STATE OF NEW YORK
SUPREME COURT MONROE COUNTY

M[redacted] M[redacted]

Plaintiff,

-vs-

T[redacted] M[redacted],
A[redacted] M[redacted],
[redacted] V[redacted], and
C[redacted], LLC,

Defendants.

Index #: I2017[redacted]

Special Term:
[redacted]2019

David Rasmussen	Jennifer Beckage	Kamran Hashmi	Raul Martinez
Attorney for Plaintiff	*Attorney for M[redacted]Defendants*	*Attorney for Defendant V[redacted]*	*Attorney for Defendant C[redacted]*

DECISION AND ORDER

Odorisi, J.

This lawsuit arises out off the sale of an allegedly structurally defective house. Pending before this Court are the following: (1) Defendant [redacted]V[redacted]s ("V[redacted]") [redacted] 2019, summary judgment and sanction motion [NYSCEF Docket # 45 - Motion # 5]; (2) Defendant C[redacted]LLC's ("C[redacted]") [redacted] summary judgment motion [Docket # 89 - Motion # 6]; and, the M[redacted] Defendants' [redacted] summary judgment motion [Docket # 63 - Motion # 7]. For the reasons set forth hereinafter: (1) V[redacted]'s motion is **GRANTED IN PART AND DENIED IN PART**; (2) C[redacted]s motion is **GRANTED**; and, (3) the M[redacted]s' motion is **DENIED**.

Legal Discussion

Each Defendant's motion is laid out hereinafter.

V[redacted]s Motion - Motion # 5

V[redacted] is entitled to summary judgment. See CPLR 3212 (b).

The first claim against V[redacted] is fraud in the inducement, which falters. See e.g. Hogan Willig, PLLC v. Kahn, 145 AD3d 1619, 1621 (4th Dept 2016) (the defendant established entitlement to summary judgment on the fraud causes of action, including fraudulent inducement).

"The elements of a fraud cause of action consist of "'a misrepresentation or a material omission of fact which was false and known to be false by [the] 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.'" Pasternack v. Lab. Corp. of Am. Holdings, 27 NY3d 817, 827 (2016). See also Wright v. Selle, 27 AD3d 1065, 1067 (4th Dept 2006). A fraud must be proven by clear and convincing evidence. See Simcuski v. Saeli, 44 NY2d 442, 452 (1978).

Here, the motion record [mainly the deposition testimony] is clear that V[redacted] was not aware of the foundation work ABS did for either S[redacted] B[redacted] or the M[redacted]s, nor did he know about the deck sinkhole. Therefore, V[redacted] was not in a position to make any knowing misrepresentations about the same [or conversely conceal anything]. Also, nothing V[redacted] actually told Plaintiff about the house's condition was false. Additionally, V[redacted] in no way interfered with Plaintiff's visits, or the home inspection. Furthermore, Plaintiff's speculative suggestion that V[redacted] "must have" known more about the house given his status as a neighbor, friend, and business

associate is wholly insufficient to raise a material question of fact. See e.g. Giffune v. Kavanagh, 302 AD2d 878, 879 (4th Dept 2003) (the plaintiff failed to submit proof in admissible form sufficient to establish the existence of a material issue of fact with respect to the elements of a fraud claim). See also S. J. Capelin Assoc., Inc., 34 NY2d 338, 341 (1974) ("A shadowy semblance of an issue is not enough to defeat the [summary judgment] motion"); State Farm Fire & Cas. Co. v. Ricci, 96 AD3d 1571, 1574 (4th Dept 2012) (reversing denial of summary judgment motion as the opposing party's speculation was insufficient to overcome the same).

Plaintiff's second claim against V[redacted] for breach of a fiduciary duty arises out of Real Property Law ("RPL") § 466, which provides that:

> An **agent representing a seller** of residential real property as a listing broker **shall have the duty to timely inform each seller** represented by that agent of the seller's obligations under this article ["Property Condition Disclosure in the Sale of Residential Real Property"]. . . . If an agent performs the duties and obligations imposed upon him or her pursuant to this section, the agent shall have no further duties under this article and **shall not be liable to any party for a violation of this article.**

RPL § 466 (emphasis added).

V[redacted] had no contact with Defendant T[redacted] M[redacted] who was one of the sellers who signed the Property Condition Disclosure Statement ("PCDS") - and this is why Plaintiff alleges a statutory violation. Despite the lack of contact due to Mr. M[redacted] incarceration, V[redacted] reasonably relied upon A[redacted] M[redacted] - through Mr. M[redacted]'s criminal defense attorney - to get the PCDS executed, the form itself was self-evident as to its truthful execution [Docket # 58], and Mr. M[redacted] admitted at his deposition that he knew he had to disclose problems with the property. Given these facts, and add on

top that V[redacted] did not owe a duty to Plaintiff (see RPL § 443), this Court sees no legal basis on which to impose fiduciary liability. See e.g. Gallagher v. Ruzzine, 147 AD3d 1456, 1458 (4th Dept 2017) (sellers' real estate agent was entitled to a summary judgment dismissal).

Finally, and although V[redacted]'s motion is successful, this Court declines to impose sanctions as the matter was not started in bad faith. See 22 NYCRR § 130-1.1; Parks v. Leahey & Johnson, P.C., 81 NY2d 161, 165 (1993) (finding that, although the complaint was properly dismissed, the lower courts abused their discretion in also imposing sanctions); Brittle v. Weltman, 202 AD2d 1059 (4th Dept 1994) (concluding that the lower court did not abuse its discretion in failing to impose sanctions upon the plaintiff with respect to the dismissal of a cause of action); Penn Iron & Metal Co., Inc. v. Gross, 192 AD2d 1059 (4th Dept 1993) (because the action was not begun in bad faith, sanctions were not justified).

In sum, V[redacted] is awarded a summary judgment dismissal.

C[redacted]s Motion - Motion # 6

C[redacted] is also entitled to summary judgment. See e.g. Diniro v. Aspen Athletic Club, LLC, 173 AD3d 1789 (4th Dept 2019) (court erred in denying the defendant's summary judgment motion dismissing the gross negligence cause of action).

The lone claim against C[redacted] is gross negligence in the Fourth Cause of Action. "'Gross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd., 81 NY2d 821, 823-824 (1993) (citing Sommer v. Fed. Signal Corp., 79 NY2d 540, 554

(1992) (grossly negligent conduct "evinces a reckless indifference to the rights of others"). See also Kalisch-Jarcho, Inc. v. City of New York, 58 NY2d 377, 385 (1983); Tiede v. Frontier Skydivers, Inc., 105 AD3d 1357, 1359 (4th Dept 2013); PJI 2:10A.

Taken all of Plaintiff's allegations as true, and viewing them most favorably to him, Mr. W[redacted]'s failure to detect the lone visible pier bolt - per the non-invasive inspection (see 19 NYCRR §§ 197-5.1 (u) & 197-5.3 (a)) - does not rise to the level of gross negligence as a matter of law. See e.g. Tracey Rd. Equip., Inc. v. Apollo 16 Painting Contractors, Inc., 171 AD2d 1031 (4th Dept 1991) (finding that claims asserted, even if deemed true, were not suggestive of gross negligence). See also Ryan v. IM Kapco, Inc., 88 AD3d 682, 683 (2d Dept 2011) (finding that the defendant home inspector was not grossly negligent). Further, there was no indication of backyard sinkholes at the time of the inspection to fault Mr. W[redacted] for not finding the same. Plaintiff's inference that the foundation pier discovery would have led to the unveiling of the buried debris issue is too untenable on which to premise a higher form of gross negligence responsibility. See e.g. Bower v. City of Lockport, 115 AD3d 1201, 1204 (4th Dept 2014) (gross negligence claim was dismissed).

Plaintiff's cited cases are not binding and/or are inapposite as they involved a failure to detect carbon monoxide leaks thereby immediately and directly endangering the home's occupants' welfare [Docket # 121, p. 19].

In all, C[redacted] is awarded a summary judgment dismissal.

M[redacted]s' Motion - Motion # 7

The M[redacted]s are again not entitled to summary judgment. See e.g. Sicignano v. Dixey, 124 AD3d 1301, 1303 (4th Dept 2015) (reversing grant of summary judgment

to home-seller due to issues of fact concerning actual knowledge of property defect).

To start, this Court disagrees with Plaintiff that the second summary judgment motion is a prohibited successive motion. See e.g. Bissell v. Town of Amherst, 56 AD3d 1144, 1146 (4th Dept 2008) (the respondent's motion was not barred by the rule discouraging successive summary judgment motions"). This Court's 2018 decision denying summary judgment was without prejudice due to the unfinished state of discovery, and the M[redacted]s were expressly given leave to renew their motion - a key fact Plaintiff ignores [Docket # 70]. Since that denial, more discovery has taken place, and the M[redacted]s rely upon the same for their present motion. Thus, there is a valid reason permitting the second application. See e.g. Pittsford Canalside Properties, LLC v. Pittsford Vil. Green, 154 AD3d 1303 (4th Dept 2017) (sufficient cause existed for the defendant's later summary judgment motion).

However, the second application does not succeed. As before, this Court continues to find material issues of fact concerning the M[redacted]s' failure to disclose the known, yet latent, foundation work and settlement watch recommendation. See Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Simone v. Homecheck Real Estate Services, Inc., 42 AD3d 518, 521 (2d Dept 2007) (fraud claim was allowed to continue); Renkas v. Sweers, 10 Misc 3d 1076(A) (Monroe Co Sup Ct 2005) (denying summary judgment to seller) [Docket # 86, pp. 13, 16; Docket # 125, p. 12]. Cf. Stoian v. Reed, 66 AD3d 1278 (3d Dept 2009) (no seller liability for disclosed defects) [Docket # 86, p. 11].

Moreover, caveat emptor does not apply to immunize the M[redacted]s as the piers were not readily visible, and where instead a latent condition. Therefore, the M[redacted]s

position at oral argument that Plaintiff's visits and inspection relieve them of any responsibility is misplaced. The M[redacted]s' case of Caceci v. Di Canio Const. Corp., 72 NY2d 52 (1988) is no longer good law [Docket # 86, p. 17; Docket # 125, p. 10], and their contract merger argument is based upon inapplicable case-law [Docket # 86, p. 15].

In sum, the M[redacted]s are not awarded summary judgment, and the matter should proceed to trial.

Conclusion

Based upon all of the foregoing, it is the Decision and Order of this Court that:

1. V[redacted]s motion is **GRANTED IN PART AND DENIED IN PART.**
2. C[redacted]'s motion is **GRANTED.**
3. The M[redacted]s' motion is **DENIED.**

Signed at Rochester, New York on [redacted], 2019.

HONORABLE J. SCOTT ODORISI
Supreme Court Justice