Residential Bd. of Mgrs. of the Toren Condominium v BFC Partners
2014 NY Slip Op 33648(U)
September 30, 2014
Supreme Court, New York County
Docket Number: 108131/11
Judge: Arthur F. Engoron

[* 1]

FA 10/2/14 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ARTHUR F. ENGORON **PART** 37

Justice

Index Number : 108131/2011
TOREN CONDOMINIUM
vs
MYRTLE OWNER LLC
Sequence Number : 004
DISMISS

INDEX NO. _____
MOTION DATE 5/16/2014
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2 **, were read on this motion to/~~for~~** Dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2
Replying Affidavits	**No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

FILED
OCT 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

RECEIVED
OCT 02 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 9/30/14

F
_____, J.S.C.
ARTHUR F. ENGORON

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 37

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THE RESIDENTIAL BOARD OF MANAGERS OF THE TOREN CONDOMINIUM, on its own behalf and as attorney-in-fact and agent for all non-sponsor residential unit owners of the Toren Condominium,

Plaintiff,

- against -

BFC PARTNERS, et al.,

Defendants.

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Index Number: 108131/11

Sequence Number: 004

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 and 2, were used on this motion to dismiss by defendants Myrtle Owner LLC, Donald Capoccia, Joseph Ferrara and Brandon Baron:

	Papers Numbered:
Moving Papers: Notice of Motion - Affidavit - Exhibits - Memorandum of Law	1
Opposition Papers: Affidavit - Memorandum of Law	2
Reply Papers	Memorandum of Law only

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

Basic Background

Plaintiff is the Board of Managers of the Toren Condominium (the "Board"), located at 150 Myrtle Avenue, Brooklyn, NY. Defendant Myrtle Owner LLC ("Myrtle") is the developer-Sponsor of the Toren Condominium ("the Condo"). Defendants Donald Capoccia, Joseph Ferrara and Brandon Baron are the principals of the Sponsor (collectively, the "individual defendants") (Moving Papers, Exhibits B and C).

According to the Offering Plan (Moving Papers, Exhibit C), the Condo "will contain" 240 residential units and their appurtenant Condo common elements, all of which "are being offered for sale." By Certification sworn to on October 23, 2007, Myrtle and the individual defendants "jointly and severally" certified the Offering Plan in accordance with Article 23-A of the General Business Law, and the promulgating regulations (Moving Papers, Exhibit B). Among other things, Myrtle and the individual defendants swore, under the penalties of perjury, that the Offering Plan and related documents (including the proposed Purchase Agreement to be provided to purchasers of the residential units) did not "omit any material fact," "contain any untrue statement of a material fact," or "contain any fraud."

On March 20, 2008, the New York State Attorney General accepted the Offering Plan for filing, conditioned upon, inter alia, "the faithful performance of all of the obligations of the sponsor, its agents and instrumentalities, which are required by law or set forth in the offering literature" (Moving Papers, Exhibits C and D).

The Complaint

On July 15, 2011, plaintiff commenced this action against Myrtle, the individual defendants, the architect and others[1], to recover damages for alleged construction and design defects in the Condo and failure to make required corrections and repairs and damages and equitable relief for alleged "misappropriation" of Condo "resources." The complaint consists of 152 separate paragraphs and fifteen separate causes of action – twelve of which are asserted against Myrtle and the individual defendants – sounding in breach of contract, breach of warranty, negligence, fraudulent inducement, professional malpractice, negligent misrepresentation, conversion and statutory violations.

The core factual allegations that form the basis of plaintiff's claims against Myrtle and the individual defendants are as follows:

- the individual defendants are "controlling principal[s] and managing member[s]" of Myrtle, "directly participated in the transactions described herein" (Moving Papers, Exhibit A, Complaint, ¶¶ 7, 8, 9), "exercised dominion and control over the corporate defendants" (Id., ¶ 15), and are the alter-ego of Myrtle (Id., ¶¶ 29-41);

- defendant Donald Capoccia, "on behalf of [Myrtle] and the Controlling Principals, signed the Certification of Sponsor and Principals" (Id., ¶¶ 10, 20, 30);

- Myrtle and the individual defendants "prepared" the Offering Plan "to induce the Residential Unit Owners to purchase units" (Id., ¶ 19);

- The Offering Plan "contained numerous representations and promises" to the unit owners, including that: the Condo would be constructed as described in the Plan; Myrtle "will diligently, expeditiously and at [its] own costs, complete construction" of the Condo; Myrtle "will promptly correct any material patent defects in the construction of

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[1] Pursuant to Stipulation, dated July 16, 2014 and filed with the Court on August 7, 2014, plaintiff discontinued, without prejudice, this action as against defendants BFC Partners L.P., Myrtle Avenue Development Associates LLC, Myrtle Venture, LLC, Gregory Baron, and Pietro Ferrara a/k/a Peter Ferrara.

By Decision and Order dated September 29, 2014, the Court granted the motion by defendant Skidmore Owings & Merrill LLP, the architect, to dismiss the complaint as against it.

Flatbush Owners Company LLC, Myrtle's alleged predecessor in interest, has not yet appeared or answered the complaint.

the [Condo] and the Units therein"; and the "Building will comply with all applicable zoning and land use requirements" (Id., ¶ 21);

- The Residential Unit Owners "relied on the promises and representations" contained in the Offering Plan (Id., ¶ 22), and in reliance thereon, purchased units in the Condo (Id., ¶ 23);

- Myrtle and the unit owners entered into Purchase Agreements in which Myrtle agreed to "(i) construct the [Condo] and the Units substantially in accordance with the Plan ... and with all applicable zoning and law; (ii) provide a permanent Certificate of Occupancy for the [Condo] by on or before June 22, 2011; (iii) construct the [Condo] so that it would achieve LEED Gold certification; and (iv) correct the defects in the design and construction of the [Condo]" (Id., ¶ 43);

- the Condo is "designed and constructed in a manner that is inconsistent with the representations made to the Residential Unit Owners ... including, without limitation, the design and construction of the [] curtain wall, roof drainage, fire stopping and dual temperature systems" (Id., ¶ 24), and has "defects and deficiencies", including "water infiltration" and "widespread water damage" (Id., ¶ 25);

- Myrtle "has failed, and continues to refuse, to repair and otherwise remediate the various defects" in the Condo (Id., ¶ 27); and

- Myrtle "misappropriated" the Condo "resources, including without limitation, certain areas of the [Condo] that are designated as Residential, Residential Limited Common Element, or General Common Elements under the Plan" and "the unauthorized waiver of common charges due and owing to the Board" (Id., ¶ 98) and "locked doors to mechanical rooms, prevented elevators from stopping on certain floors, and stored debris and property in spaces designated as Residential. . . ." (Id., ¶ 99).

Myrtle and the individual defendants now move, pursuant to CPLR 3211(a)(1) and (7) and 3016(b), to dismiss the complaint as against them, except the first cause of action for breach of contract and the second cause of action for breach of warranty, both as against Myrtle.

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 (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").

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the complaint is afforded a liberal construction. The court accepts the facts alleged in the complaint as true, accords

plaintiff the benefit of every possible favorable inference, and determines only whether the allegations 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
and Second Cause of Action, for Breach of Warranty

It is obvious, and everyone admits, that the complaint sufficiently pleads a cause of action against Myrtle for its alleged breach of the Purchase Agreements and the warranty contained therein. The complaint alleges: (i) the existence of a contract, i.e., the Purchase Agreement; (ii) identifies the provisions of the Purchase Agreement allegedly breached by Myrtle; (iii) plaintiff's performance of its obligations thereunder; and (iv) damages arising from the breach.

As to the individual defendants, however, the documentary evidence – the Purchase Agreement itself – conclusively establishes a lack of privity between plaintiff and the individual defendants, warranting dismissal of the breach of contract and breach of warranty causes of action as against them. The individual defendants are not parties to the Purchase Agreement and did not individually guarantee Myrtle'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 complaint fails to sufficiently plead a claim that the individual defendants are the "alter-ego" of Myrtle, such that the breach of contract and breach of warranty claims as against them can withstand a motion to dismiss. The allegations purporting to establish that the individual defendants are the "alter-ego" of Myrtle – for instance, that the individual defendants are "controlling principals" of Myrtle, "exercised dominion and control" over Myrtle, the absence of corporate formalities and the commingling of funds (Moving Papers, Exhibit A, Complaint, ¶¶ 7, 8, 9, 10, 20, 29-41) – are conclusory, unsupported by any facts, and, indeed, do nothing more than parrot the elements of an alter-ego claim. See, East Hampton Union Free Sch. Dist. v Sandpebble Bldrs, Inc., 16 NY3d 775, 776 (2011) ("Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer such as Canseco personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in "bad faith" while representing the corporation. In this case, plaintiff failed to allege any facts

indicating that Canseco engaged in acts amounting to an abuse or perversion of the corporate form, much less that the school district was harmed as a result of such actions").

Plaintiff argues that it is entitled to discovery pursuant to CPLR 3211(d) on its "alter-ego" claim (as well as on its negligence and fraud claims) prior to a determination of the instant 3211(a) motion to dismiss (Opp. Memo at 19, 30, 38). However, plaintiff has failed to provide "some evidentiary basis for its claim that further discovery would yield material evidence and also 'demonstrate how further discovery might reveal material facts in the movant's exclusive knowledge'." Rochester Linoleum and Carpet Center, Inc. v Cassin, 61 AD3d 1201, 1202 (3d Dept 2009); Sch. of Visual Arts v Kuprewicz, 3 Misc3d 278, 289 (Sup. Ct. N.Y. Co. December 22, 2003). Plaintiff's assertion that discovery is necessary because Myrtle and the individual defendants are in "exclusive" possession of the facts required to cure the deficiency in its pleading is conclusory and lacks the requisite evidentiary basis.

However, this Court grants plaintiff leave to replead its "alter-ego" claim, upon a set of proper papers, within 20 days from the date of this Decision and Order. East Hampton Union Free Sch. Dist. v Sandpebble Bldrs, Inc., 16 NY3d at 776.

The Third Cause of Action, for Negligence and the
Fourteenth Cause of Action, for Negligent Misrepresentation

The third cause of action, seeking damages for negligence in the construction and design of the Condo, is subject to dismissal as duplicative of the breach of contract and breach of warranty causes of action. See, Clark–Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 (1987) ("It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"); Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 (1st Dept 2013) (allegations of negligence based on defects in construction of a condominium sound in breach of contract rather than tort). The "duty to design and construct" the Condo, set forth to in paragraph 57 of the complaint, refers to Myrtle's obligations as embodied in the Purchase Agreement, and not an independent duty.

Similarly, in the absence of an allegation that defendants owed plaintiff a duty independent from the contractual obligations, a claim for negligent misrepresentation fails. See Greenman–Pedersen, Inc. v Levine, 37 AD3d 250, 251 (1st Dept 2007). The fourteenth cause of action does not contain any allegation that Myrtle and/or the individual defendants owed plaintiff any legal duty that would give rise to an independent tort cause of action in what appears to this Court to be a garden-variety condominium development project involving arms-length purchases. Plaintiffs' argument (Opp. Memo at 30) that the issue of "special relationship" or independent duty must abide discovery, is without merit. See, Rochester Linoleum and Carpet Center, Inc. v Cassin, supra, 61 AD3d at 1202; Sch. of Visual Arts v Kuprewicz, supra, 3 Misc3d at 289.

The Fourth Cause of Action, for Fraud in the Inducement

The fourth cause of action, for fraud in the inducement, is also subject to dismissal. "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. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)." Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009).

Here, plaintiff's fourth purported cause of action is based upon conclusory allegations that Myrtle and the individual defendants "made representations and promises" that the Condo "was constructed in accordance with the plans and specifications" prepared by the architect. These bare allegations lack the specificity required for a fraud claim and are, at best, duplicative of the breach of contract and breach of warranty claims, warranting dismissal. See, Non-Linear Trading Co. v Braddis Assoc., 243 AD2d 107, 118 (1st Dept 1998) (plaintiff's claim of fraud in the inducement dismissed because it "does no more than restate its action for breach of performance using different terminology"); Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 A.D.3d at 648 ("While the Martin Act does not preclude the fraud claims, which allege affirmative misrepresentations as opposed to omissions of information required by the Act, plaintiffs failed to plead those claims with sufficient particularity to permit an inference of fraud.").

Moreover, the allegations that Myrtle and the individual defendants "would" obtain LEED Gold certification, a Certificate of Occupancy and include a room for the storage of bicycles, are equally insufficient because (as noted in this Court's decision and order granting the architect's motion to dismiss) a claim of fraud cannot be based upon defendants' opinions and/or predictions of future events. Non-Linear Trading Co. v Braddis Assoc., 243 AD2d at 118 ("the alleged misrepresentation asserted in the proposed amended pleading relates to future performance").

The Eighth Cause of Action, for Misappropriation

The allegations in the eighth cause of action, that Myrtle "misappropriated" Condo "resources" depriving the unit owners of their rightful use and enjoyment thereof in breach of the Offering Plan, satisfy the requirements of CPLR 3013 as to Myrtle only, and are sufficient to provide Myrtle with fair notice of the claim, and the grounds upon which it rests.

However, the eighth cause of action is devoid of any allegations of "misappropriation" on behalf of the individual defendants, and is subject to dismissal as to those defendants.

To the extent that plaintiff prevails on its eighth cause of action, it may be entitled to an order pursuant to CPLR 3001 declaring its rights in and to the common elements allegedly "usurped" by Myrtle, as well as damages from Myrtle for loss of use of enjoyment of such elements.

The Ninth Cause of Action, for Breach of Fiduciary Duty

The complaint adequately pleads a cause of action for breach of fiduciary duty against Myrtle, but not the individual defendants. The complaint alleges that Myrtle, as and when it operated the Board, owed a fiduciary duty to plaintiff and the residential unit owners "to collect, maintain and

preserve the resources of the Board", and that it failed to do so by, inter alia, "misappropriating" such resources for its own use and benefit, causing plaintiff damages.

The complaint is devoid of any allegations of independent tortious conduct by the individual defendants separate from the allegations against Myrtle. Therefore, under Berenger v 261 West LLC, 93 AD3d 175, 185 (2012), the individual defendants "cannot be held liable for [Myrtle's] breach of fiduciary duty owed to unit owners," and the ninth cause of action is dismissed as against them.

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

General Business Law ("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).

Here, to the extent that plaintiff's tenth cause of action is based upon omissions in the Offering Plan, it is barred by the Martin Act. Additionally, the Court notes that even if the complaint stated a valid cause of action under the Martin Act, it still fails as a matter of law because the claimed violations do not have "a broad impact on consumers at large." Plaza PH2001 LLC v Plaza Residential Owner LP, 98 AD3d 89, 104 (1st Dept 2012).

To the extent that the tenth cause of action is based upon alleged affirmative misrepresentations of fact by Myrtle and the individual defendants, it constitutes a common law fraud claim and is subject to dismissal pursuant to CPLR 3016(b) for lack of specificity. The complaint merely alleges, in conclusory fashion, that Myrtle and the individual defendants "disseminated advertising and promotional information that was false in material ways ... by misrepresenting the quality of construction of the [Condo]", and that the residential units "were of a different and substandard character from, and substantially less valuable than, what [the unit owners] reasonably believed they were purchasing." No further particulars about the alleged "misrepresentations" or detail about the manner in which the units were "substandard" or "substantially less valuable" is provided. See, Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, supra, 107 AD3d at 648.

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

The eleventh and twelfth causes of action, for constructive fraudulent conveyance, seek relief under Debtor and Creditor Law §§ 273 and 274, respectively. A crucial element necessary to establish liability under these two statutes is that the complained of conveyances have been made "without fair consideration."

Here, the complaint alleges that "Equity Distributions" made by Myrtle to its members following the sale of certain units, constituted "fraudulent conveyances" since they were made "without fair consideration." Obviously, equity distributions do not require "fair consideration." To the contrary, the individual defendants, as members of Myrtle, a New York Limited Liability Company, did not have to give or give up anything "in consideration" for their right to receive "Equity Distributions"; they simply were entitled to the equity distributions by virtue of their membership in Myrtle. See, Limited Liability Company Law §§ 504, 505, 506, 507.

The thirteenth 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.

Plaintiff has failed to allege the basic facts of the purported fraudulent scheme or any facts fraudulent intent could be inferred. Instead, the complaint contains the following conclusory allegation, which merely tracks of the language of the statute: "Upon information and belief, some or all of the Equity Distributions were made by [Myrtle] with actual intent to hinder, delay and defraud creditors of [Myrtle]."

The Fifteenth Cause of Action, for Conversion

A claim of conversion lies where a defendant, "intentionally and without authority, assumes or exercises control over personal property belonging to [the plaintiff], interfering with [the plaintiff's] right of possession." Colavito v New York Organ Donor Network, Inc., 8 NY3d 43 (2006) ("Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights").

Here, the fifteenth cause of action alleges that Myrtle and the individual defendants intentionally exercised dominion over "resources and money" which rightfully belonged to plaintiff, and refused to turn over such "resources and money" to plaintiff. These allegations are sufficient to plead a cause of action for conversion as to Myrtle only. See generally, Berenger v 261 West LLC, 93 AD3d 185 (2012).

The Court has considered the parties' other arguments and finds them to be unavailing.

Conclusion

Thus, for the reasons set forth herein, the motion by Myrtle and the individual defendants to dismiss pursuant to CPLR 3211(a)(1), (7) and 3016(b) is granted in part and denied in part, and the clerk is hereby directed to enter judgment as follows: dismissing the first, second, eighth, ninth and fifteenth causes of action as against defendants Donald Capoccia, Joseph Ferrara and Brandon Baron only; dismissing the third, fourth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action against defendants Myrtle Owner LLC, Donald Capoccia, Joseph Ferrara and Brandon Baron.

Dated: September 30, 2014

Arthur F. Engoron, J.S.C.