Scott v 459 W. 18th St. LLC
2009 NY Slip Op 32524(U)
October 2, 2009
Supreme Court, New York County
Docket Number: 103163/2009
Judge: Paul G. Feinman
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SCANNED ON 10/9/2009

[* 1]

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

PRESENT: PAUL G. FEINMAN J.S.C. FEINMAN PART 12
Justice

SCOTT, BEN McLEAN

INDEX NO. 103163/09
MOTION DATE 7/22/09
MOTION SEQ. NO. 01
MOTION CAL. NO. 4

- v -

459 WEST 18TH STREET LLC, ETAL

The following papers, numbered 1 to 5 were read on this motion to/for D

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4
Application to A.G.	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Parties are directed to convert this action to electronic filing prior to the November 18, 2009 preliminary conference.

So ordered,

Dated: 10/2/09

Paul G. Feinman
J.S.C.

☒ PC 11/18/09 2:15 pm

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

BEN McLEAN SCOTT,
Plaintiff,

-against-

459 WEST 18th STREET LLC c/o TURNSTONE CAPITAL and TARTER KRINSKY & DROGIN LLP,
Defendants.

Index No.	103163/2009
Mot. Seq. No.	001
Submission Date	7-22-09
Mot. Cal. N o.	4

Papers considered on review of this motion to dismiss:

PAPERS	**NUMBERED**
Order to Show Cause, Annexed Affirmation and Exhibits	1
Affidavit in Opposition, Memorandum of Law in Opp.	2, 3
Affirmation in Further Support	4
Application to the Attorney General (Exhibit B)	5

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Appearances:

Plaintiff:
Pryor Cashman LLP
By: Todd E. Soloway, Esq,
Luisa K. Hagemeier, Esq.
410 Park Avenue
New York NY 10022
(212) 421-4100

Defendants:
Tarter Krisky & Drogin LLP
By: David J. Pfeffer, Esq.
1350 Broadway, 11th Fl.
New York NY 10018
(212) 216-8000

PAUL G. FEINMAN, J.:

This is an action alleging that the condominium sponsor, defendant 459 West 18th Street LLC (the Sponsor), breached the offering plan (Plan) and agreement (the Agreement) to sell Unit PH 1 (the Apartment), under construction at 459 West 18th Street in Manhattan, and that plaintiff, Ben McLean Scott (Scott), is therefore entitled to rescind the Agreement, and obtain a refund of his deposit and damages. The Sponsor now seeks an order pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7), dismissing the complaint for failure to state a cause of action or, alternatively, for an order granting it summary judgment pursuant to CPLR 3212.

Background

On July 27, 2007, Scott entered into the Agreement to purchase the Apartment for $3.5 million, and put down a deposit of $425,000, hoping to move in some time in the spring of 2008. The Plan, the terms of which bound the purchaser and took precedence over those of the Agreement in the event of a conflict (Agreement, § 30), provided that the Sponsor anticipated the first unit closing would occur on or before April 1, 2008, but that if such date were delayed beyond March 31, 2009, the Sponsor was required to offer all purchasers the right to rescind their purchase agreements (Plan, § 12 [13]). Under the Agreement, Scott could rescind if the Sponsor could not close on the Apartment within 12 months from the date the Sponsor projected for the first unit closing. Agreement, § 3. There were delays. The Plan's fourth amendment contained a notice to all purchasers that closing of title was anticipated in the fall of 2008, and that more information would be provided as construction got closer to completion. Scott aff., ex. 2. It is undisputed that a temporary certificate of occupancy (TCO) was needed to close on Scott's unit. Plan, § 15, C (1).

By letter dated January 14, 2009, in accordance with the Agreement's 30-day notice requirement (Agreement, § 3), the Sponsor advised Scott that the closing would take place on February 18, 2009, and asked him to inspect the Apartment with a Sponsor's representative, at least one day before the closing, and arrange for that inspection as per Agreement § 18. According to Jared Della Valle (Della Valle), a principal of the Sponsor, the New York City Department of Buildings inspected the project and the Apartment on February 3, 2009, an inspection that was needed before a certificate of occupancy could be issued. Della Valle aff., ¶ 6. Although the unit allegedly passed inspection on that date, by February 17, 2009, a TCO still had not been issued. *Id.*, ¶ 7. That day counsel for the Sponsor advised Scott's counsel,

Margaret Baisley (Baisley), by letter on February 17, 2009[1] that: the TCO had not yet been issued; it was expected that it would be issued shortly; the closing thus needed to be adjourned; and they would notify Baisley of the rescheduled closing date.

The February 17, 2009 letter from Sponsor's counsel also reflected disagreement with Biasley's claim in a letter dated February 12, 2009 that the Plan contained material misrepresentations and omissions. The Sponsor's counsel further advised Baisley that her client's inability to get a mortgage, based on current lending requirements, was irrelevant, and that Scott was not entitled to damages or to cancel the Agreement.

It then appears that Scott sought the representation of his current counsel, Pryor Cashman LLP, which sent the Sponsor and its counsel a letter, dated March 2, 2009, advising that section 3 of the Agreement allegedly required at least 30 days' written notice of any closing, and that since the closing was required to take place before March 31, 2009, and Scott had not been given the requisite 30 days' notice, he was exercising his right to cancel the Agreement, and to the return of his deposit with interest. Scott's counsel asserted in a footnote to that letter that the January 14 notice of closing on February 18 was not a *bona fide* notice since the Sponsor advised, in its February 17 letter, that a TCO had not yet been obtained. Scott's new counsel further asserted in the March 2 letter that the Sponsor's counsel, who was acting as the escrow agent, could not release the deposit to anyone other than to Scott. Scott then commenced the instant action on March 6, 2009. *See* Pfeffer aff., n 1.

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[1] The letter is actually dated February 17, 2007, however, from the substance of the letter it is clear that the year typed appears to be a typographical error.

Meanwhile, by letter of March 5, 2009, the Sponsor's counsel advised Scott's counsel that the Sponsor had properly served Scott with a closing notice and that, pursuant to paragraph 3 of the Agreement, the seller was entitled to reasonable adjournments in the event of "delays in inspections and reports thereon, or other requirements." The Sponsor's counsel also advised that the Sponsor expected to receive the TCO within "the coming days." Scott aff., ex. 6. Also, Scott's counsel was informed that, since the first unit closed on March 4, 2009, rather than after March 31, 2009, the Sponsor was not required to offer any purchaser the right to rescind. The Sponsor's counsel then set a new closing date of March 30, 2009, asked that Scott arrange for an inspection of the Apartment at least a day before the closing date, and reminded counsel that Scott risked losing his deposit if he did not close as required by the Agreement.

On March 12, 2009, about three weeks after the previously scheduled closing date, the Buildings Department issued a TCO for various parts of the building, including the Apartment. *See* Pfeffer moving aff., ex. F. On March 27, 2009, Scott inspected the Apartment with the Sponsor's representative. *See* Pfeffer reply aff., ex. B, n 1; Complaint, ¶ 41. That day, Scott's counsel wrote to the Sponsor canceling the Agreement. A copy of that letter has not been provided, but Della Valle's March 30, 2009 reply to that letter has. Evidently, Scott complained of problems with the Apartment, including its alleged deviation from the Plan in terms of the types of appliances installed and the layout of what was to have been a kitchen peninsular counter, as well as shoddy and unacceptable workmanship in the construction of the floors and walls. Della Valle denied some of Scott's claims and offered to remedy some of the alleged deficiencies.

[* 6]

Scott did not close on March 30, and, by letter dated April 1, 2009, the Sponsor's counsel notified Scott's counsel that Scott was in default, the seller remained willing and able to close, time was of the essence in curing the default and in paying the balance due, and that the failure to do so within 30 days might result in the Agreement's cancellation and a loss of the down payment.

The Action

After this action was commenced, a verified amended complaint dated March 31, 2009 was served, naming the Sponsor and its counsel as defendants. No cause of action was alleged against the Sponsor's counsel, and by stipulation dated July 22, 2009, the case was dismissed as to the law firm, and the Sponsor's counsel agreed that it would hold the escrow funds in issue until the final determination of this case. Accordingly, the Clerk of Court and the Clerk of Trial Support should amend the papers, records and files in this action to reflect the amended caption by deleting Tarter Krinsky & Drogin as a named defendant.

The amended complaint asserts two causes of action for rescission against the Sponsor based on alleged breaches of material obligations under the Agreement and Plan. Under the first cause of action, it is alleged that the Sponsor represented that "title to the Apartment would close in spring 2008" (Amended Complaint, ¶¶ 46, 50-51), the Plan did not warn of a risk of delay in the closing of title (*id.*, ¶ 48), and that the failure to close title by the spring of 2008 entitled Scott to rescind the Agreement and obtain a refund of his deposit (*id.*, ¶ 55). The first cause of action then somewhat inconsistently recites that the Sponsor agreed that, if it were unable to convey title to the Apartment by March 31, 2009, the parties had the right to rescind the Agreement, and that the Sponsor in this case could not convey title by March 31, 2009, because

[* 7]

it did not comply with a condition precedent to conveying title, namely, that it provide proper written notice of the closing. *Id.*, ¶¶ 9, 56-60. Specifically, it is alleged that 30 days' written notice of a closing was required to be given, that the 30 days' notice given by letter dated January 14, 2009 was not *bona fide* because, "on information and belief" (*id.*, ¶ 35), the Sponsor knew it would not get the TCO in time for the February 18, 2009 closing, and that the March 5, 2009 letter notifying Scott of the March 30 closing date was ineffective, since it did not constitute 30 days' notice (*id.*, ¶¶ 38-39). The amended complaint alleges that, since the condition precedent was not met by March 31, 2009, Scott was entitled to rescind the Agreement and get a refund of his deposit, with interest. The first cause of action also seeks damages of no less than $500,000, counsels' fees, costs and expenses because, among other things, the Sponsor was unable to convey title in the spring of 2008.

The amended complaint's second cause of action is based on Scott's March 27, 2009 inspection of the Apartment, and alleges that, as built, the Apartment materially departed from the Plan and Agreement. The amended complaint gives examples of claimed departures. Specifically, the plans called for a peninsula center counter, whereas the center counter, as built, was an island. In addition, the appliances were allegedly of a different, smaller and inferior type than represented in the Plan. For example, as amplified by Della Valle's March 30, 2009 letter to Scott (Scott aff., ex. 7), there were some internal inconsistencies in the Plan as to some appliances. While model numbers were given in the Plan with respect to some appliances, the sizes given in the Plan as to some appliances, or the types of appliances, did not match up with the model numbers. Scott believed that, to remedy these defects, the built-in cabinets would have to be ripped out. The complaint further alleges that the flooring was of a materially inferior

grade than represented in the Plan or in the showroom, and that it was installed in an unprofessional manner, causing it to be warped, sloped, and rutted throughout the Apartment. The amended complaint similarly asserts that the Apartment's walls were unprofessionally installed and were warped, bent, and sloping. In light of these alleged breaches of representations and obligations under the Agreement, Scott seeks to rescind the Agreement, obtain a refund of his deposit with interest, and obtain damages, again in an amount of no less than $500,000.

The Instant Motion

The Sponsor now seeks an order dismissing the amended complaint based on the documentary evidence and for failure to state a cause of action. As to the first cause of action, the Sponsor asserts that Scott's claim that he is entitled to rescission because a closing with proper notice did not occur before March 31, 2009, is without merit because the Agreement/Plan provision on which Scott relies is only applicable where the closing of the first unit has not occurred by March 31, 2009. Here, the Sponsor maintains that the closing of the first residential unit took place before that date, as evidenced by the deed to that unit dated March 24, 2009. The Sponsor also notes that the first closing of a commercial unit in the building occurred before March 31, 2009, as reflected in a deed of March 4, 2009.

The Sponsor additionally asserts that neither the Agreement nor the Plan requires that 30 days' notice be given after a 30-day notice has been timely sent and then the closing is rescheduled. The Sponsor relies on section 3 of the Agreement, which provides in relevant part, that

[* 9]

> [t]he closing of title shall take place on no less than thirty (30) days written notice to Purchaser at such place as Seller may designate, at an hour and on a date ... to be specified by Seller. The closing of title may be adjourned to such later date as the parties may agree upon in writing, or otherwise as set forth in the following paragraph, and the adjourned date shall then be deemed the Closing Date hereunder. Purchaser shall be entitled to one reasonable adjournment of up to thirty (30) days, on five (5) days written notice by Purchaser to Seller ... .
>
> The Seller shall be entitled to reasonable adjournments in the closing of title in the event of ... delays in inspections and reports thereon, or other requirements. However, if Seller shall be unable to convey title to the unit within twelve (12) months after the projected date for the first Unit closing under the Plan ... [except for, among other things, the] purchaser's default, Seller or Purchaser shall have the right to cancel this Purchase Agreement upon written notice within fifteen (15) days after presentation of an amendment to the Offering Plan disclosing the delay beyond such projected date, and upon such cancellation, Purchaser shall be entitled to the return of any moneys paid by Purchaser to Seller under the terms of this Agreement, if any.

The Sponsor maintains that, since Scott had been given timely notice, and it had obtained the TCO and was ready, willing, and able to close on March 30, 2009, it is entitled to dismissal of Scott's first cause of action.

The Sponsor further asserts that Scott's second cause of action, based on the alleged failure to construct the Apartment in accordance with the Plan or Agreement, must be dismissed because the Agreement provides in sections 17 and 18 of the Agreement that disputes of this nature are not a bar to closing. The Sponsor points out that under section 17, the "[p]urchaser shall accept title without abatement in or credit against the purchase price, and without provision for escrow, notwithstanding that Seller may not have completed construction of (i) minor details of the Unit." Pfeffer aff., ¶ 21. Section 18, which deals with inspection, requires the purchaser to inspect the unit at least a day before the closing, and provides that

> [a]t the conclusion of the inspection Purchaser will complete and sign an inspection statement in the form annexed as Exhibit B. Purchaser's signing of this Purchase Agreement shall constitute its acceptance of the Unit and the

> Building in the condition in which it shall be at the time of Closing subject solely to the "Exceptions" noted on the inspection statement ... and in accordance with Sponsor's rights and obligations under the Plan. By Closing title, Purchaser waives any claim regarding the condition of the Unit except as set forth in the inspection statement. Purchaser shall be in default under this agreement if Purchaser fails to inspect the Unit with a representative of the Sponsor on or before the day before the scheduled Closing Date. Except as expressly provided in this Agreement or the Plan, Sponsor shall have no obligation to repair or improve the Unit, any portion of Property, or the appliances, equipment, or fixtures attached to or used in connection with the Unit or the Property.

Agreement, § 18; *see also* Agreement, ex. B, Final Inspection Statement (which limits the Sponsor's post-closing repair obligations to the items listed in the inspection statement); Rider to Purchase Agreement, ¶ E (signing inspection statement constitutes the buyer's acceptance of the unit in its condition at closing time, subject solely to items listed on the statement, and constitutes a waiver of claims regarding unit's condition).

The Sponsor claims that, since all of the alleged defects were minor, Scott was still required to close on the Apartment, and then the Sponsor could decide either to finish those items or substitute equivalent or superior materials. Pfeffer aff., ¶¶ 23-24; *see* Plan, § 17 (10) (which permits the Sponsor to substitute materials and fixtures "of equal or better quality and design"); *id.*, § 10. In addition, the Sponsor evidently claims that Scott breached the Agreement by failing to fill out an inspection statement. The Sponsor asserts that there is no express provision in the Agreement or Plan permitting Scott to rescind or terminate the Agreement based on Scott's allegations. Thus, the Sponsor claims that Scott is not entitled to rescission or to terminate the Agreement under the second cause of action.

Finally, the Sponsor claims that, besides failing to state a cause of action, the action should be dismissed because Scott failed to meet a contractual condition precedent to suit,

namely that the Plan allegedly required a purchaser, in a dispute over the release of an escrow payment, to apply, in the first instance, to the Attorney General. In this regard, the Sponsor relies on section 12 (12) of the Plan, which provides, in relevant part, that, "(a) in the event of a dispute, the Sponsor shall apply and the Purchaser or the Escrow Agent holding the down payments in escrow may apply to the Attorney General for a determination on the disposition of the down payment and any interest earned thereon."

Scott opposes the motion, and asserts, with respect to the first cause of action, that the Sponsor represented that he could close by the spring of 2008, and never gave him any reason to believe that the closing would be delayed. He further asserts that he was required to be given 30 days' written notice before any closing on the Apartment, that if such notice were not given, he would be entitled to rescind the Agreement (Agreement, § 3), and that, "upon information and belief," the January 14 letter was a sham, and therefore did not constitute proper notice, "because it is believed that the Apartment was far from a state in which a TCO would be issued." Scott aff., ¶ 13. Additionally, he claims that the Sponsor was not entitled to adjourn the closing because the Sponsor has not alleged that it adjourned the closing for any of the reasons set forth in section 3 of the Agreement. Scott also maintains that he was entitled to another 30 days' written notice prior to the rescheduled March 30 closing, and that, even if he were not so entitled, 25 days constituted unreasonable notice, since it was an insufficient amount of time to do unspecified necessary "things." Scott aff., ¶ 20.

Regarding the second cause of action, Scott denies that the defects were minor, or that any substitutions were equal to or better than those required. Scott claims that, in a rush to meet the March 31, 2009 deadline set forth in section 3 of the Agreement, the Sponsor, among other

things, shoddily constructed the Apartment's floors and walls. Scott also denies that the Plan required him to first seek relief from the Attorney General, since the provision relied upon by the Sponsor, while requiring the Sponsor to apply to the Attorney General to resolve an escrow account dispute, was couched in permissive language with respect to a purchaser.

In reply, the Sponsor asserts that the January 14 written notice of closing was *bona fide* and that Scott's claim that it was a sham was invented only when he realized that he would be unable to get a mortgage to finance the Apartment's purchase. The Sponsor further claims that the Agreement was clear as to the notice requirements, and that a rescheduled closing did not require another 30 days' notice. In the reply, the Sponsor also offers several new grounds for dismissing the action. Specifically, the Sponsor now claims that the second cause of action actually sounds in misrepresentation, and that, as such, Scott has no private right of action with respect to the allegations of that cause of action. Additionally, the Sponsor observes that Scott has now filed an application with the Attorney General's office for the return of his down payment, and asserts that, therefore, Scott's second cause of action should be dismissed as duplicative.

Discussion

It is, of course, basic hornbook law on a motion to dismiss pursuant to CPLR 3211, the court must accept as true the facts alleged by plaintiff in the complaint and submissions in opposition to the motion. The plaintiff is entitled to the benefit of every possible favorable inference and the court's role is to determine whether the facts as alleged fit within any cognizable legal theory, and generally the court does not assess the truth of the facts alleged. *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d

409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1984). However, a motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 NY2d 425, 430-431 (1998), quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 (1st Dept 2007) ("[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law"). "[F]actual claims [that are] either inherently incredible or flatly contradicted by documentary evidence, are not entitled" to consideration on a motion addressed to a complaint's sufficiency. *Wilson v Hochberg*, 245 AD2d 116, 116 (1st Dept 1997).

The branch of the Sponsor's motion which seeks to dismiss the first cause of action is granted, and that cause of action is dismissed. It is readily apparent from the documentary evidence, i.e., the plain terms of the Plan, that Scott was not entitled to rescind on the ground that the Apartment was not ready in the spring of 2008. The Plan (at § 12 [13]) provided that it was anticipated that the first unit would close by April 1, 2008, but gave the right to all purchasers to rescind if that date were to be delayed beyond March 31, 2009. *See also* Agreement, § 3 (purchaser can rescind if seller cannot "convey title to the unit" by March 31, 2009). The complaint's allegation that the January 14, 2009 letter was not *bona fide* is inherently incredible (*Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V.*, 258 AD2d 349 [1st Dept 1999]), since there would be no reason for the Sponsor to send out a sham closing notice. The Sponsor, at the time the January 14 letter was issued, was dealing with a March 31, 2009 deadline, which it would either meet or not. Moreover, after the February 18 closing date passed, the Sponsor still

would have had more than 30 days to send out a closing notice. So again, the Sponsor had no incentive to send out a sham letter in January. Simply because a TCO had not been issued before February 18, does not render the January notice a sham. Moreover, that the TCO was issued only within about three weeks of February 18, demonstrates that the January 14 notice was not a sham.

The amended complaint's allegations that the Agreement required any rescheduled closing to be done on 30 days' written notice, that such notice was a condition precedent to closing title, and that such notice had to have been given by March 1, 2009 (Amended Complaint, ¶¶ 7, 39, 57-59), are not sustainable in light of the language of Agreement, which does not require 30 days' notice when a closing is rescheduled. Indeed, the Agreement provides that when a purchaser reschedules, only five days' notice is needed. Scott's claim on this motion that the application to dismiss the first cause of action should be denied because 25 days was allegedly not reasonable notice, is unavailing, since reasonable notice was not a theory set forth in the amended complaint, which simply alleges that the notice was required by the Plan and Agreement to have been given at least 30 days before the closing of March 30, 2009, as a contractual condition precedent. Amended Complaint, ¶¶ 7, 39, 57-59. Under the circumstances alleged, pleading reasonableness would not, in any event be availing. It bears noting that Scott, who now claims he needed to do "things," evidently never sought to take advantage of the Agreement's provision (§ 3) giving him one reasonable adjournment of up to 30 days. In fact, he appears to have gone along with the March 30 closing date by inspecting the Apartment on March 27. Further, under the Agreement, the Sponsor's

[* 15]

rescheduling of the closing to obtain the TCO was a valid reason to delay the closing. Agreement, § 3 (seller "entitled to reasonable adjournments" of closing due to "delays in inspections and reports thereon, or other requirements"). In light of the foregoing, the amended complaint's first cause of action for rescission fails to state a cause of action, and is dismissed.

The branch of the Sponsor's motion which seeks dismissal of the second cause of action is denied. First, the amended complaint alleges material and substantial breaches of the Agreement and Plan with respect to how the Apartment was constructed, including that it was constructed in a shoddy manner and deviated from the layout set forth in the Plan (at appendix D). Thus, the argument that the Agreement (§ 17) requires a purchaser to accept title when the Sponsor has not completed minor details of a unit, is unavailing on this motion, where the pleaded facts as to the substantial nature of the alleged breaches must be accepted as true. *See also* Agreement, § 12 (which indicates that purchasers will not be relieved of their obligations under the Agreement if there are only minor inaccuracies regarding layout or dimensions). In addition, section 20 of the Agreement, entitled "Limitation of Seller's Liability," provides, in relevant part, that

> [e]xcept as may otherwise be required by law, the Seller's liability under the agreement for failure to complete any portion of the Unit ... or deliver title ... shall be limited to the return of the money deposited hereunder (with interest, if any), and upon the return of said money, the Agreement shall be null and void.

Viewed in a light most favorable to Scott, he is asserting that the shoddily constructed premises, caused by haste to meet the March 31, 2009 deadline, were, from his point of view, not in any sense to be considered a completed job.

Second, that the Agreement (§ 18) provides that the purchaser will fill out an inspection statement after the inspection, does not bar a claim for breaches of the Agreement or Plan and a return of the down payment with interest based on those breaches. The purpose of section 18 of the Agreement, and the related attachments to that Agreement, is seemingly to limit, after closing, a purchaser's claims against, and entitlement to, relief from the Sponsor, regarding the condition of the unit.

Third, there is no contractual condition precedent requiring Scott to go in the first instance to the Attorney General to obtain relief with respect to the down payment, since the language in the Plan is permissive only. *See* Plan, § 12 (12) (purchaser "may apply to the Attorney General"). Finally, to the extent that the Sponsor urges new grounds in its reply papers for dismissal of the second cause of action, they are untimely raised as Scott has not had an opportunity to put in sur-reply papers to address these new grounds. *See Moorman v Meadow Park Rehabilitation and Health Care Center*, 57 AD3d 788 (2d Dept 2008); *Matter of Allstate Ins. Co.*, 52 AD3d 826 (2d Dept 2008). In any event, Scott's allegations, at least with respect to the shoddy construction of the walls and floors throughout the Apartment and the layout deviation, do not appear to be based on any claim of misrepresentation.

For the foregoing reasons, it is

ORDERED that 459 West 18th Street LLC's motion to dismiss the amended complaint is granted solely to the extent that the first cause of action is dismissed, and the motion is otherwise denied; and it is further

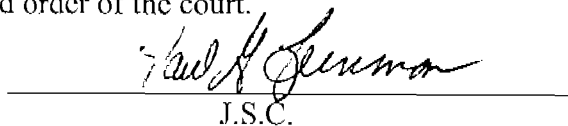
ORDERED that 459 West 18th Street LLC shall serve its answer to the remaining cause of action in the amended complaint within 20 days of entry of this order; and it is further

ORDERED that movant's counsel shall serve a copy of this decision and order upon the Clerk of Court (60 Centre Street, Basement) who shall enter judgment in accordance with foregoing and upon the Clerk of Trial Support, who along with the Clerk of Court shall amend the papers, records and files in this action to reflect the amended caption by deleting Tarter Krinsky & Drogin LLP as a named defendant; and it is further

ORDERED that the Part 12 Clerk shall set this matter down for a preliminary conference on November 18, 2009 at 2:15 p.m. in Part 12, Supreme Court, 60 Centre Street, Room 212, New York NY 10007.

This constitutes the decision and order of the court.

Dated: October 2, 2009
New York NY



J.S.C.

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

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