

TZVIB LLC v Apthorp Assoc. LLP

2014 NY Slip Op 31049(U)

April 17, 2014

Supreme Court, New York County

Docket Number: 156739/13

Judge: Melvin L. Schweitzer

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Management of Apthorp LLC; Design Profile Inc. and Mike Farahani, the engineer and architect identified under the “Offering Plan,” described below; and Jacob Kanner, a licensed professional engineer who prepared and filed the relevant floor plans, described below (complaint, ¶¶ 3-12, 18).

On July 28, 2011, plaintiff TZVIB LLC purchased Unit 1G (Unit) in the Condominium for \$3,033,250, pursuant to the “Condominium Offering Plan,” dated June 17, 2008 (Offering Plan), filed with the New York State Attorney General. The Offering Plan and related documents contain certifications by defendants as to the completeness and accuracy of the information about the Condominium (*id.*, ¶¶ 13-30).

The Unit’s size and configuration substantially differ from that shown in the Offering Plan in that there exists a descending staircase from the apartment above, located in the middle of the Unit, which is not fairly and accurately shown on defendants’ drawings, specifications, and plans. The staircase cuts-off, limits, and interferes with plaintiff’s ability to make use of the Unit for its intended purpose as a medical office (*id.*, ¶¶ 31-36).

The complaint contains five causes of action. The first cause of action is based on the allegation that the Unit is substantially different from that represented by the Apthorp defendants in the Offering Plan and the transaction’s “Purchase Agreement.” Plaintiff seeks a declaration that the Apthorp defendants breached the Purchase Agreement (*id.*, ¶¶ 37-42).

The second cause of action is based on alleged express and implied warranties from the Apthorp defendants that the Unit would be designed, constructed, and subdivided in the manner, size, layout, and configuration called for in the Offering Plan and drawings and plans related thereto (*id.*, ¶¶ 43-46).

The third cause of action alleges that the Apthorp defendants, Design Profile Inc., and Farahani made false representations and omissions of material facts to plaintiff upon which plaintiff justifiably relied (*id.*, ¶¶ 47-55).

The fourth cause of action (denominated as the third) alleges that defendants' false statements and misrepresentations in the Offering Plan constitute deceptive acts and false advertising within the meaning of sections 349 and 350 of the General Business Law (*id.*, ¶¶ 56-59).

The fifth cause of action (denominated as the fourth) alleges that the floor plans prepared and certified by Kanner were negligently, defectively, and erroneously prepared (*id.*, ¶¶ 60-5).

For each cause of action, plaintiff seeks damages of at least \$750,000.

Arguments

1. Apthorp defendants.

Plaintiff purchased the Unit "as is," and has acknowledged as such in the Purchase Agreement, and accepted the Unit after inspection and with no representations from the Apthorp defendants. Plaintiff does not dispute that the floor plan of the Unit shows the staircase at issue, contending only that the staircase shown in the floor plan does not fairly and accurately represent the staircase that exists at the Unit.

The Offering Plan provides in at least five places that the units are being sold "as is," and stated that the units should be inspected prior to purchase to determine the actual dimensions, layout, and physical condition. Purchasers were advised that former or current occupants of the units may have made alterations to certain units, including the installation or relocation of interior walls. Plaintiff's authorized signatory signed an "as is" statement on plaintiff's behalf,

indicating plaintiff's acknowledgment that the Unit was being sold "as is," and serving as an admission that plaintiff, or plaintiff's representative, inspected the Unit, and accepted it in its then current condition.

2. Plaintiff.

Contrary to defendants' claim, this is not a case of buyer's remorse, but a case involving the submission of inconsistent and different floor plans, resulting in plaintiff's purchase of a unit which was not what it bargained for. Plaintiff believed it was purchasing valuable real estate contained within the four walls of a building, with full control over the stairs. Instead, plaintiff received only a portion of the space within such four walls, and without any control of the stairs.

The depiction of the Unit contained in the Offering Plan at the time of execution of the Purchase Agreement in 2010 was changed on July 14, 2011, just prior to plaintiff's July 28, 2011 purchase. The Offering Plan diagram shows a staircase in the Unit with an arrow, and with a down ("DN") reference fully suggesting plaintiff's ownership and control of such area. However, the drawing submitted to the New York City Department of Finance (referred to by plaintiff as the "2011 Diagram") omits the arrow and the DN abbreviation, and implies that plaintiff has no control or ownership of the stairs.

The City approved defendants' submission on July 25, 2011, just three days prior to closing. The public record proves defendants' fraud and attempt to conceal the change they made to the dimensions of the Unit. The deed to the Unit is dated July 28, 2011, and was signed by plaintiff on that date, but contains two references to the future recording of the amended Unit plan on August 1, 2011. Because defendants have submitted different plans and drawings of the Unit, the claim for fraud and negligence is validly stated. The Apthorp defendants either changed

the layout of the Unit between contract and closing, or misrepresented the layout and configuration of the Unit.

Based on the “legend” definition of “unit” on the 2011 Diagram, plaintiff should have received the entire area between the Unit’s four walls. There is no area within the Unit identified as a “vault,” “general common element,” or “residential common element.” While an area depicting stairs is shown in the center of the Unit, there is no indication that such stairs do not belong to the Unit. However, plaintiff has no right or ability to remove such stairs. Thus, while the plans and diagrams show such area of stairs as being part of the Unit, in reality, such area does not presently belong to plaintiff.

Discussion

The Apthorp defendants have demonstrated entitlement to dismissal of the complaint as against them. None of the five causes of action are viable, notwithstanding that this is a pre-answer motion to dismiss and that, as a general matter, the “complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true” (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). However, as is the case here, the court is “not required to accept factual allegations that are contradicted by documentary evidence, or legal conclusions that are unsupportable in the face of undisputed facts” (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]).

The first cause of action seeks a declaration that the Apthorp defendants breached the Purchase Agreement, because the floor plan in the Offering Plan and in the 2011 Diagram are not the same concerning the staircase depictions within the Unit. Hence, plaintiff argues, the

inconsistent and different floor plans demonstrate that the Unit that plaintiff purchased was not what it bargained for.

This assertion is unpersuasive. Plaintiff alleges that it purchased the Unit in accordance with the Offering Plan, not the filing with the Department of Finance. Therefore, that the 2011 Diagram differs from that contained in the Offering Plan and omits the arrow, and may imply that plaintiff has no control or ownership of the stairs, has no bearing on the breach of contract cause of action.

According to plaintiff, the Offering Plan diagram contains a depiction of what appears to represent a staircase in the Unit with an arrow, and with the abbreviation “DN,” meaning “down,” and suggests plaintiff’s ownership and control of such area. Plaintiff has cited no other evidence to indicate that ownership of the staircase was to be included as part of the Unit. Evidence in the record does support the allegation that the staircase was included in the purchase. Hence, documentary evidence defeats plaintiff’s claim of breach of contract (*Rivietz v Wolohojian*, 38 AD3d 301, 301 [1st Dept 2007]).

The fact that it may have suggested to plaintiff that ownership of the stairs was included imposed upon plaintiff a duty to inquire further in that it was an “as is” purchase. As asserted by the Apthorp defendants without being controverted, the Offering Plan and Purchase Agreement in numerous places provide that the Unit was being sold “as is.” As such, the breach of contract claim is not viable (*see Board of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 [1st Dept 2010] [“contract claims, which are based on the architect’s description of the building’s condition included in the offering plan and incorporated in the purchase

agreements, are flatly contradicted by the ‘as is’ clause and related disclaimer provisions in those documents”]; *see also Rivietz v Wolohojian*, 38 AD3d at 301).

The second cause of action is based on alleged express and implied warranties from the Apthorp defendants that the Unit would be designed, constructed, and subdivided in the manner, size, layout, and configuration called for in the Offering Plan and drawings and plans related thereto. As discussed above, the Offering Plan does not provide that plaintiff was to obtain control or ownership of the staircase. Therefore, the “as is” disclaimer defeats the breach of warranty claim (*Meyer v Alex Lyon & Son Sales Mgrs. & Auctioneers, Inc.*, 67 AD3d 547, 548 [1st Dept 2009] [breach of warranty claim dismissed where allegedly defective equipment was purchased on an “as is” basis injured plaintiff]).

The third cause of action alleges that the Apthorp defendants, Design Profile Inc., and Farahani made false representations and omissions of material facts to plaintiff upon which it justifiably relied.

“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]). As against the moving Apthorp defendants, the complaint, together with plaintiff’s additional submissions, do not satisfy these requirements. “[C]ommon-law fraud may not be asserted against a condominium sponsor based on omissions from the offering plan” (*Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d at 582; *see also Rivietz v Wolohojian*, 38 AD3d at 301 [fraud claim fails because the “plaintiffs were given the opportunity

to inspect and were provided with a detailed report by architect, and there were no allegations or evidence that the defendant made any material, false representations or acts of concealment”)).

Plaintiff argues that, because defendants submitted different plans and drawings of the Unit, the claim for fraud and negligence is validly stated.¹ However, as discussed above, it is the drawing in the Offering Plan that plaintiff alleges to have relied upon in making the purchase, not the drawing in the filing to the Department of Finance. Hence, the alleged discrepancy in the two drawings is inconsequential for purposes of the fraud cause of action. Plaintiff could not have reasonably relied upon the drawing in the Offering Plan to assume that it was given ownership of the stairs based upon the arrow and the “DN” abbreviation. Instead, plaintiff should have taken the opportunity to inspect the Unit prior to purchase to determine what was included in the sale (*see Estrada v Metropolitan Prop. Group, Inc.*, 110 AD3d 497, 497 [1st Dept 2013]).

In *Estrada*, the Court dismissed the fraud claim, holding that the “[p]laintiff could not have reasonably relied on alleged misstatements about a cooperative apartment’s square footage in deciding to purchase the apartment” (*id.*). The brokers’ advertisements for the apartment described it as “550 s.f.” and as “approximately 500 s.f.” The square footage discrepancy in the various advertisements should have alerted plaintiff to the possibility of inaccuracy of the advertisements regarding square footage. Hence, the plaintiff should have inspected the apartment before contracting to buy it (*id.*). Similarly here, assuming that plaintiff relied upon the arrow and the “DN” abbreviation in making the purchase, it should have inquired as to their significance in that plaintiff was acquiring only one floor in the Condominium.

¹The negligence claim is contained in the fifth cause of action, and alleged solely against nonmovant Jacob Kanner.

Plaintiff cites *Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC* (71 AD3d 935 [2nd Dept 2010]) for the proposition that the fraud action may be maintained based on the representations outside the Offering Plan, including the two diagrams. As discussed above, according to the complaint (and any additional submissions), the purchase was based solely on the Offering Plan. Moreover, in *Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, the plaintiff alleged that, “pursuant to the offering plan, advertisements, brochures, and purchase agreements, the building was to be constructed with an elevator, which was never installed,” and the “first class luxury building” contained “numerous design and construction defects as detailed in an evaluation prepared by an engineering firm” (*id.* at 936). Unlike the situation presented here involving the arrow and the DN abbreviation, the purchase was not on an “as is” basis, and there was no ambiguity as to the alleged misrepresentations.

The fourth cause of action alleges that defendants’ false statements and misrepresentations in the Offering Plan constitute deceptive acts and false advertising within the meaning of sections 349 and 350 of the General Business Law.

General Business Law § 349 contains a private right of action for any person injured by reason of a violation of section 349, and it is directed at wrongs against the consuming public. To state a claim under this section, a plaintiff must allege that the defendants’ materially deceptive conduct caused injury, and that defendants’ conduct was consumer-oriented with a broad impact on consumers at large (*Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24-25 [1995]). “Deceptive acts or practices may be defined as representations or omissions likely to mislead a reasonable consumer acting reasonably under the

circumstances. A similar showing is required under General Business Law § 350, which prohibits false advertising” (*Lucker v Bayside Cemetery*, 114 AD3d 162, 174 [1st Dept 2013] [internal quotation marks and citation omitted]).

General Business Law § 349 permits a private cause of action for deceptive practices in the advertisement and sale of the condominium units (*Board of Mgrs. of Bayberry Greens Condominium v Bayberry Greens Assoc.*, 174 AD2d 595, 596 [2d Dept 1991]). Nevertheless, the claim is not validly stated because the action is limited to plaintiff’s Unit, and does not involve “the public at large” (*Sutton Apts. Corp. v Bradhurst 100 Dev., LLC*, 107 AD3d 646, 648 [1st Dept 2013], quoting *Merin v Precinct Devs. LLC*, 74 AD3d 688, 689 [1st Dept 2010] [allegedly defective conditions not disclosed to plaintiffs prior to purchase involved a “private contractual dispute between the parties without ramification for the public at large”]).

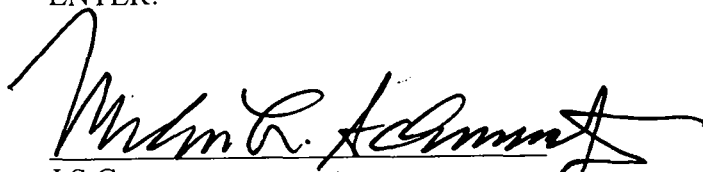
Accordingly, it is

ORDERED that the motion by defendants Apthorp Associates LLC, Apthorp Mezzanine LLC, Apthorp Holdings LLC, Apthorp Management LLC, Broadwall Management of Apthorp LLC, and Andrew Ratner is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

Dated: April 17, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER