
96 A.D.3d 514, 946 N.Y.S.2d
167, 2012 N.Y. Slip Op. 04691

****1** Lee Rosenblum et al., Appellants

v

Marc J. Glogoff et al., Respondents.

Supreme Court, Appellate Division,
First Department, New York
109723/10, 7916
June 12, 2012

HEADNOTES

Vendor and Purchaser

Contract for Sale of Cooperative Apartment Representations
in Purchase Agreement Relating to Air Conditioning

Fraud/Fraud in Inducement

Reliance on Representations in Purchase Agreement

Cobert, Haber & Haber, Garden City (Eugene F. Haber of
counsel), for appellants.

[Nadel & Ciarlo, P.C.](#), New York ([Michael J. Ciarlo](#) of
counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische,
J.), entered June 1, 2011, which, insofar as appealed from
as limited by the briefs, granted defendants' motion for
summary judgment dismissing the complaint and on their
counterclaims for breach of contract and for forfeiture of
plaintiffs' \$90,000 deposit, and directed that the judgment
be satisfied from the money held on deposit, unanimously
affirmed, without costs.

It is uncontraverted that plaintiffs failed to appear at the
time-of-the-essence closing, rendering them in default (*see*
Liba Estates v Edryn Corp., 178 AD2d 152 [1991]).
Plaintiffs assert that their default is excused because of
material misrepresentations made by defendants' agent,
regarding the existence of “thru-wall” air conditioning in the
co-op unit, which plaintiffs were told was supposed to be
behind a cabinet door in the living room. However, the court
properly determined that section 7.1 of the purchase
agreement expressly disavows any representations about the
condition of “Personalty,” including air conditioning, and
that the purchasers had inspected or waived inspection of

such personalty, and took it “as is.” Moreover, section
14.1 contains a merger clause, asserting that any prior
oral or written agreements or representations merged
into the contract, which alone expressed the parties'
agreement. Al

***515** though a general merger clause will not preclude
parol evidence regarding fraud in the inducement or fraud in
the execution (*see Magi Communications v Jac-Lu Assoc.*,
65 AD2d 727 [1978]; *Danann Realty Corp. v Harris*, 5
NY2d 317, 320 [1959]), where the parties expressly disclaim
reliance on the particular misrepresentations, contrary parole
evidence is barred (*see Citibank v Plapinger*, 66 NY2d 90,
94-95 [1985]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v*
Wise Metals Group, LLC, 19 AD3d 273, 275 [2005];
O'Keeffe v Hicks, 74 AD2d 919 [1980]).

Even assuming that section 14.1, when read in conjunction
with section 7.1, does not provide the requisite particular
disclaimer of reliance regarding air conditioning, the court
properly held that plaintiffs' fraud in the inducement
claim fails for lack of justifiable reliance on the alleged
misrepresentation (*see generally Eurycleia Partners, LP v*
Seward & Kissel, LLP, 12 NY3d 553, 559-560 [2009]).
“Where a party has the means to discover the true nature
of the transaction by the exercise of ordinary intelligence,
and fails to make use of those means, he cannot claim
justifiable reliance on defendant's misrepresentations” (****2**
Stuart Silver Assoc. v Baco Dev. Corp., 245 AD2d 96,
98-99 [1997]; *see Joseph v NRT Inc.*, 43 AD3d 312 [2007]).
Here, when told that the air conditioning unit was behind a
particular cabinet door, plaintiffs failed to even open the
door or inquire what was “thru-wall” air conditioning, or
how it worked. It is not speculation to conclude that
plaintiffs could have discovered the truth by use of
ordinary intelligence, as plaintiff Lee Rosenblum's own
affidavit, in opposition to defendants' motion for summary
judgment, states that, after execution of the purchase
agreement, when he visited the apartment and noticed that
it was hot, he opened the cabinet door and “[t]here was
nothing behind the door except a pipe. There was no air
conditioning unit of any kind.” Had plaintiffs simply opened
the door when they inspected the unit prior to executing the
purchase agreement, at the very least they would have been
put on notice of the need to inquire further regarding the
lack of any air conditioning unit in that cabinet, as plaintiff's
affidavit clearly states. Concur—Tom, J.P., Mazzarelli,
Moskowitz, Renwick and Abdus-Salaam, JJ.[Prior Case
History: 31 Misc 3d 1236(A), 2011 NY Slip Op 51014(U).]