SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

ERIC SPAR and ABBE SPAR,

Plaintiffs,

INDEX NO.: 023552/2009
MOTION DATE: 02/26/2010
MOTION SEQUENCE: 001

-against-

DISTINCTIVE VENTURES, LLC.,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits Annexed 1
Defendant's Memorandum of Law in Support of Motion to Dismiss the Complaint 2
Plaintiff's Memorandum of Law in Opposition to Defendant's Pre-Answer Motion to Dismiss 3
Affidavit of Plaintiff Eric Spar & Exhibits Annexed 4
Affirmation of Barry Manson & Exhibits Annexed 5
Defendant's Reply Brief in Support of Motion to Dismiss 6

PRELIMINARY STATEMENT

Defendant, Distinctive Ventures, LLC.("Distinctive"), has moved pre-answer, for an order pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint.

BACKGROUND

Plaintiffs entered a contract to purchase a cooperative unit in Montauk, Long Island from Defendant on September 21, 2007. (Steingut Affirmation, Exhibit A). The purchase price for the unit was $4,150,000.00, and pursuant to the agreement, plaintiffs provided a down payment of $415,000.00.

Plaintiffs' complaint asserts causes of action for breach of contract and common law fraud. Each cause of action arises out of the purchase agreement. Plaintiff seeks recision of the contract, return of the down payment and damages.

The common law fraud claim is based on the claim that "representations by [Distinctive] and its principals were false and known to be false at the time they were made, and intentionally made with the intent to mislead and defraud Plaintiffs and to induce them into entering the Purchase Agreement."(Complaint, paragraph 36) The "Offering Plan and any Amendments thereto" are incorporated by reference and part of the agreement. (See Steingut Affirmation, Exhibit A, page 1, paragraph 2 & Definition(iii)).

This agreement involved the purchase of shares of stock in a corporation known as 93 Old Montauk Owners, Inc.(a/k/a "Apartment Corporation"). Defendant, Distinctive, is a Delaware limited liability company. The original offering plan was dated January 17, 1984. On March 26, 2007, the Fifteenth Amendment was filed. The nineteenth amendment was filed on June 2, 2008.

The Fifteenth Amendment states, in part, on page 1:

> "[Distinctive Ventures] will endeavor in good faith to market and sell the Units in the Cooperative. However, New Sponsor is retaining the unconditional right to rent rather than sell Units. Because [Distinctive] is retaining the right to rent more than 49 percent of the Units in the Buildings being constructed for Cooperative ownership, future marketability of the Units may be adversely affected and purchasers may never gain effective control of the Cooperative Board. As a result of [Distinctive] retaining more than 49 percent of the Units, marketability of the Units may be adversely affected." (Spar Affidavit, Exhibit A)

Plaintiffs and defendant entered the purchase agreement on September 21, 2007, some six months after the fifteenth amendment was filed. The purchase agreement states that plaintiffs received a copy of the plan and amendments to the plan. Additionally, the Spar Affidavit states that when the Spars were deciding to purchase the Unit, they relied on the fifteenth amendment.(Spar Affidavit, paragraph 3).

Section 40, on page 18 of the purchase agreement, is titled "Material Changes." It states:

> "In the event Seller makes a change in the terms or conditions of the offering which would materially adversely affect the rights of a Purchaser, Seller will notify Purchaser by a duly filed amendment to

> the Plan within twenty (20) days of the acceptance of the amendment for filing. Purchaser will be given thirty (30) days to elect to rescind this Purchase Agreement by written notification to Seller. In the event Purchaser elects to rescind, Seller will, within ten (10) days, return all payments made pursuant to this Purchase Agreement, both parties will be relieved of all obligations under the Agreement and the Agreement shall be deemed cancelled."

Plaintiffs claim there was a material misrepresentation in the "Fifteenth Amendment that the Units at the Property would not be rented as hotel rooms after the 2007 summer season and after the transfer of shares to the renovated unit occurred.(Spar affidavit, paragraph 4). Further, plaintiff states:

> "I relied upon the representation that all of the units would thereafter be offered for sale, and not for perpetual lease. The short-term leasing of the units changes the entire nature of the development from one where owners come to relax and enjoy their own property with their neighbors, to a transient community of renters who do not assist in management or preservation of the cooperative property."*Id.*

The fifteenth amendment contains a section titled "New Unit Types" which, in part, states:

> "The remaining fifty-three(53) existing Units will initially not be offered for sale and will continue to be leased out as hotel rooms for the 2007 season. Once the transfer of shares to the first renovated Unit occurs, New Sponsor will no longer offer the fifty three (53) remaining Units for lease as transient hotel Units but reserves the right to lease the Units for a minimum period of one (1) month (non-hotel use)." (Steingut Affirmation, Exhibit C, Pg 2, part II, lines 10-15).

Plaintiff claims the failure of defendant to cease renting units as "hotel rooms" is a material breach of the purchase agreement. (Spar Affidavit, paragraph 5). Plaintiff argues this amounts to a material change in the offering plan and therefore defendant was required, by the terms of the contract to offer plaintiffs the right to rescind the purchase agreement, which defendant has not done. Plaintiff also claims defendant failed to offer recision of the purchase agreement after filing the nineteenth amendment, on June 2, 2008, which plaintiff claims also contained a material change.

The nineteenth amendment, in part, provides that:

> "All Units will receive hotel-type services and have access to all amenities offered. Units may continue to be leased until such time as they are sold. Once Units are sold by [Distinctive], the minimum rental period of at least one (1) month will become effective." (verified complaint, paragraph 15).

Plaintiffs claim the fifteenth amendment contains a material omission because it failed to disclose the fact that the Cooperative "is the mortgagor on a $45,000,000.00 loan which is secured by its property."(verified complaint, paragraph 16). Section VIII of the fifteenth amendment is titled "Acquisition and Construction Mortgage" and states, in part,

> "[Distinctive] has received an acquisition and construction loan from Barclays Capital ... in the amount of $45,000,000.00. ... The mortgage matures on April 7, 2008 but the mortgage provides that provided [distinctive] is in compliance with all the provisions of the mortgage, the Bank will release its mortgage prior to the first closing of the new renovated Units. [Distinctive] has also pledged all its interest in the shares of the Apartment Corporation to Barclays Capital. Once released, the property will not be further encumbered by [Distinctive]."

DISCUSSION

On a motion to dismiss pursuant CPLR 3211, factual averments of the complaint are accepted as true and the plaintiff is accorded the benefit of all favorable inferences to determine "whether the plaintiff can succeed upon any reasonable view of the facts stated." (*Malik v. Beal* 54 A.D.3d 910 [2d Dept 2008]). Pleadings are to be liberally construed. (*Sotomayor v. Kaufman, Malchman, Kirby & Squire, LLP* 252 A.D.2d 554 [2d Dept 1998]). In a CPLR 3211(a)(7) motion, bare legal conclusions or factual claims flatly contradicted by the record are not presumed to be true, nor are they accorded every favorable inference. *Id.*

Common Law Fraud

"To establish a prima facie case of fraud, the plaintiff must establish (1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the

defendant's representations" (see *Cash v. Titan Financial Services, Inc.* 58 A.D.3d 785 [2d Dept 2009] citing *Giurdanella v Giurdanella*, 226 AD2d 342, 343 [2d Dept 1996]).

Plaintiffs' claim of common law fraud arises out of the purchase agreement, including the incorporated fifteenth amendment. Plaintiffs conclusorily state in their complaint that Distinctive and its principals made false representations that were known to be false at the time they were made, and "intentionally made with the intent to mislead and defraud Plaintiffs and to induce them into entering the Purchase Agreement."(Complaint, paragraph 36) The only representations that plaintiffs cite for this claim are within the purchase agreement and the fifteenth amendment. Even assuming there were false representations attributable to defendant within the purchase agreement and the fifteenth amendment, plaintiffs have failed to establish prima facie evidence that the defendant "knew the representations were false and made them with intent to deceive the plaintiff." Plaintiffs have failed to establish the second required element of common law fraud. Plaintiffs' claim for common law fraud is hereby dismissed for failure to state a cause of action.

Since plaintiffs failed to state a cause of action for common law fraud, the Court does not reach the issue of whether the Court of Appeals decision in *Kerusa* extends to preempt plaintiffs private cause of action for common law fraud. (See *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236)

Breach of Contract

To state a cause of action for breach of contract, the plaintiff must establish the "specific terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant." (*Furia v. Furia,* 116 A.D.2d 694 [2d Dept 1986]).

Here, the terms of the agreement are set forth in the purchase agreement. (Steingut Affirmation, Exhibit B). It is undisputed that there was consideration. Plaintiff paid a down payment of $415,000 and promised to pay the remaining balance, in exchange for defendant's promise to transfer stock to plaintiff. Plaintiffs have also adequately claimed that they have performed under the terms of the contract up until the time the complaint was filed.

Plaintiffs claim defendant breached the agreement in three ways:

1) failing to notify plaintiffs of right to rescind contract after nineteenth

amendment was filed;

2) failure to "disclose fact that Cooperative is the mortgagor on a $45,000,000.00 loan which is secured by its property";

3) rental of units for transient hotel use in violation of amendment fifteen.

Plaintiffs claim they should have the right to rescind the contract because the nineteenth amendment that was filed contained a change that materially adversely affect plaintiffs' rights. The contract specifically contemplated this scenario. Section 40 of the purchase agreement provides, in part, "In the event Seller makes a change in the terms or conditions of the offering which would materially adverely affect the rights of a Purchaser, Seller will notify Purchaser by a duly filed amendment to the Plan within twenty (20) days of the acceptance of the amendment for filing." It further states "Purchaser will be given thirty (30) days to elect to rescind this Purchase agreement by written notification to Seller."*Id.* Plaintiffs argue this language is ambiguous and should be read to imply that defendant had an obligation to notify plaintiffs of their right rescind the contract upon a material adverse change. The Court disagrees.

The language is unambiguous, and defendants complied with the provision by providing plaintiffs and their attorney copies of the 19th amendment to the offering plan as evidenced by the June 11, 2008 letter from Barry Manson to plaintiffs.(See defendant's brief in support of motion to dismiss, Exhibit F). To the extent plaintiffs' cause of action for breach of contract is based on the failure to notify plaintiffs of a right to rescind the contract related to the nineteenth amendment, such cause of action is hereby dismissed.

Plaintiffs' second argument is that defendant breached the contract by failing to disclose that the Cooperative is the mortgagor on $45,000,000.00 loan secured by the property. Section VIII of the fifteenth amendment is titled "Acquisition and Construction Mortgage." It states, in pertinant part, "[Distinctive] has received an acquisition and construction loan from Barclays Capital ... in the amount of $45,000,000.00. ... The mortgage matures on April 7, 2008. ... [Distinctive] has also pledged all its interest in the shares of the Apartment Corporation to Barclays Capital. Once released, the property will not be further encumbered by [Distinctive]." The court finds, after giving plaintiffs every favorable inference, that plaintiffs fail to state a cause of action for breach of contract on the basis that the defendant misrepresented the true

nature of the mortgage in that the Cooperative was encumbered by the loan.

Finally, plaintiffs claim defendants use of units for transient hotel use, prior to the nineteenth amendment, breached the contract. On this basis plaintiffs claim they are entitled to rescind the contract and damages for breach of contract. Page 2, part II. of the 15th Amendment states:

> "The remaining fifty-three(53) existing Units will initially not be offered for sale and will continue to be leased out as hotel rooms for the 2007 season. Once the transfer of shares to the first renovated Unit occurs, New Sponsor will no longer offer the fifty three (53) remaining Units for lease as transient hotel Units but reserves the right to lease the Units for a minimum period of one (1) month (non-hotel use)."

Plaintiffs argue defendants rented out rooms as transient hotel rooms in 2008 and 2009, breaching the terms of the fifteenth amendment, that it would cease such use of the rooms. (See Spar Affidavit, paragraph 5). However, the nineteenth amendment, filed June 2, 2008, allowed for such use and plaintiffs were notified by letter of such amendment dated June 11, 2008. Thus, plaintiffs must point to a breach that occurred from leasing out as transient hotel rooms between the end of the "2007 season" and June 2, 2008. Examining plaintiffs allegations as true, and in a light most favorable to plaintiffs, plaintiffs have established a prima facie case for a breach of contract cause of action based on the renting out rooms as transient hotel rooms between the end of the 2007 season and June 2, 2008.

The defendant is directed to submit an answer to the complaint, as modified by this Order, within thirty days of the date of this Order. The parties are directed to appear for a Preliminary Conference on June 22, 2010, at 9:30 A.M.

This constitutes the Decision and Order of the Court.

Dated: May 10, 2010

J.S.C.