

**Leonard v Gateway II, LLC**

2008 NY Slip Op 33376(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 113232/07

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT:

PART 55

*Justica*

Index Number : 113232/2007  
**LEONARD, LAVERNE M.**  
 vs.  
**GATEWAY II, LLC**  
 SEQUENCE NUMBER : 001  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE 12/6/08  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-4	
5-7	
8-10	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the amended memorandum decision and order.

*N.B. -- Preliminary conference is scheduled for 1/12/09 at 12 noon.*

**FILED**  
 DEC 17 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 12/16/08

*J.S.*  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

-----X  
LAVERNE M. LEONARD,

Plaintiff,

-against-

INDEX NO. 113232/07

GATEWAY II, LLC, GAETANO AND  
ASSOCIATES, INC., GATEWAY  
CONDOMINIUM, STEVEN GAETANO,  
personally, MANHATTAN PROPERTY  
MANAGERS REALTY, INC. and  
GATEWAY SECURITY SERVICES, INC.

Defendants;

DECISION AND ORDER

**FILED**  
DEC 17 2008

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NEW YORK

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JANE S. SOLOMON, J.

Defendants Steven Gaetano, Gaetano and Associates, Inc. (Associates), Gateway Condominium (Condominium), and Manhattan Property Managers Realty, Inc. (Managers) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint as to them, or in the alternative, for summary judgment dismissing the complaint. In addition, defendant Gateway II, LLC (Gateway) moves for summary judgment. Plaintiff has discontinued this action as against defendant Gateway Security Services, Inc. (Security).

Gateway is the sponsor of the Condominium, which is located at 2098 Eighth Avenue in Manhattan. By two purchase agreements entered into in January 2005, plaintiff purchased unit 3G and adjoining unit 3F in the Condominium. The complaint alleges breach of contract, fraud, fraudulent inducement, tortious interference with business relations, and a grab-bag cause of action denominated

"negligence/fraud." The principal factual allegation in the complaint is that Gateway promised to combine plaintiff's two units, but that it failed to do so. Gaetano is a member of Gateway, an officer in Associates and Managers, and the president of the board of managers of the Condominium.

Plaintiff argues that defendants' motions are premature, inasmuch as defendants have not yet responded to plaintiff's requests for disclosure. However, plaintiff has made no evidentiary showing that facts that would support her opposition to the motions "may exist but cannot then be stated." CPLR 3212 (f). Plaintiff's unsupported hope that such facts may exist is insufficient. See *Fulton v Allstate Ins. Co.*, 14 AD3d 380 (1st Dept 2005).

Riders to each of plaintiff's purchase agreements provide, among other things, that:

The Sponsor hereby confirms that it has no objection to the Purchaser [...] combining Units 3F and 3G and that during the Sponsor Control Period ... the Sponsor shall consent to the alteration ... . Purchaser hereby acknowledges that it shall be responsible for any costs associated with the combination of the Units, except that Seller shall provide the labor, materials and architectural services in accordance with the attached Schedule A after the closing of title... .

...  
Seller shall complete the Alteration Work within ninety (90) days after the closing of title. In the event that the Alteration work is not substantially complete within 200 days after the closing of title, Seller agrees to pay the Unit Owner for the Unit's daily prorata common charges and real estate taxes beginning on the 100th day and

continuing until the Alteration work is completed.

The parties to the purchase agreements and the riders are plaintiff and Gateway. The purchase agreements were signed by Gaetano on behalf of Gateway; the riders were signed on behalf of Gateway by Gaetano as the managing member thereof. Plaintiff does not allege the existence of any other contracts relevant to this action. Accordingly, plaintiff's breach of contract claim must be dismissed as against all of the defendants, except Gateway. See e.g. *Worthy v New York City Hous. Auth.*, 21 AD3d 284 (1st Dept 2005).

Gateway's motion for summary judgment on plaintiff's breach of contract claim is predicated upon its argument that plaintiff sabotaged the planned alteration by immediately renting out both of her units, so that no construction could take place; by failing to pay the correct filing fee required for the alteration; and by failing to seek the required approval of the Condominium's board of managers for the proposed alteration. These matters are attested to in an affidavit sworn to by Gaetano. In addition, Gateway asserts that, although it and plaintiff understood that any alteration would need to be performed within 90 days after the closing of title to plaintiff's units, plaintiff failed timely to proceed with her part of the project.

These arguments are significantly undercut by the

undisputed fact that in e-mail messages and letters, dating at least as early as July 8, 2005, and at least as late as May 9, 2007, plaintiff and Gaetano, or an employee of Managers, discussed the pending alteration, including reviews of architectural plans, without Gateway, or Managers, raising any objection to going forward with it. Indeed, in e-mails dated May 10, 2006, plaintiff stated that she wished to commence the process of combining her units, and Gaetano replied that he was "looking into it" (Leonard Aff., Exh. 7), and in an e-mail dated July 21, 2006, Gaetano explained that the alteration process had been delayed, because he had been unable to find the separate lot numbers of plaintiff's units, which needed to be combined in order for the work to proceed. While the parties disagree as to who is responsible for the failure to combine plaintiff's units, the complaint, as amplified by plaintiff's affidavit and exhibits, shows that plaintiff has a claim for breach of contract against Gateway.

The second cause of action alleges that defendants fraudulently promised to consent to the alteration of her units, and fraudulently promised to perform the work. However, plaintiff has not alleged that Gaetano, or any other defendant, withheld consent to the alteration, and her allegation as to the failure to perform the alteration is redundant to her contractual claim. A tort claim does not arise from a breach of contract absent a legal duty

independent of the contract. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 (1987); *Brown v Brown*, 12 AD3d 176 (1st Dept 2004). Plaintiff has not alleged that any such duty was owed to her.

The third cause of action alleges that plaintiff was fraudulently induced to buy the units by false promises that she would receive tax abatements; that there would be seven-day laundry service in the building, storage space, roof access, and security service; and that the units would be constructed in a workmanlike fashion. However, paragraph 12 of each of plaintiff's purchase agreements provides that:

[e]xcept as specifically set forth herein or in the Plan, Purchaser acknowledges that [s]he has not relied upon any ... representations, warranties or statements of any nature, whether made by Seller ..., or otherwise, including ... any relating to the physical conditions of the building or the Unit ... the building services, ... [and] the availability of any tax benefits ... .

Schwartz Aff., Exhs. C and D. Having specifically waived any reliance on the matters as to which plaintiff, now, claims to have been misled, plaintiff is barred from claiming that she relied upon the misrepresentations that she alleges. See *Danann Realty Corp. v Harris*, 5 NY2d 317 (1959).

Plaintiff's fourth cause of action alleges that Managers (and, now, non-party Security) interfered with plaintiff's ability to rent or sell her units by denying access to the units and to other areas in the building to

prospective renters and purchasers of her units, and to professional workers hired by plaintiff. A claim alleging interference with pre-contractual business relations lies only where the interference was effected by unlawful means, by conduct that constitutes an independent tort, or by egregious conduct, such as conduct that is engaged in solely in order to inflict harm upon the plaintiff. *Carvel Corp. v Noonan*, 3 NY3d 182 (2004); *Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549 (1st Dept 2008). Plaintiff has alleged no such conduct here, either in her complaint or in her affidavit.

The fifth cause of action alleges that Gaetano has failed to pay the common charges for the units that he continues to own, that he has unjustly charged the Condominium for expenses and repairs associated with the initial renovation; that land adjacent to the building that was supposed to have been developed remains undeveloped; and that Gaetano has ceased to provide certain services. The first three of these claims allege damage to the Condominium as a whole, and plaintiff does not allege that she has been injured by the breach of a duty owed to her independent of Gaetano's duties to the Condominium. Accordingly, plaintiff lacks standing to raise these matters personally. *Abrams v Donati*, 66 NY2d 951 (1985). As to the last of these claims, plaintiff alleges that payment for the no-longer-provided services continues to be included in the monthly common

charges. That allegation may support an additional claim of breach of contract against Gateway.

Accordingly, it hereby is

ORDERED that the motion of Steven Gaetano, Gaetano and Associates, Inc., Gateway Condominium, and Manhattan Property Managers is granted and the complaint is severed and dismissed as against those defendants with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to render judgment accordingly; and it is further

ORDERED that the second, third, and fourth causes of action, and those portions of the fifth cause of action that allege wrongs on the part of Steven Gaetano are severed and dismissed; and it is further

ORDERED that the rest of this action shall continue, and counsel shall appear in Part 55 for a preliminary conference on January 12, 2009 at 12 noon.

Dated: December 16, 2008

ENTER:

**FILED**  
DEC 17 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

  
\_\_\_\_\_  
J.S.C.  
**JANE S. SOLOMON**