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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 109074/2010
RESIDENTIAL BRD OF MGR
VS.
C-SQUAREWOOD LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided per attached

FILED

NOV 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/9/11

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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RESIDENTIAL BOARD OF MANAGERS OF THE 62 COOPER SQUARE CONDOMINIUM ON BEHALF OF ALL RESIDENTIAL UNIT OWNERS,

Plaintiff,

Index No. 109074-10

-against-

DECISION AND ORDER

C-SQUAREWOOD LLC,

Defendant.

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EMILY JANE GOODMAN, J.S.C.:

This action involves a dispute between the Residential Board of Managers (the Board) of the 62 Cooper Square Condominium (the Condominium) on behalf of all unit owners (Plaintiff), and C-Squarewood LLC, the sponsor of the Condominium's offering plan (Defendant). The complaint asserts three causes of action against Defendant, namely: specific performance, breach of contract, and breach of implied warranty (the Complaint). Pursuant to CPLR 3211 (a) (1) and (a) (7), Defendant moves to dismiss the Complaint, and for an award of attorneys fees and costs. Plaintiff cross moves, pursuant to CPLR 3211 (c), for partial summary judgment as to Defendant's liability.

For the reasons stated herein, Defendant's motion seeking dismissal of the causes of action in the Complaint is granted in part and denied in part, and Plaintiff's cross motion for partial summary judgment against Defendant is denied.

Background

The Condominium is an association whose members are residential unit owners who own real property located at 52, 54 and 62 Cooper Square, New York City (the Buildings). Complaint, ¶ 1. In 2000, Defendant purchased the Buildings, and thereafter, as the sponsor, filed an offering plan for the Condominium with the Attorney General's Office (the Plan), which became effective on May 10, 2001. *Id.*, ¶ 2. Pursuant to the Plan, Defendant was to renovate the Buildings, but the renovations were not finished. *Id.*, ¶ 7. Thus, in July 2004, the Board and Defendant entered into a settlement agreement (the Settlement), which required Defendant to complete various "Remaining Sponsor Work" (as such term was defined therein), before the Department of Buildings (DOB) would issue a permanent certificate of occupancy (PCO). *Id.*, ¶ 9. Certain items of Remaining Sponsor Work are still not completed, and the PCO has not been obtained, as required by the Plan and the Settlement. *Id.*, ¶ 8. In 2007 and 2009, DOB issued violations for certain required renovation or repair works that were uncompleted and/or defective, which included, without limitations, the installation of stainless steel chimney linings, boiler blast dampers, fans, sensors, valves and related work. *Id.*, ¶¶ 10-11. Because of Defendant's failure to correct the problems, the value of the Condominium units has been reduced, and Plaintiff has incurred costs to correct same. *Id.*, ¶ 13.

Relying on certain documents, Defendant moves, pursuant to CPLR 3211 (a) (1) and (a) (7), for dismissal of the Complaint. In its motion, Defendant argues that the Complaint fails to state a cause of action for specific performance, and the breach of contract and breach of implied warranty claims are barred by documentary evidence.

Applicable Legal Standards

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is required to determine whether a plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are afforded a "liberal construction," and the court is to accord the plaintiff "the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 (1994). On the other hand, to prevail on a motion to dismiss based on documentary evidence, the documents relied upon by the movant must resolve all factual issues as a matter of law. *Weiss v Cuddy & Feder*, 200 AD2d 665, 667 (2nd Dept 1994). Thus, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether

the proponent of the [pleading] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2nd Dept 2005).

Discussion

As noted above, the Complaint asserts three claims: specific performance, breach of contract, and breach of implied warranty. In its cross motion, Plaintiff seeks partial summary judgment as to Defendant's liability for the specific performance claim.

Specific Performance

The elements necessary to establish a specific performance of contract claim are: (1) plaintiff has substantially performed the contract and is willing and able to complete the remaining obligations; (2) defendant is able to perform the contract; and (3) plaintiff has no adequate remedy at law. *See e.g., EMF Gen. Contracting Corp. v Bisbee*, 6 AD3d 45, 50 (1st Dept 2004). In the instant case, the parties do not dispute that the first two elements of this claim have been met. Their only contention is whether Plaintiff has an adequate remedy at law.

Plaintiff takes the position that: (1) the DOB has already issued violations for various boiler defects and lack of chimney lining, which are required to be completed before the PCO will be issued; (2) additional work may be required by the DOB, which will make money damages difficult to ascertain; and (3) without knowing the cost required to obtain the PCO, there is no adequate

remedy at law. Thus, Plaintiff argues that summary judgment should be granted as to the specific performance claim, because both the Plan and the Settlement require Defendant to obtain a PCO for the Condominium, and Defendant has failed to comply with such obligation. Plaintiff's Brief, at 1-2, 4-5.

Defendant contends that it has fulfilled its obligation because (1) the DOB issued a Letter of Completion in May 2001, a copy of which is annexed as "Exhibit B" to the Harris Affidavit;[1] (2) the Letter of Completion was a "sign-off" by the DOB relating to the boiler; and (3) nothing more related to the boiler would have prevented the Board from obtaining the PCO, as control over the Condominium has been turned over from Defendant (as sponsor) to the Board, and all responsibilities for maintaining the boiler, including curing of the subsequent DOB boiler violations, passed to the Board. Harris Affidavit, ¶¶ 5-7. Defendant also contends that, as to the items of work that are required to be completed before issuance of the POC, a list of which is annexed as "Exhibit D" to the Harris Affidavit, the estimated cost for completing such work "is readily obtainable." *Id.*, ¶ 10.

In reply, Plaintiff asserts that the obligation to obtain the PCO rests with Defendant, which is stated in the Plan and the

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[1] David Harris, an architect and design consultant retained by Defendant, executed such affidavit, dated November 15, 2010, in opposition to Plaintiff's motion for partial summary judgment.

Settlement, and such obligation was never modified or shifted to the Board. Plaintiff also asserts that the Letter of Completion that was signed-off by DOB was based on a "self-certification" of the initial boiler installation work performed by an engineer hired by Defendant, and the subsequent DOB violations are for improper installation, not improper maintenance. Plaintiff's Reply, ¶¶ 11-12; Fortino Affidavit,[2] dated February 28, 2011, ¶¶ 3-4. Assuming Plaintiff's assertions are true and valid, they mainly pertain to Defendant's alleged breach of its contractual obligation under the Plan and the Settlement, not the specific performance claim asserted against it, as explained below.

Generally speaking, specific performance will not be granted if money damages "would be adequate to protect the expectation interest of the injured party." *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 (2001)(citations omitted). However, if "the subject matter of the particular contract is unique and has no established market value," granting specific performance is a proper remedy. *Id.* (citations omitted). In determining whether there is an adequate remedy, certain factors must be considered, including "the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award." *Id.* The Court of Appeals noted that "[t]he

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[2] Frank Fortino, the expert retained by Plaintiff, is the president of a building code consulting firm in New York City. He executed the affidavit in support of Plaintiff's cross motion.

decision whether or not to award specific performance is one that rests in the sound discretion of the trial court." *Id.*

In this case, according to Mr. Fortino, he "helped clients obtained more than 300 permanent certificates of occupancy for New York City buildings", and that prior to being employed by Plaintiff for this litigation, he was also hired by Defendant and "handled various filings for the building relating to the renovations performed for its condominium conversion." Fortino Affidavit, ¶ 1. Plaintiff has also stated that the estimated cost to do the work necessary to remove the boiler violations, which included chimney linings and boiler related work, would be "in excess of $260,000." Patrick De Saint-Aignan Affidavit,[3] dated October 1, 2010, ¶ 15. Moreover, Plaintiff has stated that the estimated cost "to do all of the necessary work" to obtain the PCO "will cost at least $420,000." De Saint-Aignan Reply Affidavit, dated February 25, 2011, ¶ 14.

Based on the foregoing, even if it is a contractual duty of Defendant to obtain the PCO, the process and knowledge required to obtain same is not unique, and the cost related to curing the DOB violations, which will pave the way to obtaining the PCO, is not difficult to estimate. Inasmuch as Defendant's performance can be procured with "suitable substitute performance," and the

[3] Patrick De Saint-Aignan is a unit-owner and the president of the Board. He executed the affidavit in opposition to Defendant's motion and in support of Plaintiff's cross motion.

monetary damages Plaintiff may incur can be ascertained with "reasonable certainty" - the prime factors noted by the Court of Appeals in *Sokoloff* - this court is not inclined in granting Plaintiff's request for specific performance against Defendant. Accordingly, Plaintiff's cross motion is denied.

Breach of Contract

Plaintiff argues that Defendant's failure to obtain the PCO is a breach of the contractual obligation under the Plan and the Settlement. Plaintiff further argues that Defendant's failure to fund an escrow account under the Plan (for funding the renovation work) and to complete the Remaining Sponsor Work (as such term is used in the Settlement) also constitutes a breach of contract.

As to the Remaining Sponsor Work, a list of which was set forth in "Schedule A" of the Settlement, Defendant contends that the chimney work (installation of a stainless steel lining) was not listed in Schedule A, and thus, such work was excluded by the terms of the contract. Defendant also contends that (1) under the Settlement, in exchange for Defendant's agreement to perform the Remaining Sponsor Work and to pay certain stipulated amounts, the Board agreed to waive and release any and all claims against Defendant, and (2) Plaintiff's claim as to the chimney work, "if in fact any were extant at the time the parties entered into the Settlement," has been waived and released by the Board because it

executed the Settlement. Defendant's Brief, at 4-5.[4]

Plaintiff does not dispute that the documentary evidence (i.e., Schedule A) undermines its claim with respect to the chimney work. Yet, Plaintiff argues that because the chimney work (as well as the boiler and other related work) are required to be performed and remediated by the DOB violations, and the curing of such violations is essential to obtaining the PCO (an obligation that is owed by Defendant), the chimney work claim is not waived or released. Plaintiff's Opposition Brief, at 6-7. This argument is unpersuasive, in light of the scope of the Remaining Sponsor Work, as delineated in Schedule A.[5]

As to the boiler work and the six boiler violations issued by DOB in October 2009, Defendant points to "Exhibit C" of the Harris Affidavit, which shows that an application was filed with the DOB in July 2009 to install a new boiler at the Condominium. Defendant asserts that it "has no way of determining exactly what

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[4] Defendant also argues that the time limitation for making notification of repair claims under the Plan (by July 19, 2002) has expired, and Plaintiff is time-barred for asserting claims. This argument has no merit, because any notification deadline under the Plan was superseded by the terms of the Settlement.

[5] Notably, under the Settlement, all Remaining Sponsor Work were required to be completed by March 31, 2005, except as to the Latent Defect Work (as such term was defined therein), for which Defendant remained responsible, until issuance of the PCO. The parties have not addressed the issue of Latent Defect Work, nor have they indicated whether the DOB regulations required the installation of a stainless steel chimney lining, at the time they entered into the Settlement and the related Schedule A.

work was performed or whether the conditions set forth in the Boiler Violations were triggered by work performed under the [July 2009] application." Harris Affidavit, ¶¶ 8-9. In reply, Plaintiff asserts that the July 2009 application pertained to a new boiler to be installed by the owner of a penthouse unit at the Condominium, which had nothing to do with the Condominium's own boiler at issue. De Saint-Aignan Reply Affidavit, ¶ 13; Cicalo Reply Affidavit,[6] dated February 28, 2011, ¶ 6 ("the boilers at issue are completely separate units"). Plaintiff also asserts that the six DOB boiler violations ("Exhibit E" to De Saint-Aignan Affidavit) were "based upon the type of equipment installed being inadequate and other installation issues, not because of any ongoing maintenance problems." Cicalo Reply Affidavit, ¶ 5. Thus, Plaintiff asserts that based on the DOB violations, it was the boiler installed by Defendant, which is connected to an unlined masonry chimney, that triggered issuance of the DOB violations. Such assertion appears valid, as it is supported by documentary evidence (the DOB violations exhibits).

With respect to the PCO, which has not yet been obtained, Plaintiff points to some 150 work permits issued by the DOB for renovations or repairs to various facets of the Condominium, a list of which is annexed as "Exhibit E" to the Harris Affidavit.

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[6] James Cicalo, a registered architect, was hired by Plaintiff in connection with this litigation.

Plaintiff asserts that these permits must be "signed-off" before the DOB will issue the PCO. Harris Affidavit, ¶ 11.

In response, Defendant points to the Plan and the by-laws for the Condominium, which provided, in relevant part, that, as sponsor of the Plan, Defendant will not be responsible for the delay in obtaining the PCO, if any unit owner does not properly complete renovation work for his or her own unit and obtain all required sign-offs by June 30, 2002. Schreiber Affirmation,[7] dated November 15, 2010, ¶¶ 5-8; Plan, at 65; By-Laws, at D-39. Defendant also asserts that, after gaining control of the Board in March 2005, the unit owners, without Defendant's input and consent, unilaterally amended the Condominium's organizational documents several times to extend the renovation deadline to permit renovations to the apartment units and the common areas, which "robbed" Defendant of the benefit of its bargain under the organizational documents.[8] Schreiber Affirmation, ¶¶ 11-14. Defendant further asserts that the 150 open permits pertain to the renovation work done by the unit owners, which should have been signed-off by the owners' engineers when the work was finished, and that Defendant should not be required "to step in and clean up the residential unit owners' mess ...." *Id.*, ¶ 17.

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[7] Jeffrey Schreiber is counsel for Defendant.

[8] The renovation deadline was extended to July 31, 2008, and the PCO application period was extended to December 31, 2008.

Thus, Defendant asserts that it should not be held liable for obtaining the PCO, when the Board and the unit owners failed to complete the renovation work and obtain the necessary sign-offs.

In opposition, Plaintiff contends that of the 150 open permits, many were issued prior to 2002, when Defendant (as the sponsor) was still doing such work, and that as of February 25, 2011, there is only one open permit for work that related to a residential unit (#9C), and the rest are for Defendant's common area work and the commercial units, for which the residential unit owners are not responsible. Plaintiff further contends that the Settlement does not explicitly require the unit owners to "close out" the permits. De Saint-Aignan Reply Affidavit, ¶¶ 7-9; Cicalo Reply Affidavit, ¶ 8, Exhibit F.

In light of the parties' disparate statements, it cannot be determined how many of the 150 permits were left open (but should have been closed because the underlying work was finished) when Plaintiff commenced this action on or about July 9, 2010, and what percentage of such permits pertain to the residential units. In any event, in the context of considering a motion to dismiss, Plaintiff has stated a viable breach of contract claim because Defendant's documentary evidence fails to establish conclusively, as a matter of law, that Plaintiff does not have a breach of contract claim. At a minimum, Defendant does not deny the allegation that it failed to fund an escrow account (as required

by the Plan), and that the pending DOB boiler violations remain unresolved, and such violations appear to relate to Defendant's boiler installation work, the curing of which appears necessary before a PCO can be obtained. Accordingly, Defendant's motion to dismiss the breach of contract claim is denied.

In addition, Defendant contends that, if this court does not dismiss the Complaint, Defendant will assert counterclaims or third party claims against those unit owner whose renovation work directly caused the delay in obtaining the PCO, in the amount of $400 per day, per unit owner. Schreiber Affirmation, ¶¶ 18-19. In rebuttal, Plaintiff contends that only the Board has the right to impose penalties upon the owners, and that Defendant never sought to impose such penalties when it had control of the Board, through March 2005. De Saint-Aignan Reply Affidavit, ¶ 10.

Plaintiff's contention is unconvincing, because the Plan provided, in relevant part, that "[a]ny Unit Owners who cause the delay of the issuance of a [PCO] will be liable to the other Unit Owners, the Sponsor and the Condominium Board for damages. Without prejudice to any other rights, the Condominium Board will have the right to charge any Unit Owners ... a fee of $400.00 per day for each and every day they are not in compliance ...." Plan, at 65 (emphasis added). Therefore, pursuant to the Plan, the Board is not sole entity that holds the right to impose a penalty upon the offending unit owners.

Breach of Implied Warranty

The Complaint also asserts a breach of implied warranty claim under the New York Housing Merchant Implied Warranty Law, General Business Law, § 777-a (HMIW Law). More specifically, the Complaint alleges under HMIW Law, as the Plan sponsor, Defendant breached its obligation in providing condominium units to the unit owners free of material defects, and that Defendant's attempt to exempt the Condominium from application of HMIW Law was ineffective. Complaint, ¶¶ 35-37.

Defendant contends that HMIW Law applies only to newly constructed condominium units in residential buildings that have five stories or less, and that since the Condominium has twelve stories, HMIW Law is inapplicable. McCarthy Affidavit,[9] dated September 7, 2010, ¶¶ 25-26. In response, Plaintiff asserts that HMIW Law applies because 52 and 54 Cooper Square, two of the three Buildings that constitute the Condominium, only have five stories. Plaintiff's Brief, at 7.

Notably, the parties have not cited case law with respect to the applicability of HMIW Law in a situation similar to the facts here, nor have they addressed whether each of the three Buildings may be treated independently as a single building in terms of applying HMIW Law to that building. In such regard, the court cannot grant Defendant's request to dismiss this claim because

[9] John McCarthy is Defendant's head of asset management.

the documentary evidence submitted by Defendant - the temporary certificate of occupancy for the twelve storied building at 62 Cooper Square - does not conclusively establish, as a matter of law, that HMIW Law is inapplicable to the Condominium.

Alternatively, Defendant argues that the instant claim fails because the Board did not serve a written notice upon Defendant prior to commencing this action. Defendant relies, primarily, on *Finnegan v Brook Hill, LLC* (38 AD3d 491 [3d Dept 2007]) and *Taggart v Martano* (282 AD2d 521 [2d Dept 2001]) as support. Based on its interpretation of such cases, Defendant takes the position that the "New York courts have consistently interpreted the statute to require written notification of ... plaintiff's intent to file suit under the HMIW Law, not merely notice of the conditions at the subject building." Defendant's Brief, at 8.

Defendant's reliance on the cited cases is misplaced. In *Finnegan, the* court dismissed the HMIW claims for tardiness because "timely notice is a condition precedent to a cause of action alleging breach of he housing merchant implied warranty." *Finnegan*, 38 AD3d at 109. In *Taggart*, the court dismissed the HMIW claims because the plaintiffs did not serve the defendants with notice of the alleged defects. *Taggart*, 282 AD2d at 522. In this case, Defendant does not deny that it was aware of the HMIW claims when it entered into the Settlement with the Board, and the Board does not deny that it never served a notice upon

Defendant regarding such claims. However, an issue that has not been addressed by the parties is whether by entering into the Settlement, the notice requirement was waived because such claims were merged and incorporated into the Settlement, and Plaintiff is suing for breach of the Settlement, which encompasses such claims. It is axiomatic that in considering a motion to dismiss, the court must afford a plaintiff the benefit of every favorable inference. In such regard, Defendant has not established that the factual allegations in the Complaint do not manifest a cause of action sounding in breach of implied warranty.

Finally, with respect to Defendant's request for an award of attorneys' fees and costs, since Defendant is not the prevailing party, any such award is unwarranted under the circumstance.

Conclusion

Based on all of the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted only as to the dismissal of the first cause of action for specific performance and is otherwise denied; and it further

ORDERED that plaintiff's cross motion for partial summary judgment against defendant is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the parties are directed to appear

for a status conference before this court in Room 422, 60 Centre Street, on December 15 at 10 AM.

This constitutes the Decision and Order of the court.

Dated: November 9, 2011

ENTER:

J.S.C.

EMILY JANE GOODMAN