

McKeon v Babylon Cove Dev. LLC
2008 NY Slip Op 30442(U)
February 14, 2008
Supreme Court, Suffolk County
Docket Number: 0004631/2007
Judge: Emily Pines
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**Supreme Court – State of New York
I.A.S. Term, Part 23, Suffolk County**

Present:

HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 04-11-2007
Motion Submit Date: 01-31-2008
Motion Sequence No.: 002 MOTD

-----X
ANN MCKEON AND THOMAS MCKEON,

Plaintiffs,

-against-

BABYLON COVE DEVELOPMENT LLC and
MICHAEL J. POSILLICO,

Defendants.
-----X

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Defendants move, by Notice of Motion (motion sequence number 002), for an Order, dismissing Plaintiffs' Complaint pursuant to **CPLR §§ 3211 (a) (1), (3), and/or (7)**. In four separate Causes of Action, Plaintiffs, contract vendees, have sued Defendants, Babylon Cove Development LLC (project developer/sponsor) and Michael Posillico (one of the sponsor's principals), as a result of the corporate Defendant's termination on January 22, 2007 of a contract of sale. The Complaint sets forth causes of action for specific performance, for damages for breach of contract, for false misrepresentation, and for violation of certain provisions of the General Obligations Law, commonly known as the Martin Act. Following a dispute between the sponsor and the Village of Babylon (Village), which is the subject of a related case before this Court, the sponsor, as the entity in control of the Home Owner's Association (HOA) for a 22 unit condominium residential development, has refused to call a meeting to approve a Covenant which was a condition of the developer's change of zone. The Covenant giving rise to that dispute requires that all of the subject units be owner occupied. As a result of that dispute, the Village has refused to issue a permanent Certificate of Occupancy for the unit the Plaintiffs herein desire to purchase.

In their motion to dismiss this Complaint, Defendants' counsel argues that (1) the contract claims are barred by the language of the agreement, which permits the sponsor to terminate under circumstances which the sponsor claims existed herein; (2) the Martin Act does not provide a private cause of action; (3) claims of misrepresentation in a condominium offering plan are simply an allegation of Martin Act violations and, therefore, are not

actionable as set forth; and (4) Plaintiffs have set forth no basis to pierce the corporate veil and sue one of the sponsor's corporate principals.

In opposition to the motion and in support of their claims, Plaintiffs allege as follows. First, Plaintiffs assert that the breach of contract claims arise from intentional bad faith acts on the part of Defendants, in refusing to take the actions necessary to obtain a permanent certificate of occupancy for the unit Plaintiffs desire to purchase. With regard to its Third Cause of Action for misrepresentation, Plaintiffs argue that it is not based solely on the sponsor's Offering Plan but on the representations in the purchasing agreement itself and, therefore, not a Martin Act claim. With regard to the individual Defendant, Plaintiffs argue that he is named due to the fraud/misrepresentation cause of action, because he executed the original Declaration of Covenants and Restrictions in 2002, which has, in Plaintiffs' view, given rise to the current dispute between the sponsor/HOA and the Village of Babylon.

The Decision and Order, issued on this same date in the case of Bridgeview at Babylon Cove Home Owner's Association, Inc., against Incorporated Village of Babylon (Index # 1477-2007), is annexed hereto for reference. In such Order, the Court granted to Village's motion to dismiss the HOA's Declaratory Judgment/Injunction action and specifically upheld the constitutionality and legality the Village's 2002 actions requiring the sponsor to execute and record the covenant at issue as a condition to a change of zone, variance and subdivision approval, as a proper exercise of the Village's zoning authority.

The three contract provisions on which the Defendants rely in support of their motion to dismiss the contract claims in this action, read, in pertinent part, as follows:

Article 13: "(t)he Seller may cancel . . . in the event of occurrences of any of the following: . . . (c) the Seller is unable to obtain the necessary building permits and/or Certificate of Occupancy for any reason whatsoever for the Home."

Article 15: "(e)xcept for the Seller's wilful default, if Seller is unable to transfer ownership . . . Seller shall only be liable to Purchaser for the return of all payments . . . Seller shall not be required to commence any action or proceeding or incur any expense in order to remove the condition which prevents Seller from transferring ownership of the Home"

Article 25: "(i)n the event Seller shall be unable to convey title to the Home within twenty-four (24) months of the proposed date of delivery through no fault of the Purchaser, this Purchase Agreement shall be null and void. . . ."

The parties to this action agree that on January 22, 2007, more than twenty-four months after a December 1, 2004 "proposed date of delivery" set forth in the Purchase

Agreement, the Sponsor returned to Plaintiffs the \$94,900 down payment and advised plaintiffs in writing that the Purchase Agreement had become null and void because "(B)abylon Cove Development, LLC is unable to convey title to the home through no fault of yours (purchaser)"

MOTION TO DISMISS

In considering a motion to dismiss a pleading under **CPLR § 3211**, the Court must examine the four corners of the instrument to ascertain whether, taken together, the allegations set forth a cognizable cause of action. *Polonetsky v Better Homes Depot*, 97 NY 2d 46 (2001). In conducting such an examination, the Court affords the Plaintiff the benefit of all possible inferences and accepts as true the facts alleged both in the Complaint and in the papers submitted by Plaintiff in opposition to the motion. *see, Sokoloff v Harriman Estates Dev. Corp.*, 96 NY 2d 409, 754 NE2d 184, 729 NYS 2d 425 (2001). A motion to dismiss under **CPLR § 3211 (a)(1)** will be granted only in those cases where the documentary evidence presented establishes a total defense to the claims as a matter of law. *Leon v Martinez*, 84 NY 2d 83 (1994).

Under our law, all contracts imply a covenant of good faith and fair dealing in the manner in which they are performed. *see, Smith v Gen. Acc. Ins. Co.*, 91 NY 2d 648, 697 NE 2d 168, 674 NYS 2d 267 (1998) ; *Dalton v Educational Testing Serv.*, 87 NY 2d 384, 663 NE 2d 289, 639 NYS 2d (1995). This covenant at the very least assumes that neither party will act to destroy the right of the other to receive the fruits of the bargain. *see, Dalton*, 87 NY 2d at 389. Applicability of the covenant is especially apt in the context of a cooperative conversion or a condominium offering because neither the tenants nor the purchasers in such examples have access to the same information or have equal bargaining power with the sponsor. *see, 511 West 232nd Owners Corp v Jennifer Realty Co*, 98 NY 2d 144, 773 NE 2d 496 746 NYS 2d 131 (2002).

Applying these principles to the case at Bar, Plaintiffs' causes of action against the sponsor sounding in contract survive the motion to dismiss. Plaintiffs have alleged that the sponsor cancelled its agreement of sale without any legitimate excuse. According to Plaintiffs, the sponsor, which controls the HOA, could have taken the necessary steps of executing the appropriate covenants and restrictions required by the Village and, thereby, would have been in a position to convey title to the Plaintiffs. None of the cited contract provisions permit the Seller (sponsor) to cancel the real estate contract based on its own wilful actions. While the agreement does permit termination based on inability to convey

title, the Court finds that the covenant of good faith and fair dealing does not permit that term to be interpreted to include within its ambit an inability based upon wilful refusal to act.

MARTIN ACT

The Martin Act (**General Business Law, Article 23-A**) vests in the State Attorney General exclusive authority to investigate and prosecute false and fraudulent representations contained in publicly disseminated offering plans in connection with condominium development. *CPC International v McKesson Corp*, 70 NY 2d 269, 514 NE 2d 116, 519 NYS 2d 804 (1987); *Rego Park Gardens Owners Inc v Rego Park Gardens Assoc*, 191 Ad2d 622, 595 NYS 2d 492 (2d Dep't 1993) . However, Courts have recognized private rights of action for common law claims sounding in fraud and misrepresentation independent of the duty imposed by the Martin Act. *see*, *CPC International* at 277.

By its terms, the Fourth Cause of Action is brought pursuant to the Martin Act, is not cognizable as a private right of action and is, therefore, dismissed. However, Plaintiffs' cause of action for fraudulent misrepresentation can be read to assert that the corporate Defendant entered into this purchase agreement with the Plaintiff, knowing that it had changed a covenant and restriction that had been part of its zoning approval process and misrepresented to the Plaintiffs in such agreement that it could convey title allowing non owner occupancy and rental of the subject unit. That taken together with the sponsor's control of an HOA, which refuses to call a meeting to execute the proper covenant, is sufficient to state a private right of action, totally separate and apart from the publicly issued offering plan. As such the Plaintiffs Third Cause of Action survives the motion to dismiss.

PIERCING THE CORPORATE VEIL

In response to the motion to dismiss, Plaintiffs assert that they maintain a cause of action against Defendant Michael Posillico, a shareholder of the sponsor, because he knew of the covenants and restrictions and permitted the subject units to be sold pursuant to contracts that omitted the anti-rental provision. However, as set forth in Defendants' motion papers, in all instances where Defendant Posillico signed his name, he did so clearly as a member/shareholder of the sponsor.

It is both lawful and appropriate that individuals incorporate for the purpose of limiting liability in their business affairs. **Matter of Morris v New York State Department**

of **Taxation & Finance**, 82 NY 2d 135, 623 NE 2d 1157, 603 NYS 2d 807 (1993). In order to discard such corporate form and reach the individual shareholder, the Plaintiff must demonstrate both complete dominion and control and use of such control by the owner to perpetrate a wrong on the party suing. *Id.* Here, Plaintiffs do not make even the allegation of required dominion and control, and, accordingly, the Complaint against Michael Posillico as an individual must be dismissed.

Based on the above, Defendants' motion to dismiss the cause of Action under the Martin Act, as set forth in the Fourth Cause of Action and to dismiss the Complaint against the individual Defendant, Michael Posillico, is granted. The motion dismiss the First, Second and Third Causes of Action against the corporate Defendant is denied. This constitutes the Decision and Order of the Court.

This matter is set down for a preliminary conference to be held on March 13, 2008 at 9:30 a.m. before the undersigned.

Dated: February 14, 2008
Riverhead, New York



EMILY PINES
J. S. C.