

**Board of Directors of Powell Cove Estates Home
Owners Assn., Inc. v AVR- Powell C Dev. Corp.**

2017 NY Slip Op 33331(U)

February 16, 2017

Supreme Court, Queens County

Docket Number: 701228/16

Judge: Leonard Livote

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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

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Board of Directors of Powell Cove
Estates Home Owners Association, Inc.,
et al,
Plaintiffs,

Index No: 701228/16

-- against --

Motion Date: 11/14/16

AVR-Powell C Developmental Corp.,
et al,
Defendants.

Seq. No: 2

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The following papers numbered 1 to 6 were read on this motion by defendants for an Order pursuant to CPLR 3211(a)(1)(3) and (7) to dismiss plaintiffs' amended complaint in its entirety or, alternatively, for an order pursuant to CPLR 3024 to strike portions of plaintiffs' amended complaint and to grant sanctions against Plaintiffs and/or their counsel pursuant to 22 N.Y.C.R.R. 130-1.1 for their frivolous conduct in making improper disclosures in violation of CPLR 4547.

Papers
Numbered

Notice of Motion, Affirmation, Affidavits
and Exhibits.....
Answering Affirmations, Affidavits and
Exhibits.....
Reply Affirmations, Affidavits and
Exhibits.....
Other.....

1 - 4
5 - 6

FILED
MAR -3 2017
COUNTY CLERK
QUEENS COUNTY

Upon the following papers, the motion is decided as follows:

Plaintiffs commenced this action alleging construction defects in their condominium complex.

Pursuant to CPLR 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994], citing *Heaney v. Purdy*, 29 N.Y.2d 157 [1971]). "A clear and complete written agreement

between sophisticated, counseled business people negotiating at arm's length may be considered to be documentary evidence" (*Bd. of Managers of NV 101 N 5th St. Condominium v Morton*, 39 Misc 3d 1212(A) [Sup Ct 2013]).

Defendants move to dismiss the claims for cracking stairways, loss of heat and hot water, and, defective plumbing, on the grounds that, pursuant to the contract, these are not common elements and, therefore, plaintiff lacks standing to assert these claims.

With respect to the stairs, the contract defines the common elements as "[t]he stairs, stairways, common hallways which are not located wholly within a Home and entrances to and exits from a Building other than entrances to the individual homes."

Defendants do not identify specific stairs which they claim are not common elements. Accordingly, the motion to dismiss these claims are denied.

With respect to the loss of heat and hot water, the complaint alleges that loss results from inadequate gas supply plumbing, which are common elements. This is also sufficient to support a claim for defective plumbing. Accordingly, the branch of the motion to dismiss these claims is denied.

Defendants move to dismiss the first cause of action for breach of contract on the grounds that it is barred by the merger doctrine. However, the offering plan explicitly states that "all representations under the offering plan...will survive delivery of the deed."

Furthermore, plaintiff has standing to assert this claim on behalf of the individual condominium unit owners by reason of explicit statutory authority namely, Real Property Law § 339-dd, under which the Board of Managers of a condominium is empowered to maintain an action on behalf of the condominium owners with respect to "any cause of action" relating to the "common elements of more than one unit" (see, *Board of Managers v. Fairways at North Hills*, 150 A.D.2d 32, 38, 545 N.Y.S.2d 343).

Accordingly, the branch of the motion to dismiss the first cause of action is denied.

Defendants also move to dismiss the second cause of action for breach of warranty. First, defendants move to dismiss the claim for breach of an implied warranty pursuant to GBL § 777-a, on the grounds that this claim is barred because the defendants

provided an express warranty that complies with GBL § 777-b. Plaintiffs argue that the express warranty may be unenforceable pursuant to GBL § 777-b(4)(e)(ii).

Pursuant to General Business Law article 36-B, a builder-vendor may exclude or modify all express and implied warranties, including the housing merchant implied warranty created by the statute or by common law (see, *Caceci v. Di Canio Constr. Corp.*, 72 N.Y.2d 52), provided that the purchase agreement contains a limited warranty in accordance with the provisions of General Business Law § 777-b (*Fumarelli v Marsam Dev., Inc.*, 238 AD2d 470, 470 [2d Dept 1997], *affd*, 92 NY2d 298 [1998]). In the instant case, the express warranty excluded any implied warranty. To the extent an exclusion of the express warranty is unenforceable, the claim must, nonetheless, comply with the conditions of the express warranty in asserting the claim.

Accordingly, any claim for breach of an implied warranty is dismissed.

Defendants further move to dismiss the claim for breach of the limited warranty on the grounds that plaintiffs failed to comply with a condition precedent. However, there are factual issues concerning whether defendants' own conduct should estop them from asserting the contractual deadlines as defenses to contract liability (*Bd. of Managers of Alfred Condominium v Carol Mgt., Inc.*, 214 AD2d 380, 382 [1st Dept 1995]).

Accordingly, the motion to dismiss for failure to comply with a condition precedent is denied.

Defendants also move to dismiss the claim for breach of the implied warranty on the grounds that it is barred by the statute of limitations. With respect to the stairs and roof, this argument is dependent on whether the purported defects include damage to load bearing portions of the buildings. This question requires expert evidence which precludes it from being decided on a motion to dismiss.

Accordingly, this branch of the motion is denied with respect to the stairs and roof. However, the motion is granted with respect to the claims for loss of heat and hot water, the gate, and defective plumbing, as these items are not load-bearing.

Defendants also move to dismiss the third cause of action, which alleges violations of GBL §§ 349 & 350. A *prima facie* case

under these sections requires as a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof (see, *Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). The complaint is sufficient to meet this standard and, accordingly, this branch of the motion is denied.

The motion to strike is granted to the extent that paragraphs 5-7 and 63-78 are stricken from the amended complaint. The request for sanctions is denied.

Accordingly, the motion is granted to the extent that it is,

Ordered, any claim for breach of an implied warranty is dismissed; and it is further,

Ordered, the claim for breach of the limited warranty is granted with respect to the claims alleging loss of heat and hot water, the gate, and defective plumbing; and it is further,

Ordered, paragraphs numbered 5-7 and 63-78 are stricken from the amended complaint.

Any other or further relief not specifically addressed is denied.

This constitutes the Order of the Court.

Dated: February 16, 2017

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Leonard Livote, A.J.S.C.

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