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| <b>Lecourt v 40 Broad LLC</b>  |
| 2009 NY Slip Op 31448(U)   |
| June 26, 2009  |
| Supreme Court, New York County   |
| Docket Number: 603189/08   |
| Judge: Doris Ling-Cohan  |
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan  
Index Number : 603189/2008

PART 36

LECOURT, JEAN-PHILIPP

vs  
40 BROAD LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for dismiss

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided  
in accordance with the attached memo random  
decision.

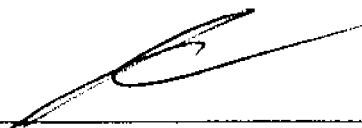
**FILED**

JUL 01 2009

COUNTY CLERK'S OFFICE  
NEW YORK

**HON. DORIS LING-COHAN**

Dated: 6/24/09



J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 36

----- X

JEAN-PHILIPPE LECOURT and SALENGRO  
REALTY MANAGEMENT LLC,

Plaintiffs,

INDEX NO.:  
603189/08

-against-

40 BROAD LLC,

Defendant.

Motion Seq. No.: 001

----- X

**DORIS LING-COHAN, J.:**

Defendant moves for an order pursuant to CPLR 3211(a)1 and 7 dismissing plaintiffs' October 23, 2008 complaint with prejudice.

In this action, plaintiffs Jean-Philippe Lecourt and his wholly owned limited liability company Salengro Realty Management LLC seek to recover their down payments in the amounts of \$234,000 and \$126,750 respectively for residential condominium units 14H and 15F, in a mixed-use condominium located at 40 Broad Street in Manhattan. Defendant 40 Broad LLC is the sponsor of the condominium conversion.

The first two causes of action of the complaint (defendant's exhibit A) assert claims for breach of plaintiffs' purchase agreements (failure to return plaintiffs' down payments) on behalf of Lecourt and Salengro Realty respectively. The third and fourth causes of action, pleaded in the alternative, seek specific performance of plaintiffs' purchase agreements. The four causes of action are conditioned on the court finding that the June 30, 2008 closing on unit 11A (the first condominium unit sold) was a sham orchestrated by defendant to circumvent the requirements of plaintiffs' purchase agreements and the offering plan (the "Plan"), that a closing on at least one

unit must occur on or before June 30, 2008. The *ad damnum* clause seeks judgment in the amounts of \$234,000 and \$126,750 or, in the alternative, a declaratory judgment that plaintiffs are entitled to specific performance of their purchase agreements. Plaintiffs also request punitive damages in an unspecified amount and reasonable attorneys' fees.

Defendant seeks dismissal of the complaint on two grounds. The first is based on documentary evidence (CPLR 3211(a)[1]). The documentary evidence cited by defendant consists of a provision in the Plan (plaintiffs' purchase agreements incorporate the Plan) which states that purchasers have the right to rescind their purchase agreements and receive a return of their down payments if the first closing does not occur within 12 months after July 1, 2007 (see defendant's exhibit B, p 3) and a provision which states that a closing cannot take place unless "a temporary or permanent certificate of occupancy for the Unit is in effect (unless Sponsor and such Purchaser otherwise agree in writing) ..." (*id.*, p 66, ¶ 1[b]). According to defendant, plaintiffs cannot rescind their purchase agreements because the closing on unit 11A took place on June 30, 2008 and the purchaser agreed in writing to waive the requirement that a temporary or permanent certificate of occupancy for the unit be in effect.

The second ground for dismissal urged by defendant is that the complaint fails to state a cause of action (CPLR 3211(a)[7]). According to defendant, plaintiffs' third and fourth causes of action are "unclear" and "insufficiently plead." Defendant adds that plaintiffs waived their right to specific performance and concludes that while plaintiffs are not entitled to punitive damages or attorneys' fees, defendant is entitled to attorneys' fees pursuant to a provision in the purchase agreements.

As detailed below, defendant's motion to dismiss is denied. For a motion to dismiss

based on documentary evidence to succeed, "the proffered documentation must definitively dispose of the claim" (see *Demas v. 325 West End Avenue Corp.*, 127 AD2d 476, 477 [1<sup>st</sup> Dept 1987]). Such is not the case herein. Plaintiff alleges in the complaint that defendant "conducted a sham closing of Unit 11A on June 30, 2008 to circumvent the requirement of the Purchase Agreements and offering Plan to close at least one unit on or before June 30, 2008" (see defendant's exhibit A, ¶ Twenty-Second). This allegation is based on, *inter alia*, the fact that the purchaser of unit 11A signed the purchase agreement, waived the requirement that a certificate of occupancy be obtained, and closed on the unit on the same day; the documentary proof submitted by defendant does not definitively dispose of such claim. Thus, dismissal on such basis is denied.

The standards applicable to a motion to dismiss a complaint for failure to state a cause of action are comprehensively set forth in *Khan v Newsweek, Inc.* 160 AD2d 425, 426 (1<sup>st</sup> Dept 1990):

A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations and everything reasonably to be implied therefrom. (see, *Foley v D'Agostino*, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (*Carbillano v Ross*, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately establish the truth of the averments. (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509.) Rather, the plaintiff must be "given the benefit of every possible favorable inference" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275)

Applying the above standard herein, the complaint clearly alleges valid causes of action.

Finally, plaintiffs' request for punitive damages and reasonable attorneys' fees in the *ad damnum* clause cannot be sustained. Punitive damages are not available absent a showing of "egregious tortious conduct" that is "part of a pattern of similar conduct directed at the public generally" (*Rocanova v Equitable Life Assurance Society of the United States*, 83 NY2d 603, 613 [1994]; see also, *Mom's Bagels v Sig Greenebaum, Inc.*, 164 AD2d 820, 823 [1<sup>st</sup> Dept 1990] ["It is well-established law that punitive damages are not available for a private wrong, breach of contract, and ordinary fraud"]). Under the American Rule, attorney's fees are incidents of litigation and the prevailing party may not collect them from the losing party unless the award is authorized by agreement between the parties, statute or court rule (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). None of the preconditions is alleged in the complaint.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted to the extent that plaintiffs' request for punitive damages and reasonable attorneys' fees contained in the *ad damnum* clause is stricken; in all other respects the motion is denied; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

This constitutes the decision and order of the court.

DATED: June 26, 2009

**FILED**  
 JUL 01 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

  
 Hon. Doris Ling-Cohan, J.S.C.

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