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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____ PART 2
Justice

Bradley, Jordan L

-v-

30 Orchard St. Assoc's.

INDEX NO. 104913/11

MOTION DATE _____

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
APR 11 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/9/12

Louis B. York, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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JORDAN L.BRADLEY, TSUCHIKO MIYATA and
BRADLEY TIRPAK,

Index #104913/11

Plaintiffs,

-against-

50 ORCHARD STREET ASSOCIATES LLC,
DOUGLAS ELLIMAN, MICHAEL MUROFF
ARCHITECT LLC, MICHAEL MUROFF and
THE BOARD OF MANAGERS OF 50 ORCHARD
STREET CONDOMINIUM,

Defendants,

----------X

YORK, J.:

Defendants 50 Orchard Associates LLC s/h/a 50 Orchard Street Associates LLC, Michael Muroff Architect LLC, and Michael Muroff move (1)for dismissal of the action, pursuant to CPLR 3012(b), as to plaintiff Jordan L. Bradley for failure to serve a complaint after the written demand and (2)for dismissal of the verified complaint as to plaintiffs Tsuchico Miyata and Bradley Tirpak against moving defendants, pursuant to CPLR 3016(b) and 3211(a)(1), (a)(3), a(5) and (a)(7).

BACKGROUND

In 2005 plaintiffs Tsuchico Miyata ("Miyata") and Bradley Tirpak ("Tirpak") entered into a Purchase Agreement ("Agreement") with 50 Orchard Associates LLC (the "Sponsor") for the purchase of their units at the 50 Orchard Street Condominium ("Condominium" or "Property"). The Agreement incorporated the Offering Plan filed by the Sponsor with the State of New York in September 2004. Defendants Michael Muroff Architect LLC, the architectural firm, and Michael Muroff, the licensed architect (collectively the "Architects") were retained by the Sponsor to provide design services in relation to the development and conversion of the property to condominium ownership. The Report of Physical Condition (the "Report") by the Architects, integrated into the Offering Plan, made statements about sound insulation between floor/ceiling systems, and between apartment walls.

Tirpak and Miyata allege that the design of the floors in the condominium units and common areas, as set forth in the Offering Plan and Report, was defective in that it failed to adequately prevent noise, sound, vibrations and nuisances coming from one condominium unit to another. In addition, the building's construction was not in compliance with applicable provisions of the New York City Building Code ("Code") concerning noise control in multiple dwelling unit buildings. Plaintiffs further allege that they made numerous complaints to the Board of Managers of the Condominium (the "Board") seeking to remedy the defective conditions, but the Board failed and/or refused to take any measures to repair the conditions or to hold the Sponsor and/or the Architects responsible.

Plaintiffs assert four causes of action against the moving defendant (the first, second, fourth and fifth causes of action). The first is for breach of the Purchase Agreement against the Sponsor.

The Agreement provided that residential condominium units and common areas would be free of defects and substantially comply with the terms of the Offering Plan and the provisions of the New York City Building Code. According to plaintiffs, the units contained substantial material defects, were constructed with substandard and deficient materials and in violation of the Code. They were not properly insulated and protected from noise, sounds and vibrations. As a result, plaintiffs incurred substantial damages, which they evaluate at five million ($5,000,000.00) dollars.

The second cause of action is for breach of implied warranty of habitability as against the Sponsor and the Board.

The fourth cause of action is for misrepresentation against the Architects. Plaintiffs claim that Architects' report, incorporated into the Offering Plan, falsely stated that the construction was completed pursuant to the terms of the plans filed with the Department of Buildings and without any violations of the NYC Building Code or applicable law in respect of sound insulation. The Architects were allegedly aware, or should have been fully aware of the falsity of these statements. Plaintiffs relied upon the Architects' report and were induced to purchase their unit, and as result incurred damages.

The fifth cause of action is for negligent misrepresentation against the Architects. Plaintiffs allege the existence of a special relationship between unit owners and Architects since the Architects knew and intended, at the time they made the representation in the Offering Plan, that this plan would be disseminated to the prospective unit owners and that unit owners would rely on them. The Architects were allegedly negligent in making representations which resulted in plaintiffs' damages.

DISCUSSION

I. Dismissal of Action as to Plaintiff Bradley.

Plaintiff Bradley served the summons in this action but has not served a complaint after defendants had duly demanded it in writing. Neither plaintiff, nor its attorney, David G. Ebert, Esq., of Ingram Yuzek, Gainen Carrol & Bertolli LLP, has requested additional time to serve a complaint. In view of the failure to serve the complaint and default on this motion to dismiss, the action is dismissed as to Jordan L. Bradley , pursuant to CPLR 3012(b).

II. Dismissal of Action as to Plaintiffs Miyata and Tirpak

Defendants 50 Orchard Associates LLC s/h/a 50 Orchard Street Associates LLC, Michael Muroff Architect LLC, and Michael Muroff move to dismiss those causes of action that are specifically asserted against them.

A. The first cause of action for breach of purchase agreement against the Sponsor.

Defendants contend that plaintiffs failed to allege the specific provisions of the contract upon which liability is predicated and instead base their claims on alleged misrepresentations in the Architects' Report. In their complaint plaintiffs refer to the Purchasing Agreement which in turn incorporates the Offering Plan providing that Sponsor would sell to the Unit Owners residential condominium units, and common areas "which were free of defects and which substantially complied with the terms of the Offering Plan and with the applicable provisions of the New York City Building Code and rules, statutes, ordinances and regulations and which met their reasonable expectations to be properly insulated and protected from unreasonable and

unnecessary noise, sounds and vibrations." (Complaint, at ¶27). The Offering Plan is annexed both as Exhibit J to the moving papers and Exhibit F to the opposition to the motion. Paragraph 10 of the Plan contains an obligation by Sponsor to substantially comply with the terms of the Offering Plan. One of the terms is to provide "sound insulation" which is described in more detail in the Architects Report and cited at ¶13 of the Complaint.

Plaintiffs alleged that this obligation was materially breached, and support this allegation with three reports by an independent sound-testing firm Acoustilog Inc.(Opposition, Exh. I). In particular, Acoustilog concluded that the partitions in the building "are deficient and fail to meet Code requirements." "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, 799 N.Y.S.2d 170, 175 [2005]). "[A]ny deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 5 NY3d 582, 591, 808 N.Y.S.2d 573, 578 [2005].

Finally, plaintiffs alleged that the substantial, unreasonable and excessive noises sounds, vibrations and nuisances result in both decline in value of their units and unreasonable interference with their right to quietly enjoy and inhabit them. Though the claimed damages of $5,000,000.00 dollars are patently disproportionate to the purchase price of the condominium units ($700,000.00 and $1,375.000.00), allegations themselves are sufficient to state a necessary element of a claim for breach of contract.

The documentary evidence presented by defendants does not conclusively refute the allegations of the complaint. A motion to dismiss is brought pursuant to CPLR 3211 (a) (1) may be

appropriately granted only where the documentary evidence submitted conclusively establishes a defense. Leon v Martinez, 84 NY2d 83, 88, 614 N.Y.S.2d 972, 974 [1994]

Defendants contest plaintiffs' standing to pursue a complaint related to common areas of the Condominium. They characterize floors as a common element of the building. To the extent plaintiffs alleged damages to their individual units, and floors between units are arguably part of such units, plaintiffs are not precluded from pursuing their claims.

Thus, dismissal of plaintiff's first cause of action must be denied.

With their motion to dismiss the complaint, the moving defendants submitted a large number of documents : copies of the reports by New York City Department of Buildings investigating complaints submitted by plaintiffs, reports of their own independent experts who analyzed sound insulation at the Condominium, minutes of the Board meeting, correspondence, as well as affidavits from a Sponsor's representative and the Architects. Pursuant to CPLR 3211(c), the court has discretion, with proper notice, to convert the motion to dismiss into a motion for summary judgment. The court chooses to exercise this option and invites plaintiffs to respond to defendants' motion for summary judgment.

B. The second cause of action for breach of implied warranty of habitability.

Defendants argue that the common-law implied warranty of habitability is not applicable in the present case. They point to the Court of Appeals decision in Fumarelli v Marsam Dev., Inc as based on essentially similar facts. In opposition, plaintiffs contend that Fumarelli did not eliminate the common-law implied warranty of habitability where General Business law article 36-B does not apply by its terms. Article 36-B covers only condominiums of five stories or less.

This argument appears to have merit and plaintiff's brief cites Brine in support . "Since Article 36–B is not applicable, the analysis must revert back to the common law. "Brine v 65th St. Townhouse LLC, 20 Misc 3d 1138(A), 867 N.Y.S.2d 372 [Sup Ct NY Cty 2008]. However a close reading of Fumarelli refutes it.

In the course of its decision the Court of Appeals emphasized that " General Business Law article 36–B is a full, effective, and realistic substitute for the protections and rationale recognized in *Caceci v. Di Canio Constr. Corp.*" Fumarelli v Marsam Dev., Inc., 92 NY2d 298, 302680 N.Y.S.2d 440 [1998]. The statute "reflects a realistic intent and effort to occupy the full field." (*id.*, at 305). Finally, the Court's distinction between "abrogating" and "derogating" from the law is centrally relevant.

> "Abrogation" means the entire repeal and annulment of a law"; "derogation" relates to "[t]he partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force" (Black's Law Dictionary 399 [5th ed.]). If General Business Law article 36–B fits the former definition, as we believe it does, then, the canon of strict construction loses its abstract instructive value, as applied here.

Fumarelli v Marsam Dev., at 306. Any suggestion that the common-law implied warranty still remains in place would mean that Article 36-B only derogated from it. Therefore, plaintiff's cause of action for the implied warranty of habitability must be dismissed.

C. The fourth cause of action for misrepresentation against the Architects.

Defendants move to dismiss this cause of action on the ground that it failed to plead alleged misrepresentations with specificity, as required by CPLR 3016, and for failure to state a claim pursuant to CPLR 3211(a)(7).

Plaintiffs rely on the following passages in the Architects' Report:

"Plans call for sound attenuation insulation to be installed between floor/ceiling systems, and between apartment walls." and

> Sound insulation between apartments is provided by 6' sound insulation horizontally between the floor joists and 31/2' sound insulation between apartments horizontally and vertically. The floor construction will have approximately 6 ml. of cork underlayment providing resiliency. The estimated STC rating between floor/ceiling assembly is approximately 51. The estimated STC rating between wall assembly is approximately 48.

(Opposition, Exh. G, PP.178-179).

Defendants find that the words "approximately" and "estimated" disclaim any firm representations contained in the report. However whether the measurements are precise enough can be determined only by relevant industry practice, and thus the use of words "approximate" and "estimated" by the Architects is not in itself detrimental to the plaintiff's position.

The passage cited, however, refers to the future, as is clearly shown in the certification by Michael Muroff, attached to the Report.

The Report:

> i)sets forth in narrative form the description and/or physical condition of the entire property as it will exist upon completion of renovation and/or construction,

provided that renovation and/or construction is in accordance with the plans and specifications I examined.

ii) in my professional opinion [the Report] affords potential investors, purchasers and participants an adequate basis upon which to found their judgment concerning the description and/or physical condition of the property as it will exist upon completion of renovation and/or construction, provided that renovation and/or construction is in accordance with the plans and specifications that I examined.

(Opposition, Exh. H).

Plaintiffs failed to allege any representation of ~~the~~ existing material fact. All cited passages express future promises. "Absent a present intention to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud. Adams v. Clark, 239 N.Y. 403, 146 N.E. 642 [1925]. Non-Linear Trading Co., Inc. v Braddis Assoc., Inc., 243 AD2d 107, 118, 675 N.Y.S.2d 5 [1st Dep't 1998] (the alleged misrepresentation relates to future performance).

The Court of Appeals found exceptions to this rule: intent not to perform the promise made with a preconceived and undisclosed intention of not performing it, constitutes a misrepresentation. Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68 NY2d 954, 956, 510 N.Y.S.2d 88 [1986] (internal quotation marks omitted). However in this case there must be specific allegations of facts that point to such intent. Failure to plead them with particularity warrants the dismissal of the claim. Acquisition Co., LLC v 627 Greenwich, LLC, 85 AD3d 645, 647, 927 N.Y.S.2d 23 [1st Dept 2011].No such specific allegations are asserted in this case. Therefore, the claim of intentional misrepresentation against the Architects is dismissed.

D. The fifth cause of action for negligent misrepresentation against the Architects.

Sykes v RFD Third Ave. 1 Assoc., LLC precludes claims for negligent misrepresentation against professionals if such misrepresentations were made in the Offering Plan and absent a special relationship with plaintiffs who allegedly relied on them. Sykes v RFD Third Ave. 1 Assoc., LLC, 15 NY3d 370, 912 N.Y.S.2d 172 [2010]. In Sykes a claim for negligent misrepresentation was asserted against the engineering firm based on its report in the Offering Plan. The court held that plaintiffs have not sufficiently alleged that they were a "known party or parties", to establish a necessary relation, analogous to privity that imparts a special duty of care. While the engineering firm obviously knew in general that prospective purchasers of apartments would rely on the offering plan, there was no indication that it knew these plaintiffs would be among them, or indeed that they knew or had the means of knowing of plaintiffs' existence when it made the statements for which it is being sued. Sykes v RFD Third Ave. 1 Assoc., LLC, at 373.

The court emphasized that its analysis applies to other professionals, and the First Department has since applied it to architects. Heather Darcy Bhandari et al., Appellants, v Ismael Leyva Architects, P.C., 84 A.D.3d 607; 923 N.Y.S.2d 484 (1st Dept' 2011).Accordingly, the claim for negligent representation against the Architects must be dismissed.

CONCLUSION

For the foregoing reasons it is

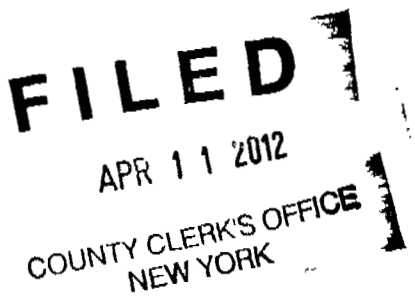
ORDERED that the action is dismissed against plaintiff Jordan L. Bradley; and it is further

ORDERED that part of the defendants' motion which relates to the dismissal of the breach of contract claim against plaintiffs Miyata and Tirpak is converted into a motion for summary judgment, pursuant to CPLR 3211(c). Plaintiffs are to respond to the motion within thirty (30) days of this order. Defendants are to submit reply papers, if any, within fourteen (14) days of the service of the opposition; and it is further

ORDERED that defendants' motion to dismiss the second cause of action as against the Sponsor and the Board, and the fourth and fifth causes of action as against the Architects is granted; and it is further

ODERED that based on documentary evidence the name 50 Orchard Street Associates, LLC is amended as follows: 50 Orchard Associates, LLC. All future documents shall reflect this change in the caption.

Dated: 4/9/12



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