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

HON. CAROL EDMEAD

PART 35

Justice

Index Number : 112406/2008

HARRIS, THORNER

VS.

SEWARD PARK HOUSING CORPORATION

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 112406-08

MOTION DATE

MOTION SEQ. NO. #007

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED

JUN 25 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that motion of defendants Seward Park Housing Corporation d/b/a the Rudd Group, Ltd., Karen Wolfson, Carlos Rosado, Eric Mandelbaum, Fred Rudd, Stanley Friedland, Dee Slater, Sean Benson, Freda Fried, Terry MacAvery, Fran Marino, Shelly Torres, Nettleton, and "John Doe" for an order, pursuant to CPLR §3211(a)(2) and (7), dismissing the complaint of plaintiff Thorner Harris is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 6/19/09

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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THORNER HARRIS,

Index No. 112406/08

Plaintiff,

-against-

SEWARD PARK HOUSING CORPORATION d/b/a THE RUDD GROUP, LTD., KAREN WOLFSON, CARLOS ROSADO, ERIC MANDELBAUM, FRED RUDD, STANLEY FRIEDLAND, DEE SLATER, SEAN BENSON, FREDA FRIED, TERRY MacAVERY, FRAN MARINO, SHELLY TORRES, NETTLETON, and "JOHN DOE",

Defendants.

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Thorner Harris ("plaintiff") seeks damages against defendants Seward Park Housing Corporation ("Seward Park") d/b/a The Rudd Group, Ltd. ("Rudd"), and Karen Wolfson, Carlos Rosado, Eric Mandelbaum, Fred Rudd, Stanley Friedland, Dee Slater, Sean Benson, Freda Fried, Terry MacAvery, Fran Marino, Shelly Torres Nettleton, and "John Doe" (the "Board") (collectively "defendants") alleging discrimination against him based upon his race and his disability.

Defendants move pursuant to CPLR §3211(a)(2) and (7) to dismiss plaintiff's Complaint.

Background[1]

Plaintiff contends that Seward Park owns the cooperative residential housing development at 413 Grand Street, New York, New York. Upon information and belief, Seward

[1] Information is taken from plaintiff's Complaint and defendants' motion, which comprises an Affirmation in Support and an Affirmation in Further Support from defendants' counsel Andrew Bernstein, along with supporting exhibits.

Park was previously the owner of the shares and proprietary lease allocated for Unit F1203 at Seward Park (the "Premises"). Rudd is the managing agent of Seward Park, and the real estate broker for the Premises. The Board is "authorized to transact and/or conduct business on behalf of Seward Park. "John Doe" is the president of the Board, whose actual name is not known to plaintiff.

Plaintiff alleges that in or about January 31, 2007, he entered into a written Contract of Sale (the "Contract") with Seward Park for the Premises. The Contract was countersigned by John Doe, as president of the Board. Pursuant to ¶ 16 of the Contract, Seward Park agreed to accept $496,000 as the purchase price, and the closing was set for March 17, 2007.

After plaintiff's interview with the Board, plaintiff's application to purchase the Premises was rejected.

In August 2007, plaintiff filed a Verified Complaint with the New York City Commission on Human Rights (the "HRC") (see "HRC Complaint").

On September 11, 2008, plaintiff filed the Summons and Complaint herein (the "Complaint").

On October 2, 2008, the HRC filed a Determination and Order After Investigation, holding that there was no probable cause to believe that defendants had engaged in or was engaging in the unlawful discrimination practices alleged by plaintiff. The HRC dismissed plaintiff's HRC Complaint (the "Determination").

On or about October 8, 2008, plaintiff appealed the Determination.

On January 13, 2009, the HRC issued a Determination and Order After Review, affirming the Determination (the "Order Affirming the Determination").

Defendants' Motion

Defendants argue that plaintiff's Complaint alleging discrimination based upon his race and disability cannot survive in light of plaintiff's HRC Complaint and the operation of New York Executive Law §§297(9) and 300 and City of New York Administrative Code §8-502(a). The Determination and the Order Affirming the Determination are the ultimate disposition of the merits of plaintiff's allegations as contained in both his HRC Complaint and in the first, third, fourth, fifth, and sixth causes of action of his Complaint here. Further, plaintiff's second cause of action alleging negligent misrepresentation fails for the lack of specificity.

First, defendants contend that the allegations contained within the plaintiff's Complaint are, for all intents and purposes, identical to the allegations contained in plaintiff's HRC Complaint. Defendants contend that Executive Law §§297(9) and 300, and Administrative Code§8-502(a) provide a right of action against unlawful discrimination practices. The statute and code apply both to employment discrimination and discrimination in places of public accommodation. By the terms of these laws, claims once brought before the HRC may not be brought again as a plenary action in another court, defendants contend. Further, once a plaintiff brings a case before the HRC and exhausts his right to appeal or review within that administrative body, he or she may appeal only to the Supreme Court of the State of New York for review, defendants argue.

Here, plaintiff failed to appeal the adverse Determination by the HRC, defendants contend. After issuing the Order Affirming the Determination, the HRC placed plaintiff on notice that he had 30 days after service of the Order to seek the review of the New York State Supreme Court. Plaintiff failed seek such a review within the 30 days. Further, plaintiff at no

time sought to withdraw the HRC Complaint, and the HRC did not dismiss the HRC Complaint for administrative convenience. Now, in essence, plaintiff is trying to relitigate his claims in New York State Supreme Court in contravention of New York law, defendants argue.

The rights of action that plaintiff is attempting to assert are "self-limiting, statutorily and code created rights," defendants argue. Consequently, plaintiff can only assert the rights of action as prescribed by the respective statute and code. There is no question that the provisions for the election of remedies apply to these circumstances, defendants argue. As this case now stands, this court has no jurisdiction over plaintiff's allegations of discrimination, because they have been ultimately decided against him by the HRC. Therefore, this court has no option but to dismiss plaintiff's first, third, fourth, fifth and sixth causes of action herein.

Second, defendants contend that plaintiff has failed to state a cause of action for negligent misrepresentation, plaintiff's second cause of action. Defendants contend that a cause of action based upon negligent misrepresentation requires, *inter alia*, proof that defendant had a duty to use reasonable care to impart correct information. Such a duty will arise only from a special relationship between the parties, defendants contend. The relationship must be one where actual privity of contract exists or the relationship is so close as to approach privity. A general commercial relationship will not suffice, defendants contend.

Assuming the truth of plaintiff's allegations, defendants argue, plaintiff's position was that of a prospective buyer of a cooperative apartment. At the same time, Rudd was the managing agent for Seward Park and/or the real estate broker for the same corporation. Rudd's position as either the cooperative's managing agent and/or real estate broker precludes a finding that it was in a "near privity relationship with the plaintiff," defendants argue. At all times, Rudd

was an agent for Seward Park in an arm's length commercial deal for its principal.

Defendants further argue that it is uncontrovertible that the relationship between Rudd and Seward Park was one of contractual privity. By the very title of "managing agent," Rudd is in a contractual, agency relationship with its principal, Seward Park. Rudd is therefore in a fiduciary relationship with Seward Park and represents the interests of Seward Park in its interactions with third parties. Plaintiff only would be able to claim that he was in a fiduciary relationship with Seward Park – and for that matter Rudd – when the sale of the subject apartment had been completed and plaintiff became a corporate shareholder. A managing agent dealing with the logistics of an application to purchase a cooperative apartment for the cooperative corporation acts only for its principal and cannot be found to be in a privity or near-privity relationship with the cooperative's prospective buyer, defendants contend. Based upon the allegation that the Rudd was Seward Park's managing agent, there can never be a finding that Rudd was in a special privity or near privity with a plaintiff buyer. It is argued that without such a relationship, Rudd owes not duty to plaintiff, and the negligent representation claim must fail.

The result is the same based on plaintiff's allegation that Rudd was Seward Park's real estate broker relative to the proposed sale of the Premises to plaintiff, defendants argue. A real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of his principal; it is an agency relationship. Thus, defendants contend, within the parameters of a real estate transaction, Rudd would be acting only in the interest of its principal, Seward Park. Rudd, operating on behalf of Seward Park in this arm's length transaction could never be found to be simultaneously in a privity or privity approaching relationship with plaintiff. By definition, Rudd owed its duty and was in privity with Seward Park. Therefore, as defined as a real estate

broker, Rudd owed no duty to plaintiff, and plaintiff's second cause of action must fail.

Defendants further argue that not all statements can be the basis of a cause of action for negligent misrepresentation. For example, promissory statements as to what will be done in the future are not actionable, defendants argue. Here, based on the allegations contained within plaintiff's Complaint, plaintiff understood that he would be required to participate in a process that might lead to the Board's unconditional consent to the sale of the Premises. Plaintiff further understood, as reflected in his Complaint, that the Board would be making that decision, defendants argue. Therefore, Rudd's "misrepresentations" that the application process was "routine" and "perfunctory" and that the Board's approval was "imminent" can only be characterized as expressions of opinions and predictions of how the Board would perform in the future, defendants argue, citing Complaint, ¶ 20. Such statements cannot be the basis of a cause of action for negligent misrepresentation, defendants argue. These statements on their face do not arise out of a special relationship, nor can they ever be reasonably relied on, as they do not communicate what currently or what the speaker knows will exist in the future.

Third, defendants argue that plaintiff's second cause of action for negligent representation is not stated in sufficient detail, pursuant to CPLR §3016(b). The simple act of claiming a misrepresentation does not meet the specificity requirements of the statute, defendants argue. Here, plaintiff's entire cause of action for negligent misrepresentation is contained within ¶ 20 of his Complaint. Within that paragraph, plaintiff alleges that Rudd represented that the application process was "routine and perfunctory and that the Board's approval was imminent." The allegation goes on to state that the plaintiff relied upon those representations. However, there is absolutely no detail reflecting the facts and circumstances surrounding these representations. For

example, there is no indication of the individual who made these representations. There is no indication of when these representations were made. There is no claim that plaintiff reasonably relied upon these representations. Overall, plaintiff has failed to meet the pleading burden established by CPLR § 3016(b), defendants argue.

Plaintiff's Opposition

Plaintiff contends that his Complaint alleges claims that must survive defendants' motion to dismiss. The defendants' election to seek a higher price forms the basis for the causes of action relating to breach of contract and consequential damages flowing therefrom.

Plaintiff argues that the Contract was never effectuated. The Contract provided *inter alia* that as a condition to closing, plaintiff was required to attend a Board interview. Despite the assurances of Rudd and its employees that the process was merely perfunctory and routine and that Board approval was certain, the Board interview took less than two or three minutes, plaintiff contends. During the same, neither the members nor the managing agent asked plaintiff any questions. Further, without outlining its rationale, the Board ultimately denied plaintiff's application. Plaintiff contends that his application was in proper form and that his financial statements were entirely sufficient.

Plaintiff believes that the Board's denial was based on, in part, racial discrimination, as well as the fact that he is HIV positive, facts that were disclosed in his application. At the time the Board denied plaintiff's application, plaintiff was offered no legitimate excuse for its decision. Rather, in the context of the HRC Complaint, the defendants, for the first and only time, alleged that plaintiff's application was denied "due to their unsupported claim that the *agreed upon* purchase price was insufficient," plaintiff argues (Complaint, ¶ 6).

Plaintiff further contends that defendants' belated excuse was merely manufactured for litigation, and it defies logic because neither the Board nor Rudd offered the same to him as a basis for not proceeding with the transaction. Moreover, defendants never gave plaintiff the option to increase his offer.

Notwithstanding the Determination, which plaintiff contends was "incomplete and flawed," plaintiff maintains that the Complaint contains causes of action that are not barred by the HRC's rejection of his Complaint (opp., ¶ 7). Defendants breached the parties' contract without proper legal justification, defendant argues. "Simply, the fact that an administrative agency failed to find probable cause for discrimination does not bar additional breach of contract claims (which coincidentally the Agency found in its determination)," plaintiff argues. Thus, defendants' reliance on caselaw that bars plaintiff's entire claim is misplaced, plaintiff argues. No finding or determination was ever made regarding whether defendants breached the parties' contract claims, plaintiff argues. To date, defendants have merely alleged that the contract price was insufficient, which if accepted by the Court, demonstrates, as a matter of law, that defendants breached the parties' Contract without legal justification.

If, in retrospect, Seward Park and the Board chose to use the Board interview as a means to deny his application based on the theory that the purchase price was insufficient, then such conduct is not legally protected, plaintiff argues. If the Court permits this sort of conduct, then every seller would have the ability to change his mind (and cancel a contract to sell) if market conditions yield more favorable terms, plaintiff argues. Similarly, any buyer would be relieved of his obligations under a Contract of Sale if after the same was executed, the value of the apartment depreciated; thus affording said party an unintended right to rescind the deal. Here,

defendants argue that they never engaged in any discriminatory conduct, but rather opted to cancel the transaction because they sought a higher purchase price.

Based on the foregoing, plaintiff argues, if the Court is inclined to dismiss certain causes of action, all causes of action relating to the breach of contract must survive. Plaintiff contends that this rationale was followed by the HRC in its Determination, which specifically found that the HRC did not have the power to address or rule on a breach of contract claim.

Plaintiff further argues that the Court should deny defendants' motion as premature pending completion of discovery. At no point was plaintiff involved in the HRC's investigation, nor has plaintiff been afforded a full or fair opportunity to depose or question the defendants as to the exact reasons for the denial of his purchase application. The mere fact that an investigation took place does not equivocally confirm that a full exploration of the issues alleged in Complaint were properly addressed. For this reason, the Court should hold its decision in abeyance until plaintiff has had a minimum opportunity to conduct discovery.

Defendants' Reply

First, defendants contends that plaintiff accepts, without opposition, the fact that by virtue of his filing the HRC Complaint prior to his filing the Complaint in this case, he engaged in an election of remedies barring the maintenance of the third and fourth causes of action herein. Each of these causes of action are based upon and seek relief arising from the same alleged discriminatory practices as were alleged in the HRC Complaint. Second, defendants contend that plaintiff makes no argument in opposition to the request and the arguments presented in furtherance of the defendants' motion requesting that his second cause of action for negligent misrepresentation be dismissed. Third, defendants contend that plaintiff's arguments in

opposition to defendants' motion with respect to his first cause of action, breach of contract, are ultimately entirely without merit. Plaintiff seeks recovery based upon claims of discrimination as alleged in his HRC Complaint. Therefore, this Court is without jurisdiction over the claim. Further, plaintiff's claim for breach of contract is defeated by documentary evidence, *i.e.*, the Contract, into which plaintiff entered voluntarily, defendants argue.

Defendants contend that a plaintiff may not avoid the jurisdictional bar of the Administrative Code and the Executive Law by merely adding additional elements of damage arising out of the same underlying conduct, by changing his legal theory, or by couching his claim in such vague and conclusory terms as to thwart comparison of the administrative and legal proceedings. Further, with respect to plaintiff's allegations that his offer to purchase the Premises was rejected because of his race, color, or disability, the HRC found those claims to be without merit, as Seward Park's rejection of plaintiff's application was a legitimate business decision. The Determination and the subsequent Order Affirming the Determination are, by operation of statute, code and law, the final decision on that issue.

Defendants argue that plaintiff alleges a breach of contract based upon the rejection of his application to purchase the Premises "based upon improper grounds," and that plaintiff specifically identified those grounds as his race, color and disability. Although, now couched in terms of the legal theory "breach of contract," the essence of plaintiff's Complaint and his HRC Complaint is discrimination. This Court can have no jurisdiction over such a claim, plaintiff cannot be allowed to relitigate that claim, and the necessary proof upon which the breach of contract claim is based cannot be established, defendants argue. The issue of whether plaintiff has been discriminated against by the defendants in his efforts to purchase the Premises has been

determined against the plaintiff "finally and for all time," defendants contend, and is barred by *res judicata*.

Plaintiff now comes forward with an assertion that his breach of contract claim is not based upon allegations that he was discriminated against based upon his color, race, and/or disability, although he restates those facts in opposition, but rather, "additional breach of contract claims" not pleaded within his Complaint, defendants argue. In effect, plaintiff attempts to amend his Complaint through his Opposition. However, adding elements of damage, changing legal theories, or couching a claim in vague and conclusory terms does not permit plaintiff to avoid the effect of his choice of venue, defendants argue.

Defendants further contend that even amended, plaintiff's "breach of contract" theory fails. Plaintiff appears to argue that he had an enforceable contract before he and his application were considered by the Board. This is incorrect and undermines his theory. Paragraph 6.1 of the Contract, which plaintiff intentionally seeks to avoid, states: "This sale is subject to the unconditional consent of the Corporation." The Board had every right to reject the sale on the ground that plaintiff did not provide a large-enough sales price, or for any other legal reason, including a decision not to sell the apartment, defendants contend.

Plaintiff also contends that the Determination does not reach the issue of breach of contract. However, defendants argue, it is equally telling that the Determination states the following:

> Complainant first claims that respondent breached the January 31, 2007, Contract of Sale ("Contract"). Complainant, however, misunderstands the conditional nature of the Contract. Section 6 of the Contract clearly explained that additional procedures were required to finalize the sale. Section 6.1 of the Contract reads, "This sale is subject to the unconditional consent of the Corporation." Accordingly, the Contract would have become final only after Respondents Board of Directors approved the sale. Prior to

> Board approval, the Contract had no binding effect on respondent. In any event, a breach of contract is no within the jurisdictional purview of the Commission.
> (Determination, p. 2, ¶ 2)

Thus, plaintiff's Complaint should be dismissed in its entirety.

Analysis

According to CPLR §3211(a)(2), a party may move to dismiss a cause of action on the ground that the court lacks subject matter jurisdiction over that cause of action.

New York City Administrative Code §8-502(a), states in relevant part:

> Except as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title or by an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, *unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence.*
> (*Emphasis added*)

New York State's Human Rights Law, Executive Law §297(9) ("Exec. Law §297(9)"), states in relevant part:

> Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, *unless such person had filed a complaint hereunder or with any local commission on human rights* . . . provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled.
> (*Emphasis added*)

New York State's Human Rights Law, Exec. Law §300, states:

> The provisions of [Article 15] shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin; *but . . . the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned.* If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure herein.
> (*Emphasis added*)

In essence, New York law allows a plaintiff alleging discrimination based on race or disability to choose a remedy, either administrative, such as a proceeding before the HRC, or judicial, to the exclusion of the other (*see Jones v Gilman Paper Co.*, 166 AD2d 294 [1st Dept 1990]). Once an action is pending before an administrative agency, then the administrative procedure becomes the exclusive remedy (*see also Castle Hill Beach Club, Inc. v Arbury*, 208 Misc 622, 625 [Sup. Ct. New York County 1955] [holding that Exec. Law §300 provides (1) that during pendency of a proceeding before the commission, it shall be the exclusive remedy, (2) a final determination bars resort to any other forum. Conversely the last sentence bars complaint or action therein by the commission subsequent to the institution of a plenary action"], *modified on other grounds* 1 AD2d 943 [1st Dept 1956], *republished* 1 AD2d 950 [1st Dept 1956], *affd* 2 NY2d 596 [1957]). The threshold test is whether the causes of action in the complaint subsequently filed in Court *arises from the same facts and circumstances* as the prior complaint before the administrative agency (*Jones v Gilman Paper Co.*). If so, then the "filing of the administrative complaint constituted an election of remedies barring maintenance of [the Court] action" (*id.*)

An exception to this rule arises when "the administrative complaint is, under specified

circumstances, dismissed by the agency on grounds *not going to the merits*" *(Acosta v Loews Corp.*, 276 AD2d 214, 218 [1st Dept 2000] (*emphasis added*) [holding that the plaintiff who had first filed a complaint with the New York City Commission on Human Rights was not barred from commencing suit after the agency dismissed his action for "administrative convenience"]; *cf. Emil v Dewey*, 49 NY2d 968, 969 [1980] [holding that Executive Law §297(9) precluded the Court from hearing a housing discrimination case because "prior to commencing this action the plaintiff had filed a complaint with the State Division of Human Rights. Although the plaintiff withdrew that complaint prior to any determination by the division, there is no showing this was done for administrative convenience"]).

Here, it is undisputed that the third and fourth causes of action in plaintiff's Complaint before this Court arise from the same facts and circumstances as the causes of action in his HRC Complaint. The HRC Complaint against Rudd alleged that:

> 3. On January 31,2007, [plaintiff] submitted to Respondent a contract of sale for [the Premises] and a sum of $496,000.
>
> 4. On or about March 21,2007, [plaintiff] submitted an application to buy [the Premises], and indicated that he is disabled on the application. [Plaintiff] delivered the application to the Respondent Managing Agent's receptionist at 413 Grant Street, New York, New York. Upon information and belief, the Managing Agent became aware that [plaintiff] is Black.
>
> 5. On or about April 24, 2007, three of Respondent's co-operative board members interviewed [plaintiff] in connection with his application, but did not ask [him] any questions. Upon information and belief, Respondent's co-operative board members became aware that [plaintiff] is Black.
>
> 6. On April 25,2007, [plaintiff] received written denial of his application (*id.*, ¶ 5). (Exhibit "C", paragraph 6).
>
> 7. On May 7, 2007, [plaintiff] appealed the denial to the Seward Park Board of Directors.
>
> 8. In a letter dated May 17, 2007, Respondent refused to review its determination, and

returned the amount of $496,000 that [plaintiff] had submitted with the contract of sale.

9. [Plaintiff] charges that Respondent has discriminated against him by withholding from him the sale of a housing accommodation because of his race, color, and disability in violation of Section 8-107.5(a)(l) of the Administrative Code of the City of New York and has damaged him thereby.
(HRC Complaint, ¶¶ 3-9)

In plaintiff's Complaint herein, plaintiff alleges that in or about January 31, 2007, he entered into the Contract with Seward Park for the Premises. Pursuant to ¶ 16 of the Contract, Seward Park agreed to accept $496,000 as the purchase price for the Premises. Pursuant to ¶ 6.1 of the Contract, the sale was subject to the consent of Seward Park (Complaint, ¶ 6). Pursuant to ¶ 6.2 of the Contract, plaintiff submitted a completed purchase application that contained a financial statement, and personal and business references. (Complaint, ¶ 7). In furtherance thereof and in accordance with ¶ 6.2.2 of the Contract, Seward Park and Rudd instructed plaintiff to attend a Board interview with a designated committee comprising approximately three or four members of the Board (Complaint, ¶ 8).

Plaintiff attended the interview, and although one-half hour was allotted for the interview process, no questions were ever asked of him, and the entire process took merely three to five minutes, plaintiff contends (Complaint, ¶ 9). "Without due cause, justification or explanation," Seward Park through its agent Rudd notified plaintiff that his application to purchase the Premises was denied, plaintiff contends (Complaint, ¶ 10). At no point did any of the defendants disclose that the reason for denial was that the purchase price contained in the Contract was insufficient, plaintiff contends (Complaint, ¶ 11).

Plaintiff alleges that the denial of his application to purchase the Premises was based on the fact that he suffers from a disability (a fact disclosed in the purchase application) and because

he is African-American (a fact discovered by the Board during the interview process) (Complaint, ¶ 12). Plaintiff contends that as an African-American afflicted with HIV disease, he is a member of a protected class. He further contends that he "in good faith applied for the purchase of housing, and despite possessing sufficient qualifications, he was rejected without proper cause and said housing opportunity remained available until resold to a third party" (Complaint, ¶ 13). "As a result of Defendants' wrongful conduct, Plaintiff has sustained damages" (Complaint, ¶ 14).

As to the third cause of action, plaintiff contends defendants violated the New York State Human Rights Law, to wit, Article 15 of the New York Sate Executive Law, and Title 8, §296 of the Administrative Code. Plaintiff alleges that defendants denied his application to purchase the Premises because he suffers from a disability, a fact disclosed to Seward, the Board and Rudd in the purchase application. Plaintiff further alleges that race was a factor in Seward Park's decision to deny his application. As to the fourth cause of action, plaintiff alleges that defendants violated the 1968 Fair Housing Act and the Fair Housing Amendments of 1988, which prohibits discrimination based on race in the sale and negotiation of housing.

It is clear from the language of the HRC Complaint and Complaint herein that plaintiff's causes of action arise from the same facts and circumstances, *i.e.*, defendants' alleged discrimination against plaintiff because of his race. By filing the HRC Complaint first, plaintiff elected an administrative remedy before the HRC. The HRC did not dismiss plaintiff's action, but instead considered the merits of plaintiff's case (*cf. Acosta v Loews Corporation.*). Subsequently, the HRC issued its Determination on the following grounds:

> [Plaintiff's] offer fell below the $500,000.00 minimum acceptable to Respondent. Additionally, Respondent demonstrates racial diversity and a willingness to accommodate

> individuals with special needs. Accordingly, the Commission does not find any evidence of discriminatory animus regarding Respondent's legitimate business decision to reject Complainant's application to purchase Apartment F1203.
>
> Based on the foregoing, the Complaint is hereby dismissed.
> (Determination, p. 3)

After considering plaintiff's appeal, the HRC affirmed the Determination (see Order Affirming the Determination) on the merits. Thus, the administrative procedure became the exclusive remedy to address plaintiff's claims (*Gaynor v Rockefeller).* Because plaintiff's HRC Complaint was determined on the merits by HRC, and the causes of action in the HRC Complaint and Complaint herein arise from the same facts and circumstances, plaintiff is barred from maintaining the third and fourth causes of action in this Court (*Jones v Gilman Paper Co.*). It is noted that plaintiff does not dispute that the third and fourth causes of action arise from the same facts and circumstances of his HRC Complaint. Accordingly, defendants' motion to dismiss plaintiff's third and fourth causes of action is granted.

As to plaintiff's first cause of action for breach of contract, plaintiff contends that pursuant to ¶ 6.2.3 of the Contract, he provided documentary proof of his ability to meet his financial obligation to Seward Park under the Contract, as well as, any future obligation to pay maintenance (Complaint, ¶ 16). Plaintiff alleges that without proper legal justification, defendants breached the Contract by denying plaintiff's application based on improper grounds; "it has been discovered that Defendants allegedly elected to deny [plaintiff's] purchase application based on their claim that the purchase price contained in the duly executed Contract of Sale was insufficient" (Complaint, ¶ 17). As a result, plaintiff seeks compensatory damages of $2 million.

It is clear from the Complaint that plaintiff's breach of contract claim arises from the

Board's rejection of his purchase application on the ground that plaintiff's Contract price was too low. The claim does not solely arise from the same allegations of discrimination in his HRC Complaint. Further, the HRC never determined the merits of plaintiff's breach of contract claim. While the HRC discusses plaintiff's breach of contract claim in the Determination, the agency concedes that it has no jurisdiction over the claim:

> Complainant first claims that Respondent breached the January 31, 2007, Contract of Sale ("Contract"). Complainant, however, misunderstands the conditional nature of the Contract. Section 6 of the Contract clearly explained that additional procedures were required to finalize the sale. Section 6.1 of the Contract reads, "This sale is subject to the unconditional consent of the Corporation." Accordingly, the Contract would have become final only after Respondent's Board of Directors approved the sale. Prior to Board approval, the Contract had no binding effect oh Respondent. *In any event, a breach of contract is not within the jurisdictional purview of the Commission.* (Emphasis added) (Determination, p. 2)

However, although plaintiff's breach of contract claim does not arise from the same facts and circumstances as plaintiff's HRC Complaint, plaintiff, nevertheless, failed to state a cause of action for breach of contract.

Failure to State a Cause of Action

In determining a motion to dismiss, pursuant to CPLR §3211(a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corporation.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause

of action, the court must accept factual allegations as true]).

When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR §3026). On a motion to dismiss made pursuant to CPLR §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2D 83, 87-88, [1994]).

However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2D 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corporation.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

Breach of Contract

To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by the proponent, a breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071[A], 2006 NY Slip Op 50497[U] [Sup Ct, New York County 2006], *citing Furia v Furia,*

116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC v Soleo Communications Inc., citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] and *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). Further, a complaint alleging breach of contract must set forth the terms of the agreement upon which liability is predicated by making specific reference to the relevant portions of the contract or by attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 [Sup Ct, New York County 2006)] *citing Chrysler Capital Corporation. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987], *accord Valley Cadillac Corporation. v Dick,* 238 AD2d 894, 894 [4d Dept 1987]).

Here, plaintiff has failed to allege that defendants breached the Contract.

The clear terms of the Contract flatly contradict plaintiff's allegation. Under the heading "Required Approval and References," the Contract states: "This Sale is subject to the unconditional consent of [the Board]" (Contract, §6.1). Nowhere in the Contract is approval by the Board guaranteed. In fact, §6.3 implies the opposite: "Either Party, after learning of the Corporation's decision, shall promptly advise the other Party thereof. . . . If such consent is refused at any time, either Party may cancel this Contract by Notice" (Contract §6.3). Thus, it is clear from the language of the Contract that the approval of plaintiff's purchase application was conditioned on the Board's approval. The Contract does not list any criteria by which the Board was to assess the application of potential purchasers. Nor does the Contract require the Board to give a potential purchaser a reason for rejection. Therefore, based on the language of the Contract, defendants' rejection of plaintiff's application to purchase the Premises did not

constitute a breach of the Contract. Accordingly, as plaintiff's allegations are "flatly contradicted by documentary evidence," plaintiff has failed to state a cause of action for breach of contract, his first cause of action (*see Biondi v Beekman Hill House Apt. Corp.*).[2]

Negligent Misrepresentation

Plaintiff also failed to sufficiently plead a cause of action for negligent misrepresentation. It is noted that in his opposition, plaintiff never addressed defendants' arguments to dismiss this cause of action.

CPLR §3016(b) requires that causes of action such as negligent misrepresentation be pleaded with sufficient particularity, *i.e.* in sufficient detail to give adequate notice (*see Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]). The statute does not require a plaintiff to prove his allegations. Indeed, the Court of Appeals has specifically noted that this rule "is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977] [citation omitted]). Further, on a motion to dismiss for failure to state a cause of action, "a plaintiff . . . need only plead that he relied on misrepresentations made by the defendant . . . since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage" (*Guggenheimer v Bernstein Litowitz Berger*

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[2]In his opposition, plaintiff also alleges that the HRC's determination is flawed, in that at no point was plaintiff involved in the HRC's investigation, and plaintiff had not been afforded a full or fair opportunity to depose or question the defendants as to the exact reasons for the denial of his purchase application. However, plaintiff's criticism of the HRC's review is improper, in that he made the choice to pursue a remedy before the agency. The First Department makes clear that the "policy of [EL§297(9)] is result oriented: since plaintiff has had the benefit of a full hearing and determination on the merits of his claim, with the advantages of less expense and swifter resolution than he could have had in the judicial arena, his attempted recourse to the courts was thereby foreclosed" (*Magini v Otnorp, Ltd.*, 180 AD2d 476, 477 [1st Dept 1992], *lv to appeal denied by* 80 NY2d 751 [1992]). In addition, depositions of the defendants would not cure plaintiff's failure to state a cause of action.

& Grossmann LLP, 11 Misc [3d Dept 926, 810 NYS2d 880 [Sup Ct New York County 2006]).

According to the First Department, a "claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given" *(Hudson River Club v Consolidated Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]). In accepting all of plaintiff's allegations as true and drawing all inferences in plaintiff's favor, this Court must "evaluate the sufficiency of the alleged special relationship, as a matter of law" (*Delcor Laboratories, Inc. v Cosmair, Inc.*, 169 AD2d 639, 640 [1st Dept 1991], *lv dismissed* 78 NY2d 952 [1991]). Here, plaintiff fails to allege that he was in a special relationship with the author of the alleged misrepresentations *(see Glanzer v Keilin & Bloom LLC*, 281 AD2d 371, 372 [1st Dept 2001] ["These allegations do not state a cause of action for . . . negligent misrepresentation, there being no showing of a special relationship of trust or confidence"]). Nor does the Complaint support an inference that a special relationship between plaintiff and any of the defendants existed.

In his Complaint, plaintiff describes Rudd as the managing agent of Seward Park, and the real estate broker for the Premises (Complaint, ¶ 3). Plaintiff alleges that Rudd made representations to him that "the application process was routine, perfunctory and that the Board's approval was imminent" (Complaint, ¶ 20). Based on Rudd's representations, plaintiff elected to relinquish his possession of a rent-stabilized apartment in contemplation of closing on the Premises, resulting in significant monetary damages. However, plaintiff's relationship with Rudd does not rise to the level of a special relationship.

In alleging that Rudd was the managing agent of Seward Park and the real estate broker

for the Premises, plaintiff has merely alleged that he had a contractual, arm's length relationship with Rudd. A plaintiff also has to allege a special relationship, independent of the contract, from which a duty of care would arise, although it may be connected with or dependent on the contract (14 NY Prac, New York Law of Torts §7:17; *Ansari v New York Univ.*, 1997 WL 257473, *6 [SDNY 1997] [holding that there was no special relationship where "plaintiff and defendants were involved in an ordinary buyer and seller relationship"]). The "special relationship" has to rise to the level of the "functional equivalent of privity" (*Samuels v Fradkoff*, 38 AD3d 208, 208 [1st Dept 2007] [holding that a special relationship existed where plaintiff alleged that duty of care arose out of defendants "negligent performance of architectural services"]). The Court in *Murphy v Kuhn* (90 NY2d 266, 270 [1997]) cited such professionals as lawyers, engineers and accountants, who "by virtue of their training and expertise, may have special relationships of confidence and trust with their clients" (*see also Schonfeld v Thompson*, 243 AD2d 343 [1st Dept 1997] ["With respect to the non-attorney and non-accountant professionals, neither nondisclosure nor negligent misrepresentation gave rise to a cause of action since there were no fiduciary or confidential relationships emanating from this arm's length business transaction"]). The First Department has held that no such duty exists between a real estate agent and potential buyers (*Pappas v New 19 West*, LLC, 859 NYS2d 897, 2008 WL 509087, NY Slip Op 50361[U], *5 [1st Dept 2008] ["Buyers further allege that the Selling Agent Defendants owed a duty to them as real estate brokers and agents to refrain from representing that the roof setback was usable as their exclusive outdoor space. The Selling Agent Defendants and Buyers were engaged in an arms-length transaction, and Buyers provide no authority for the proposition that they owed a duty to correctly describe the legal use available for the roof area"]).

As plaintiff failed to allege that he was in a special relationship with Rudd, from which a duty of care would arise, plaintiff has failed to state a cause of action for negligent misrepresentation. Accordingly, defendants' motion to dismiss plaintiff's second cause of action is granted.

Attorneys' fees

As the sixth cause of action for attorneys' fees, a plaintiff is not entitled to an award of attorneys' fees absent an agreement between the parties, statutory authorization, or court rule (*Crispino v Greenpoint Mortg. Corporation.*, 769 NYS2d 553 [2d Dept 2003], *citing Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [2d Dept 1998]). As plaintiff has failed to present a *prima facie* case for attorneys fees, defendants' motion to dismiss this cause of action is granted.

Punitive Damages

Likewise, plaintiff has failed to sufficiently state a claim for punitive damages. "Punitive damages are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime,'" (*Prozeralik v Capital Cities Comm., Inc.*, 82 NY2d 466, 479 [1993], *quoting* Prosser and Keeton, Torts §2, at 9 [5th ed 1984]). Thus, the harmful conduct must be "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" (*McDougald v Garber*, 73 NY2d 246, 254 [1989]). Furthermore, a cause of action for punitive damages cannot stand as a separate cause of action since it constitutes merely an element of the single total claim for damages on the underlying causes of action *(APS Food Systems, Inc. v Ward Foods, Inc.*, 70 AD2d 483, 421 [1st Dept 1979], *citing Goldberg v New York Times*, 66 AD2d 718 [1st Dept 1978]; *Kallman v Wolf*

Corporation., 25 AD2d 506 [1st Dept 1966]). And, the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights *(see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]). Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved and which is actionable as an independent tort, but also that such conduct was part of a pattern of similar conduct directed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]; *Rocanova v Equitable Life Assurance Society of United States*, 83 NY2d 603, 613 [1994]).

Here, plaintiff's allegations that defendants' acted egregiously, maliciously and with reckless disregard for plaintiff and that defendants' actions "constituted gross, wanton and/or willful conduct involving a high degree of culpability aimed at defrauding and discriminating" against plaintiff (Complaint, ¶¶ 32-33) are insufficient. The allegations are aimed solely at vindicating plaintiff's private rights, not public rights (*American Transitions. Co. v Associated Inter. Ins. Co.*, 261 AD2d 251 [1st Dept 1999]). Further, since punitive damages cannot stand as a separate cause of action and all of the causes of action lack merit, there is no basis for punitive damages. Accordingly, defendants' motion to dismiss plaintiff's fifth cause of action is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that motion of defendants Seward Park Housing Corporation d/b/a the Rudd Group, Ltd., Karen Wolfson, Carlos Rosado, Eric Mandelbaum, Fred Rudd, Stanley Friedland, Dee Slater, Sean Benson, Freda Fried, Terry MacAvery, Fran Marino, Shelly Torres, Nettleton,

and "John Doe" for an order, pursuant to CPLR §3211(a)(2) and (7), dismissing the complaint of plaintiff Thorner Harris is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: June 19, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD