

**13th & 14th St. Realty, LLC v Board of Mgrs. of the A  
Bldg. Condominium**

2014 NY Slip Op 31429(U)

May 30, 2014

Sup Ct, New York County

Docket Number: 100061/11

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
13<sup>th</sup> & 14<sup>th</sup> STREET REALTY, LLC, *et al.*

Plaintiff,

-against-

THE BOARD OF MANAGERS OF THE  
A BUILDING CONDOMINIUM,

Defendant.

-----X

BARBARA JAFFE, JSC:

**For plaintiff:**  
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**For defendant:**  
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By notice of motion, plaintiff moves pursuant to CPLR 3213 for an order granting it summary judgment in lieu of complaint. Defendant opposes.

Plaintiff is a New York limited liability company (sponsor), and defendant is an unincorporated business association of unit owners (Board) formed pursuant to an offering plan and condominium declaration sponsored by plaintiff relating to the condominium conversion of a building located at 425 East 13<sup>th</sup> Street in Manhattan. (NYSCEF 3).

By promissory note dated March 6, 2008, defendant agreed to pay plaintiff \$323,750 plus interest, payable in 60 monthly payments commencing March 2008 until March 30, 2013 (maturity date), and waived "any and all rights to setoffs, counterclaims or abatements of any nature that [defendant] may have against [plaintiff] or the obligations of [defendant] hereunder or under any circumstances or agreement between [defendant] and [plaintiff]." Defendant also

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**DECISION & ORDER**

agreed that its failure to pay timely would be deemed an event of default, which would entitle plaintiff to additional interest, and attorney fees and costs for enforcing the note. (NYSCEF 4). Plaintiff alleges that defendant failed to pay the full amount due by the maturity date, and currently owes the principal sum of \$223,750 plus interest at the rate of 24 percent from June 1, 2013. (NYSCEF 3).

Defendant alleges that the note was signed on the Board's behalf by a principal of sponsor when sponsor's principals were the only members of the Board, that the amount due represents the proceeds of a sale by sponsor to the Board of a condominium unit that had been designated as a residence for a superintendent, that the note is the product of sponsor's self-dealing, fraudulently procured as part of a scheme to extract money from the condominium, and that sponsor thereby breached its fiduciary duty to the condominium. Defendant thus argues that the note should not be enforced. (NYSCEF 11).

In reply, plaintiff observes that by decision and order dated August 29, 2013, I denied consolidation of this action with defendant's action against plaintiff and others based on alleged construction defects in the condominium, finding that as the subject unit is not referenced in the note, it is not intertwined with the transactions at issue in the Board's action against sponsor, and argues that in any event defendant waived any set-offs, and that a defense based on facts extrinsic to the note does not preclude summary judgment in lieu of complaint. (NYSCEF 496). Plaintiff thus argues that defendant has no bona fide defense to the note.

Proof of the note and defendant's default in paying it constitutes *prima facie* evidence of plaintiff's entitlement to judgment. The burden shifts to defendant to submit evidence demonstrating the existence of a triable issue with respect to a bona fide defense. (*Zyskind v*

*FaceCake Marketing Tech., Inc.*, 101 AD3d 550 [1<sup>st</sup> Dept 2012]).

As defendant's allegations that the note was procured by fraud are not controverted by plaintiff, defendant has demonstrated a bona fide defense to the note. (See *Baldeo v Rambaran*, 107 AD3d 924 [2d Dept 2013] [summary judgment in lieu of complaint denied as defendant raised triable issue as to whether subject promissory note was procured through coercion and duress]; *Coleman v Norton*, 289 AD2d 130 [1<sup>st</sup> Dept 2001] [summary judgment based on promissory note should be denied given factual questions as to whether note procured by fraud]; see also *Bloom v Lugli*, 102 AD3d 715 [2d Dept 2013] [defendant raised triable issue as to whether agreement should be deemed void and unenforceable on ground of self-dealing]; *Crystal v Manes*, 140 AD2d 956 [4<sup>th</sup> Dept 1988], *lv denied* 73 NY2d 871 [1989] [lease of property terminated as void *ab initio* as it resulted from defendants' self-dealing and breach of fiduciary duties]). The absence of any mention of the unit in the note is immaterial.

A waiver provision may be unenforceable if the agreement containing it was procured by fraud. (See *Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2d Dept 2010] [written waiver cannot operate to shield party from own fraud]; *European Am. Bank v Mr. Wemmick, Ltd.*, 160 AD2d 905 [2d Dept 1990] [waiver provision would not be enforced to bar fraud counterclaims]; *Sterling Nat. Bank & Trust Co. of New York v Giannetti*, 53 AD2d 533 [1<sup>st</sup> Dept 1976] [defenses based on allegations of fraud may not be contractually waived]). Here, as the note is alleged to have been signed fraudulently by a principal of sponsor for the sponsor's benefit, the waiver provision contained therein may not be binding. (Compare *In re Liquidation of Union Indemn. Ins. Co. of New York*, 21 AD3d 833 [1<sup>st</sup> Dept 2005] [defendant did not raise triable issue as to whether he was victim of fraud so as to prevent enforcement of waiver of defenses clause against

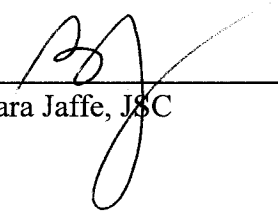
plaintiff's recoupment of payment under bond]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment in lieu of complaint is denied;  
and it is further

ORDERED, that plaintiff shall serve a formal complaint upon defendant's attorney within  
20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant  
shall move against or serve an answer to the complaint within 20 days after service of the  
complaint.

ENTER:

  
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Barbara Jaffe, J&C

DATED: May 30, 2014  
New York, New York