

People v Schwartz

2014 NY Slip Op 30754(U)

March 25, 2014

Sup Ct, Kings County

Docket Number: 8415/2012

Judge: Ann T. Pfau

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Commercial 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of March, 2014

P R E S E N T:

HON. ANN T. PFAU,

Justice.

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PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General
of the State of New York,

Index No. 8415/2012

Petitioner,

- against -

DECISION, ORDER and
JUDGMENT

YITZCHOK SCHWARTZ and
MASPETH PLAZA, LLC,

Respondents.

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The following papers were read on motion sequence numbers 01 and 06:

All papers electronically filed with the New York State Courts E-Filing (NYSCEF) system in connection with this petition, including document numbers 1 - 30, and numbered 84 - 91.

The Office of the Attorney General of the State of New York (OAG) brought this special proceeding seeking a judgment enjoining the respondents from further engaging in the fraudulent, deceptive and unlawful practices described in the petition; directing respondents to pay to the condominium and/or individual unit owners a sum not less than \$1,217,650 as restitution and/or damages; permanently enjoining respondents from engaging in any direct or indirect business activity relating to the advertising, offer or sale

of securities in or from the State of New York as defined in General Business Law Article 23-A; awarding OAG \$85,000 pursuant to GBL 350-d and directing each respondent to pay OAG the sum of \$2,000 as costs pursuant to CPLR 8303(a)(6).

In September 2005 respondent Maspeth Plaza LLC (Sponsor) submitted an offering plan to OAG for the sale of 17 units in a newly-constructed condominium located at 57-59 Maspeth Avenue, Brooklyn, New York (condominium). Respondent Yitzchok Schwartz (Schwartz) is the sole principal of the Sponsor (Petition, § 6). The offering plan was accepted for filing by OAG in January 2006 and was thereafter amended four times, with the last amendment accepted in March 2008 (*id.*, §16). The offering plan stated, in part that “[t]he Sponsor will complete the work set forth in this plan relating to the building, and the apartments contained herein, all applicable zoning and building laws, including, but not limited to, the New York City Administrative Code and the Zoning Resolution of 1961 as amended, and subject to the procurement of all applicable and proper permits which are required, if any” (*id.*, §18). The offering plan further provided that (a) for one year the home must be free from defects caused by workmanship or materials that do not meet standards of the applicable building code; for the items not covered by code, the construction must be in accordance with locally accepted building practices; (b) for two years, the plumbing, electrical heating cooling and ventilation systems must be free from defects caused by unskilled installation; and (c) for six years the home must be free from physical defects in the structural elements (foundation, floors, walls, roof framing) which make it unsafe or unlivable (*id.*, §22).

OAG contends that the actual conditions in the condominium do not comply with the representations and promises set forth in the offering plan, and alleges that respondents were made aware of some of these defects as early as November 2006 and should have known about them during the time the sales took place (*id.*, §19). Accordingly, as set forth in the petition, respondents engaged in fraudulent business practices pursuant to Executive Law 63(12) in that while engaged in the offer and sale of units in the condominium respondents engaged in fraudulent activity, including employing a device, scheme or artifice to defraud, deception, misrepresentation, concealment, suppression, false pretense and/or false promise concerning the disclosure of physical defects affecting life safety, constituting repeated fraudulent acts and persistent fraudulent activity in the conduct of business in violation of Executive Law 63(12) (*id.*, §31, First Cause of Action). As a second cause of action, OAG alleges that while engaged in the sale of residential units in the premises, respondents engaged in fraudulent activity concerning the disclosures in the offering plan and the plan amendments while engaging in the sales of the condominium units, in violation of Article 23-A of the General Business Law (*id.*, §35, Second Cause of Action). OAG also claims that each of the purchases of the 17 condominium units was a consumer transaction, with respondents' conduct in connection with those sales false and misleading in that they misrepresented to each purchaser that they had constructed a building in accordance with the offering plan and building code and concealed serious construction defects and deficiencies from prospective purchases, with each sale a violation of General Business Law § 349.

After this matter was commenced, respondents sought leave to add third-party defendants. Leave was granted by decision and order of this court dated February 27, 2013. In that order, the instant petition was held in abeyance. OAG now moves for an order “releasing the petition from abeyance” and seeking the relief set forth in the petition (Notice of Motion to Release the Petition from Abeyance, and upon its Release, for an Order Granting Permanent Injunctive Relief and Civil Penalties, and Directing Restitution, or to the Extent that it Raises a Triable Issue of Fact, Severing Petitioner’s Cause of Action for Restitution; or Alternatively, for a Preliminary Injunction, dated October 1, 2013). In support of that motion OAG submits numerous affirmations supporting the merits of the petition that were not submitted with the original petition (Aff. of Serwat Farooq in Support of Motion). This motion for release from abeyance, which does not appear to have a basis in the CPLR, will be deemed a request to determine the petition on its merits. Affidavits newly presented in furtherance of this motion that were not proffered in support of OAG’s claims at the time of the filing of the petition are not properly before the court and will not be considered.

A special proceeding, including a proceeding brought pursuant to Executive Law 63(12) is the functional equivalent of a motion for summary judgment in an action, with the same procedural standards (*see* CPLR 409[b]; *National Enters, Inc. v Clermont Farm Corp.*, 46 AD3d 1180 [3rd Dept 2007]; *Friends World College v Nicklin*, 249 AD2d 393 [2nd Dept 1998]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68

NY2d 320, 324 [1986]). The petition must be supported by "evidentiary proof in admissible form" (*Friends of Animals v Associated Fur Mfgs.*, 46 NY2d 1055, 1067 [1979]). Conclusory assertions without factual proof are insufficient (*Matter of Sour Mtn. Realty v NYS Dept. Env. Cons.*, 260 AD2d 920 [3rd Dept 1999]). Moreover, CPLR 3212(b), which governs motions for summary judgment, provides that in considering such a motion if it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross motion (*see Wiseman v Knaus*, 24 AD2d 869 [2nd 1965]).

In support of the petition, OAG submits the affirmation of Jensen Ambachen, Esq., with exhibits annexed thereto and the affidavit of Samuel Eliacin. The Ambachen affirmation states that the respondents developed and sold 17 condominium units in the condominium "without disclosing serious construction defects and deficiencies to purchasers" (Ambachen Aff., §7). Ambachen further asserts that respondent Maspeth Plaza provided an offering plan to each prospective buyer that concealed the existence of serious physical construction defects and deficiencies in the premises, misrepresented the true physical conditions of the building and falsely promised a new condominium constructed in accordance with the offering plan and all applicable building codes (*id.*, §8). Ambachen also states that respondents repeatedly engaged in this fraudulent conduct for every one of the 17 units sold, causing purchasers to live in a building with structural defects, leaks and lack of fire proofing among other serious deficiencies (*id.*, §9). Ambachen concludes that the actual conditions in the condominium do not comply with the

representations and promises set forth in the offering plan, and asserts that “respondents were made aware...[of the defects] as early as November 2006 and/or should have been aware of them at the time the sales took place (*id.*, §18).

Support for these allegations is proffered in the form of a report by the engineering firm Howard L. Zimmerman and Associates, PC (Zimmerman Report), which was retained by the condominium owners in January 2011 (Ambachen Aff., Exh.F). Notwithstanding the fact that the report was generated significantly after the dates of the offering plan at issue, the Zimmerman Report does not constitute evidentiary proof in admissible form (*see Friends of Animals v Assoc. Fur Mfgs.*, *supra*). Such an unsworn report, without a supporting affidavit from the provider, is not admissible for summary judgment purposes (*see Rupp v City of Port Jervis*, 10 AD3d 391 [2nd Dept 2004]; *Washington v City of Yonkers*, 293 AD2d 741 [2nd Dept 2002]; *Ticor Title Guarantee Co v Bajraktari*, 261 AD2d 457 [1st Dept 1999]).

OAG also supports its petition with the affidavit of Samuel Eliacin. In his affirmation, Eliacin states that he has been a licensed professional engineer for 18 years, and that he is employed by OAG as a professional engineer (Eliacin Aff., §§1, 2). He inspected the premises of the condominium March 10, 2011, and asserts that he confirmed the presence of numerous construction defects and deficiencies, which are listed in his affidavit (*id.*, §§6, 7). Eliacin states that based on his professional opinion respondents “knew or should have known the defective conditions and deficiencies . . . were created at the time of the construction” (*id.*, §8).

In opposition to the petition, respondents submit the affirmation of their attorney, Evan Newman, Esq., and the affidavits of respondent Schwartz and Don Erwin, an architect. Erwin contests the reliability and veracity of the Zimmerman Report. In particular, he contends that the Zimmerman Report is not an expert report describing conditions in the building, but rather a "transition" report "which condominium boards generally obtain when assessing their potential liability for future maintenance repairs. The format of such reports is to list possible maintenance areas and its estimate, on a very conservative basis, of the expected maintenance and repair costs so that the board can reserve sufficient funds to ensure that it is able to pay for anticipated future expenses." (Erwin Aff., ¶ 13).

Schwartz contends that Eliacin, the OAG engineer, had inspected the building in 2009, and found none of the alleged "defects" he references in his recent affidavit (Schwartz Aff., ¶ 44). Schwartz further contends that the building was inspected by the New York City Department of Buildings (DOB) in 2006 for the purpose of determining if building codes were complied with in connection with the sponsor's application for a certificate of occupancy. The certificate of occupancy was granted, and no notice of building code violations was issued. Accordingly, respondents argue, OAG's present argument that, based upon the 2011 Zimmerman Report and Eliacin's 2011 inspection, respondents knew or should have known of conditions in violation of building codes in 2006 and 2008 must fail because both DOB and OAG inspectors found no such violations in the earlier inspections. Respondents reason that if in 2006 and 2008 the DOB and OAG inspectors could not identify the issues

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now raised in the Eliacin affidavit and Zimmerman Report, then OAG cannot establish that respondents “knew or should have known” of these conditions.

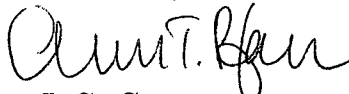
Conclusions and speculation, whether from counsel or an expert, are insufficient to support a motion for summary judgment (*Picerno v NYC Transit Auth.*, 4 AD3d 349 [2d Dept 2004]; *Daria v Beacon Capital Co., Inc.*, 299 AD2d 312 [2d Dept 2002]). Here, there are two sources in support for the OAG’s assertion that the respondents engaged in the complained-of activity. First are the statements by counsel that respondents knew in November 2006 and/or should have known about the defects at the time of the sale of the units. This assertion is made without personal knowledge, and is entirely speculative. The second source is the Eliacin affidavit, which states that Eliacin reviewed the Zimmerman Report and personally inspected the premises in March 2011, finding a variety of conditions that respondents should have known of. However, he does not refute that he inspected the premises closer in time to respondents’ alleged misconduct, in 2009, and he *did not* find these conditions, and he gives no explanation for how these conditions became apparent to him only in March 2011, but nevertheless should have been apparent to respondents in 2006 and 2008.

OAG's argument that respondents "knew or should have known" that the alleged defective conditions were created at the time of constructions, when its own inspector and DOB inspectors could not detect these conditions, is tantamount to bare conclusion and speculation. Such bare conclusions and speculation, without more, does not constitute evidence in admissible form to establish a prima facie entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp., supra*). Accordingly, it hereby is

ORDERED that OAG's motion to release the petition from abeyance (motion sequence 06) is granted to the extent that the petition hereby is decided on the merits; and it further is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

ENTER,


J. S. C.

HON. ANN T. PFAUL