STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

EMPIRIAN DOCKSIDE, LLC and
EMPIRIAN ACQUISITION, LLC

Plaintiffs

MEMORANDUM DECISION

vs.

Index No. 1212/08

DOCKSIDE VILLAGE, LLC and
DOCKSIDE VILLAGE SEWAGE
WORKS CORPORATION

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **LIPSITZ GREEN SCIME CAMBRIA, LLP**
Attorneys for Plaintiffs
Joseph J. Manna, Esq., of Counsel

FRANK T. GAGLIONE, P.C.
Attorneys for Defendants
Frank T. Gaglione, Esq., of Counsel

CURRAN, J.

Before the Court are Plaintiffs' motion for partial summary judgment and Defendants' cross-motion for partial summary judgment.

Background

Plaintiffs and Defendants entered into a contract on May 5, 2006, pursuant to which Plaintiffs agreed to purchase from Defendants a certain apartment complex being constructed by Defendants located at 10750 Transit Road, East Amherst, New York for the

price of $24,750,00.00 ("Contract" or "Agreement"). Plaintiffs deposited $500,000.00 with an appointed escrow agent to be held in accordance with paragraph 15 and schedule 12 of the Contract.

According to Plaintiffs, there are a number of pre-conditions to closing the transaction which involve the sewer system that defendant Dockside Village Sewage Works Corporation ("DVSWC") constructed to service the apartment complex and other users (Aff. of David L. Cohen, Esq., ¶ 7)("Cohen Aff."). Pursuant to paragraph 12 of the Contract, the closing of the transaction was to take place "sixty (60) days after the Construction Conditions, Performance Conditions and Sewage System Conditions are satisfied in full." If those items were not satisfied in full on or before October 31, 2007, either party could terminate the Contract.

The Sewage System Conditions are contained in paragraph 36 of the Contract. As noted in that paragraph, at the time of execution of the Contract, DVSWC was in the process of negotiating a Sewer Construction and Operation Agreement with the Town of Amherst. In relevant part, paragraph 36(c) of the Contract provides that it shall be a condition to the Buyer's obligation to consummate the Closing that the following conditions (the "Sewage System Conditions") are satisfied in full:

> (v) The Sewage Construction Agreement shall be finalized in form and substance acceptable to Buyer (the form and substance attached hereto as Schedule 16 being deemed acceptable) and shall be in full force and effect;
>
> (vi) The Town, Sewage Works Corporation and Buyer shall have entered into an agreement, in form and substance reasonably acceptable to all parties thereto, which provides for assessments, enforcement, maintenance, etc.

In paragraph 36(a), Defendants represented and warranted that the Sewage Construction Agreement annexed as Schedule 16 to the Contract had been approved by the Town, subject to Comptroller Review. As stated within paragraph 36(c)(v), the Sewage Construction Agreement annexed as Schedule 16 to the Contract was acceptable to Plaintiffs.

On or about October 17, 2007, Plaintiffs received a fully executed Revised Construction Sewage Agreement from Defendants ("Revised Sewer Agreement")(Cohen Aff., ¶ 12). According to Plaintiffs, although the document was apparently executed in February 2007, Plaintiffs were never consulted concerning the changes that were made nor were they aware of any proposed revisions prior to their receipt of the Revised Sewer Agreement. On December 10, 2007, Plaintiffs notified Defendants that the Revised Sewer Agreement was not acceptable to Plaintiffs and was changed without Plaintiffs' consent although such consent is required under paragraph 36(c)(v) of the Contract (Cohen Aff., ¶ 13). Defendants contend that the Town required the revisions to the agreement and that Defendants did not require any additional changes of their own, but did accept the changes required by the Town in order to finalize the agreement (Aff. of Anthony Cutaia, ¶ 4). On December 20, 2007, Defendants sent Plaintiffs a letter advising that the changes to the Revised Sewer Agreement were required by the Town and that those requirements were not flexible (Cohen Aff., ¶ 15).

In a letter dated December 28, 2007, Plaintiffs outlined their objections to the Revised Sewer Agreement, in relevant part, as follows:

(a) The Original Sewer Agreement provided that a non-profit motivated governmental body would pass only hard costs onto sewer users such as the Plaintiffs. The Revised Sewer Agreement permits the DVSWC to set its own sewer use charges, which leaves Plaintiffs vulnerable to a privately owned, profit motivated sewer owner. Additionally, DVSWC

was permitted to add various "soft costs" as well as ambiguous costs such as "direct costs," "overhead costs," "debt service" and "other expenses" that were not permitted in the Original Sewer Agreement.

(b) The billing formula in the Revised Sewer Agreement permits DVSWC's principals to receive both a profit and a "reasonable return" which was not part of the Original Sewer Agreement.

(c) The definition of the term "system" was radically changed in the Revised Sewer Agreement. Essentially, the sewer line was bifurcated into two portions with one part being owned by the Town and the other by DVSWC, which subjected Plaintiffs to having to deal with two entities and two billing regimes rather than one as set forth in the Original Sewer Agreement.

(d) Under the Original Sewer Agreement, the Town agreed to a mandatory acquisition of the sewer on its 11th Anniversary. The Revised Sewer Agreement deleted the mandatory municipal takeover and instead made it an option. Plaintiffs objected to this change because they wanted to be dealing with a non-profit motivated entity such as a municipality in the long term since a municipality can be expected to have a consistent purpose, disposition and method of operation over time.

(e) Unlike the Original Sewer Agreement, the Revised Sewer Agreement states that it pertains to a development consisting of not more than 620 single family residential housing units. Since the subject property is a 184 unit multi-family development, it was unclear whether the Revised Sewer Agreement excluded the property.

(Cohen Aff., ¶ 16).

Additionally, the Contract at paragraph 36(c)(vi) requires that the Town, DVSWA and Plaintiffs enter into an agreement which provides for assessments, enforcement, insurance, maintenance and other issues pertaining to the sewer. According to Plaintiffs, no such agreement was ever reached (Cohen Aff., ¶ 17). As a result, Plaintiffs assert that two conditions precedent to closing did not occur: (1) there is no Sewage Construction Agreement

finalized in form and substance that is acceptable to Plaintiffs; and (2) no agreement has been reached between the Town, Plaintiffs and DVSWA concerning the sewer.

The Complaint was filed on January 29, 2008 and contains three causes of action: (1) breach of contract (seeking a return of the deposit, a declaration that Plaintiffs are excused from any further performance, and damages); (2) specific performance; and (3) fraud. Plaintiffs have moved for summary judgment on the first cause of action and are seeking a declaration that Plaintiffs have no further obligation to close on the property and are entitled to the return of their deposit. Defendants have cross-moved for partial summary judgment limiting the damages on the first cause of action, dismissing the second and third causes of action and canceling the Notice of Pendency. The part of the motion seeking a declaration that Plaintiffs have no further obligation to close on the property is unopposed by Defendants.

Pursuant to paragraph 18(b) of the Contract, if Defendants "shall have breached any covenant, representation, or warranty or shall otherwise be in default under this Contract or if the conditions to Buyer's obligation to consummate this transaction have not been satisfied in full, Buyer shall be entitled either (a) to receive the return of the Deposit, which return shall operate to terminate this Agreement, or (b) to enforce specific performance."

According to Defendants, since Plaintiffs have elected to pursue summary judgment on the breach of contract claim and have sought termination of the Contract and a return of their deposit, summary judgment should be granted to Defendants dismissing the second cause of action for specific performance and dismissing the Notice of Pendency filed in connection therewith. Defendants also assert that summary judgment should be granted

limiting the damages for the first cause of action to a return of the escrow deposit as provided for in paragraph 18(b) of the Contract.

Finally, Defendants argue that Plaintiffs' third cause of action for fraud must be dismissed as duplicative of the contract cause of action. Plaintiffs allege that at the time Defendants entered into the Agreement, they did not intend to strictly perform its terms and thereby fraudulently induced Plaintiffs to enter into the Agreement. Plaintiffs seek rescission, return of the escrow deposit, reliance damages and punitive damages.

Procedural Standard

On a motion for summary judgment, until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied (*Loveless v Am. Ref-Fuel Co. of Niagara, LP*, 299 AD2d 819, 820 [4th Dept 2002]; *Seefeldt v Johnson*, 13 AD3d 1203, 1204 [4th Dept 2004]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*Gern v Basta*, 26 AD3d 807, 808 [4th Dept 2006], *lv denied* 6 NY3d 715 [2006]).

Breach of Contract:
Conditions Precedent

"A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). "Conditions can be express or implied. Express conditions are those agreed to and imposed by the parties themselves. Imposed or constructive conditions are those imposed by

law to do justice. Express conditions must be literally performed, whereas constructive conditions, which ordinarily arise from language of promise, are subject to the precept that substantial compliance is sufficient" (*Oppenheimer*, 86 NY2d at 690).

"The flexible concept of substantial compliance stands in sharp contrast to the requirement of strict compliance that protects a party that has taken the precaution of making its duty expressly conditional. If the parties have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event. Substantial performance in this context is not sufficient, and if relief is to be had under the contract, it must be through excuse of the non-occurrence of the condition to avoid forfeiture" (*Oppenheimer*, 86 NY2d at 692).

Indeed, "[w]here the parties to a contract have made an event a condition of their agreement, there must be strict compliance" (*Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006]). Express conditions precedent go "to the very essence of the contract" and "the whole purpose of the instrument would be defeated by relieving [a party] of the necessity of performance of the conditions which he has agreed to meet" (*Witherell v Lasky*, 286 AD 533, 535 [4th Dept 1955]).

Here, as demonstrated by the language chosen by the parties, there can be no question that the Sewage System Conditions are express conditions precedent. Not only did the parties specifically identify the disputed items as "Sewage System Conditions," the conditions themselves contain the term "shall," which is a mandatory, not permissive, term. Further, it is undisputed that there is no Sewage Construction Agreement finalized in form and substance that is acceptable to Plaintiffs and that no agreement has been reached between the Town,

Plaintiffs and DVSWA concerning the sewer. Although the parties disagree as to the reasons for the lack of consensus on these issues, and offer various explanations for the non-occurrence of the conditions, the fact is that the conditions remain unsatisfied. Therefore, pursuant to the clear terms of paragraph 18(b) of the Contract, since the conditions to Plaintiffs' obligation to consummate the transaction have not been satisfied in full, Plaintiffs shall be entitled either (a) to receive the return of the Deposit, which return shall operate to terminate the Agreement, or (b) to enforce specific performance. By making this motion, Plaintiffs have elected their remedy and chosen the former.

Defendants' argument that there are material triable issues of fact as to whether Plaintiffs breached, repudiated or terminated the Contract when they failed to close on the purchase and reneged on the agreed to purchase price, and whether the purported unfulfilled conditions precedent were waived or cured, are unavailing. Pursuant to the language of Contract, Plaintiffs had no obligation to close unless and until the express conditions precedent were met. Since those conditions precedent have never been met, Plaintiffs cannot be found to have failed to closed.

Furthermore, "[w]aiver is the voluntary abandonment or relinquishment of a known right, which, except for such waiver, the party would have enjoyed. Waiver may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage" (*Bolis v Fitzpatrick*, 35 AD3d 1153 [4th Dept 2006]; *see also Hadden v Consolidated Edison Co. of New York*, 45 NY2d 466, 469 [1978]). Despite Defendants' contentions to the contrary, there is nothing in this record which could serve as any

basis for a waiver. Rather, the record on these motions clearly establish Plaintiffs' objection to the documents at issue as well as their insistence that the conditions be complied with.

Based on the foregoing, Plaintiffs' motion for summary judgment on the first cause of action seeking a declaration that Plaintiffs have no further obligation to close on the property and for the return of their deposit is granted.

Damages

Pursuant to paragraph 18 of the Contract, the parties clearly limited their damages for breach to the amount of the escrow deposit. Accordingly, Defendants' motion for summary judgment seeking to limit the damages on the first cause of action to the amount of the escrow deposit also is granted.

Specific Performance:
Election of Remedy

As noted above, since the conditions to Plaintiffs' obligation to consummate the transaction have not been satisfied in full, Plaintiffs shall be entitled either (a) to receive the return of the Deposit, which return shall operate to terminate this Agreement, or (b) to enforce specific performance. Plaintiffs have sought and received judgment for the return of their deposit. Accordingly, based upon the terms of the Contract, Defendants' motion for summary judgment seeking to dismiss the second cause of action for specific performance and to cancel the Notice of Pendency filed in connection therewith is granted.

Fraud

To state a claim for fraud, plaintiff must allege a misrepresentation of a material existing fact, falsity, scienter, deception, and injury (*New York Univ. v Continental Ins. Co.*, 87

NY2d 308, 318 [1995]). It is well settled that a claim for fraud that merely states a breach of contract claim may not be maintained (*see Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]). Thus, general allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim (*New York Univ.*, 87 NY2d at 318; *see also Amherst Magnetic Imaging Assocs., P.C. v Community Blue,* 239 AD2d 892, 893 [4th Dept 1997]).

"A viable claim of fraud concerning a contract must allege misrepresentations of present facts (rather than merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract" (*Orix*, 256 AD2d at 115 [citation omitted]). Here, the alleged misrepresentations are that Defendants concealed their intentions to not comply with certain provisions of the Contract, specifically: (a) to not enter into certain types of leases in violation of paragraph 14 of the Contract (Complaint ¶¶ 19-21); (b) collect security deposits from all tenants (Complaint ¶ 22); (c) provide complete and accurate rent rolls (Complaint ¶ 23); and (d) to obtain a Sewer Construction Agreement acceptable to Plaintiffs (Complaint ¶¶ 24-26). These items are not collateral to the Agreement. Rather these purported misrepresentations are "directly related to a specific provision of the contract" (*Orix,* 256 AD2d at 115; *Martian Entertainment, LLC v Harris*, 2006 NY Slip Op 51517[U] [Sup Ct, New York County 2006]).

Based on the foregoing, Defendants' motion to dismiss the third cause of action for fraud is granted.

Plaintiffs' counsel shall settle the Order with counsel for the Defendants.

DATED: May 18, 2009

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HON. JOHN M. CURRAN, J.S.C.