

Organizacion Ideal v CP Hotels (Bermuda) Inc.

2011 NY Slip Op 33833(U)

July 12, 2011

Sup Ct, New York County

Docket Number: 600769/10

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**
Justice

PART 39

Organizacion Ideal
- v -
CP Hotels

INDEX NO. 600769/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 7/12/11

[Signature]
BARBARA R. KAPNICK S.C.
J&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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39**

-----x
ORGANIZACION IDEAL, S. de R.L. de C.V.,
as successor-by-merger of DIAMANTE
RESORTS LIMITED,

Plaintiff,

DECISION/ORDER

Index No. 600769/10
Motion Seq. No. 001

- against -

CP HOTELS (BERMUDA) INC.,

Defendant.

-----x
BARBARA R. KAPNICK, J.:

In this action for fraudulent concealment, defendant CP Hotels (Bermuda), Ltd. i/s/h/a CP Hotels (Bermuda) Inc. ("CP Hotels") moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint against it for failure to state a claim. Plaintiff Organizacion Ideal, S. de R.L. de C.V., as successor-by-merger of Diamante Resorts Limited, alleges that defendant fraudulently concealed information from it in connection with its purchase of three hotels from defendant.

Background

On September 4, 2007, Diamante Resorts Limited ("Diamante" or "purchaser") purchased from defendant all of the issued and outstanding shares of Princess Properties International Limited ("PPIL") pursuant to the terms of an Amended and Restated Stock Purchase Agreement ("SPA"). Through the purchase of those PPIL

shares, plaintiff acquired the ownership of three luxury hotel properties - the Fairmont Acapulco Princess Hotel ("Acapulco Princess") and the Fairmont Pierre Marques Hotel, both in Acapulco, Mexico, and the Fairmont Hamilton Princess Hotel in Hamilton, Bermuda ("Hamilton Princess"), in addition to adjacent properties. The purchase price for the PPIL shares was \$378.5 million.

As a condition to the closing, plaintiff retained defendant's affiliates to manage the hotel properties subsequent to the sale, for a base term of 18 years, with the option of five five-year extensions (Complaint, ¶ 8). The management maintained control over the annual operating budgets for the hotels' hotel management agreements, advertising for the hotels and over the hotels' operating accounts (*id.*). The affiliates were guaranteed a fixed percentage of the gross revenue for providing their management services to the hotels, with an incentive provision giving them 30% of the hotels' net operating income in excess of a stated level (*id.*).

After defendant filed a Complaint against plaintiff asserting a purchase price adjustment claim (see discussion below), plaintiff filed the instant Complaint alleging two causes of action for fraudulent concealment. The first cause of action alleges that defendant failed to disclose that there were latent structural

concrete problems at the Acapulco Princess. The second cause of action concerns the alleged failure by defendant to adequately disclose the existence of an equipment lease for the boiler at the Hamilton Princess.

Plaintiff alleges that prior to closing, defendant gave plaintiff a property condition report for the Acapulco Princess indicating that the concrete balcony planters, ceilings, balcony railings and the hotel facade were in "good condition" (Complaint, ¶ 11). In addition, before the closing, plaintiff had a team of engineers inspect the property, at which time concrete spalling and related cosmetic issues with the facade, balcony planters, and ceilings were noted (Complaint, ¶ 13).

Plaintiff claims that after the closing, it discovered two documents which defendant allegedly should have posted in the parties' online "Data Room"¹ and which disclosed a latent structural concrete problem at the hotel - namely, a draft Concrete Condition Survey Report, dated January 21, 2004 ("2004 concrete report"), and an architect's written proposal, the Latent Concrete Report II, dated August 2007 ("2007 proposal"). The 2004 concrete

¹ The Data Room was created to post key documents relating to all three hotels, including, but not limited to, financial reports, leases, contracts and other materials, for plaintiff's review as part of its "due diligence" (see SPA §§ 3.1, 5.1 [p]).

report noted extensive concrete deterioration due to either use of substandard concrete during the hotel's construction and/or excessive exposure to ocean water. The 2007 proposal described in even more detail the deterioration of the balconies, planters and the hotel's facade, and identified several options for remodeling the facade of the Acapulco Princess Hotel (Complaint, ¶ 22).

Plaintiff alleges that these documents were concealed in violation of SPA § 5.1 (p), which provides that "[t]o seller's actual knowledge, the Data Room contains, or seller has otherwise made available to Purchaser, true, correct and complete copies of all material documents affecting ... the Property ...". Plaintiff asserts that Michael Glennie, Executive Vice President - Real Estate of Fairmont Hotels, Inc. and Ian Robinson, Regional Vice President, Southeast US and Mexico, and the Executive Vice President in charge of the Acapulco hotels, had actual knowledge of the existence of the latent structural concrete problems (Complaint, ¶¶ 24-25).

Plaintiff also claims that on or about September 15, 2007, less than two weeks after the Closing date, a 'chunk' of the Acapulco Princess' concrete facade broke loose and fell to the ground. After this incident, plaintiff learned from the staff at the hotel that the Acapulco Princess had been periodically

experiencing falling pieces of concrete for several years and that the defendant had commissioned studies and reports with regard to the concrete issues (Complaint, ¶ 29).

As a result, plaintiff hired an architect to conduct an extensive review of the Acapulco Princess (Complaint, ¶ 30). Plaintiff then learned the full extent of the concrete structural problems after it "stripped" one of the Acapulco Princess's towers in a renovation project, which revealed extensive corrosion of the rebar and other metal supports. Also at this time, plaintiff's architect received the 2004 concrete report, as well as other pre-closing reports and surveys from Santiago Duran, defendant's engineer, and was allegedly directed not to disclose the existence of the documents to anyone, particularly plaintiff (Complaint, ¶¶ 30-31).

Plaintiff's architect's report explained that the root cause of the concrete structural problems at the Acapulco Princess resulted from systematic corrosion of the steel rebar that reinforced the concrete of the hotel's facade and ceilings, as well as the balcony planters and railings (Complaint, ¶ 15). The architect claimed that the corrosion led to structural instability, which resulted in chunks of concrete falling from the facade and ceilings, which required immediate attention, extensive repairs and

replacement of the rebar and concrete on the facade and ceilings, given that there were 'life safety' issues (*id*).

Plaintiff admits in the Complaint that defendant made some disclosures concerning some of the concrete issues, particularly with respect to some of the concrete planters (Complaint, ¶ 26), which it believed could be managed through maintenance programs as opposed to remedial work (Complaint, ¶¶ 26, 27). Defendant offered to contribute \$2 million towards the estimated cost of the maintenance work of \$4 million (Complaint, ¶ 26). Plaintiff claims, however, that the cost to complete all the necessary repairs was actually in excess of \$7 million (Complaint, ¶ 32).

In its second cause of action, plaintiff alleges that defendant failed to disclose a six-year equipment lease pertaining to a boiler and related systems at the Hamilton Princess (Complaint, ¶¶ 40, 41). At the expiration of the lease, defendant had the option of extending the lease or purchasing the boiler for \$574,924.09 (Complaint, ¶ 41). Plaintiff alleges that it did not become aware of the equipment lease until after the closing, when a financing company advised it that the lease was coming to an end (Complaint, ¶ 42). Due to the fact that the seller would no longer guarantee the lease, plaintiff was unable to renew the lease and instead opted to minimize its damages by

purchasing the boiler (Complaint, ¶¶ 43, 49). Plaintiff claims that defendant fraudulently concealed the lease which should have been posted in the Data Room as a material document, and also failed to list the lease in the rider of the SPA concerning contracts relating to the hotel, in violation of SPA § 5.1 (Complaint ¶¶ 38, 39, 44).

Plaintiff alleges that Jon Crellin, General Manager of the Hamilton Princess, and Norm Mastalir, General Manager and Director of the Bermuda property, had knowledge of the lease, but failed to disclose it (Complaint, ¶ 45), and that it suffered damages in the amount of \$574,924.09, i.e., the amount it paid to buy the boiler upon expiration of the lease.

Related Litigation Involving the Parties

Subsequent to the closing, defendant claims that the plaintiff failed to make numerous multi-million dollar payments that it owed pursuant to the SPA and other written agreements entered into in connection with the transaction. As a result, defendant filed two lawsuits in this Court: (1) a petition to compel plaintiff to arbitrate defendant's claim for a multi-million dollar post-closing purchase price adjustment (Index No. 650102/2009); and (2) a \$1.3 million claim for breach of a written contract concerning monies owed for upkeep of certain common areas in a residential area adjacent to the Acapulco hotels (Index No. 650101/2009). Seller

also filed a lawsuit in the United States District Court for the Southern District of New York for \$2.8 million owed under two insurance advisory agreements (Case No. 09 CV 1741)). The parties settled the breach of contract case (Index No. 650101/2009) and the insurance matter before the Southern District. The purchase price adjustment claim was sent to arbitration pursuant to the decision of this Court dated May 18, 2010 in Index No. 650102/2009.

Discussion

In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference (citation omitted). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.

EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005)

"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 (citation omitted)." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]. "In addition to the traditional elements of misrepresentation, scienter, reliance and damages, a plaintiff alleging fraud based upon fraudulent concealment must allege a duty to disclose material information (citation omitted) [which] must be based upon some special

relationship between the parties," such as a contractual, confidential or fiduciary relationship or where one party has superior knowledge, *Albion Alliance Mezzanine Fund, L.P. v State St. Bank & Trust Co.*, 8 Misc 3d 264, 269 (Sup Ct, NY Co 2003), *aff'd* 2 AD3d 162 (1st Dept 2003).

Defendant argues that the first cause of action must be dismissed because plaintiff can neither establish justifiable reliance, nor a duty to disclose. Specifically, defendant claims that plaintiff cannot establish justifiable reliance because there is express disclaimer language in the SPA, see, *Danann Realty Corp. v Harris*, 5 NY2d 317, 322 (1959).

SPA § 9.1 (No Reliance on Document) provides in relevant part as follows:

Except as expressly stated herein, Seller makes no representation or warranty as to the truth, accuracy or completeness of any materials, data or information delivered or made available by Seller or its agents to Purchaser in connection with the transactions contemplated hereby; provided, however, that Seller has no knowledge that any such materials, data or information are false, inaccurate or incomplete. Purchaser acknowledges and agrees that all materials, data and information delivered or made available by Seller or its agents to Purchaser in connection with the transactions contemplated hereby are provided to Purchaser as a convenience only and that any reliance on or use of such materials, data or information by Purchaser shall be at the sole risk of Purchaser, except as otherwise expressly stated herein. Without limiting the generality of the foregoing provisions, Purchaser acknowledges and agrees that ... (b)

Purchaser shall not have the right to rely on any [offering memorandum, environmental or other] report delivered or made available by Seller or its agents to Purchaser, but rather will rely on its own inspections and investigations of the Property and any reports commissioned by Purchaser with respect thereto ... (

SPA § 9.2 (Disclaimers) provides in relevant part as follows:

EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, IT IS UNDERSTOOD AND AGREED THAT SELLER IS NOT MAKING AND HAS NOT AT ANY TIME MADE ANY WARRANTIES OR REPRESENTATIONS OF ANY KIND OR CHARACTER, EXPRESSED OR IMPLIED, WITH RESPECT TO THE SHARES OR THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ... THE TRUTH, ACCURACY OR COMPLETENESS OF THE PROPERTY DOCUMENTS OR ANY OTHER INFORMATION PROVIDED BY OR ON BEHALF OF SELLER TO PURCHASER ... PURCHASER ACKNOWLEDGES AND AGREES THAT UPON CLOSING PURCHASER SHALL ACCEPT THE PROPERTY "AS IS, WHERE IS WITH ALL FAULTS", EXCEPT TO THE EXTENT EXPRESSLY PROVIDED OTHERWISE IN THIS AGREEMENT. ... PURCHASER REPRESENTS TO SELLER THAT PURCHASER HAS CONDUCTED, OR WILL CONDUCT PRIOR TO CLOSING, SUCH INVESTIGATIONS OF THE SHARES AND THE PROPERTY, INCLUDING BUT NOT LIMITED TO, THE PHYSICAL AND ENVIRONMENTAL CONDITIONS THEREOF, AS PURCHASER DEEMS NECESSARY TO SATISFY ITSELF AS TO THE CONDITION OF THE PROPERTY ... AND WILL RELY SOLELY UPON SAME AND NOT UPON ANY INFORMATION PROVIDED BY OR ON BEHALF OF SELLER OR ITS AGENTS UPON CLOSING, PURCHASER SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING BUT NOT LIMITED TO, CONSTRUCTION DEFECTS AND ADVERSE PHYSICAL AND ENVIRONMENTAL CONDITIONS, MAY NOT HAVE BEEN REVEALED BY PURCHASER'S INVESTIGATIONS, AND PURCHASER, UPON CLOSING, SHALL BE DEEMED TO HAVE WAIVED, RELINQUISHED AND RELEASED SELLER ... FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION (INCLUDING CAUSES OF ACTION IN TORT) ... OF ANY AND EVERY KIND OR CHARACTER, KNOWN OR UNKNOWN, WHICH PURCHASER MIGHT HAVE ASSERTED OR ALLEGED AGAINST SELLER ... AT ANY TIME BY REASON OF OR ARISING OUT OF ANY LATENT OR PATENT CONSTRUCTION DEFECTS OR PHYSICAL CONDITIONS ... REGARDING THE PROPERTY OR THE SHARES BUT WITHOUT WAIVER OR PURCHASER'S RIGHTS TO RELY ON AND OTHERWISE WITH RESPECT TO REPRESENTATIONS AND WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT.

It is well settled that while "a general merger clause is ineffective to exclude parol evidence of fraud in the inducement," a party who disclaims reliance on statements concerning particular matters may not then claim reliance as to those matters, *Citibank v Plapinger*, 66 NY2d 90, 94 (1985); *Laxer v Edelman*, 75 AD3d 584, 586 (2d Dept 2010). If a party is aware of information that renders its reliance unreasonable, or if it "had enough information to create a duty to investigate further, the requisite reliance cannot be established" *Littman v Magee*, 54 AD3d 14, 17 (1st Dept 2008). However, "a purchaser may not be precluded from claiming reliance on misrepresentations of facts peculiarly within the seller's knowledge, notwithstanding the execution of a specific disclaimer (citation omitted)." *Steinhardt Group v Citicorp*, 272 AD2d 255, 257 (1st Dept 2000).

While the evidence may show that the information defendant had with respect to the structural concrete issues "was either nonexistent or available to plaintiff with the exercise of reasonable diligence," in which case defendant would not have concealed said information, or that plaintiff was not justified in relying on defendant's misrepresentation, "it is inappropriate to determine those issues as a matter of law based solely on the allegations in plaintiff's complaint, at this point in the

proceedings." *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 (1st Dept 2003); *Steinhardt Group, supra*; see also *Swersky v Dreyer & Traub*, 219 AD2d 321 (1st Dept 1996).

Defendant next argues that it had no duty to disclose the concrete problems pursuant to the doctrine of caveat emptor. "'New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment'" *Beach 104 St. Realty, Inc. v Kisslev-Mazel Realty, LLC*, 76 AD3d 661, 664 (2nd Dept 2010), (quoting *Matos v Crimmins*, 40 AD3d 1053, 1054 [2nd Dept 2007]) (other citations omitted). In addition, defendant argues that while it had no duty to disclose, it did provide plaintiff with sufficient information to put plaintiff on notice that the Acapulco Princess had concrete problems.

Plaintiff, on the other hand, contends that defendant failed to make full disclosure and had superior knowledge as to the latent structural conditions of the concrete, and that given the management contract plaintiff had with defendant to retain management control for up to 43 years, the parties had a "special relationship," which creates a duty to disclose, see e.g., *Williams*

v Sidley Austin Brown & Wood ,L.L.P., 38 AD3d 219 (1st Dept 2007); *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, *supra*; *CSI Investment Partners II, L.P. v Cendant Corp.*, 2002 WL 925044, (SDNY). It appears to this Court that since defendant did retain management control over the properties, a special relationship between the parties was established (see e.g. *Grupo Sistemas Integrales de Telecomunicacion S.A. de C.V. v AT&T Communications Inc.*, 1996 WL 312535 [SDNY]).

Accordingly, it would be premature to dismiss the first cause of action at this time.

As to the second cause of action, defendant claims that under SPA § 5.3, no claims for breach of representation or warranty shall be actionable “[b] unless the valid claims for all such breaches collectively aggregate more than One Million Dollars (\$1,000.000), in which event the full amount of such claims shall be actionable (underlining supplied).” Defendant asserts that the claim does not meet the monetary threshold under the SPA, and, since the remainder owed on the equipment lease was only approximately \$575,000, roughly .15% of the \$378.5 million transaction price, it is not material. However, since the claims in this action collectively total over \$1,000,000, the motion to dismiss the second cause of action on the grounds of failure to establish materiality is denied.

Finally, defendant argues that to the extent the Purchaser bases its fraudulent concealment causes of action on seller's purported breach of the representations and warranties memorialized in SPA §§ 5.1(h) and 5.1(p), its causes of action are time-barred by SPA § 5.3 which gave Purchaser only 90 days after September 4, 2008 (one year after the Closing Date) to commence an action for breach of any warranties and representations. However, it is clear that the two causes of action alleged in this Complaint are based on fraudulent concealment and thus are not subject to the one-year contractual time limit established in SPA § 5.3 for claims for breach of any representation or warranty of the Seller.

Conclusion

Accordingly, the motion to dismiss is denied.

Defendant is directed to serve an answer to the Complaint within 30 days after entry of this Order.

Counsel shall appear for a preliminary conference in IA Part 39, 60 Centre Street - Room 208 on September 7, 2011 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: July 12, 2011



BARBARA R. KAPNICK
J.S.C.