Cabora v Babylon Cove Dev., LLC
2015 NY Slip Op 30686(U)
April 20, 2015
Supreme Court, Suffolk County
Docket Number: 06-10726
Judge: Denise F. Molia
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[* 1]

SHORT FORM ORDER

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INDEX No. 06-10726
CAL No. 14-01359CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 11-17-14 (#004)
MOTION DATE 1-2-15 (#005)
ADJ. DATE 1-16-15
Mot. Seq. # 004 - MotD
005 - XMotD

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THOMAS CABORA and SUSAN CABORA, JOSEPH COLONNA and CATHERINE COLONNA, BRIAN DOHERTY, LENORE DE MARIA, JOSEPH FRYZEL and NANCY FRYZEL, CONOR HARTNETT, and JOHN MEILLO,

Plaintiffs,

- against -

BABYLON COVE DEVELOPMENT, LLC, CERTILMAN, BALIN, ADLER & HYMAN, LLP, MICHAEL J. POSILLICO, JOSEPH K. POSILLICO, PAUL F. POSILLICO and JOSEPH D. POSILLICO, III,

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 19 ; Answering Affidavits and supporting papers 20 - 22, 25 - 31 ; Replying Affidavits and supporting papers ___; Other memorandum of law 23 - 24 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiffs for an order pursuant to CPLR 3212 granting partial summary judgment as to the defendants' liability is granted as to the plaintiff's fourth cause of action for breach of contract and, in light of said determination, setting this action down for a trial on the assessment of the plaintiffs' damages, and is otherwise denied; and it is further

ORDERED that the cross motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the plaintiffs' third cause of action for fraud is dismissed, and is otherwise denied.

RST

This action seeks damages in connection with the purchase of homes by the plaintiffs in a town house development known as Bridgeview at Babylon Cove located in the Village of Babylon, Suffolk County. The defendant Babylon Cove Development, LLC (BCD or sponsor), and its members Michael J. Posillico, Joseph K. Posillico, Paul F. Posillico and Joseph D. Posillico, III (the members) are the sponsors of the development (collectively, the defendants). The plaintiffs discontinued their cause of action against the defendant Certilman, Balin, Adler & Hyman, LLP, attorney for the sponsor, by stipulation filed with the Court Clerk on August 24, 2011.

In their complaint, the plaintiffs allege that the Home Owners Association Offering Plan for the development misrepresented that the purchasers had the right to rent or lease their units, and that the defendants knew that they had agreed to the condition set by the Board of Trustees of the Incorporated Village of Babylon (Village of Babylon) to restrict use of the units to owner occupants only. The complaint contains six causes of action. The fifth cause of action against the subject law firm has been discontinued, and the sixth cause of action against all the defendants was dismissed by order of the Court dated October 20, 2006. The remaining causes of action are all predicated on allegations that the sponsors made the aforesaid misrepresentation in the Offering Plan for the development, and failed to use reasonable care in preparing the Offering Plan. It is determined that the first cause of action for breach of the covenant of good faith is subsumed within the fourth cause of action for breach of contract (*see e.g.* ***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 697 NYS2d 128 [2d Dept 1999]). It is further determined that the second cause of action for fraudulent misrepresentation is subsumed in the third cause of action for fraud. Thus, it is deemed that the only viable causes of action herein are the causes of action for fraud and breach of contract. In fact, the plaintiffs have restricted the arguments and contentions in their motion to the two remaining causes of action.

It is undisputed that the Village of Babylon granted a change of zoning regarding the sponsor's property and approval of the subject development, subject to certain conditions in April 2002. All of the written approvals issued by the relevant agencies and the Village included as condition #57: "All dwelling units shall be owner occupied only. Rental shall not be permitted." On August 7, 2002, BCD executed the declaration of covenants and restrictions required by the Village of Babylon which included the conditions contained in the approval of its development, through its manager, Michael J. Posillico. However, BCD never caused said declaration to be recorded in the Office of the Clerk of Suffolk County. The subject Offering Plan was accepted for filing by the New York State Attorney General on or about November 22, 2003, and included a provision in Article XIV of the Bylaws that any purchaser would have the right to lease their entire home subject to Article XIII of the Declaration of Covenants, Restrictions, Easements, Charges and Liens contained in the plan. It is also undisputed that the sponsor and the members, in their capacity as members, executed the certification required to be included in the Offering Plan pursuant to 13 NYCRR § 22.4(b) (the certification) stating that they had investigated the facts set forth in the plan, and that the facts were accurate.

It is also undisputed that, as the development progressed, the plaintiffs individually closed title pursuant to their contracts of sale with BCD in the period from February 2004 to April 2005. All of the contracts of sale expressly provided that all representations in the Offering Plan would survive delivery of the respective deeds. On September 13, 2005, after discovering that BCD had failed to record the declaration of covenants and restrictions, the Village of Babylon adopted a resolution authorizing the

retainer of an attorney to ensure the filing of the subject declaration. Thereafter, said attorney contacted the homeowners in the development, including the plaintiffs, and obtained and recorded signed amended declarations from each homeowner.

The plaintiffs now move for partial summary judgment as to the defendants' liability on their third cause of action for fraud and their fourth cause of action for breach of contract. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of their motion, the plaintiffs submit, among other things, the pleadings, the Village of Babylon approvals, and the Offering Plan. The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g.* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). When the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see* ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565 [2002]; ***Willsey v Gjuraj***, 65 AD3d 1228, 885 NYS2d 528 [2d Dept 2009]).

Here, the adduced evidence establishes the plaintiffs' prima facie entitlement to summary judgment on their fourth cause of action for breach of contract. The failure of a party to comply with the provisions of a contract constitutes a breach (***ABS Partnership v AirTran Airways, Inc.***, 1 AD3d 24, 765 NYS2d 616 [1st Dept 2003], entitling the non-breaching party to the benefit of the bargain (*see* ***Astoria Caterers, Inc. v J&P 1870 Realty Corp.***, 24 AD3d 478, 806 NYS2d 242 [2d Dept 2005]; ***BLS Dev. Corp. v Broad Cove***, 178 AD2d 394, 577 NYS2d 98 [2d Dept 1991]).

However, the plaintiffs have failed to establish their prima facie entitlement to summary judgment on their third cause of action for fraud. It is well settled that a simple breach of contract is not considered a tort unless a legal duty independent of the contract has been violated (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; *see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]; ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 583 NYS2d 957 [1992]). A party to a contract may be liable in tort when it has "breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (***New York Univ. v Continental Ins. Co.***, 87 NY2d at 316, 639 NYS2d at 287; *see* ***North Shore Bottling Co. v C. Schmidt & Sons***, 22 NY2d 171, 292 NYS2d 86 [1968]; ***D'Ambrosio v Engel***, 292 AD2d 564, 741 NYS2d 42 [2d Dept]). However, the legal duty must arise from circumstances "extraneous to, and not constituting the

elements of, the contract, although it may be connected with and dependant on the contract" (***Clark-Fitzpatrick, Inc. v Long Is. R.R.***, 70 NY2d at 389, 521 NYS2d at 657; *see* ***Krantz v Chateau Stores of Canada***, 256 AD2d 186, 683 NYS2d 24 [1st Dept 1998]).

In his affirmation in support of the motion, counsel for the plaintiffs acknowledges that the courts "do not recognize a claim of fraud by one party to a contract against the other when the alleged misrepresentation of facts are themselves contractual representations," and that BCD's "misrepresentation of fact is itself a contractual breach." That is, that "the fraud claim against the sponsor is subsumed in the contract claim" (***Stangel v Zhi Dan Chen***, 74 AD3d 1050, 903 NYS2d 110 [2d Dept 2010]). Nonetheless, the plaintiffs contend that the members are not in direct privity with the plaintiffs and can be found liable in fraud as "each of them provided an affirmative misrepresentation of fact as evidenced by their certification of the offering plan." The authority cited for this contention is inapposite, as one matter involved a corporate entity that executed a certification in its separate capacity as a non-sponsor of the development (***Birnbaum v Yonkers Contr. Co.***, 272 AD2d 355, 707 NYS2d 662 [1st Dept 2000], and the other matter involved certifications executed by the individual defendants in their individual capacities (***Zanani v Savad***, 228 AD2d 584, 644 NYS2d 527 [2d Dept 1996]).

It is generally held that the principals of a corporate entity, which is itself entitled to the dismissal of a fraud claim as duplicative of a contract claim, are also entitled to have the fraud claim against them dismissed absent a promise collateral to the subject contract or a separate duty owed to the plaintiff (***Cole, Schotz, Meisel, Forman & Leonard, P.A. v Brown***, 109 AD3d 764, 972 NYS2d 21 [1st Dept 2013]; ***Rivas v AmeriMed USA, Inc.***, 34 AD3d 250, 824 NYS2d 41 [1st Dept 2006]; ***Page v Muze, Inc.***, 270 AD2d 401, 705 NYS2d 383 [2d Dept 2000]). Here, the plaintiffs do not allege, neither do they offer any evidence, that the members breached a duty independent of their contractual obligations, or that they engaged in tortious conduct separate from the alleged failure to comply with the terms of the agreement (*see* ***Probst v Cacoulidis***, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; ***Givoldi, Inc. v United Parcel Serv.***, 286 AD2d 220, 729 NYS2d 25 [1st Dept 2001]).

The failure of the plaintiffs to make a prima facie showing of entitlement to summary judgment regarding their third cause of action for fraud requires a denial of that branch of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). However, having established their entitlement to summary judgment on their fourth cause of action for breach of contract, it is incumbent upon the defendants to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*).

In opposition to the plaintiffs' motion, the defendants cross move for summary judgment dismissing the complaint against them. It is noted that the plaintiffs contend that the cross motion should be denied as untimely pursuant to CPLR 3212(a), and in violation of the "single motion rule" for summary judgment. It is well settled that a court may entertain a belated cross motion for summary judgment if a timely motion for such relief has been made on "nearly identical" grounds (***Grande v Peteroy***, 39 AD3d 590, 592, 833 NYS2d 615, 617 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 497, 793 NYS2d 176 [2d Dept 2005]). In addition, it is determined that the

cross motion is not duplicative of the defendants' prior motion for summary judgment, as the prior motion was made on the ground that the plaintiffs' causes of action were barred by the Martin Act.

The defendants cross move on the grounds that the plaintiffs' cause of action for breach of contract fails because the plaintiffs were not bound by the unrecorded declaration of covenants and restrictions at the time they purchased their townhouses, and that they consented to the rental restriction when they signed the amended declarations proffered by the attorney for the Village of Babylon. In addition, the defendants move on the grounds that the cause of action for fraud is duplicative of the breach of contract action, and that the members cannot be found liable for fraud.

The defendants' contentions that the plaintiffs' cause of action for breach of contract should be dismissed are without merit. In essence, the defendants argue that, due to BCD's failure to record the subject declaration of covenants and restrictions, it is freed from its potential liability for breach of contract as the plaintiffs were not bound by the condition that they could not rent their homes without notice thereof. It has been held that such a condition, when "incorporated in an amending ordinance, the result is as much a 'zoning regulation' as an ordinance, adopted without conditions (citations omitted)" (***Collard v Incorporated Vil. of Flower Hill***, 52 NY2d 594, 439 NYS2d 326 [1981]). Thus, a municipality is entitled to enforce such conditions, "even against a subsequent purchaser" (***O'Mara v Town of Wappinger***, 9 NY3d 303, 849 NYS2d 9 [2007]). The defendants do not challenge the validity of the conditional zoning change made by the Village of Babylon, or the fact that the municipality was entitled to seek to enforce the condition against the sponsor or the purchasers of the town houses.

In addition, the defendants' contention that the plaintiffs waived any claim for breach of contract when they "voluntarily" signed the amended declarations of covenants and restrictions demanded by the attorney for the Village of Babylon is without merit. As set forth above, the Village of Babylon was within its rights to enforce the subject condition and to seek to correct the sponsor's error in failing to record the subject declaration. The record reveals that the Village of Babylon was prepared to revoke the certificates of occupancy of the subject town houses if the error was not corrected, and that its attorney indicated to the homeowners, including the plaintiffs, that the village was determined to resolve the matter. It is determined that the execution of the amended declarations was not voluntary and did not constitute a waiver of any claims by the plaintiffs. Moreover, the defendants' contention that the plaintiffs' motion should be dismissed in its entirety as it is not supported by an affidavit of an individual with personal knowledge is without merit.

Here, the defendants have failed to raise an issue of fact requiring a trial of the plaintiffs' cause of action for breach of contract, and their contentions that the cause of action should be dismissed are without merit. Accordingly, that branch of the plaintiffs' motion seeking summary judgment on their fourth cause of action for breach of contract is granted, and the defendants' cross motion to dismiss said cause of action is denied.

The Court now turns to that branch of the defendants' motion which seeks to dismiss the plaintiffs' third cause of action for fraud. As set forth above, the plaintiffs concede that their cause of action for fraud against BCD is duplicative of their cause of action for breach of contract. In addition, the record reveals that the defendants have established that they executed the subject certification in their

representative capacities as principals of BCD, not in their individual capacities. Thus, as set forth above, the defendants have established their entitlement to summary judgment dismissing that portion of the plaintiffs' cause of action for fraud involving the members' alleged liability for affirmatively making false representations in the certification to the Offering Plan.

In addition, to the extent that the plaintiffs's third cause of action can be read to allege that the members' failure to disclose that they had agreed to the condition set by the Village of Babylon limiting the right of purchasers to rent their homes constitutes fraud it is without merit. Generally, an omission of facts or mere silence does not constitute fraud unless there is a fiduciary relationship between the parties (***Eurycleia Partners, LP v Seward & Kissel, LLP***, 46 AD3d 400, 849 NYS2d 510 [1st Dept 2007], *affd* 12 NY3d 553, 883 NYS2d 147 [2009]; *see also* ***Golub v Tanenbaum-Harber Co., Inc.***, 88 AD3d 622, 931 NYS2d 308 [1st Dept 2011]). In the absence of such a confidential or fiduciary relationship, the silence must be accompanied by some deceptive act to be actionable as fraud (***First Keystone Consultants, Inc. v DDR Constr. Servs.***, 74 AD3d 1135, 904 NYS2d 113 [2d Dept 2010]; ***Shomar Const. Services, Inc. v Lawman Const. Co., Inc.***, 262 AD2d 956, 693 NYS2d 784 [4th Dept 1999]). Here, the plaintiffs do not allege that they had a confidential or fiduciary relationship with the defendants, and there is no evidence in the record that the plaintiffs enjoyed such a relationship or that the defendants engaged in any deceptive acts herein.

Moreover, in an action to recover damages for fraud, the measure of damage is "indemnity for the actual pecuniary loss sustained as the direct result of the wrong," that is, what is lost "out-of-pocket," and there can be no recovery of profits which would have been realized absent the fraud (citations omitted) (***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 646 NYS2d 76 [1996]. The record reveals that the plaintiffs do not claim any special damages, neither is there any evidence in the record that they would recover any damages not recoverable under their cause of action for breach of contract. Thus, the plaintiffs third cause of action is duplicative of their fourth cause of action (***Rivas v Amerimed USA, Inc.***, *supra*; ***34-35th Corp. v 1-10 Indus. Assoc.***, 2 AD3d 711, 768 NYS2d 644 [2d Dept 2003]). Accordingly, that branch of the defendants' motion which seeks to dismiss the plaintiffs' third cause of action for fraud is granted.

Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part calendar for the next available trial date.

Hon. Denise F. Molia

Dated: 4-20-15

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**