

Caboara v Babylon Cove Development, LLC

2006 NY Slip Op 30395(U)

October 20, 2006

Supreme Court, Suffolk County

Docket Number: 0010726/2006

Judge: Howard Berler

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SHORT FORM ORDER

INDEX NO. 10726/06

**SUPREME COURT - STATE OF NEW YORK
PART XX SUFFOLK COUNTY**

PRESENT:

HON. HOWARD BERLER
Justice

ORIGINAL DATE: 7/19/06
SUBMISSION DATE: 8/18/06
MNEMONICS: MG
SEQ. NO.: 001

THOMAS CABOARA, SUSAN CABOARA,
JOSEPH COLONNA, CATHERINE COLONNA,
BRIAN DOHERTY, LENORE DE MARIA,
JOSEPH FRYZEL, NANCY FRYZEL, CONOR
HARTNETT and JOHN MEILLO,

Plaintiffs,

v

BABYLON COVE DEVELOPMENT, LLC,
CERTILMAN, BALIN, ADLER & HYMAN, LLP,
MICHAEL J. POSILLICO, JOSEPH K.
POSILLICO, PAUL F. POSILLICO and
JOSEPH D. POSILLICO, III,

Defendants.

PLAINTIFFS' ATTY:
KRESSEL, ROTHLEIN, WALSH
& ROTH, LLC
684 Broadway
Massapequa, NY 11758

DEFENDANTS' ATTYS:
AGOVINO & ASSELTA, LLP
(For defts Babylon Cove
Dev. and the Posillico
defts)
Suite 608
170 Old Country Road
Mineola, NY 11501

CERTILMAN, BALIN, ADLER &
HYMAN, LLP
(Defts pro se)
90 Merrick Avenue
East Meadow, NY 11758

Upon the papers submitted (Notice of Motion with supporting papers and Memorandum of Law; Affirmation in Opposition with supporting papers and Memorandum of Law; Reply Affirmation with supporting papers and Memorandum of Law) it is

ORDERED, that the defendants' motion to dismiss the First, Second, Third, Fourth and Sixth Causes of Action in the complaint is granted; and it is further

ORDERED, that only the Fifth Cause of Action, which is solely against the defendant law firm Certilman, Balin, Adler & Hyman, LLP, shall remain.

The plaintiffs are some of the unit purchasers in the 22-unit townhouse project known as Bridgeview at Babylon Cove (hereinafter the project). The defendants are the Sponsor of the project, Babylon Cove Development, LLC (hereinafter the Sponsor), its members, the Posillico's (Michael, Joseph K., Paul and Joseph D.) and the law firm which represented the Sponsor at a prior time including when it filed its Offering Plan with the New York State Attorney General's office.

The crux of the plaintiffs' complaint is that the defendants made misrepresentations in the project's Offering Plan concerning the rights of purchasers to rent their units by indicating there were no restrictions on the purchasers regarding renting their units to third parties when, in fact, such restrictions did exist, that these restrictions were allegedly known by the defendants and were included in a pre-existing, though unfiled, Declaration of Covenants, Restrictions, Rights, Licenses and Easements (hereinafter the Declaration).

Chronology

In April 2002, the Village of Babylon (hereinafter the Village) approved the Sponsor's zoning application for building the project upon the condition, inter alia, that the townhouse units would be owner-occupied only and no rentals would be permitted. The Sponsor agreed to this and the other restrictions.

In August 2002, the Declaration containing these restrictions was executed by the defendant Michael J. Posillico on behalf of the Sponsor. This Declaration was never filed.

In November 2003, the Offering Plan was filed with the State Attorney General's office.

In November 2004, the Caboara plaintiffs (the only plaintiffs to submit an affidavit in this regard) received a copy of the Offering Plan (which indicated no restrictions) and a few days later signed a purchase agreement which incorporated the Offering Plan by reference.

In December 2005, the plaintiffs (as members of the homeowners' association) received notices indicating a meeting was to be held at which the Special Counsel to the Village would discuss the issue of the restrictions. At that meeting, according to the plaintiffs, the Special Counsel informed the members of the homeowners' association that they would each have to sign off on an amended Declaration containing the same or similar restrictions as to rentals as contained in the unfiled original Declaration or their Certificates of Occupancy would be revoked.

The plaintiffs, making no apparent challenge to the statement made by the Special Counsel, subsequently signed the amended Declaration.

The plaintiffs then brought this action seeking damages for the alleged harm caused to them by the misrepresentations contained in the Offering Plan and as incorporated by reference in the purchase agreements.

The complaint contains six causes of action, to wit:

- First Cause of Action: Against all the defendants for allegedly breaching their obligations of fair dealing and good faith as evidenced by the misrepresentations in the Offering Plan which were incorporated by reference in the Purchase Agreement. This is similar to the Fourth Cause of Action which alleges a breach of contract.
- Second Cause of Action: Against all the defendants for the "false representations" contained in the Offering Plan.
- Third Cause of Action: Similar to the Second Cause of Action but alleges "fraudulent representations."
- Fourth Cause of Action: Against all the defendants. Alleges a breach of contract (the Purchase Agreement) insofar as it incorporated by reference the Offering Plan which indicated no rental restrictions.
- Fifth Cause of Action: Only against the defendant law firm; not challenged on this motion to dismiss; alleges the law firm failed to use reasonable care in preparing the Offering Plan.
- Sixth Cause of Action: Against all the defendants. Alleges violations of GBL §349 ("deceptive acts or practices").

Discussion

A discussion of the issues in this case cannot be done in the absence of reference to the Martin Act (GBL, Article 23-A).

The Martin Act, enacted in 1921, is New York's "blue sky" law, that is; it governs the offer and sale of securities as well as governing investments within the real estate marketplace which would include cooperative apartments and condominiums (see Kaufman, Introduction and Commentary Overview, McKinney's Cons Laws of NY, Book 19, GBL, p. 9).

Of particular significance to this action is the fact that there is no private right of action under the Martin Act (see **CPC Intl. Inc. v McKesson Corp.**, 70 NY2d 268, 519 NYS2d 804 [1987]; **Keh Hsin Shen v Astoria Fed. Sav. And Loan**, 295 AD2d 319, 744 NYS2d 336[2d Dept 2002]; Kaufman, Introduction and Commentary Overview, McKinney's Cons Laws of NY, Book 19, GBL, p. 8).

The defendants argue that the Martin Act is applicable here because the crux of the plaintiffs' complaint are the alleged misrepresentations contained in the Offering Plan - both standing alone and as incorporated by reference into the purchase agreements.

It is well settled in cases under the Martin Act that only the State Attorney General is authorized to bring proceedings regarding such misrepresentations. Furthermore, complaints which artfully try to get around the prohibition against private actions will not be permitted (see **Keh Hsin Shen v Astoria Fed. Sav. And Loan**, 295 AD2d 319, 744 NYS2d 336[2d Dept 2002]; **Thompson v Parkchester Apts. Co.**, 249 AD2d 68, 69, 670 NYS2d 858 [1st Dept], *lv dismissed* 92 NY2d 946, 681 NYS2d 476 [1998]).

This is such a case. The allegations are all founded in the alleged misrepresentation contained in the Offering Plan and regardless of the Offering Plan being incorporated by reference in the purchase agreements, the law reserves such an action to the State Attorney General. Accordingly, the Second and Third Causes of Action which specifically address the alleged "false representations" and "fraudulent representations" contained in the Offering Plan must be dismissed as there is no private right of action in such regard under the Martin Act.

Similarly, the alleged breach of the obligation of fair dealing and good faith (First Cause of Action) and the alleged breach of contract (Fourth Cause of Action) are plainly based upon the statement in the Offering Plan which was incorporated by reference in the agreements and, thus, must also be dismissed for the same reasons as discussed with regard to the Second and Third Causes of Actions [as well as being duplicative of each other].

The remaining challenged cause of action, the Sixth, alleges violations of GBL §349. This section of the General Business Law does not apply to private transactions which do not impact the public at large (see **New York Univ. v Cont'l. Ins. Co.**, 87 NY2d 308, 320, 639 NYS2d 283, 290 [1995]; **Green Harbour Homeowners Assn. v G.H. Dev. & Constr., Inc.**, 307 AD2d 465, 469, 763 NYS2d 114, 118 [3d Dept], *lv dismissed* 100 NY2d 640, 769 NYS2d 204 [2003]). Since the alleged deceptive acts or practices here only concern these few plaintiffs in the context of this single and unique townhouse development, it cannot be said to have the broad impact envisioned by GBL §349. Accordingly, the plaintiffs have

