

TIAA Glocal Inv. LLC v One Astoria Sq. LLC
2013 NY Slip Op 33857(U)
April 22, 2013
Sup Ct, New York County
Docket Number: 652907/12
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

TIAA GLOBAL INVESTMENTS LLC et al

INDEX NO. 652907/12

ONE ASTORIA SQUARE LLC et al

MOTION DATE

MOTION SEQ. NO. 001

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

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 by defendants to
dismiss the complaint
is DENIED per the attached
Decision and Order.

A Preliminary Conference is scheduled for
6-7-13 at 11 AM at 26 Broadway
10th Floor

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

Dated: April 22, 2013

Melvin L. Schweitzer, J.C.
MELVIN L. SCHWEITZER

- 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

TIAA and One Astoria entered into a Purchase and Sale Agreement (Agreement) with respect to One Astoria Square, located at 26-38 21st Street, Astoria, New York (Property) for a purchase price of \$43,000,000 in January 2011. The parties amended the Agreement five times in February 2011. In March 2011, TIAA assigned all of its rights under the Agreement to TCAM. The closing of the sale took place in March 2011. Prior to the closing, TIAA engaged in extensive due diligence of the Property, and hired LRA to perform a Property Condition and Engineering Assessment of the Property, and to provide a report with respect to the Property.

In addition to breach of contract, this action alleges fraud by One Astoria, Mr. Khan and Criterion involving concerted efforts to actively conceal a massive problem with the air infiltration system resulting from latent deficiencies at the Property, prior to the sale of the Property by One Astoria to TIAA Global. Specifically, it is alleged that it was revealed after the sale that critical elements of the Property, such as insulation, fire walls and the proper connection of vertical interior walls to slabs were virtually non-existent. Allegedly, these missing building elements were set forth in as-built plans provided to plaintiffs and filed with the Department of Buildings, but were never constructed, in violation of New York City Building codes and regulations (Code). Plaintiffs allege the Property was hollow such that outside air flow into the Property was entirely unimpeded by any of the building elements required by the Code or plans. Plaintiffs allege two aspects to this scheme to defraud: (1) the active concealment of latent building conditions and widespread tenant complaints related to the outside air infiltration issue; and (2) intentional misrepresentations made by moving defendants to thwart plaintiffs' ability to discover the latent deficiencies of the Property.

Plaintiffs allege that after the sale, upon inhabiting and managing the Property, numerous complaints from tenants led plaintiffs to discover the deficient and substandard air infiltration

system hidden under the building exterior, which allowed outside air to penetrate throughout the Property. Plaintiffs further allege that defendants actively concealed the existence of a tenant campaign protesting the untenable living conditions resulting from these construction deficiencies. Subsequent to the sale, plaintiffs learned of emails from tenants to Criterion and Mr. Khan complaining of uninhabitable conditions and threatening legal action, as well as responses from Criterion and Mr. Khan agreeing to concessions, including rent abatement, lease termination and payment of utility bills. Such emails were allegedly absent from the files that were required to be turned over pursuant to the purchase and sale agreement between One Astoria and TIAA for purchase of the Property (Agreement). Plaintiffs allege that such emails are the tip of the iceberg and discovery will reveal documentation concerning these issues, which were intentionally purged from the files required to be turned over. The allegedly fraudulent concealment of these documents is critical as such records contradict representations made by One Astoria in the Agreement and, once discovered by plaintiffs after the Closing, provided them with an indication of the latent deficiencies and Code violations at the Property.

Plaintiffs allege additional fraudulent conduct. Plaintiff's property manager discovered a tenant letter dated January 26, 2011 (Tenant Letter) on the eve of the March 1, 2011 closing of the Property sale (Closing). The Tenant Letter in which tenants complained of high heating bills was also allegedly intentionally withheld in violation of the Agreement. Based on the Tenant Letter, on the morning of the Closing, plaintiffs wrote to Mr. Khan to inquire about the heating bills. Allegedly, in Mr. Khan's response email dated March 1, 2011 (Mr. Khan Email), Mr. Khan personally and fraudulently misrepresented that everything is as per code and "there is no excessive air penetration from the exterior of the building." Plaintiffs allege that on that same day, Mr. Khan obtained a letter from Mechanical Services, Inc. (MSI), a mechanical contractor

(MSI Letter), stating the problem related specifically to defective valves in PTAC mechanical units, and all necessary repairs were made on February 16, 2011. Allegedly, One Astoria's sales agent also sent an email stating tenants' complaints regarding high heating bills were exaggerated because they were combining months.

Plaintiffs allege that it has been compelled to expend over \$5,000,000 for repairs so that the Property is habitable for its tenants, meets fire safety requirements and complies with the ADA and FHA regulations.

Discussion

"On a motion addressed to the sufficiency of a complaint the facts pleaded are presumed to be true and accorded every favorable inference. On the other hand, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Roberts v Pollack*, 92 AD2d 440, 444 (1st Dept 1983) (citations omitted). Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is warranted "where 'the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1(1st Dept 2004) (citation omitted).

Plaintiffs' first cause of action alleges a breach of the Agreement by One Astoria. To adequately allege the essential elements of a breach of contract claim, plaintiff's complaint must plead the existence of a contract between the parties; plaintiff's performance under the contract; defendant's breach of the contract; and plaintiff's resulting damages. *JPMorgan Chase v J.H. Elec. Of New York, Inc.*, 69 AD3d 802 (2d Dept 2010).

TIAA and TCAM's Breach of Contract Claim Against One Astoria

Defendants argue that the breach of contract claim fails based on the merger doctrine. Under the merger doctrine, closing of title will extinguish any claim of a breach of a contract for sale of real property, unless there was clear intent evidenced by the parties that a particular provision of the contract of sale would survive delivery of the deed. *Ka Foon Lo v Curis*, 29 AD3d 525, 526 (2006); *Crowley Marine Assocs. v Nyconn Assocs., L.P.*, 292 AD2d 334 (2002). Defendants argue that because plaintiffs' claims do not relate to representations that were designated to survive the closing, plaintiffs' claims should be dismissed. Plaintiffs argue that there is a "latent defect" exception to the merger doctrine that is applicable in this case. The merger doctrine "has no application where the purchaser discovers latent defects which are discoverable only after the purchaser occupies the premises." *Fehling v Wicks*, 179 Misc 2d 1041, 1042 (2d Dept 1999). A latent defect is defined "as one that is not discoverable by reasonable inspection." *Mandracchia v 901 Stewart Partners, LLC*, 2011 WL 2728422. Plaintiffs have alleged latent defects and facts sufficient to support that they conducted a reasonable inspection of the Property with respect to the latent defects. Consequently, the breach of contract claim does not fail under the merger doctrine.

Defendants next argue that plaintiffs' claims are untimely filed and must be dismissed. Defendants explain that, in the Agreement, although the parties agreed certain representations would survive delivery of the deed, they also explicitly limited that survival until December 1, 2011. "It is well settled that parties to a contract may agree to limit the period in which an action must be commenced to a shorter time than that otherwise provided by the applicable Statute of Limitations." *Krohn v Felix Indus., Inc.* 226 AD2d 506 (1996). Defendants assert that plaintiffs did not commence this action until August of 2012, which is more than eight months after the

expiration of the claims. Plaintiffs do not deny that the parties have the right to limit the period in which an action must be commenced to a shorter time period, but plaintiffs argue that equitable tolling should function to toll the commencement of such contractual statute of limitations where defendants have wrongfully deceived or misled the plaintiffs in order to conceal the existence of a cause of action. *Kotlyarsky v N.Y. Post*, 195 Misc 2d 150, 153 (Sup. Ct. Kings County 2003). Because plaintiffs have set forth numerous facts relating to defendants' concealment and deceit, the shortened statute of limitations is tolled.

Defendants also argue that the plaintiffs waived their breach of contract claim by their election to close. Defendants assert that prior to closing, when plaintiffs received the Tenant Letter that demonstrated the falsity of certain representations made by the defendants in the Agreement, the plaintiffs had two options: (1) terminate the contract, or (2) close and waive the inconsistency between the representations in the Agreement and the Tenant Letter. Defendants argue that because plaintiffs elected to close, plaintiffs may not withdraw their waiver. Plaintiffs assert that given the Tenant Letter received on the eve of the closing was the first indication of any issue with the air infiltration system, the as-built plans provided by One Astoria indicated a well-insulated structure and proper interior walls, Mr. Khan's misrepresentations on the morning of the closing that everything was per Code, the misrepresentations that the required repairs had been made, and One Astoria's claims that the tenants' complaints were exaggerated, plaintiffs had no reason not to close on the Property. Plaintiffs were justified in relying on these representations in going forward with the Closing the day after discovering the Tenant Letter. Their election to close did not constitute a waiver of its breach of contract claim.

Plaintiffs Adequately Pleaded Their Fraudulent Concealment Claim

Plaintiffs' second cause of action alleges fraudulent concealment against One Astoria, Mr. Khan, and Criterion. For concealment to be actionable as fraud, plaintiffs must demonstrate that "defendants 'thwarted' the plaintiffs' efforts to fulfill their responsibilities imposed by the doctrine of caveat emptor." *Camisa v Papaleo*, 93 AD3d 623, 624-25 (2d Dept 2012) (citing *Margolin v I M Kapco Inc.*, 89 AD3d 690, 691 (2d Dept 2011)). Active concealment has been defined as a suppression of facts that makes a representation "convey a misleading impression, or an attempt by one party to draw the other's attention from a fact or to cover it from view." *Haberman v Greenspan*, 82 Misc 2d 263, 265-66 (Sup. Ct. Richmond County 1975).

Plaintiffs allege that defendants actively concealed issues with the air infiltration system, which thwarted plaintiffs' efforts to uncover latent defects at the Property that were contrary to the filed as-built plans. Because this information was allegedly exclusively in defendants' knowledge, plaintiffs argue that they were justified in relying on defendants' representations. Plaintiffs allege additional facts demonstrating defendants' efforts to actively conceal material information related to the Agreement, which required defendants to provide plaintiffs with certification by the architects of the plans, certification of compliance with ADA and FHA requirements, copies of all leases and arrangements, and correspondences affecting such leases.

Plaintiffs set forth numerous examples of defendants' alleged effort to actively conceal the tenant campaign protesting the untenable living conditions resulting from the air infiltration issue, demanding concessions and threatening legal action. Plaintiffs assert that Criterion and Mr. Khan concealed their rent abatement agreements and other concessions, such as paying heating bills to compensate tenants. Prior to discovering these problems, plaintiffs sought contractual protection by requiring One Astoria to represent that: there were no actions, suits or

proceedings pending or threatened against it; it had received no notice of claims or offsets by any tenant; it received no notices of any circumstances that could constitute a default by it under any of the leases or entitle any tenant to a defense against payment of rent. Plaintiffs argue that One Astoria was required to turn over all documents relating to the leases under the Agreement. Plaintiffs allege that not a single letter or record of any tenant complaint was included in the files made available to plaintiffs because the defendant allegedly concealed all related records.

Plaintiffs allege that Criterion and Mr. Khan made numerous misrepresentations of fact which were false and known to be false when made, including Mr. Khan's email, the MSI letter regarding repair of PTAC units, and the email from One Astoria's sales agent stating tenant complaints were exaggerated. Because plaintiffs have set forth allegations of active concealment, defendants' motion to dismiss the second cause of action of fraudulent concealment is denied.

Plaintiffs Adequately Pleaded Their Fraudulent Misrepresentation and Fraud Claims

Plaintiffs' third cause of action alleges fraudulent misrepresentation against One Astoria, Mr. Khan, and Criterion. To prove an action for fraudulent misrepresentation, plaintiffs must establish the following elements: (1) a misrepresentation or omission of a material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury. *Jablonski v Rapalje*, 14 AD3d 484 (2d Dept 2005). Here, points (1), (2) and (4) are clearly well plead. The court turns to point (3).

Plaintiffs' complaint must plead justifiable reliance. Plaintiff asserts that it adequately pleads justifiable reliance with respect to a fraudulent misrepresentation if it "has gone to the trouble to insist on a written representation that certain facts are true." *DDJ Mgt. LLC v Rhone*

Group, LLC, 15 NY3d 147, 154 (2010) (DDJ). It argues that when a plaintiff does so, the plaintiff is not required to make additional inquiry to establish justifiable reliance. *DDJ*. It argues that as a general rule, the issue of reasonable reliance should be decided by the trier of fact, not decided as a matter of law. *Swersky v Dryer & Traub*, 219 AD2d 321, 328 (1st Dept 1996). As such, it contends, reliance is rarely a suitable matter for a motion to dismiss.

Defendants contend that plaintiffs' fraud claims fail because there was no reasonable reliance, as a matter of law. Defendants assert that a sophisticated party who does nothing before signing the contract cannot subsequently claim fraud. "If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing ... the truth or real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." *Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 278-79 (2011) (quoting *DDJ*). "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing files of the other parties." *UST Private Equity Investors Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001). Defendants argue that plaintiffs' reliance was unreasonable as a matter of law because the plaintiffs had the right to conduct destructive testing to the Property, but did not do so. Defendants contend that the Agreement gave plaintiffs unlimited access to the property, and a more than adequate opportunity to investigate and discover the numerous issues. Thus, defendants assert that they are not liable because the Agreement gave plaintiffs unlimited access, and plaintiffs failed to exercise those rights.

Plaintiffs allege that, as developer for the construction of the Property, Criterion was well aware the Property was not built in accordance with the as-built plans and of the major Code violations. Plaintiffs allege that defendants made misrepresentations for the purpose of inducing plaintiffs to rely upon them and to proceed with the Closing without further investigation, to the plaintiffs' detriment. Although plaintiffs did not conduct destructive testing, they hired LRA to perform a Property Condition and Engineering Assessment of the Property, and obtained representations from defendants that everything was per Code and that the tenants' complaints were exaggerated. Plaintiffs state that when they learned of a potential insulation problem through a tenant prior to the closing, defendants allegedly concealed the problem by making a series of knowingly false statements to plaintiffs.

There are allegations in the complaint which reflect knowledge of facts peculiarly in the possession of defendants at the time of the transaction. Because there is an issue of fact as to whether plaintiffs' due diligence efforts were sufficient, and an issue as to whether plaintiffs' reliance was reasonable, defendants' motion to dismiss the third and fourth causes of action is denied.

The Fraud Causes of Actions Are Not Duplicative of the Breach of Contract Action

Defendants argue that the fraud causes of action fail because they are duplicative of the breach of contract action. "Merely alleging scienter in a cause of action to recover damages for breach of contract, unless the representations alleged to be false are collateral or extraneous to the terms of the agreement, does not convert a breach of contract cause of action into one sounding in fraud." *Ka Foon Lo*, 29 AD3d, 526.

Plaintiffs contend that the allegedly fraudulent misrepresentation by Mr. Khan, claiming that everything was per Code and there was no exterior air infiltration, was made in an

extraneous email. The misrepresentation that excessive heating bills resulted from a problem with the defective valves in already repaired PTAC units was made in a MSI letter forwarded by Mr. Khan. The letter from MSI was sent to Mr. Khan at his request, so that he could then forward it to the plaintiffs. One Astoria's agent also emailed the claim that the tenant complaints regarding high heating bills were exaggerated.

Plaintiffs assert that defendants' argument overlooks the fact that, although aspects of intentional fraud may be "parallel in many aspects to [a] breach of contract claim," where claims of fraudulent misrepresentation and/or concealment were made by defendants to induce plaintiffs into entering a contract and closing on real property, they are not "merely redundant" or duplicative of a breach of contract claim. *Gizzi v Hall*, 300 AD2d 879, 880 (3d Dept 2002).

Plaintiffs have alleged that defendants made false representations extraneous to the Agreement. Plaintiffs' fraud claims are not duplicative of their breach of contract claims. Defendants' motion to dismiss the second, third, and fourth causes of action of fraud is denied.

Escrow Agreements

Defendants argue that the claims regarding construction defects and the alleged ADA/FHA noncompliance are barred by payment, accord and satisfaction, and the terms of certain Air Infiltration Escrow Agreement. The Air Infiltration Escrow Agreement provided for holding funds in escrow after the closing to pay for work necessary with respect to air infiltration into the Property.

Where the parties agree to a payment of a sum certain in satisfaction of a particular claim, and the payment is made and accepted, future assertion of the underlying claim is barred by the doctrine of accord and satisfaction. *Rein v. Wagner*, 49 Misc 2d 683 (Sup. Ct. 1965) *modified*, 25 AD2d 356 (1966) *affd*, 18 N.Y.2d 989 (1966). Defendants argue that the terms of

the Air Infiltration Escrow Agreement demonstrate that plaintiffs were aware of, and fully compensated for, air infiltration problems.

Plaintiffs argue that the doctrine of accord and satisfaction does not apply because, as a result of defendants' fraudulent conduct, plaintiffs agreed to the Air Infiltration Escrow Agreement based on an entirely different understanding of the nature and extent of the air infiltration issue. "The payment of an admitted liability is not a payment of or a consideration for an alleged accord and satisfaction of another and independent alleged liability." *Hudson v Yonkers Fruit Co.*, 258 NY 168, 173 (1932).

Plaintiffs allege that given the as-built plans, which indicated a well-insulated building, and defendants' representation that the high heating bills related solely to the window/door assembly at the balcony or the need for further repair of the PTAC mechanical units, the defendants' fraudulent conduct prevented plaintiffs from having any indication as to the pervasiveness and severity of the air infiltration issue. Plaintiffs further allege that Mr. Khan and MSI led it to believe that MSI had repaired those PTAC units that originally malfunctioned. Plaintiffs argue that due to defendants' concealment of records, it was not until plaintiffs closed on the Property that a series of more elaborate tenant complaints came to the direct attention of plaintiffs.

After closing, plaintiffs engaged the services of Bone-Levine Architects to assist in an evaluation of deficiencies and implementation of a limited scope of repairs surrounding the PTAC units and the balcony door, and to conduct destructive testing, which revealed the extent of building-wide latent defects. Plaintiffs argue that the Air Infiltration Escrow Agreement was not intended to deal with air infiltration issues stemming from latent deficiencies of the scope and magnitude as discovered at the Property. Plaintiffs argue that they were completely unaware

of the pervasiveness and severity of the latent building deficiencies causing the air infiltration issue, and allege that defendants had knowledge as to the true nature of the defects through their management of the Property and their receipt of complaints from tenants.

Because plaintiffs have alleged facts that demonstrate they did not intend for the escrow account to cover the severe building defects which were discovered by destructive testing, as they did not have knowledge of the extent of the problem due to defendants' fraud, defendants' argument with respect to accord and satisfaction and the Air Infiltration Escrow Agreement is of no avail.

Corporate Veil Claim

Plaintiff's eighth cause of action, based on piercing the corporate veil, is against Mr. Khan and Criterion. The corporate veil of a business entity may be pierced where plaintiffs sufficiently state "that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Shisgal v Brown*, 21 AD3d 845, 848 (1st Dept 2005) (citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 (1993) (citations omitted).

Plaintiffs sufficiently allege both prongs to pierce One Astoria's corporate veil by setting forth facts showing that virtually all of the "indicia of a situation warranting veil-piercing" were present. They include inadequate capitalization due to the transfer of the sale proceeds back to Criterion or Mr. Khan; overlap in ownership, officers, and directors; common office space and address of corporate entities; and the limited amount of business discretion displayed by One Astoria. *Shisgal*, 21 AD3d at 848 (citing *Passalacqua Bldrs. v Resnick Devs. S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991)) (listing the factors). Allegedly, Mr. Khan and Criterion so dominated

One Astoria that One Astoria was their alter ego, and they allegedly have abused the privilege of doing business in the LLC form.

As for the second prong, plaintiffs plead that by acting through One Astoria, Mr. Khan and Criterion committed a fraud against plaintiffs, leading to injury in excess of \$4,000,000. Plaintiffs were allegedly defrauded by Mr. Khan's and Criterion's active concealment and fraudulent misrepresentation of the condition of the property, actions through One Astoria, and limitation of One Astoria's available funds for contingent liabilities in transferring the proceeds of the sale to Mr. Khan and Criterion. The court in *Grammas v Lockwood Associates* held that plaintiffs had adequately plead the defendant engaged in acts amounting to an abuse of the LLC form to perpetrate a wrong against plaintiffs where defendant dissolved a single purpose entity after the sale and "failed to reserve funds for the purposes of contingent liability." 95 AD3d 1073, 1075 (2d Dept 2012).

Defendants argue that the cause of action for piercing the corporate veil should be dismissed as the plaintiffs' fraud claims are duplicative of the breach of contract claims. As discussed above, they are not.

Plaintiffs have stated a claim for piercing One Astoria's corporate veil. The motion to dismiss the eighth cause of action is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiffs' complaint is denied.

Dated: April 22, 2013

ENTER:

J.S.C.

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MELVIN L. SCHWEITZER