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

PRESENT: ~~MARY S. SOLOMON~~ PART 55

Index Number : 601652/2009
COLLIN, DANIEL
VS
TANEN, PHILIP
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8/30/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits Notice of x-motion	6-14
Replying Affidavits	15-16

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

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

Dated: 4/11/11

MARY S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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DANIEL COLLIN,

Plaintiff,

-against-

PHILIP TANEN and DOUGLAS ELLIMAN REALTY, LLC, d/b/a PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,

Defendants.

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DECISION and ORDER

Index No. 601652/09

DOUGLAS ELLIMAN REALTY, LLC, d/b/a PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,

Plaintiff,

-against-

MICHAEL MEIER,

Defendants.

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Index No. 590836/09

Jane Solomon, J.:

This is an action for fraud, breach of contract and breach of fiduciary duty by plaintiff Daniel Collin in connection with his purchase of a condominium unit. Collin moves, pursuant to CPLR 3212, for an order granting summary judgment on each cause of action set forth in the amended complaint. Defendants Douglas Elliman, LLC (Douglas Elliman) and Philip Tanen (Tanen) cross-move for summary judgment dismissing the amended complaint.

Third-party defendant Michael Meier (Meier) also cross-moves for an order granting summary judgment dismissing the amended complaint.

1. Background

On January 10, 2008, Collin entered into a contract to purchase a condominium unit, Unit 7B, in the building located at 415 Greenwich Street in Manhattan (the Building), for $3.675 million. The Sponsor was non-party 415 Greenwich Fee Owner, LLC. On that same day, Collin agreed to purchased a license to use a parking spot in the Building for $175,000 and the right to use a storage bin in the Building for $12,000. The contract was made subject to Sponsor's offering plan (Collin Aff., Ex. A, B and E), which was disclosed to Collin and his attorney before he agreed to the purchase. The offering plan provided that a buyer could rescind its purchase, subject to certain conditions. Previously, on December 27, 2007, Collin offered to purchase Unit 4G in the building, which was accepted, but he then exercised his right to rescind the offer.[1]

Collin testified at his deposition that, before the

[1] The record does not state the exact date he rescinded the offer, but it was no later than January 10, 2008.

sale, he had been employed by JP Morgan in mergers and acquisitions, then joined a private equity fund, and then he formed Monmoy Capital Partners, where he is now a principal (Collin Deposition, 6-7). Also, he was part of a limited liability company that owned property in Florida and had been involved in other real estate business (*id.* at 8).

Collin's purchase of Unit 7B closed on August 6, 2008. A less propitious time to purchase a condominium in New York could hardly be imagined. Like nearly every other person who purchased an interest in real estate near the height of the market, Collins believed that the value of his investment failed to meet expectations. This lawsuit was commenced in May 2009.

The amended complaint states that Douglas Elliman served as the agent for the Sponsor in connection with the sale of condominium units and parking space licenses in the Building and Tanen was the Douglas Elliman broker assigned to represent the Sponsor. At the same time, Douglas Elliman, through Meier, also served as plaintiff's agent in connection with his purchase of the apartment and the parking space license.

Collin asserts claims for breach of fiduciary duty, breach of contract, fraud and negligence. Collin asserts that defendants induced him to purchase the unit by misrepresenting or

omitting relevant facts about other units in the Building. Among other things, he allegedly was misled as to the number of units in the building that had already been contracted for sale and the price per square foot of such units, and as to the number of parking space and storage bin licenses that already had been sold.

Douglas Elliman commenced a third-party action demanding indemnification from Meier in September 2009 (Third-party Complaint, Aff. Of Kevin Fritz, Esq., Ex. E). In November 2009, Collin served an amended complaint naming Meier as a direct defendant (Amended Complaint, Fritz Aff., Ex. A). Meier answered Collin's amended complaint and asserts cross-claims against Tanen for fraud and misrepresentation, and against Douglas Elliman for Tanen's tortious conduct under the doctrine of respondeat superior (Third-party Defendant's Second Amended Answer, Fritz Aff., Ex. C). Meier's cross-claims are conditioned upon Collin obtaining a judgment against him.

Collin now moves for summary judgment on each of his causes of action. Defendants cross-move for summary judgment dismissing the amended complaint.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter

of law, by providing sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

2. Fraud

Collin's third cause of action, asserted against all defendants, is for fraud. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Parnters, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [1st Dept 2009]). A fraud claim must be pleaded with the requisite particularity under CPLR 3016 (*id.*), and must be proven by clear and convincing evidence (*Abrahami v UPC Const. Co.*, 224 AD2d 231 [1st Dept 1996], and *see* PJI 3:20 [Intentional Torts-Fraud and Deceit]).

A. Price Per Square Foot

Collin alleges that Douglas Elliman, through Tanen and Meier, misrepresented to Collin that specific units in the Building had sold for at least $1,500 per square foot.

Specifically, Collin alleges the misrepresentation was communicated in an email from Meier, dated December 24, 2007, which states the following:

> Phil tannen told me that 6g sold for over 1500 per foot (but cleared hubret bldg). He told me that 6,7,8 h lines sold for over 1500 per foot but had window in kitchen and bedroom facing east BC also cleared building) and the 6f sold for 3.9mm (7F is 2466 square feet)
>
> Hope this is what you were looking for.

(Meier Email, Collin Aff., Ex. C).

Collin alleges that he believed the price per square foot representations in the Meier Email were "true" (Collin Aff., paragraph 11), and that the Meier Email induced him to purchase Unit 7B at $1,493 per square foot. As evidence of his reliance, Collin submits a spreadsheet calculation he created before the Meier Email was received, which shows that he recorded prices and areas of several units, including Unit 7B, and calculated the price per square foot for these units (Collin Aff., Ex. D). The spreadsheet indicates a price, number of square feet, transaction costs and a calculation of price per square foot for nine units in the Building.[2]

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[2] Notably, the amount recorded for Unit 7B is precisely what he agreed to pay, implying that he did not arrive at his offer in reliance on the Meier Email to determine the price.

Collin alleges that he subsequently learned that, at the time of the Meier Email, Unit 6F had not been sold, while the other units at issue had either been sold or were under contract at prices less than $1,500 per square foot. As such, he contends that the Meier Email was a fraudulent misrepresentation that induced him to purchase Unit 7B at a higher price than he should have paid.

Defendants do not dispute that Meier sent the December 24, 2007 email to Collin, and they do not dispute that the unit prices in the email are inaccurate. However, defendants do not agree with each other as to whether Tanen actually provided Meier with the specific price per square foot information for each unit as set forth in the email. At his deposition, Tanen stated that he merely told Meier that some of the better units in the Building had sold for $1,500 per square foot. He denied that he specifically described specific units that had sold for that amount.

Regardless of the truth of the Meier Email's content, defendants dispute Collin's assertion that he reasonably relied on the information set forth in the email as the basis for his eventual purchase of Unit 7B. Collin avers that price per square foot was of paramount importance to him and that he would not

have purchased Unit 7B if he had known that the units described in the Meier Email had not sold for $1,500 per square foot.

As a matter of law, the Meier Email cannot be grounds for fraud. On its face, it does not invite reliance. It clearly states that the information communicated is not based on Meier's first-hand knowledge, but on information passed along from Tanen, whom Collin knew to be the Sponsor's representative. Although there is a dispute between Tanen and Meier as to whether Tanen named specific units when he quoted the $1,500/square foot prices, there is no showing that Meier intentionally misrepresented prices to Collin to induce him to over-pay for Unit 7B. In fact, it is undisputed that, at the time the Meier Email was sent, Collin was negotiating to purchase units *other than* 7B.

The Meier Email provides additional information from Tanen clearly intended to differentiate the nature of the units (i.e., "window in kitchen," "faces east," and "cleared building" --which appears to mean it has an unimpeded view), implying that a straight price per square foot calculation is not meaningful because the units are different. Collin admitted at his deposition that he considered other factors that were material to his decision, such as layout and functionality (Collin

Deposition, 18). He also stated that he spoke directly to Tanen at some point about the price per square foot of units in the Building and that Tanen "mentioned" the $1,500 price per square foot (Collin Deposition, 130). Considering these facts together, Collin cannot show that he reasonably relied upon the Meier Email in purchasing Unit 7B.

Although the question of reliance often is viewed as a fact intensive inquiry to be reserved for the trier of fact (*MBIA Ins. Co. v GMAC Mtge. LLC*, ___ Misc 3d ___, 914 NYS2d 604 [Sup Ct NY County 2010], citing *Bank Hapoalim Ltd. v Banca Intensa S.p.A.*, 22 Misc 3d 1104(A), 2008 NY Slip Op 52596(U) [Sup Ct, NY County 2008]), no reasonable trier of fact could impose liability on the facts presented here.

B. Rescission Applications

Collin alleges that Tanen and Douglas Elliman informed him that more than 75% of the units in the Building had been sold. However, they allegedly failed to inform him that certain purchasers of such units were eligible to exercise rescission rights in connection with their units. Specifically, defendants allegedly knew that on July 11, 2007, the Sponsor had amended the condominium's budget, which, under the Offering Plan, triggered a right of rescission for every purchaser who had entered into a

purchase agreement prior to July 11, 2007. Collin alleges he received notice of this rescission right in March 2008, when an amendment to the offering plan making specific reference to the July 11 rescission opportunity was delivered.

Collin asserts that 37 of 43 purchase agreements were *eligible* for rescission because they were executed prior to the July 11, 2007 amendment. Thus, he contends that he was given the false impression that the inventory of available units was limited, which reduced his negotiating position with the Sponsor. At the time he entered in to the purchase contract, only one unit buyer (besides Collin) had exercised its right to rescind. Collin's argument is that had he known that others also could rescind their purchases, he would not have executed the contract.

Defendants argue that this claim should be dismissed: Collin knew of the existence of the potential rescission rights because he was aware of the July 11, 2007 amendment. In support of this, they point out that Collin exercised his own such right when he rescinded his purchase of Unit 4G.

It is clear that Collin knew that purchasers could have the right to rescind, since he exercised his own right to do so. The record contains no evidence that defendants asserted that the right to rescind was peculiar to Collin's offer. The right to

rescind arises from the offering plan and amendments thereto, which he received before executing the contract. Arguably, if a purchaser's right to rescind was not communicated in the offering plan, or was improperly granted to other purchasers after Collin signed his Unit 7B contract, there could be a claim against the non-party Sponsor. However, Collin fails to meet his burden to show that defendants fraudulently misrepresented the content of the offering plans or the right of a purchaser to rescind its agreement to purchase.

C. Parking Space Licenses

The amended complaint alleges that in December of 2007, Tanen and Douglas Elliman falsely represented to Collin that: 1) substantially all prior purchasers of units in the Building had also purchased parking space licenses; 2) "many" such licensees had joined a waiting list to purchase additional licenses; 3) licences for available spaces would be offered to future purchasers before being sold to those on the list; and 4) Collin's ability to resell the condominium unit would be hampered if he did not also have a license for a parking space.

In this motion, Collin states that he was told that "many" parking space licenses were sold (Collin Aff., paragraph 13). At his deposition, Tanen admitted that he told Collin many

spaces were sold (Tanen Deposition, 129). In fact, as of December 28, 2007, only 13 of the available 90 spaces were sold. Collin maintains that he purchased a parking space license in reliance Tanen's statement. After consulting with his broker (presumably Meier), Collin decided that it would be wise to purchase a parking space with Unit 7B because it would improve the resale value (Collin Dep., 55).

Tanen stated that by "many", he meant approximately one-third and that this meant that one-third of the purchasers of units had also purchased parking space licenses, which was accurate. Further, Tanen denied that there was a wait list to purchase licenses or that he indicated to Collin that such a list existed.

Tanen's representation that "many" licenses were sold is too vague to form a basis for fraud liability, and contrary to Collin's argument, it is not so incredible that the court should infer from it an intent to deceive. Also, Collin presents no proof of damages on this claim. He testified that he purchased the parking only space only after determining that it was a wise way to improve the resale value, and there is no evidence that it did not, or that the resale value for Unit 7B would have been enhanced if fewer licenses were available in January 2008.

Accordingly, the cause of action for fraud is dismissed as to all defendants.

3. Breach of Fiduciary Duty

The cause of action for breach of fiduciary duty is alleged against all defendants. Collin argues that, as his agents, defendants owed fiduciary duties to him and that they breached such duties by: 1) failing to advise him that Douglas Elliman served as a dual agent for both himself and the Sponsor; 2) failing to advise him of material facts concerning the Rescission Applications; and 3) making false statements to him in connection with the prices per square foot at which other units had been sold, as well as with respect to the parking space licenses and the storage bin licenses.

As a threshold matter, this claim is dismissed as against Tanen. It is undisputed that Douglas Elliman represented Collin through Meier. There is no allegation that Tanen was Collin's agent. Therefore, there was no fiduciary duty owed by Tanen to Collin.

Collin alleges that Douglas Elliman breached its fiduciary duty to him by failing to inform him of every fact material to his interest and obtaining adequate consent from him

to its dual agency.

A real estate broker has a duty not to act on behalf of a party whose interests are adverse to those of the broker's principal (*Matter of Goldstein v Department of State, Div. of Licensing Servs.*, 144 AD2d 463, 464 [2d Dept 1988]). As such, the broker cannot act as agent for both seller and purchaser of property in a real estate transaction without first obtaining the consent of the principal, given after full knowledge of the facts (*id.*; and *see Queens Structure Corp. v Jay Lawrence Assoc.*, 304 AD2d 736 [2d Dept 2003]). Agents of buyers and sellers of one to four family residential properties are required to provide a specific written disclosure form to their principals, but this requirement does not apply to transactions involving condominiums such as the one at issue (Real Property Law § 443; and *see, Rivkin v Century 21 Teran Realty, LLC*, 10 NY3d 344 [2008]).

Douglas Elliman asserts that it orally informed Collin at the outset of the transaction that it employed separate agents on both sides of the transaction. At his deposition, Collin acknowledged that he was aware that both Tanen and Meier worked for Douglas Elliman, and that Tanen represented the Sponsor's interests. Thus, Collin knew of the existence of the dual agency and consented by continuing to employ Douglas Elliman as his

broker. Moreover, Collin was a sophisticated buyer, and his conduct in the transaction bespeaks a level of sophistication such that the notice he received was sufficient under the circumstances. Accordingly, summary judgment dismissing the breach of fiduciary duty claim is granted in defendants' favor.

4. Negligence

Collin's fourth cause of action is for negligence, against Meier only. Collin alleges that Meier failed to perform "due diligence" by investigating the accuracy of the representations by Tanen and the Sponsor as set forth above.

Meier states that he could not perform the type of due diligence described by Collin because he did not have access to the necessary information. He states that information about the Building was maintained by the Sponsor, including the price per square foot of the various units and information about the parking space licenses. He states that such information was available to the Douglas Elliman agents who represented the Sponsor, such as Tanen, rather than those agents who represented buyers. Although Meier worked at Douglas Elliman, he, Tanen and a Douglas Elliman employee produced for deposition, Karen Mansour, state that Meier was treated as an outside buyer's

agent. He did not have independent access to information regarding the number of purchasers who could exercise a right of rescission, or regarding the parking space and storage bin licences.

To establish a prima facie case for negligence, Collin must show that Meier owed him a duty, that Meier breached that duty, and that Collin sustained damages as a result thereof (*see, Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Meier owed a duty to Collin to exercise the degree of skill and professionalism required of a real estate broker practicing in New York on transactions such as the one at issue. Collin presents no evidence that Meier breached this duty, and in particular, there is no evidence, in the form of an expert opinion or otherwise, that obtaining the sort of detailed publicly unavailable information regarding the Sponsor's sales and offers to other prospective purchasers is within the scope of the standard of care expected of a New York real estate broker. Therefore, Meier is entitled to summary judgment in his favor dismissing the negligence claim.

5. Breach of Contract

Collin's claim for breach of contract is directed

against Douglas Elliman and Meier. He alleges that the parties entered into an agreement whereby Douglas Elliman and Meier would act as Collin's agent in connection with the purchase of an apartment, in exchange for a commission. He argues that the bases for the breach of contract claim are the same as his "substantive claims" (Plaintiff's Brief, 34), referring to the other claims in the lawsuit. On this motion, he makes no reference to any provision of his contract with Douglas Elliman or Meier, and said contract is not an exhibit to his motion or reply. There is no evidence of any contract between Collin and Meier in his individual capacity. Since the other claims are dismissed, and no independent breach of contract claim is made, the breach of contract claim also is dismissed.

Collin's other arguments have been considered, and are unavailing.

6. Cross-Claims Between Defendants

In light of the foregoing, summary judgment dismissing the cross-claim by Tanen and Douglas Elliman against Meier for indemnification (initially asserted in the third-party complaint) is granted by the court upon searching the record (CPLR 3212[b]), and Meier's cross-claim against Tanen and Douglas Elliman

likewise is dismissed because it is conditioned upon Collin's obtaining judgment against him.

Accordingly, it is

ORDERED that plaintiff Daniel Collin's motion for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment by defendants Philip Tanen and Douglas Elliman is granted, and the complaint is dismissed as against them, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it further is

ORDERED that defendant Michael Meier's cross motion for summary judgment is granted, and the complaint is dismissed as against him, with costs and disbursements to Meier as taxed by the Clerk ; and it further is

ORDERED that, upon searching the record, cross-claims by and against Meier are dismissed, with costs and disbursements to Meier as taxed by the Clerk; and it further is

ORDERED that the Clerk shall enter judgment accordingly.

DATED: April 11 , 2011

ENTER:

J.S.C.

ARNE S. SOLOMON

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE