Board of Mgrs. of the S. Star v WSA Equities, LLC
2014 NY Slip Op 32750(U)
October 20, 2014
Sup Ct, New York County
Docket Number: 159128/2012
Judge: Arthur F. Engoron

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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BOARD OF MANAGERS OF THE SOUTH STAR,

Plaintiff,

- against -

WSA EQUITIES, LLC, et al.,

Defendants.

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Index Number: 159128/2012

Sequence Number: 002

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on this motion to dismiss by defendants WSA Equities, LLC, 80 John Condominium, LLC, WSA Management, Ltd., Frederic Oliver, Carol Achenbaum, William Achenbaum, and Michael Achenbaum:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Opposing Affidavit - Exhibits - Engineer Affidavit - Memorandum of Law 2
Reply Affidavit 3

Upon the foregoing papers, the motion is granted in part and denied in part as follows:

Basic Background

In this action, plaintiff, the Board of Managers of The South Star (the "Board"), a condominium building located at 80 John Street in Manhattan ("the Building"), is suing to recover damages for alleged "pervasive construction defects" during the mid-2000s physical renovation and legal conversion of the Building (built in 1927) into condominium units. Commencing in or about 2006, defendants WSA Equities, LLC, the developer-sponsor of the condominium (the "Condo"); 80 John Condominium, LLC, an alleged "affiliate" of the Sponsor (collectively, "the Sponsor"); and Frederic Oliver, Carol Achenbaum, William Achenbaum and Michael Achenbaum, apparently the principals of the Sponsor ("the individual defendants"), marketed the Condo units for sale to the public. The closing on the first Condo unit took place on or about January 24, 2007. Defendant WSA Management, Ltd. ("WSA Mgt.") is the alleged managing agent of the Condo.

At issue is whether the complaint states valid causes of action as against the Sponsor, the individual defendants and WSA Mgt.[1].

[1] By Decision and Order dated August 1, 2014, this Court denied a motion by defendants Corcoran Marketing Group and the Corcoran Group, the selling agents, to dismiss the complaint as against them.

The Complaint

On November 14, 2013, the Board commenced this action against the Sponsor, the individual defendants, WSA Mgt., the selling agents, the architect and the construction manager to recover damages for alleged "rampant defective conditions" throughout the Building, which the Sponsor, its alleged principals, and the selling agents marketed as a "premier luxury caliber building." The complaint consists of 48 pages, 228 separate paragraphs and 12 separate causes of action. Over the course of eighteen pages (specifically, pages 10 through 23, and pages 26 through 30), the complaint sets forth, with specificity, a laundry list of serious "material defects" in the structural system of the building, including but not limited to the building's "exterior facade" and roof system, the electrical systems and emergency power systems, the HVAC systems, and the plumbing and drainage systems, as well as missing or defective "apartment finishes" and features, such as wall finishes, paint, partitions, new bathtubs and bathtub fixtures, and Packaged Terminal Air Conditioning Units. The complaint also alleges that the defective conditions throughout the Building and apartments violate specifically-identified building codes, regulations and industry standards. The complaint further alleges that the Sponsor and individual defendants knew about the serious material defects existing throughout the Building at the time they prepared and certified the Offering Plan but failed to disclose such defects, which defects allegedly have not been cured or repaired. Among other things, the complaint alleges that Steven Kaplan, P.E., defendants' "consulting structural engineer" issued a letter dated December 22, 2005 notifying defendants that there are "many unknowns" with respect to the condition of the Building's exterior facade lintels, that "all obviously badly deteriorated conditions" should be repaired "immediately," and that when the Building is converted "full disclosure" of these conditions to the Attorney General is required. The complaint further alleges that, notwithstanding the Kaplan letter, defendants certified in the Offering Plan that the exterior facade of the Building was in "generally good condition."

As against the Sponsor and individual defendants the complaint asserts six causes of action: breach of contract (1st cause of action); fraud in the inducement (2nd cause of action); violations of General Business Law ("GBL") §§ 349 and 350 (7th cause of action); constructive fraudulent conveyances while insolvent (10th cause of action); constructive fraudulent conveyances causing unreasonably small capital (11th cause of action); and intentional fraudulent conveyances (12th cause of action), for which cause of action the Board seeks punitive damages. As against WSA Mgt. the complaint asserts one cause of action for breach of contract (8th cause of action).

The Sponsor, the individual defendants and WSA Mgt. (collectively, "defendants") now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint as against them. In the main, defendants construe the complaint as one seeking "to hold the Sponsor Defendants liable for allegedly failing to deliver on promises made in the offering plan" and assert that the allegations in the complaint "[a]t most, if proven … amount to poor construction, not malice." Defendants seek dismissal of the complaint upon the grounds that it (1) is barred by the Statute of Limitations governing construction defect claims; (2) is barred by the Martin Act under Kerusa Co. LLC v W10Z/515 Real Estate L. P., 12 NY3d 236 (2009), because it is based solely upon "omissions" from the Offering Plan, and therefore lies solely within purview of the Attorney

General; (3) asserts "duplicative" causes of action; (4) fails to allege sufficient facts to support the fraud allegations; and (5) fails to allege sufficient facts to support the breach of contract allegations against WSA Mgt.

In opposition, the Board claims that the Sponsor and individual defendants promised "a premier luxury caliber residential building, constructed with the highest quality materials and workmanship and in accordance with all applicable codes, rules, regulations and industry standards," but delivered a building with "substantial defects." The Board also claims, as set forth in the complaint, that although defendants knew about serious defects in the building, the most glaring of which are alleged defects in the "exterior facade walls," which "have caused severe water intrusion" and "badly deteriorated conditions" in the facade lintels, defendants not only omitted those defective conditions from the Offering Plan but affirmatively misrepresented that the facade was in "generally good condition." The Board argues that the breach of contract claim is timely because it is brought within six years of January 24, 2007, the date of the first Condo closing. The Board also argues that under Assured Guar. v JP Morgan Inv. Mgt. Inc., 18 NY3d 341, 353 (2011), and other recent First Department authority, the Martin Act does not preclude the breach of contract, fraud and GBL §§ 349 and 350 claims, because such claims are based upon defendants' failure to perform under the Purchase Agreements and their affirmative misrepresentations, and not merely defendants' alleged "omissions" from the Offering Plan. The Board contends that the complaint sufficiently pleads causes of action against the individual defendants for breach of contract, fraud and GBL §§ 349 and 350 violations because they certified the Offering Plan and "personally participated" in the fraudulent conduct. Additionally, the Board argues that (1) the common law and statutory fraud claims are plead with sufficient specificity; (2) the fraud claims are not duplicative of the breach of contract claims because they are based upon "contract-independent" conduct; (3) the GBL §§ 349 and 350 claims should stand because the case arises from a "public offering of 147 residential condominium units"; and (4) the breach of contract cause of action against WSA Mgt. satisfies the pleading requirements necessary to withstand a motion to dismiss.

Discussion

Dismissal of a complaint pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law").

Dismissal of a complaint pursuant to CPLR 3211(a)(7) is only warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. Stukuls v State of New York, 42 NY2d 272, 275 (1977);

EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013; see Rogers v Earl, 249 AD2d 990 (4th Dept 1998).

The First Cause of Action, for Breach of Contract

The breach of contract cause of action is timely brought within the applicable six-year Statute of Limitations. CPLR 213(2). The Board commenced this action on December 21, 2012, within six years of January 24, 2007, the date of the first condominium sale and therefore the date on which the Board's claims accrued. See Bd. of Mgrs. of the Chelsea Quarter Condominium v 129 W. Residential Partners LLC, 14 Misc 3d 1212(A), 5 (condominium board claim for breach of Purchase Agreement and Offering Plan accrues upon sale of first condominium).

Defendants' assertion that the six-year Statute of Limitations began to run upon issuance of the certificate of occupancy in December 2000, is not only incorrect but incongruous. Under defendants' theory, the Statute of Limitations on the Board's breach of contract claim ran in December 2006, one month before there was anyone on whose behalf the Board could assert such claim against the Sponsor; there were no unit owners on whose behalf the Board could act until January 24, 2007. Moreover, a December 2000 accrual date would only arguably apply to claims by the Board against the original architects or contractors whose work was completed as of December 2000, see City Sch. Dist. of City of Newburgh v Hugh Stubbins & Assocs., Inc., 85 NY2d 535, 538 (1995) ("In cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance"), and not to claims brought by the Board on behalf of the individual unit owners against the Sponsor for breach of the purchase agreement.

The breach of contract claim (and, as shown below, the fraud in the inducement claim and the GBL §§ 349 and 350 claims) is not barred by the Martin Act because it is based upon, inter alia, defendants' alleged failure to provide a myriad of features, finishes and amenities bargained for by the individual unit owners, which defendants, in the Purchase Agreement, promised to provide, and not upon defendants' failure to disclose the construction defects in the Offering Plan. Caboara v Babylon Cove Dev., LLC, 82 AD3d 1141, 1142 (2nd Dept 2011) ("causes of action asserted by the plaintiffs to recover damages for common-law fraud and breach of contract based on affirmative misrepresentations in an offering plan, incorporated by reference into contracts of sale of condominium units, were not preempted by the Martin Act").

Furthermore, the complaint sufficiently pleads a cause of action against the Sponsor for its alleged breach of the Purchase Agreements. The complaint alleges: (i) the existence of a contract, i.e., the Purchase Agreement; (ii) the provisions of the Purchase Agreement that the Sponsor allegedly breached, i.e., the promises and covenants that the units would contain certain features and amenities, be constructed in accordance with the Offering Plan, and comply with the Building Code and all other applicable laws, rules and regulations; (iii) the individual unit

owners' performance of their obligations thereunder; and (iv) damages arising from the breach. See Furia v Furia, 116 AD2d 694, 695 (2nd Dept 1986) ("The pleading clearly specifies the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant.").

As to the individual defendants, however, the Purchase Agreement and Offering Plan establish a lack of privity between the Board and the individual defendants, warranting dismissal of the breach of contract cause of action as against them. The individual defendants are not parties to the Purchase Agreement and did not individually guarantee the Sponsor's obligations thereunder. As defendants argue, the fact that the individual defendants certified the Offering Plan is insufficient to impose liability for alleged breach of contract against them. Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC, 106 AD3d 542, 544 (1st Dept 2013) ("The motion court correctly determined that the Non-Sponsors may not be held individually liable for any of plaintiff's claims premised solely on alleged violations of the offering plan and certification."). The Court notes that the complaint does not allege that the individual defendants are the "alter-ego" of the Sponsor, such that the breach of contract claims as against them would lie. Accordingly, the first cause of action as against the individual defendants only is subject to dismissal.

The Second Cause of Action, for Fraud in the 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). As explained by the Court of Appeals in Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 492 (2008):

> Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action. Although under section 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct.

Here, the complaint contains sufficiently detailed allegations of the allegedly fraudulent misrepresentations made by the Sponsor and the individual defendants in the Offering Plan and Purchase Agreements that were allegedly known to be false when made, made with the intention of inducing the individual unit owners to purchase units, and which they allegedly justifiedly relied upon, causing them to be injured. The allegations about the December 22, 2005 letter of Steven Kaplan, P.E. are sufficient to permit a reasonable inference that the Sponsor and individual defendants knew about the allegedly seriously defective condition of the exterior facade and lintels, yet misrepresented the condition in the Offering Plan to be "generally good" in order to induce the individual unit owners to enter into Purchase Agreements.

Contrary to defendants' assertion, the fraud cause of action is not duplicative of the breach of

contract cause of action, because the alleged wrongful conduct underlying the fraud claim is separate and distinct from that underlying the breach of contract claim. See First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287, 291-292 (1st Dept 1999) ("A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract"). Here, the complaint alleges – separate and apart from defendants' alleged failure to perform under the Purchase Agreement – that defendants made material factual misstatements in the Offering Plan about the condition of the Building with the intent to deceive by their misrepresentations, and that the individual unit owners justifiably relied on such misrepresentations to their detriment in purchasing the units. Defendants' argument that the individual unit owners cannot establish justifiable reliance on the alleged misrepresentations or omissions, citing 2001 Local Law 11 reports, is unavailing because those reports were not filed with the Department of Buildings until February 2007, after the closing of the first unit and after many other individual unit owners entered into Purchase Agreements. Accordingly, the second cause of action for fraudulent inducement as against the Sponsor and individual defendants states a valid cause of action.

The Seventh Cause of Action, for Violation of GBL §§ 349 and 350

GBL §§ 349 and 350 (consumer protection statutes which form part of the "Martin Act") empower the Attorney General to bring an action to enjoin deceptive trade practices based upon omissions in a condominium offering plan. The Martin Act does not bar a private right of action for common law fraud based upon affirmative, material misrepresentations of fact. Assured Guar. v JP Morgan Inv. Mgt Inc., 18 NY3d 341, 353 (2011) (holding that the Martin Act does not prevent a private litigant from bringing a fraud claim); Caboara v Babylon Cove Dev., LLC, supra.

To the extent that the seventh cause of action is based upon allegations that the Sponsor made affirmative misrepresentations of fact about the condition of the Building, for instance, that the exterior facade walls and lintels were in "good condition," it is not barred by the Martin Act. However, this cause of action still fails as a matter of law because the claimed violations do not have a broad impact on consumers at large. Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 (1st Dept 2013) ("The court also properly dismissed the claims alleging violation of General Business Law §§ 349 and 350, as this action is limited to the parties in the subject building and does not involve "the public at large."); Plaza PH2001 LLC v Plaza Residential Owner LP, 98 AD3d 89, 104 (1st Dept 2012); Thompson v Parkchester Apts. Co., 271 AD2d 311, 311–312 (1st Dept 2000) (contracts between parties involving the purchase of condominium units held "unique to the parties" and "[do] not fall within the ambit of the statute").

The Tenth, Eleventh and Twelfth Causes of Action, for Constructive Fraudulent Conveyance and Intentional Fraudulent Conveyance

The tenth and eleventh causes of action, for constructive fraudulent conveyance, seek relief under Debtor and Creditor Law §§ 273 and 274, respectively. The allegations in support of these causes of action track the language of the statute but fail to contain facts "showing a fiduciary or confidential relationship between" the Board and the Sponsor and individual defendants necessary to support a claim for constructive fraudulent conveyance. Sutton Apts. Corp. v

Bradhurst 100 Dev. LLC, supra,107 AD3d at 648 (1st Dept 2013) ("The court properly dismissed [co-op board's] claims alleging constructive fraudulent conveyance and fraudulent conveyance causing unreasonably small capital, as [co-op board] did not allege facts showing a fiduciary or confidential relationship between them and the sponsor defendants."). Accordingly, the tenth and eleventh causes of action as against the Sponsor and individual defendants are subject to dismissal.

The twelfth cause of action, for intentional fraudulent conveyance, which seeks relief under Debtor and Creditor Law § 276, fails to satisfy the fraud pleading requirement and is subject to dismissal. The Board has failed to allege the basic facts of the purported fraudulent scheme or any facts from which fraudulent intent could be inferred. Instead, the complaint contains the following conclusory allegation, which merely tracks the language of the statute: "Upon information and belief, some or all of the Equity Distributions were made by the Sponsor with actual intent to hinder, delay and defraud creditors of the Sponsor, including the Condominium and Unit Owners." As the twelfth cause of action for intentional fraudulent conveyance is subject to dismissal, there is no basis for the Board's request for punitive damages, and such request is subject to dismissal.

The Eighth Cause of Action as Against WSA Mgt., for Breach of Contract

The complaint sufficiently pleads a cause of action against WSA Mgt. for its alleged breach of contract. The complaint alleges: (i) the existence of a contracts between the Board and WSA Mgt. to "perform management services in connection with the operation of the Condominium and the Building"; (ii) the manner in which WSA Mgt. allegedly breached the contracts, i.e., mismanaging Condo funds and failing properly to manage the Building; (iii) the Board's performance of its obligations thereunder; and (iv) damages arising from the breach. See Furia v Furia, supra.

The Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons set forth herein, the motion by the Sponsor, the individual defendants and the managing agent pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint is granted in part and denied in part, and the clerk is hereby directed to enter judgment as follows: dismissing the first cause of action, for breach of contract, as against defendants Frederic Oliver, Carol Achenbaum, William Achenbaum, and Michael Achenbaum only; and dismissing the seventh, tenth, eleventh and twelfth causes of action against defendants WSA Equities, LLC, 80 John Condominium, LLC, Frederic Oliver, Carol Achenbaum, William Achenbaum, and Michael Achenbaum.

Dated: October 20, 2014

AE

Arthur F. Engoron, J.S.C.