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| Lower Manhattan Inner City Real Estate Assoc. LLC v 56 Leonard LLC |
| 2019 NY Slip Op 30596(U) |
| March 8, 2019 |
| Supreme Court, New York County |
| Docket Number: 651141/2018 |
| Judge: Robert D. Kalish |
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 29

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 LOWER MANHATTAN INNER CITY REAL ESTATE
 ASSOCIATES LLC,

Plaintiff,

Index No.: 651141/2018

-against-

Mot. Seq. Nos. 002-003

56 LEONARD LLC and NRT NEW YORK LLC
 d/b/a THE CORCORAN GROUP d/b/a COROCORAN
 SUNSHINE MARKETING GROUP,

Defendants.

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ROBERT D. KALISH, J.S.C.:

Defendants NRT New York LLC (Broker) (mot. seq. 002) and 56 Leonard LLC (Sponsor) (mot. seq. 003), move, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), to dismiss plaintiff Lower Manhattan Inner City Real Estate Associates LLC (Buyer)'s complaint based on documentary evidence, lack of standing, and failure to state a cause of action. Motion sequence numbers 002 and 003 are hereby consolidated for disposition.

Background¹

Defendant Sponsor is the sponsor of the building located at 56 Leonard Street (amended complaint, ¶ 11). Sponsor retained Broker to market apartments in the building (the Building) (*id.*, ¶¶ 14-15). Ron Dana (Dana), Buyer's principal, was interested in purchasing an apartment in the building, and eventually purchased penthouse apartment PH-56 (the Premises) (*id.*, ¶¶ 2, 20). Buyer alleges that Broker marketed the Premises as having specific features that lead Dana to buy it, features which were set out in the initial Offering Plan for the Building but not in the Amended and Restated Offering Plan (*id.*, ¶¶ 18-19, 22).

¹ Citations to the complaint are presumed true solely for the purpose of resolving these motions.

On March 31, 2013, Dana attended Broker's marketing presentation for the Building (*id.*, ¶ 25). During the presentation, Broker's employees represented that, among other things, the ceilings of the Premises would be at least 14 feet high, with space to go higher if desired (*id.*, ¶¶ 28-29). Further, each apartment would be delivered in "brand new condition, free of any defects" (*id.*, ¶ 27), would have an "integrated curtain system" (*id.*, ¶ 34), a private elevator (*id.*, ¶¶ 38-39), a breakfast bar (*id.*, ¶ 42), "would be constructed with high quality finishes," (*id.*, ¶ 45), and would need no renovation work (*id.*). Buyer alleges that all of these features were material to Dana's decision to purchase the Premises (*id.*, ¶ 22). By contrast, the Amended and Restated Offering Plan (the Amended Plan), according to Buyer, provides conflicting information regarding the ceiling heights (*id.*, ¶ 31; Bahar aff dated 7/5/18, exhibit B, Amended Plan at 277), and did not reference any of the other features (amended complaint, ¶¶ 37, 41, 43).

The Amended Plan provides that construction in the Building would continue up and subsequent to Buyer closing on the Premises (Amended Plan at xi, § 7). Conditions at the Building would be "noisy and disruptive," and certain amenities and utilities might be affected during the first year of operation (*id.*). Sponsor agreed to correct any defects "substantially at variance with the Plans and Specifications" if notified at closing by the purchaser or within a year of the closing if the defect was latent (*id.* at 91, § O [1] [a]). Sponsor disclaimed responsibility for insubstantial defects and normal wear and tear, specifically including

"slight separation in joints of kitchen tile or wood Flooring, warping, cupping or creaking of wood Flooring or any nicks, scratches, gouges, imperfections or discolorations thereof, Floors out of level, variations in width, length or tone of wood Floor strips or other Flooring or Floor finishes, also, normal shrinkage or expansion of wood Flooring" (*id.* at 91-92).

Further, the Amended Plan barred liability for Sponsor for special or consequential damages, "whether based on negligence, breach of contract, warranty, or otherwise;" Sponsor's sole

obligation was to repair or replace “any defective item of construction” (*id.* at 92). The Amended Plan also specifically provides that Sponsor would still be liable for “actual damages resulting from property damage or personal injury arising as a result of negligence” (*id.*). Purchasers agreed to inspect each unit before closing and provide an inspection statement, either acknowledging “acceptance of the Unit in good condition and accordance with the terms of [the Amended Plan],” or providing “a list of the incomplete work to be completed in the Unit by [Sponsor] following the closing” (*id.* at 92-93).

On July 3, 2013, Dana and Sponsor entered into a contract for Dana to buy the Premises for \$28,500,000, with a \$4,275,000 initial deposit (Bahar aff, exhibit C, contract, § 3). Pursuant to the contract, Dana acknowledged that he had received and read a copy of the Amended Plan, which was incorporated by reference into the contract (*id.*, §§ 11.1-11.2). Further, he acknowledged that, in purchasing the Premises, he was not relying on “any architect’s plans, sales plans, selling brochures, advertisements, websites, representations, warranties, statements, or estimates of any nature whatsoever, whether written or oral, made by [Sponsor], [Broker], or otherwise, including, but not limited to, any relating to the description or physical condition of the property, the building, or the [Premises]” (*id.*, § 20). A copy of the form for the inspection statement was attached to the contract as Schedule C (*id.*, Schedule C).

On January 20, 2017, Sponsor sent Dana a closing notice, stating that the Premises was ready for closing and setting the closing date for February 28, 2017, which was rescheduled for March 17, 2017 (amended complaint, ¶ 50). That day, Dana, Buyer’s agent, Jacob Mineo of the Corcoran Group, and Sponsor’s architect Resat Arbus (Arbus), conducted a final walkthrough and inspection of the Premises (*id.*, ¶ 51). Buyer alleges that Dana discovered “numerous defects, poor workmanship and mistakes in the construction of the Premises,” non-functioning

bathrooms, and an extensive punch list of other necessary work (*id.*, ¶ 53). Further, the Premises did not have an integrated curtain system, as promised by Broker's employees (*id.*, ¶ 54). Arbus assured Dana that Sponsor would remediate any defective work, and that the Premises would be delivered "in excellent condition, in proper working order and free of any defects" (*id.*, ¶ 56).

Sponsor insisted that Dana had to close on the Premises on April 17, 2017 (*id.*, ¶ 60). On that date, Sponsor had not yet repaired most of the defects noted on the inspection statement (*id.*). Accordingly, Buyer and Sponsor entered into a letter agreement (the letter agreement), pursuant to which Sponsor agreed to repair all of the defects listed in the inspection statement "within a reasonable period of time after" the closing (Bahar aff, exhibit E, letter agreement dated 4/17/17). That same day, Dana assigned all of his "right, title, and interest" in the contract to Buyer (Bahar aff, exhibit D, assignment agreement dated 4/17/17). Buyer then closed on the property.

Buyer alleges that, since the closing, Sponsor has "substantially failed to fix" the various defects set forth in the inspection statement, which are extensively set forth in the amended complaint and range from uneven fixtures and improperly installed doors, to defective tile installation requiring a completely new set of tiles and related other work (amended complaint, ¶¶ 65-66). Further, Sponsor has caused additional damage to the Premises in attempting to repair the defects (*id.*, ¶ 68). The ongoing construction in the Building has also caused "excessive noise and falling debris" (*id.*, ¶ 69). Sometime during the Summer of 2017, and again on October 23, 2017, Buyer requested that Sponsor fix the problems in a timely manner as promised in the letter agreement (*id.*, ¶¶ 70-71). Buyer alleges that, rather than contact Buyer, Sponsor sent workers to the Premises to try to fix all of the problems in 24 hours following the October 23 communication (*id.*, ¶ 72).

Finally, in December 2017, Buyer discovered a latent defect in the Premises' flooring (*id.*, ¶ 78). Specifically, Buyer's contractor informed Buyer that the three sub floor layers and the top floor were improperly constructed and installed, leading to significant gapping, cupping, and separation of the floor boards, as well as water penetration in the flooring (*id.*, ¶¶ 73-75, 77-79). Buyer claims that it will now have to replace the entire floor, and that it could not have discovered this defect prior to closing (*id.*, ¶¶ 81-82). Sponsor has disclaimed both the existence of any defective condition, and any related liability (*id.*, ¶ 87).

Buyer filed the amended complaint on May 29, 2018. The amended complaint asserts six causes of action: breach of the Amended Plan (first cause of action) against Sponsor; breach of the letter agreement (second cause of action) against Sponsor; negligence (third cause of action) against Sponsor; trespass (fourth cause of action) against Sponsor; nuisance (fifth cause of action) against Sponsor; and fraud (sixth cause of action) against Broker.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). “[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Breach of the Amended Plan (First Cause of Action)

For its first cause of action, Buyer alleges that Sponsor breached the Amended Plan by

failing to remediate the various defective conditions at the Premises, said defects also lowering the rental value. Sponsor, in moving to dismiss, argues that Buyer is, in effect, seeking consequential damages, which are barred by the Amended Plan. Alternatively, Sponsor argues that Buyer's claimed damages are carved out in the Amended Plan (see Court tr dated 1/9/19 at 51:13-52:06). In opposition, Buyer argues that it has claimed numerous items of property damage, which are expressly permitted by the Amended Plan. Further, it asserts that the damage to the floor of the Premises is caused by improper installation, and thus not covered by the exception in the contract.

A breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). It is settled law that a court may interpret the unambiguous terms of a contract (*see, e.g., Maysek & Moran, Inc. v S.G. Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*see, e.g., Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]).

Here, the Amended Plan clearly provides that Buyer may not recover consequential damages (Amended Plan at 92). The Amended Plan, however, also expressly allows "actual damages resulting from property damage" (*id.*). The Court finds that Buyer alleges both consequential damages (amended complaint, ¶ 100) and actual damages, specifically a lengthy list of defects in the Premises (*id.*, ¶ 53, 65, 68). While the consequential damages are barred, Buyer states a cause of action with respect to the property damages alleged.

Turning to the issue of the alleged damages to the floors of the Premises, the Amended Plan provides that Sponsor would not be responsible for "normal wear and tear . . . or for defects

of an insubstantial nature” (Amended Plan at 91). With respect to floors, the Amended Plan specifically carved out “slight separation in joints of . . . wood flooring, warping, cupping or creaking of wood flooring . . . floors out of level . . . [and] normal shrinkage or expansion of wood flooring due to changes in moisture content of wood” (*id.* at 92). Notwithstanding Sponsor’s narrow reading of the amended complaint, Buyer alleges significant problems with the flooring caused by improper construction of the floor (amended complaint, ¶¶ 73-78). Indeed, Buyer alleges that the entire floor will have to be replaced (*id.*, ¶ 82). At this stage of the litigation, these allegations are sufficient to overcome the limited carve out in the Amended Plan for insubstantial issues related to the floor. To the extent that Sponsor argues that any kind of damage to the floor is barred by this provision, such a reading renders the general descriptor “defects of an insubstantial nature” meaningless and is therefore not a permissible reading of the Amended Plan (*e.g. Warner*, 71 AD3d at 5). In any case, whether Buyer’s claimed damages are “insubstantial” is a factual issue that cannot be resolved at this time (*Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013] [fact questions ill-suited to resolution on motion to dismiss]).

Accordingly, that branch of Sponsor’s motion to dismiss the first cause of action is granted only to the extent of dismissing Buyer’s claim for consequential damages, and is otherwise denied.

Breach of the Letter Agreement (Second Cause of Action)

For its second cause of action, Buyer asserts that Sponsor breached the letter agreement by failing to remediate the defective conditions noted in the inspection statement. The parties make largely the same arguments with respect to this claim as they do with respect to the first cause of action, and the Court’s decision thereon applies equally to this cause of action.

However, Buyer argues additionally, in opposition to the motion, that the consequential damages bar in the Amended Plan does not apply to the letter agreement, as it is a separate agreement. In reply, Sponsor argues that the letter agreement is based on the inspection statement, which is specifically contemplated by both the Amended Plan and the contract. Accordingly, the letter agreement must incorporate the terms of those documents. Moreover, it states that, if the letter agreement is a separate agreement, it is unenforceable for lack of consideration.

“As a general rule, contracts remain separate unless the history and subject matter shows them to be unified” (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395, 396 [1st Dept 1996] [internal quotation marks and citation omitted]). “In determining whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances” (*id.* [internal quotation marks and citation omitted]). “[A]greements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one” (*1471 Second Corp. v NAT of NY Corp.*, 162 AD3d 449, 450 [1st Dept 2018] [internal quotation marks and citation omitted]).

Here, the Amended Plan, contract, and letter agreement were not executed contemporaneously. The contract, however, specifies that closings would not begin at the building until at least two years after the parties entered into the contract (contract, § 17.4). Moreover, the Amended Plan and the contract both reference the pre-closing walkthrough and resulting inspection statement that are the basis for the letter agreement (Amended Plan at 92-93; contract, § 18). While the letter agreement does not explicitly include the words “incorporated by reference,” it does frame the letter agreement in terms of the relationship governed by the Amended Plan (letter agreement at 1). Thus, the common subject matter of all three agreements

suggests that they should be read together (*1471 Second Corp.*, 162 AD3d at 450; *National Union Fire Ins. Co. of Pittsburgh, Pa.*, 223 AD2d at 396). If the agreements are read together, then the consequential damages bar in the Amended Plan applies with equal force to this cause of action.

The alternative to reading the agreements together is to consider the letter agreement as a separate agreement. As Sponsor points out and Buyer does not contest, the record does not disclose any consideration for the letter agreement (Court tr dated 1/9/19 at 51:13-55:22). “Consideration consists of either a benefit to the promisor or a detriment to the promisee” (*Anand v Wilson*, 32 AD3d 808, 809 [2d Dept 2006]). “All contracts must be supported by consideration” (*Beitner v Becker*, 34 AD3d 406, 407 [2d Dept 2006]). Without consideration, the letter agreement is unenforceable as a separate agreement. To avoid rendering the letter agreement unenforceable unnecessarily, the Court instead construes it together with the Amended Plan and the contract (*see Credit Suisse First Boston v Utrecht-Am. Fin. Co.*, 80 AD3d 485, 488-89 [1st Dept 2011] [“[A]n interpretation that renders a contract illusory and therefore unenforceable is disfavored and enforcement of a bargain is preferred, particularly where, as here, the parties have expressed their intent to be contractually bound in a writing.”]).

Accordingly, and for the reasons set forth with respect to the first cause of action, that branch of Sponsor’s motion to dismiss the second cause of action is granted only to the extent of dismissing Buyer’s claim for consequential damages, and is otherwise denied.

Negligence (Third Cause of Action)

For its third cause of action, Buyer asserts that Sponsor negligently constructed the Premises, and caused further damage by negligently attempting to remediate the defective work. At oral argument, Sponsor’s counsel confirmed that Sponsor only challenged this cause of action

insofar as it asserted a claim for consequential damages (Court tr dated 1/9/19 at 31:16-23). As set forth above, Buyer alleges substantial property damages in addition to its barred claims for consequential damages. Accordingly, that branch of Sponsor's motion to dismiss the third cause of action is denied, except to the extent this claim seeks consequential damages.

Trespass (Fourth Cause of Action)

For its fourth cause of action, Buyer alleges that Sponsor has trespassed on the Premises by negligently working on the upstairs apartment, causing debris to fall from the Premises' ceiling. Sponsor argues that it has not entered the Premises, and, therefore, it has not trespassed. In opposition, Buyer argues that Sponsor's negligent construction above the Premises caused material to enter the Premises from the ceiling, which is sufficient to allege a trespass.

"Trespass is the invasion of a person's right to exclusive possession of his land, and includes the entry of a substance onto land" (*Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012] [internal citations omitted]). "Trespass does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion" (*id.*). Here, as the Sponsor points out and Buyer does not contest, the complaint fails to allege that any substance unlawfully entered the Premises. The broadest possible reading of the amended complaint shows only that material fell from the ceiling, specifically material from the ceiling itself (*id.* ["[T]he act done must be such as 'will to a substantial certainty result in the entry of the foreign matter'"]). Nothing in the amended complaint supports the conclusion that material from outside the Premises unlawfully entered the Premises as a result of Sponsor's conduct. Accordingly, Sponsor has not trespassed. The cases cited by Buyer are distinguishable, as they all clearly state that the trespassing material in question came from outside the plaintiff's property (*see e.g. Berenger*, 93 AD3d at 182 [triable issue of fact where defendant caused glycol

to leak into plaintiff's penthouse by failing to repair a cooling tower]; *Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 [1st Dept 2006] [reinstating trespass claim where complaint alleged that the defendant's failure "to properly cover and seal exploratory holes that it opened in the roof ... resulted in leaks into Duane Reade's store and, on at least two occasions, allegedly caused water pipes to freeze and burst"; *Stewart v State*, 248 AD2d 761, 761 [3d Dept 1998] ["Water and debris cast upon the lands of another is actionable as a trespass."]; *see also Ivory v. International Bus. Machines Corp.*, 116 A.D.3d 121, 129-130 [3d Dept 2014] [holding that courts have generally precluded trespass claims where the entry or intrusion was intangible, such as the occurrence of vibrations, and such "intangible intrusions" are rather treated as nuisances]).

Accordingly, that branch of Sponsor's motion to dismiss the fourth cause of action is granted.

Nuisance (Fifth Cause of Action)

For its fifth cause of action, Buyer alleges that Sponsor's construction in the upstairs apartment is a nuisance, causing falling debris and excessive noise. Sponsor argues that construction noise is not actionable as a nuisance. Moreover, it claims that Buyer was aware of the construction pursuant to the Amended Plan, and cannot bring a nuisance claim based on the construction. In opposition, Buyer states that the falling debris is sufficient to sustain the nuisance claim.

"The elements of a common-law claim for a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Berenger*, 93 AD3d at 182 [internal quotation marks and citations omitted]). Here, even assuming *arguendo* that general construction noise is not actionable as a nuisance, Buyer

adequately alleges that debris fell from the ceiling due to Sponsor's construction, which Buyer gave Sponsor notice of and Sponsor continued to do in an allegedly unsafe and negligent manner, unreasonably interfering with Buyer's right to use and enjoy its property. Buyer's notice to Sponsor is sufficient to allege the necessary intentional interference (*id.* at 183-184 ["The plaintiffs' documentation of noise complaints to the defendants also raises triable issues as to whether the defendants knew that excessive noise was 'resulting,' and thus whether allowing the noise to continue was intentional"]). While Sponsor characterizes the debris falling as minimal, such a question of fact cannot be resolved on a motion to dismiss (*Williams*, 104 AD3d at 522). Further, while the Amended Plan does warn potential purchasers of ongoing construction, there is no mention of falling debris. Sponsor provides no authority for the proposition that such a contractual provision bars a nuisance claim related to the construction generally, or with respect to the falling debris.

Accordingly, that branch of Sponsor's motion to dismiss the fifth cause of action is denied, except to the extent this claim seeks consequential damages.

Fraud (Sixth Cause of Action)

For its sixth cause of action, the sole claim asserted against Broker, Buyer asserts that Broker falsely represented that the Premises would contain certain features which were material to its desire to purchase the Premises. Specifically, that the Premises would have private elevator access, a breakfast bar, 14-foot-high ceilings, and an integrated curtain system. Broker argues that the contract contains a clear disclaimer of any reliance on Broker's statements, barring Buyer's fraud claim. Further, it argues that any claims related to these items were waived when Buyer accepted the deed to the Premises subject to the inspection statement, which did not list any of the aforementioned items. Moreover, Broker argues that Buyer lacks standing

to assert a fraud claim, because any representations Broker made were made to Dana individually.

In opposition, Buyer first argues that Broker cannot rely on the contract because it was not a party to the contract. Further, Buyer claims that Broker had exclusive knowledge of the fact that the Premises would have none of the allegedly promised items, which precludes the contract's disclaimer provision even if it did apply. Finally, Buyer asserts that Dana was acting as Buyer's principal throughout the process, not in his individual capacity, thus giving Buyer standing to assert a fraud claim based on misrepresentations Broker made to Dana. In any event, Buyer states, the issue of Dana's capacity cannot be resolved at the pleading stage.

"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]).

Here, assuming arguendo that Buyer has standing to assert this claim, Buyer has failed to state a cause of action. It is settled law that a party may not claim fraud based upon representations it has specifically disclaimed (*Danann Realty Corp v Harris*, 5 NY2d 317, 320-321 [1959]). Here, Buyer claims that it relied on Broker's misrepresentations as to characteristics of the Premises. Dana, however, specifically disclaimed reliance on any representations by Broker as to the characteristics of the premises in the contract (contract, § 20). Buyer cannot claim reliance on such representations when its principal disclaimed reliance on representations "as to the very matter as to which it now claims it was defrauded" (*Mahn Real Estate Corp. v Shapolsky*, 178 AD2d 383, 385 [1st Dept 1991] [internal quotation marks and citation omitted]). *Wittenberg v Robinov* (9 NY2d 261 [1961]), cited by Buyer, is distinguishable. In *Wittenberg*, the Court of Appeals reversed the dismissal of claims against the

defendant real estate broker because he was not a party to the contract and the express language of the disclaimer did not “inure to his benefit” (*id.* at 263-264). Here, by contrast, the disclaimer language specifically includes representations made by Broker, not just by Sponsor. As Sponsor’s agent, Broker is protected by the disclaimer even though it is not party to the contract (*c.f. Berkowitz v Fischbein, Badillo, Wagner & Harding*, 7 AD3d 385, 387 [1st Dept 2004] [“Because the Fischbein firm represented Lefkowitz in negotiating the buyout agreement, it was his agent and is thus immunized from liability under the terms of the release”]).

Moreover, Dana also stipulated that he had received and reviewed a copy of the Amended Plan, which Buyer claims contradicted Broker’s misrepresentations, or was silent as to the subject matter thereof (contract, §§ 11.1-11.2). Buyer does not allege that Dana made any inquiries as to the inconsistencies between the Amended Plan and Broker’s alleged misrepresentations. Where a plaintiff can discover the truth of the alleged misrepresentations “by the exercise of ordinary intelligence . . . [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations” (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] [internal quotation marks and citations omitted]). For the same reason, Buyer’s reliance on *Steinhart Group v Citicorp* (272 AD2d 255 [1st Dept 2000]) is unavailing, as the amended complaint does not sufficiently allege that the truth of Broker’s alleged misrepresentations was peculiarly within Broker’s knowledge.

The Plaza PH2001, LLC v Plaza Residential Owner LP (2009 NY Slip Op 32228[U] [Sup Ct, New York County 2009], *affd as mod sub nom. Plaza PH2001 LLC v Plaza Residential Owners LP*, 79 AD3d 587 [1st Dept 2010]) is instructive. In *The Plaza PH2001 LLC*, the plaintiff sued the defendant building Sponsor and broker for fraud, alleging misrepresentations as

to features of a penthouse apartment. The court (Shafer, J.) dismissed the fraud claim against both parties, relying on a nearly identical reliance disclaimer as that stipulated in the contract herein (*The Plaza PH2001*, 2009 NY Slip Op 32228[U]).² The Appellate Division, First Department upheld the decision (*Plaza PH2001*, 79 AD3d at 587). Buyer's attempts to distinguish *Plaza PH2001* are unpersuasive.

Accordingly, Broker's motion to dismiss the sixth cause of action as against it for fraud is granted.

The Court has examined the remaining arguments of the parties and finds them to be unavailing.

² Broker's counsel stated at oral argument that his firm had also drafted the disclaimer language at issue in *Plaza PH2001* (Court tr dated 1/9/19 at 7:20-22).

CONCLUSION

Accordingly, it is hereby,

ORDERED that defendant NRT New York LLC's motion (mot. seq. 002) to dismiss the amended complaint as against it is granted, and the amended complaint is dismissed against said defendant, with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of this action is severed and continued; and it is further

ORDERED that the action shall bear the following caption:

-----X
LOWER MANHATTAN INNER CITY REAL ESTATE
ASSOCIATES LLC,

Plaintiff,

Index No.: 651141/2018

- against -

56 LEONARD LLC,

Defendant.

-----X

And it is further

ORDERED that defendant NRT New York LLC shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry upon all parties and upon the county clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who shall mark their records to reflect the change in the caption herein; and it is further

ORDERED that defendant 56 Leonard LLC's motion (mot. seq. 003) to dismiss the amended complaint against it is granted to the extent of dismissing all claims for consequential damages related to the first, second, third, and fifth causes of action as set forth above, and dismissing the fourth cause of action in its entirety, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference at 71 Thomas Street,
Room 104 at 9:30 a.m. on April 16, 2019.

The foregoing constitutes the decision and order of the Court.

Dated: April 8, 2019

ENTER:



HON. ROBERT D. KALISH, J.S.C.
J.S.C.