

Argyrides v River Terrace Apts. LLC

2014 NY Slip Op 30182(U)

January 17, 2014

Sup Ct, New York County

Docket Number: 150984/2013

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

SALIANN SCARPULLA

PRESENT: _____
Justice

PART 19

Anthony Argyrides

INDEX NO. 150984/13

River Terrace Apts. LLC

MOTION DATE _____

MOTION SEQ. NO. 2

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

decided per the memorandum decision dated 1/17/14
which disposes of motion sequence(s) no. 002, 003 + 005.

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

Dated: 1/17/14

SS _____, J.S.C.

SALIANN SCARPULLA

- 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 : IAS PART 19

-----X
Anthony Argyrides and Antonia
Rigopoulos,

Plaintiffs,

Index
Number:

-against-

150984/2013

River Terrace Apartments LLC,
Douglas Elliman, Gibbons &
Ives, Inc., The Board of
Managers of the 515 East 72nd
Street Condominium, f/k/a
"Miraval Living", The
Marketing Directors, Inc.,
and Carolyn Sebba

Defendants.

-----X
Saliann Scarpulla, J.:

Defendant The Board of Managers of the 515 East 72nd Street
Condominium f/k/a "Miraval Living" (the Board) moves, pursuant to
CPLR 3211 (a) (7), to dismiss the complaint as against it (motion
sequence #002). Defendant River Terrace Apartments LLC (River
Terrace) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss
the complaint (motion sequence #003). Defendants The Marketing
Directors, Inc. (Marketing Directors) and Carolyn Sebba (Sebba),
(together, the Selling Agents) move, pursuant to CPLR 3211 (a)
(1) and (7), to dismiss the complaint (motion sequence #005).
Plaintiffs and Douglas Elliman, Gibbon & Ives, Inc. (Douglas
Elliman) entered into a stipulation dated June 7, 2013 (the

Stipulation). Pursuant to the Stipulation, plaintiffs discontinued their action against Douglas Elliman, resolving Douglas Elliman's motions (motion sequence #001 and 004) and directing the Clerk of the Court to amend the records accordingly. The Board's motion (motion sequence #002), River Terrace's motion (motion sequence #003) and the Selling Agents' motion (motion sequence #005) are consolidated for disposition and decided as noted below.

Parties and Their Allegations

River Terrace was the sponsor of the condominium conversion (the Conversion) of a building (the Building) located at 515 East 72nd Street, New York, New York (amended complaint, ¶¶ 4, 8). For the Conversion, River Terrace filed an offering plan (the Offering Plan) with the office of the New York Attorney General for conversion of the Building, an existing 41-story residential building, into a condominium (the Condominium) with luxury residential condominium units (*id.*, ¶¶ 9-10).

Marketing Directors was the selling agent for River Terrace and Sebba was an employee of the Marketing Directors (*id.*, ¶¶ 81-82). Under the By-Laws of the Condominium, the Board initially consisted of individuals appointed by River Terrace and the Board had the authority to make determinations as to maintenance, repair, improvements and decorations to the common areas (*id.*, ¶¶ 67, 71).

Although in the amended complaint plaintiffs allege that as of August 23, 2012, no meeting of the Board had been held, the Board's motion annexes as Exhibit B a copy of the minutes of the a Board meeting dated July 24, 2012, reflecting an election of new members of the Board and plaintiffs' opposition papers recognize that this meeting was held (Anthony Argyrides affidavit [plaintiff], ¶ 27).

Plaintiffs allege that in May-June 2007, after seeing advertising with a Miraval logo, they went to the Building, met Sebba and looked at a model unit (amended complaint, ¶¶ 15-17). They state that they were given a promotional booklet (the Booklet) that represented that the Condominium would be a high-end, luxurious residence with access to spa-like services including yoga, a personal valet, cooking classes, an indoor pool and garden, all at world-class levels (*id.*, ¶¶ 40-43).

On or about July 15, 2007, plaintiffs entered into a purchase agreement (the Contract) to purchase unit 26G (the Unit) of the Condominium for \$1,680,000 (*id.*, ¶ 28). Plaintiffs were given the Offering Plan (*id.*, ¶ 31) and on January 29, 2008, the closing on the Unit took place (plaintiff affidavit, ¶ 18).

Plaintiffs assert that the common areas were not kept up in an adequate manner, the health club was not properly maintained, that there was dust and debris due to ongoing construction in the Building as part of the Conversion and that the spa-related

facilities, valets, yoga classes and other high-end luxury facilities were not provided (amended complaint, ¶¶ 43, 54; plaintiff affidavit, ¶ 22). They also contend that the front door of the Unit, the pipes, shower door and flooring in the Unit were defective and had to be repaired (amended complaint, ¶¶ 60-62). On January 31, 2013, they commenced this action by filing a summons and complaint.

Defendants note that under the Contract, plaintiffs purchased the Unit on an "as-is" basis and with provisions barring consideration of oral representations, consideration of selling materials such as the Booklet or any representations except for those in the Contract or the Offering Plan. They contend that, since plaintiffs have not identified any breaches of the Contract or any representations of fact made in the contract or Offering Plan, plaintiffs could not reasonably rely on the Booklet. They also assert that the Board owed no fiduciary duty to plaintiffs and that plaintiffs have not shown the specificity required for causes of action of fraud and breach of fiduciary duty. Consequently, defendants seek dismissal of the complaint.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and

determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also "[w]hether 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]).

Contract Interpretation

Where a contract's provisions are clear and unambiguous, they "must be given their plain and ordinary meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]; *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]; *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006]). While ambiguities are construed against the drafter, the court should not disregard the plain meaning to create an ambiguity, since

this improperly rewrites the parties' agreement (*Broad St.*, 37 AD3d at 131; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2d Dept 2007]).

However, "[i]n determining the meaning of an indefinite or ambiguous term in a contract, the construction placed upon the term by the parties themselves as established by their conduct may be examined to determine the term's true meaning" (*Harza Northeast v Lehrer McGovern Bovis*, 255 AD2d 935, 936 [4th Dept 1998]; *Surlak v Surlak*, 95 AD2d 371, 375 [2d Dept 1983], *appeal dismissed* 61 NY2d 906 [1984]).

"[T]he rule of construction [is] that ambiguities in contracts must be construed against the drafter" (*Guardian Life Ins. Co. of Am. v Schaefer*, 70 NY2d 888, 890 [1987]; *Shadlich v Rongrant Assoc., LLC*, 66 AD3d 759, 760 [2d Dept 2009]; *Lerer v City of New York*, 301 AD2d 577, 578 [2d Dept 2003]).

Fraud and Fraudulent Inducement

"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" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). "[A] cause of action for fraud will not arise when the only fraud charged relates to a breach of contract" (*Sound Communications, Inc. v Rack & Roll, Inc.*, 88

AD3d 523, 524 [1st Dept. 2011], quoting *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). "General allegations that a party entered into a contract with the intention not to perform it are insufficient to support a claim for fraud" (*Town House Stock LLC v Coby Hous. Corp.*, 36 AD3d 509, 509 [1st Dept 2007]; see also *International Fin. Corp. v Carrera Holdings Inc.*, 82 AD3d 641, 641-642 [1st Dept 2011]).

Also, "[w]hile a general merger clause is ineffective to exclude parol evidence of fraud, a specific disclaimer will defeat any allegation that a contract was executed in reliance upon contrary oral representations" (*Yellow Book Sales & Distrib. Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d 663, 664 [2d Dept 2012]; see also *Natoli v NYC Partnership Hous. Dev. Fund Co., Inc.*, 103 AD3d 611, 612-613 [2d Dept 2013]; *Mountain Cr. Acquisition LLC v Intrawest U.S. Holdings, Inc.*, 96 AD3d 633, 634 [1st Dept 2012]). Similarly, an "'as is' clause and related disclaimer provisions in [a contract are sufficient to defeat contractual and fraud claims]" (*Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 [1st Dept 2010]; see also *B&C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 655 [1st Dept 2013]).

Breach of Fiduciary Duty

"[T]he elements of a cause of action . . . for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused

by the defendant's misconduct'" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011] [internal citation omitted]). Generally, "a corporation does not owe fiduciary duties to its members or shareholders" (*Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012] [internal quotation and citation omitted]; see also *Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]). However, there is "a cognizable claim for breach of fiduciary duties by a sponsor-appointed, first board of managers of a condominium development" (*Board of Mgrs. of Whispering Pines at Colonial Woods Condominium II v Whispering Pines Assoc.*, 204 AD2d 376, 377 [2d Dept 1994]; *Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 327 [2d Dept 1993]). Finally, a requirement is "that the defendant knowingly induced or participated in the breach . . . [and] a plaintiff may not merely rely on conclusory and sparse allegations" (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007]).

CPLR 3016 (b)'s Required Particularity

CPLR 3016 (b) provides as follows:

"Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

"The purpose of [this statute's] pleading requirement is to inform a defendant with respect to the incidents complained of

... [and it] should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances'" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008], quoting *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). "[T]here is certainly no requirement of 'unassailable proof' at the pleading stage, [but] the complaint must 'allege the basic facts to establish the elements of a cause of action' ... [and therefore] CPLR 3016 [b] is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct" (*Eurycleia Partners*, 12 NY3d at 559, quoting *Pludeman*, 10 NY3d at 492).

However, "[b]are allegations" are insufficient (*Gervasio v Di Napoli*, 126 AD2d 514, 514 [2d Dept 1987]; *Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1189 [2d Dept 2012]). Also, "allegations [that] are wholly speculative" lack the required particularity under CPLR 3016 (b) (*Katz 737 Corp. v Cohen*, 104 AD3d 144, 154 [1st Dept 2012], *lv denied* 21 NY3d 864 [2013]). "A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 [b]" (*Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684 [2d Dept 2011]; quoting *Palmetto Partners, L.P.*, 83 AD3d at 808; see also *Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011]).

Standing

The owner of a condominium unit "lacks standing to sue individually for injury to the common elements or finances [of the condominium]" (*Davis v Prestige Mgt. Inc.*, 98 AD3d 909, 910 [1st Dept 2012]; *Leonard v Gateway II, LLC*, 68 AD3d 408, 410 [1st Dept 2009]).

Contractual Provisions

The Contract contains the following provisions:

Clause 21 (the As-Is Clause)

"ACCEPTANCE OF CONDITION OF PROPERTY. The signing of this Agreement by Purchaser signifies Purchaser's acceptance of the condition of the Property [as represented by Sponsor in the Plan] including the Building, the public areas, the Unit and all fixtures, machinery, equipment, furnishings, appliances, installations and other personal property contained [herein collectively called 'Installations'], in their respective existing conditions. . . . Purchaser acknowledges having read the Description of Property, which sets forth a description of the physical condition of the Building set forth in Part II of the Plan. Purchaser acknowledges having inspected the Unit prior to signing this Agreement. Purchaser understands that neither the Condominium nor the Sponsor have any obligation to make any repairs, improvements or decorations in or to the Property, the Building or the Unit, except as may otherwise be set forth in the Plan. . . . The provisions of this paragraph shall survive Closing. [capitals in original]"

Clause 23 (The Merger Clause) provides as follows:

"NO REPRESENTATIONS. Purchaser acknowledges that the Purchaser has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations,

warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Sponsor, Selling Agent or otherwise, including but not limited to, any related to the description or physical condition of the Property, the Building or the Unit, or the size or the dimensions of the Unit . . . [or] the services to be provided to the Unit Owners . . . except as herein or in the Plan specifically represented, Purchaser having relied solely on his own judgment and investigation in deciding to enter into this Agreement and purchase the Unit. No person has been authorized to make any representations on behalf of Sponsor except as herein or in the Plan specifically set forth. No oral representations or statements shall be considered a part of this Agreement. Sponsor makes no representations or warranty as to the work, materials, appliances, equipment or fixtures in the Unit other than as set forth herein or in the Plan."

The Special Risks Section of the Contract (LifeStyle Unit Clause) contains the following provision:

"48. The LifeStyle Unit will be operated by Miraval Management New York I, LLC . . . as a [Miraval] spa."

Discussion

Plaintiffs' complaint has five causes of action: 1) Fraud against River Terrace; 2) Breach of Contract against River Terrace; 3) Breach of Warranty against River Terrace; 4) Breach of Fiduciary Duty against River Terrace and the Board; and 5) Fraud against the Selling Agents.

The Merger Clause specifically stated that plaintiffs were not relying upon "sales plans [or] selling brochures."

Plaintiffs therefore cannot claim reliance upon the Booklet, and to the extent that they do rely upon it, such reliance was not reasonable. The As-Is Clause specified that plaintiffs were accepting the Unit in its "existing conditions" as well as "the public areas [of the Building]." The LifeStyle Unit Clause provided that Miraval Management New York I LLC was responsible for the spa and its associated operations.

The Merger Clause and the As-Is Clause are the type of "specific disclaimer [clauses that] will defeat any allegation that a contract was executed in reliance upon contrary oral representations" (*Yellow Book*, 98 AD3d at 664; *Mountain Cr.*, 96 AD3d at 634).

Plaintiffs have also failed to set forth with CPLR 3016 (b)'s required particularity the facts sufficient to sustain a cause of action for fraud or breach of fiduciary duty (*Katz*, 104 AD3d at 154). The fraud cause of action also fails since "the only fraud charged relates to [an alleged] breach of [the Contract]" (*Sound Communications*, 88 AD3d at 524).

Similarly, the breach of contract and breach of warranty causes of action are barred the Merger and As-Is Clauses (*Chelsea 19 Condominium*, 73 AD3d at 581).

The breach of fiduciary duty cause of action against the Board is also dismissed because the Board lacks any duty to plaintiffs (*Stalker*, 93 AD3d at 552) as the Board was not "a

sponsor-appointed first board of managers" (*Whispering Pines*, 204 AD2d at 377). Also, plaintiffs' claim is barred because "individual unit owners lack standing to seek damages for injury to the [B]uilding's common elements" (*Chelsea 19 Condominium*, 73 AD3d at 581).

Accordingly, River Terrace's motion to dismiss the complaint is granted, the Selling Agents' motion to dismiss the complaint is granted and the Board's motion to dismiss the complaint as against it is granted.

It is, therefore,

ORDERED that defendant The Board of Managers of the 515 East 72nd Street Condominium's motion (motion sequence #002) to dismiss is granted and the complaint is dismissed as against it, together with costs and disbursements, as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant River Terrace Apartment LLC's motion (motion sequence #003) to dismiss is granted and the complaint is dismissed as against it, together with costs and disbursements, as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further


ORDERED that defendants The Marketing Directors, Inc. and Carolyn Sebba's motion (motion sequence #005) to dismiss is granted and the complaint is dismissed against said defendants,

together with costs and disbursements, as taxed by the Clerk,
upon submission of an appropriate bill of costs; and it is
further

ORDERED that the Clerk is directed to enter judgment
accordingly.

Dated: *January 17*, 2014

ENTER:



J.S.C.

SALIANN SCARPULLA