

**Plaza PH2001, LLC v Plaza Residential Owner LP**

2009 NY Slip Op 32228(U)

September 22, 2009

Supreme Court, New York County

Docket Number: 602673/08

Judge: Marilyn Shafer

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

PRESENT: Jon Marilyn Shafer  
Justice

PART 8

Index Number : 602673/2008  
PLAZA PH2001, LLC  
vs.  
PLAZA RESIDENTIAL OWNER LP  
SEQUENCE NUMBER : # 001  
DISMISS COMPLAINT

INDEX NO. 602673-08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #001  
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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accord  
with the annexed memorandum.

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

Dated: 9/27/09

MARILYN SHAFER  
J.S.C.  
[Signature]  
J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST



agreements, plaintiff made payments of \$6,200,000 and \$307,000, respectively, which payments are being held *in escrow* by the lawfirm.

The penthouse, an addition to the existing structure of the Plaza, was under construction at the time that the parties entered into the purchase agreements. Plaintiff alleges it had no access to the unit during construction and that the completed penthouse unit (1) was not constructed in accordance with the plans and specifications filed with the Department of Buildings; (2) did not comport with the unit as depicted in the model of the Plaza shown to the plaintiff prior to purchase; and (3) did not comport with the representations made by the sponsor as to the size of the rooms, height of the ceilings and number and sizes of the windows. Plaintiff asserts that, pursuant to the provisions of the Condominium Plan, incorporated into the sales agreements, it should have been notified of these changes and given the opportunity to consent thereto or to rescind the agreements.

The complaint contains four causes of action: (1) breach of contract against the sponsor; (2) legal fees in accord with a provision in the purchase agreements; (3) fraud against the sponsor and the broker; and (4) release of the down payments to the plaintiff.

Defendants move to dismiss the complaint in its entirety. In the alternative, defendants move to dismiss as to the smaller apartment against which no complaints have been made. Additionally defendants seek release of the down payments to the sponsor and an award of legal fees.

In support of its motion to dismiss, defendants point to the following provision contained in both purchase agreements:

**No Representations.** Purchaser acknowledges that Purchaser has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representation, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by the Sponsor, Selling Agent or otherwise, including, but not limited to, any relating to the description or physical condition of the Property, the Building or the Unit, or the size or the dimensions of the Unit or the rooms therein contained or any other physical characteristics thereof ... except as herein or in the Plan specifically represented; Purchaser has relied solely on his or her own judgment and investigation in deciding to enter into this Agreement and purchase the Unit. No person has been authorized to make any representations on behalf of the Sponsor. No oral representations or statements shall be considered a part of this Agreement. Purchaser agrees (a) to purchase the Unit, without offset or any claim against, or liability of, Sponsor, whether or not any layout or dimension of the Unit or any part thereof, or of the Common Elements, as shown on the Floor plans on file in Sponsor's office and [to be] filed in th City Register's Office, is accurate or correct, and (b) that Purchaser shall not be relieved of any of Purchaser's obligations hereunder by reason of any immaterial or insubstantial inaccuracy or error. The provisions of this Article 20 shall survive the closing of title or the termination of this Agreement.

In evaluating a dismissal motion based on the pleadings, the sole criterion is whether the pleading states a cause of action, and if, from its four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977] ) The Court presumes the allegations of the complaint to be true and accords them every favorable inference, except insofar as they consist of bare legal conclusions or are inherently incredible or flatly contradicted by documentary evidence. ( *Beattie v Brown & Wood*, 243 AD2d 395 [1st Dept 1997] ) Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law. (*Ladenburg Thalmann & Co v Tim's Amusements, Inc*, 275 AD2d 243 [1st Dept 2000] )

This Court finds that the disclaimer contained in the purchase agreements relates precisely to plaintiff's complaints and establishes a complete defense as a matter of law. (*Danann Realty Corp v Harris*, 5 NY2d 317 [1959] [“Where a purchase agreement contains a specific disclaimer that a purchaser is not relying on extra-contractual representations by the seller, the disclaimer destroys the allegations in the complaint that the agreement was executed in reliance upon contrary oral representations.”])

Plaintiff's reliance upon the Condominium Plan is misplaced. Under the Condominium Plan, the sponsor reserves the right to

(i) amend from time to time any of the Plans and Specifications (including changes in layouts and designs, changes in the size or number of Units ... and changes affecting the materials, appliances, equipment, fixtures and other construction details)....

The right to rescission arises only from changes which are “material (for example, variations in square footage in excess of 5%).” Plaintiff's pleadings fail to describe any changes which, under these definitions, would be considered “material.”

Where, as here, the defendant in an action for declaratory judgment moves to dismiss pursuant to CPLR 3211 (a)(7), the Court should declare the rights of the parties. (*Rivera v Russi*, 243 AD2d 161 [1<sup>st</sup> Dept 1998])

This Court finds that, in light of the above, the defendant law firm may release the

down payments it holds *in escrow* to the sponsor and the sponsor may recover its reasonable legal fees pursuant to Section 35 of the purchase agreements.

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that motion by defendant to dismiss the complaint is granted.

Settle order.

This reflects the decision and order of the court.

Dated: 9/22/09

[Signature]  
MAHE...  
J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION