

Morrison v Grand Chelsea Condominium

2009 NY Slip Op 33104(U)

December 15, 2009

Supreme Court, New York County

Docket Number: 103194/2009

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT:

PART 55

Index Number : 103194/2009

MORRISON, BRET

VS.

GRAND CHELSEA CONDOMINIUM

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3, 4-5

6-7

8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided by the annexed ~~order~~

decision and order

FILED

JAN 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

12/15/09

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

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

-----X

BRET MORRISON,

Index No. 103194/2009

Plaintiff,

DECISION AND ORDER

-against-

THE GRAND CHELSEA CONDOMINIUM,
THE BOARD OF MANAGERS OF THE GRAND
CHELSEA CONDOMINIUM, ROSE
ASSOCIATES, INC., and THE ARGO CORP.,

Defendants.

-----X

Solomon, J:

Plaintiff, Bret Morrison, sues Defendants for damages resulting from water leaks and flooding. Defendants Board of Managers of the Grand Chelsea Condominium (Managers) and Rose Associates, Inc (Rose), the managing agent, move pursuant to CPLR 3211(a)(7) to dismiss the third, eighth and ninth counts of the verified complaint. Morrison opposes the motion though he withdraws count eight. For the following reasons, the motion is granted.

FACTS

Morrison is the owner of unit #7G (Apartment), a condominium apartment located in 270 West 17th Street, New York, New York (Building). In August 2006, the Apartment suffered water leaks and flooding. This problem persisted through December 2007. Morrison alleges that Defendants knew of the water leaks but did not repair them. He further states that he

moved out on December 28, 2007, because the damage to the Apartment made it uninhabitable.

In his complaint, Morrison seeks recovery in counts one, two, four, and five, under a theory of negligent maintenance of the Building; in counts six and seven, under a theory of nuisance; and in counts three and nine, under a theory of fraud. Count eight is withdrawn.

In the third count, Morrison alleges that the Defendants' agents "falsely represented that the cause of the water incursions . . . had been properly and completely . . . repaired" (Complaint, ¶ 63) and that he relied on these statements by not moving out of the Apartment and was damaged in the amount of \$2 Million. In the ninth count, Morrison alleges that Arnie Lurie of Defendant Argo Corp. (Argo), a subsequent managing agent, "represented that the defendants would properly remediate and repair the premises in a timely manner" (Complaint, ¶ 92) and that Morrison "relied on these representations to his detriment" (Complaint, ¶ 96) and was damaged in the amount of \$500,000.

DISCUSSION

Count Three

Defendants argue that there may not be a cause of action for fraud where the complaint alleges that there is a contract containing the duty to repair the premises. Defendants

also contend that the count is not sufficiently pleaded. Morrison argues that there is an independent legal duty, separate from the contract, upon which the fraud claim can rest.

Morrison does not allege how his reliance on the statements referenced above caused him any damages. He merely alleges that Defendants told him the Apartment was repaired, that in fact it was not, that he relied on the statement and remained in the apartment, and he was damaged. However, the complaint contains no allegation that puts forth how Morrison's reliance was detrimental (see *Nam Tai Electronics, Inc. v. UBS PaineWebber Inc.*, 46 AD3d 486, 488 [1 Dept, 2007]). Damages resulting from improper or substandard repairs are covered by the proceeding counts one, two, four and five, making this claim duplicative.

Accordingly, the third cause of action is insufficient to state a cause of action for fraud and is dismissed.

Count Nine

Defendants argue that the ninth cause of action is insufficient because it is based on a promise, not a representation of an existing fact. Plaintiff counters that a promise is actionable when it is made with a present, undisclosed intent not to perform.

"A failure to perform promises of future acts is merely a breach of contract A cause of action for fraud does not arise when the only fraud charged relates to a breach of

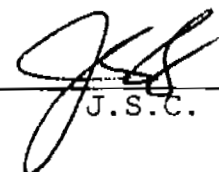
contract" (*Ullmann v. Norma Kamali, Inc.*, 207 AD2d 691, 693 [1st Dept. 1994]). While a fraud claim may survive when the defendant had no intention of fulfilling the promise at the time it was given, (*Braddock v. Braddock*, 60 AD3d 84, 89 [1 Dept., 2009]), there is no allegation in the complaint of a lack of intention, nor is there a an allegation that would allow a reasonable inference of such to be drawn (Id). Accordingly, the ninth cause of action is dismissed.

For the foregoing reasons, it hereby is

ORDERED that the motion to dismiss is granted and the third, eighth and ninth causes of action of the complaint are dismissed.

Dated: December 15, 2009

ENTER:



 J.S.C.

JANE S. SOLOMON

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