

Villamar v 13th & 14th St. Realty, LLC

2014 NY Slip Op 30652(U)

March 12, 2014

Sup Ct, New York County

Docket Number: 590144/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: How Joan A. Miller
Justice

PART 11

Index Number : 105759/2010
VILLAMAR, GIOVANNI
vs.
13TH
SEQUENCE NUMBER : 004
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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~~ and cross motion are decided in accordance with the annexed Memorandum Decision & Order.

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

RECEIVED
MAR 17 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED

MAR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 12, 2014

[Signature], 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: PART 11

-----X
GIOVANNI VILLAMAR and JULISSA CRUZ,

Plaintiffs,

Index No. 105759/10

-against-

13th and 14th STREET REALTY, LLC,

Defendant.

-----X
13th and 14th STREET REALTY, LLC,

Third-Party Plaintiff,

Index No. 590144/13

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP,
CRYSTAL CURTAIN WALL SYSTEM, CORP.,
CRYSTAL WINDOW AND DOOR SYSTEMS, LTD.,

DECISION AND ORDER

FILED

Third-Party Defendants.

MAR 18 2014

-----X

JOAN A. MADDEN, J:

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment against defendant as to liability on plaintiffs' claim for breach of contract. Defendant cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Overview

Plaintiffs, who purchased a newly constructed condominium apartment from the defendant sponsor, seek to rescind their purchase and/or recover damages for breach of contract, fraud, negligent misrepresentation and deceptive business practices based upon persistent water leaks into the apartment which have not been remedied, and which have led to extensive damage and the growth of mold within the apartment. The sponsor asserts third-party claims against the

general contractor and the company responsible for the windows and curtain wall system¹ as well as the window company's parent corporation.

Facts

Plaintiffs Giovanni Villamar and Julissa Cruz, who are husband and wife (Plaintiffs or Owners), are the owners of a condominium apartment, known as Unit 5N, located at 425 East 13th Street, New York, New York (the Apartment). Defendant 13th and 14th Street Realty, LLC (Sponsor), is the sponsor and developer of the premises. The building is known as the A Building Condominium (the Condominium). The Condominium contains 96 housing units, one resident manager unit, one commercial unit and 38 storage locker units.

Third-party defendant Hudson Meridian Construction Group, LLC (Hudson) was the general contractor for the construction of the Condominium. Third-party defendant Crystal Curtain Wall Systems, Corp. (Crystal Curtain) was the window manufacturer retained by Hudson in connection with the fabrication and installation of the window and curtain wall system of the Condominium. Third-party defendant Crystal Window and Door Systems, Ltd. (Crystal Window) is the parent corporation of Crystal Curtain.

In September 2006, Sponsor filed a condominium offering plan (the Offering Plan) for the Condominium and, during construction, began entering into purchase agreements with individuals seeking ownership of the individual housing units. The first closing took place on January 4, 2008.

On March 22, 2007, Plaintiffs entered into a unit purchase agreement (the Purchase

¹ A "curtain wall system" is an outer covering of a building in which the outer walls are nonstructural, but are designed to keep the weather out.

Agreement) with Sponsor to purchase Unit 5N for a price of \$790,000.00. Plaintiffs allege that they entered into the Purchase Agreement based upon the representations in the Offering Plan and, particularly, Sponsor's representations that the Apartment would be properly constructed and fully complete at the time they took possession and began their occupancy.

Plaintiffs closed on the purchase of the Apartment on May 1, 2008. Plaintiffs allege that within days of closing, the first leaks appeared and seemed to be the result of rain entering the Apartment through the balcony windows. The leaks resulted in damage to both the floor and the ceiling in the living room and the bedroom of the Apartment. On May 15, 2008, less than three weeks after the closing, Plaintiffs began corresponding with Sponsor and its employees about the leaks and water damage affecting the Unit. Plaintiffs allege that, notwithstanding Sponsor's acknowledgment of the problem, and some attempt at repair, the water leaks have continued and worsened.

Plaintiffs contend that the leaks are building-wide problems that are due to construction defects and a faulty curtain wall system. Plaintiffs assert that during the course of discovery in this action they learned that Sponsor was explicitly warned by Hudson as early as May 18, 2007, that the curtain wall system was "inherently defective," "would leak immediately" and that in Hudson's professional opinion, Sponsor should not proceed with the installation of the curtain wall system (Kaye aff, exhibit 17).

In addition, a letter from Gordon H. Smith, Corp. (GHS), Sponsor's curtain wall consultant, to Sponsor's principals, dated August 29, 2006 indicates that GHS warned Sponsor's principals regarding the curtain wall system. That letter states, in part, as follows:

"What we have not received is detailed responses addressing our

repeatedly stated concerns as to 'weathertight integrity' (water management) and condensation resistance. All we have received is verbal assurances that 'it has worked on other buildings . . . '

We will continue to work with you and your Architect on a 'best effort' basis but cannot be held responsible for the outcome. ***Let me be very clear, we have serious and significant concerns regarding the system's performance . . .*** We are only proceeding with out services to you with the understanding that you fully understand our concerns and agree to release our firm from any liability regarding the performance of the system" [emphasis added]

(Kaye aff, exhibit 15).

In another letter to one of Sponsor's principals, dated July 13, 2007, GHS listed the problems with Crystal Curtain's contract, concluding, in part, as follows:

"As the parameters for each of the above were provided by the Design Team it became apparent to [GHS] that the system proposed by Crystal would not meet the agreed upon parameters and absent a 'basic design change' could not be made to do so. . . .

Our comments are self explanatory and are offered to highlight our concerns ***even though we know that it is not Crystal's intention to address our concerns as relates to performance and that Ownership has acknowledged that this is to be the case and is relying on a to be negotiated warranty of satisfactory performance by Crystal***" [emphasis added]

(Kaye aff, exhibit 19).

Plaintiffs state that Sponsor also hired Israel Berger & Associates ("IBA"), an exterior wall and roofing consultant to determine the cause of the leaks. On January 26, 2009, Robert Pelham of IBA wrote to Hudson concerning the balconies of apartments 3N, 4N and 5N. He stated in his report that the balconies were "back pitched," allowing water to pool. In addition, the coatings on the balconies were blocking the weep system of the curtain wall and the terrace

doors. He also stated that the steel construction of the balcony, as opposed to poured concrete added to the problem. Pelham's report stated, in part, as follows:

“1. The balconies are back pitched into the building at the deck level approximately ½". The added coating/tiles pitches the deck away from the building.

2. The coatings need to be removed in all instances. In addition to blocking the weep system of the curtain wall it is also blocking the weep system of the terrace doors. . . .

5. The balcony panels are most likely going to need to be refabricated. The current design does not allow for water to escape from the balcony once the coating is removed. Water will essentially pool or pond on the balcony to a depth of about ½". . . .

The steel construction of the balcony instead of poured concrete does not establish provisions for maintaining the air/water seal of the building. The Ting Wall as currently installed does not make provisions to maintain the air and water seal at the balcony within the system. . . .”

(Kaye aff, exhibit 13).

Later on, in September 2010, Sponsor hired Gilsanz Murray Stefieck, LLP (GMS), an engineering firm, to investigate the leaks. The GMS report states that the leaks into Unit 5N (Plaintiff's Unit) are most likely caused by two conditions: First, the missing base flashing and flawed drainage system of the curtain wall at 6N could be the result of the water leak at the ceiling. Water entering the curtain wall system at the 6th floor level may drain back into the building at the interface of the curtain wall with the balcony. Second, the leak at the base of the curtain wall is most likely a result of the balcony at 5N pitching toward the building, causing water to pool on the balcony surface and the perimeter seal at the bottom of the curtain wall

(Kaye aff, exhibit 5 at 2).

Based upon the above reports plaintiffs allege that, prior to installation, Sponsor was

aware that the curtain wall system was faulty, that it nonetheless proceeded with construction, choosing to rely on an assignable warranty issued by Crystal Curtain, and that the cause of the leakage is a result of the construction of the balconies in conjunction with the drainage of the curtain wall system.

Plaintiffs commenced the within action in May 2010. Plaintiffs allege seven causes of action against Sponsor: rescission and/or termination of the agreement (first cause of action); declaratory judgment providing that the plaintiffs are entitled to rescind and terminate the Agreement (second cause of action); breach of contract (third cause of action); fraud and/or fraudulent concealment (fourth cause of action); negligent misrepresentation (fifth cause of action); breach of the implied covenant of good faith and fair dealing (sixth cause of action); and deceptive trade practices (seventh cause of action).

Related Actions

In April 2011, Sponsor commenced an action against Hudson, Crystal Curtain and Crystal Window, entitled *13TH and 14TH Street Realty LLC v Hudson Meridian Construction Group, LLC et al*, index No. 651062/11 (Sponsor's Action), alleging causes of action for negligence, negligent supervision, breach of contract, breach of warranty and breach of guaranty. In Sponsor's Action, Sponsor alleges that Hudson was responsible for hiring Crystal Curtain and for the day-to-day operations of the construction site, and that defects in design, materials and construction were the fault of those defendants. In July 2011, defendant Crystal Curtain filed for Chapter 7 bankruptcy and state court actions were stayed as to Crystal Curtain.

In October 2011, the Board of Managers of the Condominium (Board of Managers) and the owners of 50 separate Units in the Building, including Plaintiffs herein, commenced an action

against Sponsor, its principals, the architect of the building, Hudson, the managing agents, Crystal Curtain, Crystal Window and Tingwall, entitled *The Board of Managers of the A Building Condominium, et al., v 13TH & 14TH Street Realty, LLC, et al.*, index No. 100061/2011 (the Board of Managers Action). In that action, the plaintiffs allege that the design and construction of their individual units was not done in a skillful manner, that the workmanship and materials used in the construction does not meet the specific regulations of the New York City Building Code and that it does not conform to industry standard. In a detailed complaint, plaintiffs in the Board of Managers Action allege numerous instances of violations of the New York City Building Code, as well as construction defects and deviations from the Plans and Specifications filed with the New York City Department of Buildings. Plaintiffs in that action also allege certain improper actions of the principals and affiliates of the Sponsor and state multiple causes of action for breach of contract as well as causes of action for breach of warranty, breach of guaranty, negligence, professional malpractice, fraud, negligent misrepresentation, deceptive business practices pursuant to New York General Obligations Law, section 349 (a), fraud pursuant to United States Code, 15 USC § 1703 (a) (2), and conversion.

In June 2012, Hudson commenced a third-party action against a number of its subcontractors, entitled *Hudson Meridian Construction Group, LLC, et al., v Demar Plumbing Corp., et al.*, index No 590536/2012 (the Hudson Action), alleging that if the third-party defendant subcontractors had properly fulfilled their duties under their respective subcontracts, the damages claimed by the plaintiffs in the main action would not have occurred. In the Hudson Action, Hudson alleges causes of action for negligence, breach of contract, breach of implied warranties, common law and contractual indemnification, damages for failure to procure

insurance and contribution.

The Board of Managers Action and the Hudson Action were assigned to Part 12. By order dated December 9, 2011, Sponsor's Action, along with a number of other, related actions, were transferred to Part 12, for purposes of joint supervision of discovery. The within case was not transferred because discovery was complete and a note of issue was to be filed shortly.

Thereafter, by notice of motion dated August 29, 2012, Plaintiffs sought an order granting leave to amend the caption and parties in the Board of Managers Action by withdrawing their names as plaintiffs, without prejudice. Sponsor, as defendant in the Board of Managers Action moved to consolidate this action with those pending in Part 12. Upon oral argument, Plaintiffs agreed to withdraw from the Board of Managers Action with prejudice.

The court, by order of Justice Jaffe, denied the Sponsor's motion to consolidate on the ground that "the rights of Villamar plaintiffs to continue their action in Part 11 apace outweighs any benefit to sponsors and third-party defendants to avoid having to defend their positions in two venues" (order, Justice Jaffe, June 5, 2013, index No. 10006/11).

Plaintiffs' Motion

Plaintiffs move for partial summary judgment as to liability on their third cause of action for breach of contract on the grounds that Sponsor breached both the Offering Plan and the Purchase Agreement. The Offering Plan, sets forth the "Rights and Obligations of Sponsor." Among the obligations set forth therein, paragraph (e) provides as follows:

"Sponsor will perform such work and supply such materials, or will cause the same to be performed and supplied, as is necessary in order to complete the construction of the Building with a quality of construction comparable to the currently prevailing local standards and substantially in accordance with the Plans and

Specifications for the construction work filed with the Buildings Department and other appropriate governmental authorities”

(Kaye aff, exhibit 1, Offering Plan at 81).

In addition, the Sponsor is responsible to correct and repair any construction defects.

Paragraph (m) of the Offering Plan provides, in part as follows:

“Sponsor will correct, repair, or replace any and all defects relating to construction of the Building, Common Elements or the Residential Units or in the installation or operation of any appliances, fixtures, or equipment therein, or will cause the same to be corrected, repaired or replaced, but only if:

- (1) Such defects are due to substantially improper workmanship or construction practices or the use of materials that are substantially and materially at variance with the Plans and Specifications for the same; and
- (2) Sponsor is notified by the Condominium Board or the affected Residential Unit Owner, as the case may be, or the same in accordance with the following, which notice shall be by certified mail, return receipt requested:
 - (i) with respect to any latent defect (that is, a defect that is not visually ascertainable) in the construction of a Residential Unit, within six (6) months of the earlier to occur of the [sic] (a) the Closing of Title to the Residential Unit or (b) the commencement date of any agreement by which a Purchaser is permitted to occupy the Residential Unit prior to Closing;
 - (ii) with respect to any patent defect in the construction of a Residential Unit, within three (3) months of the earlier to occur of the [sic] (a) the closing of Title to the Residential Unit, provided such patent defect is not caused by the Residential Unit Owner or other occupant of the Residential Unit or (b) the commencement date of any agreement by which a Purchaser is permitted to occupy the Residential

Unit prior to Closing”

(Kaye aff, exhibit 1, Offering Plan at 84).

The Purchase Agreement incorporates by reference, the Offering Plan “as if set forth herein at length” (Kaye aff, exhibit 1, Purchase Agreement, § 11.2). Plaintiffs allege that Sponsor failed “to complete the construction of the Building with a quality of construction comparable to the currently prevailing local standards and substantially in accordance with the Plans and Specifications” as required by the Offering Plan at section (e) and further, that it failed to “correct, repair, or replace any and all defects relating to construction of the Building Common Elements or the Residential Units ” as required by the Offering Plan at section (m). Plaintiffs contend that “Implicit and inherent in Sponsor’s obligations is the obligation to complete each Unit in a manner so that it is watertight, weatherproof and fully habitable” (complaint, ¶ 41).

Sponsor claims that the documentary evidence supporting Plaintiffs’ claim that the Apartment is defective is hearsay and therefore insufficient to support a motion for summary judgment. It further claims that any complaints regarding leakage are due to the negligence of Crystal Curtain. Sponsor asserts that Crystal Curtain issued a warranty which directly covers the alleged defects claimed by Plaintiffs and the Offering Plan contains a warranty provision which requires Plaintiffs to seek repairs and damages solely from Crystal Curtain. Sponsor also asserts that, section (ee) of the Offering Plan requires Plaintiffs to bring their claims against Sponsor through the Board of Managers of the Condominium. Finally, Sponsor asserts that Plaintiffs may not seek rescission of their Purchase Agreement.

“To prevail on a summary judgment motion, the moving party must produce evidentiary

proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor” (*Kershaw v Hospital for Special Surgery*, __AD3d__, 978 NYS2d 13, 2013 NY Slip Op 08548, *5 [1st Dept 2013], citing *GTF Mktg., Inc. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*id.*, citing *Kosson v Algaze*, 84 NY2d 1019 [1995]).

Plaintiffs contend that, in Sponsor’s Action against Hudson, Crystal Curtain and Crystal Window, Sponsor has acknowledged, through its allegations in its complaint, that the Apartment is defective. In the Sponsor’s Action, Sponsor alleges that, “[d]uring the course of construction at the Subject Premises, in June 2007 and continuing thereafter, defects in the material and design were found along with faulty workmanship in connection with the overall construction at the Subject Premises, including among other things, the curtain wall system” (13TH and 14TH *Street Realty LLC v Hudson Meridian Construction Group, et al*, index No. 651062/11, complaint, ¶ 20). The Sponsor continues that: “[t]he faulty material, design and workmanship at the Subject Premises could have been prevented if, Defendant HUDSON adequately supervised, directed and controlled the overall means and methods of the construction performed at the Subject Premises, including among other things, the installation of the curtain wall system” (complaint, ¶ 21). Plaintiffs assert that Sponsor is bound by these allegations and may not now take an inconsistent position. Plaintiffs assert that inconsistent positions in legal proceedings runs afoul of the doctrine of judicial estoppel or the “doctrine of estoppel against inconsistent positions” (*Environmental Concern v Larchwood Constr. Corp.*, 101 AD2d 591, 593 [2d Dept 1984]).

“The doctrine of judicial estoppel ‘precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed’” (*Carr v Caputo*, __AD3d__, 979 NYS2d 1, 2013 NY Slip Op 08522, *5 [1st Dept 2013], quoting *Gale P. Elston P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005], quoting *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept 1995]). “[T]he doctrine ‘rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise’” (*Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 518 [1st Dept 2013], quoting *All Terrain Props. v Hoy*, 265 AD2d 87, 93 [1st Dept 2000]). However, the doctrine requires that the party has “secured a judgment” in his or her favor, and is inapplicable where, as here, there has been no judgment (see *Carr v Caputo*, 979 NYS2d 1).

Plaintiffs next argue that the documentary evidence, consisting of the numerous reports and emails, authored by Sponsor’s consultants as well as Hudson, and obtained by Plaintiffs through discovery, prove that the design and construction of the Apartment is defective. These reports also demonstrate that Sponsor was informed of the defects in design prior to and during construction, but that Sponsor proceeded anyway. After construction, despite being informed by its own consultants of the repairs that needed to be made, Sponsor failed to remedy these defects and, that accordingly, Sponsor has breached the Purchase Agreement. Sponsor asserts that these reports are inadmissible hearsay, and cannot support the motion for summary judgment. Plaintiffs respond that these reports are business records.

“Out-of-court statements offered for the truth of the matters they assert are hearsay and

‘may be received into evidence only if they fall within one of the recognized exceptions to the hearsay rule’” (*Nucci v Proper*, 95 NY2d 597, 602 [2001], quoting *People v Brensic*, 70 NY2d 9, 14 [1987]). The business writing exception to the hearsay rule, which is contained in CPLR 4518 (a), “allows a document to be used as proof of the ‘act, transaction, occurrence or event recorded in the document’” (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 31 Misc3d 21, 22 [App Term, 2d Dept 2011] [quoting CPLR 4518 (a)], *revd in part on other grounds*, __AD3d__, 977 NYS2d 292, 2013 NY Slip Op 08430 [2d Dept 2013]).

“The essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business as a business are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant’s obligation is to have them truthful and accurate for purposes of the conduct of the enterprise”

(*People v Kennedy*, 68 NY2d 569, 579 [1986]).

“To constitute a business record exception to the hearsay rule, the proponent of the record must first demonstrate that it was within the scope of the entrant’s business duty to record the act, transaction or occurrence sought to be admitted” (*Matter of Leon RR*, 48 NY2d 117, 122 [1979]). “A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker’s business practices and procedures” (*Unifund CCR Partners v Youngman*, 89 AD3d 1377, 1378 [4th Dept 2011] [internal quotation names and citation omitted]; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1330-1331 [4th Dept 2009]). Here, Plaintiffs have not supported the introduction of any of the reports with an affidavit from either the author or any other knowledgeable individual and, accordingly, the reports constitutes hearsay and may not be used to support Plaintiffs’ motion for summary judgment.

Nonetheless, in their verified complaint and in an affidavit by plaintiff Giovanni Villamar, plaintiffs have alleged that water has continuously leaked into the Apartment since July 2008. In addition, Plaintiffs submit various emails addressed to Sponsor complaining of the leaks. Plaintiff Giovanni Villamar also submits videos, supported by his affidavit, as to this allegation. Giovanni states that he took the videos in the Apartment in August 2008, April 2009, March 2010, and April 2011. In addition, plaintiffs have submitted the Offering Plan which provides that "Sponsor will perform such work and supply such materials, or will cause the same to be performed and supplied, as is necessary in order to complete the construction of the Building with a quality of construction comparable to the currently prevailing local standards" as well as the Purchase Agreement, which sets forth Sponsor's obligation to "correct, repair, or replace any and all defects relating to construction of the Building."

Plaintiffs' submissions are sufficient to support a motion for summary judgment as to the issue of breach of contract (*see e.g. Singh v Thomas*, 113 AD3d 748 [2d Dept 2014]; *see also Liberman v Cayre Synergy 73rd LLC*, 108 AD3d 426 [1st Dept 2013]).

Notably, Plaintiffs' allegations of water leakage of water into the Apartment are not factually contested by Sponsor other than by a general denial in its answer. That general denial is insufficient to raise an issue of fact as to that issue (*Marine Midland Bank, N.A. v Micheli Contr. Corp.*, 95 AD2d 946, 947 [3d Dept 1983]; *Di Sabato v Soffes*, 9 AD2d 297, 300 [1st Dept 1959]). An affidavit submitted by Robert Kaliner, one of Sponsor's principals, does not contest the issue of water leakage, but rather asserts that attempts were made to address the Unit Owner's concerns. Kaliner asserts that, after commencement of the Board of Managers Action in October 2011, the Board of Managers refused to allow further repairs (Carbone aff, exhibit D). The

Board of Managers Action was, however, commenced over three and one-half years after Plaintiffs' first complaint of water leakage, giving Sponsor more than sufficient time to fix the problem, as it was required to do.

Sponsor asserts, as a defense to the motion for summary judgment, that it is not responsible to make repairs to Plaintiffs' apartment, because the leaks are caused by a design defect in the curtain wall system for which Plaintiffs must seek recovery from Crystal Curtain and as Plaintiffs must proceed through the Board of Managers. These contentions, which are also the basis for Sponsor's cross motion for summary judgment dismissing the complaint, are discussed below.

Sponsor's Cross Motion

Sponsor cross-moves to dismiss the complaint on the grounds that: (1) the leaks into Plaintiffs' Apartment are caused by a defective curtain wall, and, pursuant to the Offering Plan, Plaintiffs must proceed against Crystal Curtain based upon their warranty; and (2) Plaintiffs must bring their action through the Board of Managers of the Condominium.

Paragraph (n) of the Offering Plan, relied upon by the Sponsor, provides in relevant part, as follows:

- (n) Sponsor will not be obligated to correct, and will not be liable to the Condominium Board or any Residential Unit Owner as a result of any defects in construction, or in the installation or operation of any mechanical equipment, appliances, other equipment, finishes, materials or fixtures (including appliances and bathroom fixtures):
 - (i) with respect to which assignable warranties or other undertakings (however denoted) from manufacturers, contractors, materials persons, or others which are assigned to the Condominium Board and/or

any Residential Unit Owner” [emphasis added]

(Kaye aff, exhibit 1, Offering Plan at 85).

Crystal Curtain provided an assignable warranty, dated July 2007, which is annexed to the Sponsor’s moving papers (Carbone Aff, exhibit B). In addition, Crystal Curtain’s parent company, Crystal Window, issued a guaranty of performance to Sponsor (Carbone aff, exhibit C).

Plaintiffs respond that the Purchase Agreement prevents Sponsor from escaping its obligation to make repairs. The Purchase Agreement provides, in relevant part, as follows:

“17. Construction.

- 17.1 The construction of the Building and the Unit, including the materials equipment and fixtures to be installed therein, shall be substantially in accordance with the Plan and the Plans and Specifications . . . **However, nothing herein contained shall excuse Sponsor from its obligations to correct any defects in construction in accordance with the conditions set forth in the Section of the Plan entitled “Rights and Obligations of Sponsor.**
- 17.2 **The construction of the Building and the Unit and the correction of any defects in the construction thereof to the extent required under the Plan are the sole responsibility of Sponsor”**
[emphasis added]

(Kaye aff, exhibit 1 Purchase Agreement at 11).

Sponsor may not disclaim liability based upon Crystal Curtain’s warranty. First, Plaintiffs’ claim for breach of contract is not based solely on the defects in the curtain wall system. It is based upon defects in connection with the Apartment’s overall design and

construction, including, but not limited to, the design of the curtain wall system and the balcony, as well as Sponsor's failure to deliver an apartment in accordance with prevailing local standards. Sponsor, who seeks to rely on a warranty provision in the Offering Plan, has the burden of proving the applicability of that provision (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Alvaraz v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Maric Mech., Inc. v Dormitory Auth. of State of N.Y.*, 62 AD3d 965 [2d Dept 2009]). Sponsor has not set forth any evidence to indicate that the leakage into Plaintiffs' apartment is caused solely by a defective curtain wall system. Sponsor's papers in support of its motion, contain no evidence that the water leakage was caused solely by a faulty curtain wall system, other than the affirmation of its attorney, which is of no probative value (*see Zuckerman v City of New York*, 49 NY2d at 563).

Further, Sponsor's assertion that Hudson also issued an assignable warranty is without merit. Hudson's warranty provides that "The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be of good quality . . . that the Work will be free from defects not inherent in the quality required or permitted, and that the work will conform to the requirements of the Contract Documents (Kaye aff, exhibit 3 at 17). Hudson's warranty does not provide that it is assignable, and Sponsor has presented no evidence that Hudson's warranty has been assigned to the Board of Managers.

Additionally, the limited warranty contained in the Purchase Agreement does not preclude Plaintiffs' assertion of their claim for breach of contract, where, as here, the Purchase Agreement specifically provides that "nothing herein contained shall excuse Sponsor from its obligations to correct any defects in construction in accordance with the conditions set forth in the Section of the Plan entitled 'Rights and Obligations of Sponsor'" (*see e.g. Tiffany at*

Westbury Condominium v Marelli Dev. Corp., 40 AD3d 1073, 1075-1076 [2d Dept 2007]).

“[A] contract should be ‘read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose’” (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007][citation omitted]). Here, Sponsor clearly undertook to be responsible for the sound completion of the building and to make repairs due to faulty construction. It should be held to its contract.

Sponsor’s next contention is that the Offering Plan obligates the Plaintiffs to proceed in an action commenced by the Board of Managers.

Section (ee) of the Offering Plan provides as follows:

“Obligations of Sponsor hereunder with respect to the Building shall be enforceable only by the Condominium Board on behalf of all Unit Owners. Obligations of Sponsor shall be enforceable by individual Unit Owners if either (i) the Condominium Board fails to take reasonable action to enforce such obligations within one hundred and twenty (120) days following the giving of notice of such claim by any Unit Owner to the Condominium Board or (ii) the applicable statute of limitations with respect to any claim by a Unit Owner which would otherwise be enforceable by the Condominium Board will expire during the aforesaid one hundred and twenty (120)-day period”

(Carbone aff, exhibit A, Offering Plan at 89).

Here, plaintiffs closed on their apartment in May 2008. Plaintiffs first contacted the Sponsor and its principals via email on May 15, 2008 (Complaint, ¶ 22 [internal exhibit 3]). At that time, Sponsor’s principals were also members of the Board. The Board of Managers did not commence its action until over three and one-half years later in November 2011. Plaintiffs therefore had the right to proceed in their capacity as individual unit owners.

Rescission

In their first cause of action for rescission/termination of the Purchase Agreement, Plaintiffs allege that Sponsor failed to deliver the Unit to Plaintiffs in complete and satisfactory condition in that the Unit is not watertight. Plaintiffs therefore seek judgment rescinding and terminating the Agreement. “In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; and inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof [citation omitted]” (*Babylon Assoc. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984]). “Generally, rescission is available where a party lacks a ‘complete and adequate remedy at law and where the *status quo* may be substantially restored” *Alper v Seavey*, 9 AD3d 263, 264 [1st Dept 2004], quoting *Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]).

Sponsor seeks summary judgment dismissing this claim on the ground that the Offering Plan only creates a right of rescission for residential unit owners under certain conditions, which do not exist in the case at bar. Sponsor cites section (gg) of the Offering Plan, which states, in part, that:

“In the event Sponsor is unable to perform its material obligations under the Plan, all sales will cease, Sponsor will promptly submit an amendment to the Plan setting forth its inability to perform such material obligations under the Plan. and will offer all Purchasers the right to rescind their Agreements within fifteen (15) days after the Presentation Date of the Amendment”

(Kaye aff, exhibit 1, Offering Plan at 89).

While the above provision provides for rescission under certain circumstances, it does not prohibit rescission if, for instance, the contract were to fail of its essential purpose (*cf.*, *MBIA Ins.*

Corp. v Countrywide Home Loans, Inc., 105 AD3d 412, 413 [1st Dept 2013]). Rescission is an equitable remedy and does not require that the contract specifically allow for the remedy.

Whether or not Plaintiffs are entitled to rescission of their Purchase Agreement is an issue of fact for trial.

Accordingly, based upon the foregoing it is

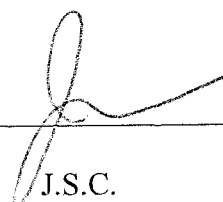
ORDERED, that the motion by plaintiffs Giovanni Villamar and Julissa Cruz for partial summary judgment on the issue of liability as to their third cause of action for breach of contract is granted; and it is further

ORDERED that the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that cross motion by defendant 13th and 14th Street Realty, LLC for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street, on April 3, 2014 at 9:30 am.

Dated: ~~March 12, 2014~~ *March 12, 2014*



J.S.C.

FILED

MAR 18 2014

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