable promisee would be justified in understanding were included (see *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389, 639 NYS2d 977 [1959]). However, no obligation may be implied that would be inconsistent with other terms of the contractual relationship (see *id.* at 389, 639 NYS2d 977; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304, 461 NYS2d 232 [1983]). Here, a finding that the moving defendants breached the covenant of good faith and fair dealing would necessarily contradict explicit and unambiguous terms of the contract and create additional obligations not contained in it. The express provisions of the contract conclusively establish a defense to causes of action alleging breach of the implied covenant of good faith and fair dealing (see *Minovici v Belkin BV*, 109 AD3d 520, 521, 971 NYS2d 103 [2d Dept 2013]; cf. *Sunset Cafe, Inc. v Mett's Surf & Sports Corp.*, 103 AD3d 707, 708–709, 959 NYS2d 700 [2d Dept 2013]; *Laxer v Edelman*, 75 AD3d

584, 586, 905 NYS2d 649 [2d Dept 2010]). Accordingly, the second cause of action must also be dismissed.

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Hon. Paul M. Hensley  
Acting Justice of the Supreme Court

Date: December 13, 2022  
Riverhead, New York