SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

MARTINE MANDRACCHIA and MENFI REALTY CORP.,

Plaintiffs,

-against-

901 STEWART PARTNERS, LLC, GARY D. CANNELLA ASSOCIATES, GARY D. CANELLA and THE BOARD OF MANAGERS OF THE GARDEN CITY PROFESSIONAL PLAZA CONDOMINIUM,

Defendants.

Decision and Order

MOTION SUBMITTED:
April 19, 2011
MOTION SEQUENCE:07
INDEX NO. 14488-08

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affidavit in Opposition	2
Memorandum of Law in Support of Motion	3
Reply Affirmation	4

In an action to recover damages for, *inter alia*, breach of contract, 901 Stewart Partners, LLC ("Defendant") seeks, in effect, renewal of that branch of a prior motion for summary judgment dismissing the third cause of action in the Plaintiff's complaint, which was denied in a decision and order dated September 1, 2010.

For the reasons that follow, Defendant's motion is denied.

Background

On April 12, 2006, Martine Mandracchia, DMD ("Mandracchia") entered into a contract with the Defendant for the purchase of a condominium unit (the "condo") in the Garden City Professional Plaza Condominium located at 901 Stewart Avenue, Garden City, New York (Ex. "D" to Motion at ¶ 13). The purchase contract expressly stated:

> [I]t is specifically understood and agreed by the parties hereto that the acceptance of the delivery of the deed at the time of closing of title hereunder shall constitute full compliance by the Seller with the terms of this agreement and none of the terms hereof, except as otherwise herein expressly provided, shall survive the delivery and acceptance of the deed. All representations contained in the Offering Plan shall survive delivery of the deed.

(Ex. "D" to Motion at ¶ 15).

On September 25, 2006, Mandracchia moved into the condo pursuant to an occupancy agreement and began seeing patients within a couple of days (Ex. "J" to Motion; Ex. "G" at pp. 46, 50). On October 31, 2006, a punch list was made highlighting repairs that needed to be completed prior to closing (Ex. "K" to Motion).[1] Among the items in the punch list were:

> HVAC-DUCTS need adjusting Air flow- Waiting room cold. Operatories hot when A/C is on.
>
> Ceiling tiles-Leak in compressor closet. Leak in (Room 2) original plan room 2 on Dawn's side.
>
> The paint is not washable; it is chipping, and is staining.
>
> Parking lot lighting is out. Patients are complaining of darkness.
>
> Sound proof wall that is being put up.

(Ex. "K" to Motion). The closing occurred on November 10, 2006 (Ex. "M" to Motion).[2]

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[1] A punch list is "generally a list of tasks or 'to-do' items" (Wikipedia).

[2] At closing, the deed was transferred to Plaintiff Mandracchia, who, in turn, assigned her contract rights to Plaintiff Menfi Realty Corp. Martine Mandracchia is the sole shareholder, president and secretary of Menfi Realty Corp. Martine Mandracchia and Menfi Realty Corp. are collectively referred to as "Plaintiffs".

After the closing, the Plaintiffs commenced the instant action against, *inter alia*, the Defendant based upon defects in the condo mini suite and surrounding areas, including a deteriorating roof and air conditioner, inadequate lighting conditions in the parking area, inadequate soundproofing, and raccoon infestations (Ex. "A" to Motion at ¶¶ 36- 42). Following service of responsive pleadings, Defendant moved for summary judgment dismissing the complaint.

In a decision and order dated September 1, 2010, this court granted the Defendant's motion, in part, dismissing the first, second, fourth and fifth causes of action (Ex. "E" to Motion). The court denied summary judgment as to the third cause of action for breach of contract, which was based on Defendant's failure to complete Plaintiffs' unit in accordance with the requirements of the Building Department and to deliver the unit in a condition suitable for its intended use (Ex. "E" to Motion).

Upon completion of discovery, the Defendant brought the instant motion in effect, to renew the branch of the prior motion which was denied. In support of its motion, Defendant argues that the Plaintiffs "cannot avoid application of the merger doctrine by misrepresenting that there were 'latent defects' in the Unit that were allegedly undiscoverable at the time of closing when the evidence establishes that all of the alleged defects were discovered and discoverable by plaintiffs before closing. Indeed, plaintiffs occupied the Unit for over a month and a half before closing - from September 25, 2006 to November 10, 2006 - and were well aware of the condition of the Unit and the common elements before closing" (Affirmation in Support at ¶ 38).

Analysis

Pursuant to the merger doctrine, provisions in a contract for the sale of real property merge into the deed and are thereby extinguished absent a clear intent by the parties that a provision of the contract shall survive the transfer of title (*Marcantonio v Picozzi*, 70 AD3d 655 [2d Dept 2010]; *Ka Foon Lo v Curis*, 29 AD3d 525 [2d Dept 2006]). However, as stated in this court's September 1, 2010 order, the existence of latent defects is an exception to the merger doctrine (Ex. "E" at pp. 6-7). If the defects complained of by Plaintiffs were latent, they did not merge with transfer of the deed. If the defects complained of by Plaintiffs were not latent, such defects merged upon transfer of the deed and were extinguished thereby.

A latent defect is defined as one that is not discoverable by reasonable inspection (*Applegate v Long Island Power Authority et al.*, 53 AD3d 515 [2d Dept 2008]; *Ferris v County of Suffolk*, 174 AD2d 70, 76 [2d Dept 1992]; *Cady v City of New York*, 35 AD2d 202 [1st Dept 1970]). Here, the defects at issue and as specified in Plaintiffs' responses to the first set of interrogatories are as follows:

> Odors from urine/feces of raccoons and/or squirrels; leaks in the roof of the building which leaks flowed into the Premises damaging Plaintiffs' premises and personal property therein; unacceptable noise levels emanating outside the interior walls of the Premises, but within the building itself; the lack of heat on the floor of the Premises believed to be causes by lack of proper insulation under the floor of the Premises which was exposed to the outside elements as there was a parking garage/lot under the Premises; lack of proper and safe lighting in the parking lot of the building (Ex. "N" to Motion at ¶ 13).

Significantly, except for the raccoon infestation, Mandracchia was aware of each of the defects listed above and included them in a "punch list" to be cured by Defendant (Ex. "K" to Motion). For example, the punch list addressed the HVAC ducts and a cold waiting room,[3] leaks in the ceiling tiles,[4] inadequate lighting in the parking lot,[5] and the building of a sound-proofing wall (Ex. "K" to Motion).[6] Moreover, the HVAC system, leaks in roof, unacceptable noise level, and inadequate lighting in the parking lot - alleged to be latent defects - were not latent but, rather, were "visually ascertainable upon inspection" (*Talbi v ZCWK Assoc.*, 179 AD2d 475 [1st Dept 1992]). Given Mandraccia's awareness of these issues prior to closing, each of which was discoverable upon a reasonable inspection, the court concludes, as a matter of law, that they are not "latent defects" (CPLR 3212 [g]).

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[3] While Mandracchia stated in her deposition that she first became aware that there was cold air coming into the condo the first winter she occupied it, in 2006 to 2007 (Ex. "G" to Motion at p. 105), the punch list dated October 31, 2006 indicates "waiting room cold" (Ex. "K" to Motion).

[4] Mandracchia explained at her deposition that there was "[w]ater coming through, from I'll assume the roof, through the ceiling tiles and then into the suite in various rooms" (Ex. "G" at p. 65).

[5] The inadequacy of lighting in the parking area was also an issue raised prior to closing. Mandracchia testified at her deposition as follows:

Q: What were you told about lighting improvements to the parking area?
A: I was told that they would be improved. I was told that they would be improved.
Q: What did you take that to mean?
A: That lighting would be adequate.
Q: What I'm asking is: Did you see the lighting in the parking area prior to your purchase of the suite 214?
A: Yes.

(Ex. "G" to Motion at pp. 99-100).

[6] While the punch list also included a reference to paint within the condo that is "not washable", "chipping" and "staining" (Ex. "K" to Motion), Mandracchia's response to interrogatories fails to mention substandard paint as a latent defect (Ex. "N" to Motion).

Regarding the problem of racoon infestation, the evidence indicates that as early as April 13, 2006, and then again on July 5, 2006, prior to Mandracchia's purchase of the condo, the Defendant had retained Crossfire Pest Control to inspect, trap and remove raccoons from the ceiling of the parking garage (Ex. "1" to Opposition at p. 36; Ex. "U" to Motion). In this regard, Michael Grey, a member of the Defendant LLC, testified that:

> We learned a raccoon or more than one raccoon got into the ceiling of the grade level parking area. We hired a - I believe they're called trappers, who over a period of time places traps, recovers all the animals and released them somewhere far away and then we closed up whatever paths we could identify that the raccoons used to get into the parking garage.
>
> Beyond that, we learned that the trapper did not get all of the live animals, as it appears that one or more them died in the walls or somewhere and the identification came from the decay of the animal, the smell. We found where they were and removed them and treated the area with deodorizers. Identified areas that accumulated urine and feces on insulation throughout the insulation, aired out the areas and replaced the insulation and returned the ceiling tiles (Ex. "1" to Opposition at pp. 36-37).

In view of Grey's testimony that the raccoon problem dating back to April 2006 was purportedly cured, and Mandracchia's testimony that the "raccoon infestation" began in the spring or summer of 2007 (Ex. "G" to Motion at p. 104), the court is unable to conclude, as a matter of law, that the raccoon problem was not a latent defect.

Accordingly, it is hereby ordered that the Defendant's motion seeking leave to renew the branch of its prior motion for summary judgment dismissing the third cause of action asserted in the complaint is denied.

The Defendant's request for sanctions against the Plaintiffs pursuant to 22 NYCRR § 130-1.1 is denied.

This constitutes the decision and order of the court.

Dated: June 22, 2011

Hon. Vito M. DeStefano, J.S.C.