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SHORT FORM ORDER

INDEX No. 41838-08

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/31/11
ADJ. DATES 6/17/11
Mot. Seq. # 003 - Mot D
Pre-Trial Conf: 9/9/11
CDISP Y____ N__X__

CIRCLE ASSOCIATES, LP,

Plaintiff,

-against-

STARLIGHT PROPERTIES, INC.,

Defendant.

PINKS, ARBEIT & NEMETH, ESQS.
Attys. For Plaintiff
140 Fell Ct.
Hauppauge, NY 11788

ROE, TAROFF, TAITZ & PORTMAN
Attys. For Defendant
1 Corporate Dr.
Bohemia, NY 11716

Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 5-7; Replying Affidavits and supporting papers 8-9; 10-11; Other 12-13 (19-1 Statement); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the defendant for summary judgment is considered under CPLR 3212 and is granted to the extent set forth below; and it is further

ORDERED that a pre-trial conference shall be held with respect to the defendant's second counterclaim on Friday, **September 9, 2011**, at 9:30 am in the courtroom of the undersigned located in the Supreme Court Annex at One Court Street, Riverhead, New York 11901, at which counsel for the respective parties are directed to appear.

The plaintiff commenced this action to recover damages allegedly incurred by reason of the defendant's purportedly wrongful removal of excavation materials from a subdivision of land comprised of some 89 acres in Yaphank, New York. Now before the court is a motion (#003) by the defendant for an order awarding it summary judgment dismissing the complaint and judgment on its two counterclaims. The factual circumstances underlying the claims of the parties are as set forth below.

The defendant, Starlight Properties, Inc. (hereinafter "Starlight"), was the owner of a large tract of land situated in Yaphank, New York. In 1996, a topographical survey of the premises was prepared by the engineering firm of Nelson & Pope, LLP., as a tenant of the defendant Starlight expressed interest in expanding its facilities on the premises. After the tenant's expansion proposal was abandoned, Starlight decided to subdivide the property into five lots. In an effort to gain approval for its subdivision,

Starlight engaged a new engineering firm, Barrett, Bonacci & Van Weele, P.C. (hereinafter "Barrett"), to develop subdivision plans and drawings for submission to the Town of Brookhaven's Planning Department. On May 31, 2002, a proposed subdivision map was prepared by the Barrett firm and submitted to the Town for preliminary approval.

On October 9, 2002, the plaintiff, as purchaser, and the defendant Starlight, as seller, entered into a written contract for the sale of Lot # 5 on the subdivision map for $4,500,000.00. The lot was described as a parcel of approximately 20 acres of vacant land as depicted on the subdivision map attached to the contract. Also attached was a rider, the provisions of which, were expressly incorporated into and made a part of the contract of sale. Among other things, the rider expressly conditioned the sale of Lot #5 upon Starlight's successful quest for approval of the subdivision substantially in accordance with the May 31, 2002 preliminary map prepared by the Barrett firm. The rider further conditioned the sale upon the plaintiff's acquisition of site approval authorizing the use of the premises as an asphalt/concrete plant. Other relevant provisions of the rider stated as follows:

> 40. This Contract of Sale is completely non-recourse as to Seller, and as such neither Purchaser or its respective nominees, successors, assigns, employees, agents, or any other person or entity controlled by it or with which it is affiliated shall initiate, seek, pursue or participate in any action, legal or equitable, against the Seller, its agents, and their respective heirs, executors, administrators, successors and assigns on account of any obligation of the Seller hereunder, it being agreed with respect to the Seller, only Seller's interest in the property being conveyed pursuant to this Contract shall be subject to execution, attachment, or any other claim or proceeding on account of any obligation of the Seller hereunder. Purchaser reserves the right for specific performance.
>
> 41. Seller agrees that it shall not alter the topography of the subject property except to bring same into conformity with the final grading plans as approved by the Town of Brookhaven as part of the subdivision approval process as set forth in Paragraph 36(a) herein and Seller further agrees not to remove any material from the subject property.
>
> 42. Seller intends to bid out the infrastructure required under the subdivision approval. In the event the Purchaser elects to bid thereunder, and is the lowest responsible bidder, the parties will enter into a Contract for the Purchaser to perform all site improvements on the entire subdivision. At the option of the Seller, the Purchaser will either receive a credit for the amount of the said Contract against the purchase price or shall be paid separately, as agreed upon by and between the parties. The Seller agrees to give purchaser a "last look" at all the bids in order to enable the purchaser to meet the lowest bid price.

Starlight obtained conditional final subdivision approval from the Town of Brookhaven in August of, 2006. The approved subdivision map included grading and drainage plans to be performed by Starlight and/or its contractors in conformance with certain elevations depicted in the plans and map. Performance of this work required the removal of excess material from the site, which removal was subject to regulation by the Town of Brookhaven. Proposals for the performance infrastructure work, both on-site and off-site, as depicted on revised subdivision plans prepared by the Barrett firm on October 4, 2005, were submitted to Starlight by a corporation known as Sealer Supply Co., Inc. (hereinafter "Sealer") in January of 2004 and April of 2006. The terms of these proposals were augmented by a letter agreement dated June 9, 2006 that was executed by Ronald Fehr, Sr., an officer of Sealer, the construction contractor. It was therein proposed that Sealer, as the construction contractor, would be paid the contract price for the on-site work ($1,025,000.00) and the contract price for the off-site work ($130,000.00) in lump sums at the closing of the contract of the sale to Lot #5 to the plaintiff Circle Associates. On June 15, 2006, the president of Starlight signed off on both infrastructure proposals and thereby retained Sealer to perform the infrastructure work required by the Town of Brookhaven as a condition of its issuance of subdivision approval. By its terms, the letter agreement dated June 9, 2006, that was accepted by Starlight on June 15, 2006, was incorporated into the separate infrastructure contracts proposed by Sealer.

The closing of title to Lot #5 under the terms of the October 9, 2002 contract of sale between the plaintiff Circle and defendant Starlight occurred on December 20, 2006. Prior thereto, the parties agreed to the terms set forth in the letter prepared by Starlight's counsel which modified and/or supplemented the terms of the October 9, 2002 contract of sale, and the terms of the infrastructure contracts of June 15, 2006. Pursuant to this letter agreement, the purchase price of Lot #5 was reduced to reflect a decrease in acreage resulting from the subdivision process. Circle and Starlight further agreed that Circle would be credited with the combined price ($1,155,000.00) of the infrastructure work awarded to Sealer under its June 15, 2006 contracts with the defendant Starlight, so as to reduce the amount of cash due from Circle to Starlight towards the purchase price at the closing. Since, however, the infrastructure work contemplated by the June 15, 2006 contracts with Sealer was not then complete, Circle agreed to give Starlight a promissory note in the amount of $550,000.00 that was secured by a mortgage on Lot #5. Both the note and the mortgage were returnable to Circle upon completion of the infrastructure work within one year of the agreement, and if not so completed, Circle would be in default of the terms thereof.

The letter agreement of December 20, 2006 also included new terms that were not part of either the contract of sale or the infrastructure contracts between Sealer and Starlight. Therein, the plaintiff Circle agreed to pay Starlight the sum of $137,310.00 in four installments as payment for excess excavation material removed from the site in connection with construction of the infrastructure at the subdivision. The last installment, in the amount of $37,000.00, was due from Circle on March 1, 2007. Starlight agreed that "all additional material over and above the grades as indicated on the approved subdivision Map of Starlight Properties for lots 1 through 4 shall belong to Circle Associates for disposal as it sees fit" provided that Circle "leaves or delivers sufficient material on Lot #1 to construct the berms required by the site plan of Fireworks by Grucci for the price of $2.25 per yard". As payment for portions of the excess material left to it, Circle agreed that Starlight would be credited with the sum of $635,000.00 towards the total cost of the infrastructure contracts [$1,155,000.00] with Sealer. Circle further agreed, among other things, to be responsible for payment of excess material fees that may be due the Town of Brookhaven and to pay Starlight its proportionate share of the real estate taxes due on Lot #5 for the 2006/2007 tax year.

Soon after the parties closed the sale of Lot #5 on December 20, 2006, the Town of Brookhaven

Control and others. In August of 2008, the investigation in to the site culminated in the execution of a consent order by Circle and the Town of Brookhaven. The order recited that 65,800 cubic yards of excess material had been removed from the site without permits or approvals from the Town of Brookhaven. Fees in the amount of $197,400.00 were assessed by the Town by reason of the removal of the 65,800 cubic yards of excess material without permits or approval. Fees for material removed under existing permits, as modified by the order, were also assessed as agreed to by Circle. Without admitting any wrongdoing, Circle paid the Town all of the fees assessed under the consent order.

In November of 2008, the plaintiff Circle commenced this action against Starlight seeking recovery of the sum $197,400.00. This amount represents the fees Circle paid to the Town for the 65,800 cubic yards of excess material that were removed from the site under the terms of the consent order without the requisite permits and/approvals from the Town. The plaintiff further seeks recovery of the additional sum of $592,200.00 which it claims is the open market value of the 65,800 cubic yards of excess material it claims it could have recovered by selling it to third parties at the rate of $9.00 per cubic yard. In the single cause of action set forth in its complaint, the plaintiff claims that it is entitled to recover the amounts demanded from the defendant Starlight because Circle relied upon the 1996 topographical survey prepared by Nelson & Pope when considering whether to purchase Lot #5 from Starlight and whether to enter into its agreement to perform construction work to pay the defendant for excess material. Starlight claims that the wrongful removal by defendant Starlight of the 65,800 cubic yards of excess material from the site sometime after the preparation of the 1996 topographical survey of Nelson & Pope warrants Circle's recovery of the amounts sued upon (*see* Complaint ¶¶ 12; 13; 14). The plaintiff characterizes its claim as one sounding in fraud in the inducement, for which, it seeks the money damages demanded in the wherefore clause of its complaint. (*see* ¶¶ 2; 22; 30 of the affirmation in opposition by plaintiff's counsel; *see also* ¶ 24 of the attached affidavit of Ronald Fehr).

Issue was joined by service of Starlight's answer in December of 2008. Numerous affirmative defenses are raised therein, many of which are based upon the language of the October 9, 2002 contract of sale between Starlight and the plaintiff. In addition, Starlight asserts two counterclaims; the first for recovery of $33,770.00, which amount represents the last of the four installment payments due Starlight under the terms of item numbered 3 in the December 20, 2006 letter agreement wherein Starlight agreed to accept the sum of $137,310.00 for 45,770 cubic yards of material removed from the premises; the second for recovery of $9,837.58, which amount represents the proportionate share of real estate taxes assessed against Lot #5 for the tax year of 2007-2008 which was allegedly paid by Starlight. In its reply to these counterclaims, Circle admits that it did not pay the amounts demanded, because Starlight breached of the terms of the December 20, 2006 letter agreement of the parties.

Now before the court is the defendant's motion for summary judgment dismissing the plaintiff's complaint and for summary judgment in its favor on its counterclaims. The defendant contends that the December 20, 2006 letter agreement of the parties constituted a consolidation of the October 9, 2002 sales contract between it and the plaintiff Circle and the June 15, 2006 contracts for infrastructure improvements between the defendant Starlight and Sealer, a close affiliate of the plaintiff Circle. As a result of such consolidation, various provisions of the October 9, 2002 real estate contract, including the "'as is' condition of the premises"clause; the "no reliance on seller's or its agent's representations"clause; the "no-recourse against seller" clause; the purchaser's "warranty of inspection" clause, and the "merger" clause are binding on the plaintiff and preclude its continued prosecution of the claims asserted herein against Starlight. The defendant Starlight further asserts that it did not remove the materials at issue in this action and that the plaintiff's claims that it did so are unsubstantiated as they are premised solely upon surmise and conjecture. Finally, Starlight contends that it is entitled to summary judgment on its counterclaims as the plaintiff admits

that the amounts sued upon are due and because it did not breach the terms of the December 20, 2006 "consolidated" agreement.

The plaintiff opposes the motion on several grounds. They include claims that the December 20, 2006 letter agreement did not consolidate nor merge the October 9, 2002 purchase contract and the separate contracts of June 15, 2006 with Sealer for the infrastructure improvements so as to make them one, unified contract. The plaintiff further claims that a failure of proof on the issue of who removed the 65,800 yards of cubic material at issue in this action warrants a denial of the motion. For the reasons stated, the motion by Starlight is granted to the extent set forth below.

Rejected as unmeritorious is the defendant's claim that the December 20, 2006 letter agreement constituted a consolidation and/or merger of the October 9, 2002 purchase agreement and the June 15, 2006 contracts for infrastructure improvement agreements so as to incorporate all of their terms with those set forth in the December 20, 2006 letter agreement. The law is well settled that "'[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms' (***Vermont Teddy Bear Co. v 538 Madison Realty Co.***, 1 NY3d 470, 475, 775 NYS2d 765 [2004], *quoting* ***WWW Assoc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing'" (***Vermont Teddy Bear Co. v 538 Madison Realty Co.***, 1 NY3d at 475, *supra*, *quoting* ***Reiss v Financial Performance Corp.***, 97 NY2d 195, 199, 738 NYS2d 658 [2001]). This rule is especially important in commercial transactions negotiated between sophisticated parties (*see* ***White Plains Plaza Realty, LLC v Town Sports,*** 79 AD3d 1025, 914 NYS2d 222 [2d Dept 2010]).

Although the infrastructure agreements are referred to in the December 20, 2006 letter agreement and were purportedly attached thereto, there is no expression of any intent to consolidate and/or merge the agreements so that all of the terms of the separate infrastructure agreements between Starlight and Sealer became part and parcel of the prior purchase agreement between Circle and Starlight. Unlike the rider to the October 9, 2002 purchase agreement and the June 6, 2006 letter agreement, both of which contained express incorporation terms, the December 20, 2006 letter agreement contains no incorporation, merger or other like terms from which an intent to so integrate and/or consolidate the three agreements might be discerned. Under these circumstances, the defendant's attempt to bootstrap the merger, no-recourse and the other favorable clauses contained in the October 9, 2002 purchase agreement into the infrastructure contracts of June 15, 2006 is without any support in the record. Since the claim that the December 20, 2006 letter agreement constituted an integrated and complete consolidation of those agreements is premised solely upon defense counsel's characterization of it as such, and not from the language employed by the parties in their writings, such claims are rejected as unmeritorious.

The court nevertheless finds that the defendant is entitled to the defendant is entitled to an accelerated judgment dismissing the plaintiff's complaint. A review of the record adduced on this motion reveals that the plaintiff's claims for damages due to the defendant's alleged fraud in inducing the plaintiff into entering into the October 9, 2002 purchase agreement and/or the June 15, 2006 infrastructure contracts, as amended by the December 20, 2006 letter agreement, are without merit.

"In an action to recover damages for fraud, the plaintiff must prove a representation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 421, 646 NYS2d 76 [1996]). Such a claim sounds in tort for which damages are available even where the contract is fully affirmed as the defrauded party may retain his or her contractual benefits and sue for the damages sustained by reason of

the fraud (*see* ***Ross v Preston***, 292 NY 433, 55 NE2d 49 [1944]; ***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.***, 88 AD2d 461, 453 NYS2d 750, 754 [2d Dept 1982]). The damages recoverable for fraudulent misrepresentation are dependent upon the injury sustained by the inducement to make a contract which otherwise would not have been made (*see* ***Sager v Friedman***, 270 NY 472, 1 NE2d 971[1936]). "The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the out-of-pocket rule. Under this rule, the loss is computed by ascertaining the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain. Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained. Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud" (***Lama Holding Co. v Smith Barney***, *supra*, 88 NY2d at p. 421 (internal quotation marks and citations omitted).

Here, the plaintiff's claims are premised upon allegations that the defendant removed excess material from the site after the 1996 topographical survey was prepared. That survey allegedly served as the basis for calculating the amount of excess material that would be available from the proposed subdivision depicted on May 31, 2002 subdivision map prepared by the Barrett engineering firm that formed the basis of the defendant's subdivision approval application (*see* Complaint ¶¶ 7-16). Based upon the calculations of the Barrett firm, the plaintiff and the defendant allegedly agreed that approximately 577,560 cubic yards of excess fill would be available to the plaintiff from the subdivision over and above the amount of fill on Lots 1-4 above the grade depicted on the subdivision map for which the "plaintiff" agreed to pay the defendant the sum of $635,000.00 (*see* Complaint ¶ 8-9). Those calculations were allegedly fraudulent due to the defendant's purported wrongful removal of the 65,800 cubic yards of excess material at issue herein, some time after the 1996 topographical survey was prepared by Nelson & Pope, LLP (*see* Complaint ¶¶ 10;11). The plaintiff claims that it would not have agreed to purchase Lot # 5 from the defendant, had it known that the yield calculations of excess material which the Barrett firm allegedly derived from the 1996 topographical study were, or would be, incorrect due to Starlight's wrongful removal of the 65,800 cubic yards of fill from the site. For these same reasons, Circle claims that it [or its affiliate] would not have entered into the infrastructure contracts of June 15, 2006, as modified by the December 20, 2006 letter agreement, in which Circle agreed to pay Starlight, among other things, the sum of $635,000.00 on Lots 1-4 above certain grades depicted on the subdivision map.

By the submissions adduced in support of its motion, Starlight established, prima facie, that the plaintiff has no cognizable claims for recovery of damages due to Starlight's alleged deception in misrepresenting the actual yield of excess material to which Circle should have been entitled to under the October 9, 2002 purchase agreement. There is no evidence that the right to remove excess material based upon a yield derived from the 1996 topographical survey was a material part of the purchase contract even after its amendment and/or modification by the December 20, 2006 letter agreement or that Circle bargained for and was granted the right to remove excess excavation material under the terms of the purchase contract as so modified and amended. The purchase agreement at ¶ 42 did not confer upon Circle any entitlement to perform the infrastructure work or to remove excess material. Instead, it merely contemplated that Circle would bid on the infrastructure contract and if so, that it would be accorded a favorable position by the defendant. The December 20, 2006 letter agreement modified and amended the October 9,2002 purchase agreement only with respect to the purchase price, the provisions for its payment and the pro-ration of real estate taxes clauses set forth therein. Nor is there any evidence that Starlight made any representations to the plaintiff regarding the yield of excess materials that would be available from the site which induced the Circle into executing the October , 2002 purchase agreement and that the plaintiff was injured by reason of its reasonable reliance thereon. For theses reasons, the court finds that the plaintiff's claims that defendant Starlight fraudulently induced the plaintiff into entering into the October 9, 2002 purchase agreement are without merit.

Likewise without merit are the plaintiff 's claims that Starlight fraudulently induced the plaintiff into entering into the infrastructure contracts as amended and/or modified by the December 20, 2006 letter agreement. Those contracts, which were executed by the plaintiff's affiliate, Sealer and the defendant Starlight, as amended in June of 2006, contained no provisions for the removal of excess material from the site. The December 20, 2006 letter agreement modified those contracts so as to make Circle the payee of both contract prices by virtue of a credit against the purchase price at the time of the closing of the sale of Lot #5. The December 20, 2006 letter agreement obligated Circle to pay Starlight the sum of $137,310.00 of Circle's removal excess material in four installments, the last of which was not paid by Circle. It further obligated Circle to pay Starlight the sum of $635,000.00 for a portion of the excess material removed from Lots 1-4. These last two terms which provided for a division of excess material between the parties and for payment by Circle to Starlight of specified cubic yards at specified prices are new, as the two infrastructure contracts finally executed by Sealer and Starlight in June of 2006 contained no provision for the division of excess material between Circle and Starlight and payment therefor by Circle to Starlight.

While Circle alleges that Starlight knew that Circle was relying upon the 1996 topographical survey and the yield calculations allegedly made therefrom at some earlier date, and further alleges, for the first time in its opposing papers, that a principal of Starlight misrepresented that the survey was accurate and that such representation was inaccurate because Starlight removed the 65,800 cubic yards from the site after the 1996 survey was prepared, such allegations do not state cognizable claims for fraud in the inducement for which damages are recoverable by the plaintiff. The nature and timing of such representation is not, however alleged in either the plaintiff's opposing papers or its complaint. The record is simply devoid of any evidence that Starlight made such a false representation or omitted a material fact it was bound to disclose to Starlight. Nor is there evidence of that any such representation or omission, if made, was made for the purpose of inducing Circle's justifiable reliance thereon and that Circle thereby sustained injury for which damages in tort are now recoverable (***Lama Holding Co. v Smith Barney***, 88 NY2d 413, *supra*). The plaintiff is thus awarded summary judgment dismissing the plaintiff's complaint.

The plaintiff is further awarded summary judgment on its first counterclaim for recovery of monies due it from the plaintiff, Circle under the terms of the December 20, 2006 letter agreement. The moving papers established, prima facie, that Circle breached its obligation to pay the last installment due on March 1, 2007 in the amount of $33,770.00 which it agreed to pay under the terms item numbered 3 of the December 20, 2006 letter agreement. The plaintiff's defense that Starlight is not entitled to collect said amount because of Starlight's alleged breach of the "consolidated" agreement has not been advanced in the plaintiff's opposing papers and is unsupported by the record. The plaintiff is thus awarded summary judgment on its first counterclaim for a money judgment against Circle Associates, LP in the amount of $33,770.00, together with interest from March 1, 2007.

Starlight's moving papers also established, prima facie, that it was billed by the Town of Brookhaven the sum of $9,837.58 in real estate taxes for the 2007-2008 tax year, which amount was allocable to Lot #5, which the plaintiff purchased on December 20, 2006. While the court can find no express contractual obligation on the part of Circle to make such payment, as the December 20, 2006 letter agreement refers only to the 2006-2007 tax year and the mortgage, upon which Starlight relies to support its claim, was not submitted to the court, the plaintiff did not deny its responsibility for such payment. The plaintiff did, however, contest Starlight's entitlement to a money judgment for said amount due to the absence of any proof that said amount had actually been paid by Starlight. Since Starlight's submissions in reply provided no evidence that it paid the plaintiff's share of the 2007-2008 real estate taxes in the amount of $9,837.58, its demands for summary judgment on its second counterclaim are denied.

In view of the foregoing, this motion (#003) by the defendant Starlight is granted to the extent that it is awarded summary judgment dismissing the plaintiff's complaint and summary judgment on Starlight's

first counterclaim for recovery of money judgment from Circle Associates, LP in the amount of $33,770.00, together with interest from March 1, 2007. Summary judgment is denied with respect to Starlight's demands therefor on its second counterclaim, which claim is continued herein.

Pursuant to CPLR 3212(e), the claims upon which summary judgment has been awarded to the defendant are severed from those unaffected by such award and the defendant may forthwith settle a judgment, upon a copy of this order, reflecting the severance, continuance and the award of summary judgment herein granted. A pre-trial conference with respect to this claim shall be held as set forth above.

DATED: 2/25/10

THOMAS F. WHELAN, J.S.C.