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MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 23

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K&S STORAGE II, LLC

x

INDEX NO. 11130/00

- against -

BY: GLOVER, J.

ADAMS BRUSH MANUFACTURING CO., et al.

x

DATED: OCTOBER 10, 2001

Defendant Adams Brush Manufacturing Co. and defendant Michael Zurawin have moved for, inter alia, summary judgment dismissing the complaint against them.

On or about December 23, 1998, defendant Adams, as seller, entered into a contract for the sale of real property located at 94-02 104th Street, Ozone Park, New York with Shurgard Storage Centers, Inc., as buyer. The purchase price amounted to \$4,350,000. Shurgard Storage Centers, Inc. subsequently assigned the contract to plaintiff K&S Storage II, LLC. Paragraph 36 of the rider to the contract of sale provided in relevant part that defendant Adams had "no present knowledge of any encroachments, pending litigation involving the property, claims against the property, structural problems, environmental conditions, violations, or threats of same other than as set forth in the materials provided to purchaser pursuant to this paragraph." Paragraph 4(d) of the "Amendment to Contract of Sale Regarding Environmental Matters" provided in relevant part: "Seller and Purchaser agree to include the other party and their respective representative(s) in all meetings and discussions of consequence with any governmental agency and will promptly provide

to each other copies of any correspondence or other documents submitted to or received from any governmental agency or environmental consultant with respect to the property." In February 2000, the New York City School Construction Authority ("SCA") sent defendant Adams a letter advising it that the New York City Board of Education had identified its building as a possible location for a school. The letter stated that SCA had been asked by the Board of Education "to determine whether your property is suitable for this purpose and, if so, arrange for its acquisition." The letter continued: "Over the next several months, the SCA will make various studies and conduct a public review of the proposed site to determine whether your property should be acquired for the proposed public purpose." Defendant Adams allegedly failed to disclose to plaintiff K&S prior to the closing of title that SCA had requested permission to conduct a survey and an appraisal of the property with a view to condemning it. Defendant Michael Zurawin, an officer of defendant Adams, allegedly instructed one of its employees, Edward Daber, to remain silent about the proposed acquisition by SCA. On or about April 14, 2000, defendant Adams conveyed title to the property to plaintiff K&S. Shortly after title closed, SCA began a proceeding to obtain access to the property. The plaintiff alleges that it would not have acquired the property had it known that SCA had taken steps to condemn it.

That branch of defendant Adams' and defendant Zurawin's motion which is for summary judgment dismissing the first cause of

action asserted against them is granted on consent. (See stipulation dated August 22, 2001.

Those branches of defendant Adams' and defendant Zurawin's motion which are for summary judgment dismissing the second, third and fourth causes of action asserted against them are denied. The proponent of a motion for summary judgment has the burden of establishing his entitlement to judgment as a matter of law. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) In the case at bar, the movants failed to carry this burden. It is true that paragraph 36 of the rider to the contract of sale provided in relevant part that defendant Adams had "no present knowledge of any \* \* \* pending litigation involving the property, claims against the property, \* \* \* or threats of same \* \* \*" (emphasis added) and that on December 23, 1998, when the contract of sale was entered into, defendant Adams had no present knowledge that SCA was contemplating condemnation proceedings against the property. It is also true that the plaintiff's reliance on paragraph 4(d) of the "Amendment to Contract of Sale Regarding Environmental Matters" is misplaced since a condemnation proceeding is not an "environmental matter." However, the plaintiff has adequately stated causes of action for fraud. The elements of such a claim are: (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance and (5) injury. (See, Lama Holding Co. v Smith Barney, 88 NY2d 413; New York Univ. v Continental Ins. Co., 87 NY2d 308; New York City Transit Authority v Morris J. Eisen, P.C., 276 AD2d 78; American Home Assur. Co. v

Gemma Const. Co., Inc., 275 AD2d 616; Swersky v Dreyer & Traub, 219 AD2d 321.) In the case at bar, there is an issue of fact concerning whether defendant Adams committed fraud through its concealment of the letter from SCA about the proposed condemnation of the property the defendant intended to sell to the plaintiff. "When one of the parties, pending negotiations for a contract, has held out to the other the existence of a certain set of facts material to the subject of the contract and knows that the other party is acting upon the inducement of their existence \* \* \* and while they are pending, knows that a change is likely to occur, of which the other party is ignorant, good faith and common honesty require him to correct the misapprehension which he has created." (Saslow v Novick, 192 NYS2d 138, 139-140; Schroeder v Schroeder, 269 App Div 405.) In the case at bar, there was a change in circumstances after the contract was signed, and the representation made in the contract of sale that defendant Adams had no present knowledge of claims or litigation involving the property allegedly created a misapprehension in the plaintiff that the defendant was under a duty to correct. Moreover, under the circumstances of this case "it was the duty of the vendor to acquaint the vendee with a material fact known to the former and unknown to the latter." (Rothmiller v Stein, 143 NY 581, 592; see, Scharf v Tiegerman, 166 AD2d 697.) "'[W]here one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge', there is a duty to disclose that information \* \* \*." (Stevenson Equip. v Chemig

Constr. Corp., 170 AD2d 769, 771, affd 79 NY2d 989, quoting Aaron, Ferer & Sons v Chase Manhattan Bank, Natl. Assn., 731 F2d 112, 123.) The SCA's steps toward the condemnation of the property were peculiarly within the knowledge of the seller and were not likely to be discovered by a reasonably prudent purchaser, thus creating a duty on the vendor's part to make disclosure. (Compare, Trustco Bank, Natl. Assn. v Cannon Bldg. of Troy Assocs., 246 AD2d 797.) Moreover, although the SCA has allegedly repaid or will repay the plaintiff for its purchase price of the premises, the conflicting allegations of the parties have created an issue of fact concerning whether the plaintiff sustained additional damages from the condemnation of the property. Finally, regarding defendant Zurawin, "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties \* \* \*." (American Exp. Travel Related Services Co., Inc. v North Atlantic Resources, Inc., 261 AD2d 310.)

That branch of the motion which is for an order permitting the defendants to serve an amended answer is granted. (See the stipulation dated November 30, 2000.)

That branch of the motion which is for an order imposing sanctions is denied.

Settle order.

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J.S.C.