

Tan v Pan Am Equities, Inc.
2019 NY Slip Op 32287(U)
July 30, 2019
Supreme Court, New York County
Docket Number: 151234/2019
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. PAUL A. GOETZ****PART****IAS MOTION 47EFM***Justice*

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WILLIAM TAN,

Plaintiff,

- v -

PAN AM EQUITIES, INC., 330 EAST 39TH STREET, LLC,
MIRADOR REAL ESTATE LLC

Defendant.

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INDEX NO. 151234/2019**MOTION DATE** 07/18/2019**MOTION SEQ. NO.** 001**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27

were read on this motion to/for

DISMISS

On March 25, 2017, plaintiff William Tan entered into a lease with defendants Pan Am Equities, Inc. and 330 East 39th Street LLC (the "Owner Defendants") through their broker, defendant Mirador Real Estate LLC (the "Broker Defendant", and collectively "Defendants"), for a penthouse apartment in the building located at 330 East 39th Street, New York, New York. Prior to entering into the lease, the Defendants advertised the apartment for rent on StreetEasy.com, stating that it has a "north facing balcony" and "HUGE private roof top deck" and that the pictures of the apartment online were "100% accurate." Complaint, ¶¶ 13-14. Plaintiff and his agent contacted the Broker Defendant, who informed him that the building would be undergoing a renovation pursuant to Local Law 11 within the next few months and that plaintiff would not have access to his balcony and roof deck for a few months. Complaint, ¶¶ 20-21. In exchange, the Broker Defendant offered to compensate plaintiff by providing him with a \$500 monthly credit for the period of time his access to the balcony and roof deck was restricted due to the Local Law 11 renovations. Complaint, ¶ 22. However, plaintiff alleges that the Broker

Defendant failed to inform him that his roof deck would serve as the staging area for the renovation and that the metal gate and fences on the roof deck would be removed during the renovation, thereby permitting anyone to access his roof deck. Complaint, 23, 24. Further, plaintiff alleges that the Broker Defendant's representation that the Local Law 11 renovation would be a minor renovation which would last only a few months was misleading as the renovation continued for approximately 18 months, during which time the balcony and roof deck were unavailable to plaintiff and dust permeated plaintiff's apartment, creating a hazardous living condition for him and his daughter. Complaint, ¶¶ 33-36.

As a result of this renovation and other problems with the condition of the apartment, including extensive and recurring flooding, plaintiff commenced this action asserting causes of action for breach of contract and fraud. Although this dispute is primarily between plaintiff and the Owner Defendants, plaintiff asserts two causes of action against the Broker Defendant for fraudulent misrepresentation and violation of section 349(a) of the General Business Law based on their alleged misrepresentations regarding the Local Law 11 renovation and the condition of the apartment. The Broker Defendant now moves pursuant to CPLR 3211(a)(1) and (7) to dismiss these causes of action.

With respect to the fraud claim, the Broker Defendant argues that this claim must be dismissed based on the provisions in plaintiff's lease in which plaintiff disclaims reliance on any representations made by the owner or the owner's agents regarding the condition of the apartment except as expressly set forth in the lease and agrees to accept the apartment in its present condition "as is." Affidavit of Angelo Scaridis sworn to on April 5, 2019, Exh. B, ¶ 28 of lease and ¶ 5 of lease rider. It is well-established that "a specific disclaimer of reliance on representations as to the condition of real property will ordinarily bar a fraud claim." *TIAA*

Global Investments, LLC v. One Astoria Square LLC, 127 A.D.3d 75, 87 (1st Dep't 2015), citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320-21 (1959). However, a plaintiff "may not be precluded from claiming reliance on misrepresentations of facts peculiarly within [the defendant's] knowledge, notwithstanding the execution of a specific disclaimer." *Joseph v. NRT Inc.*, 43 A.D.3d 312, 313 (1st Dep't 2007) (internal citation omitted).

Here, the complaint supports plaintiff's position that that he could not have reasonably anticipated the extent of the Local Law 11 renovation, particularly since the work had not yet commenced when plaintiff signed the lease for the apartment. Complaint, ¶¶ 20-21; *see also TIAA Global Investments*, 127 A.D.3d at 89. Although the Broker Defendant argues that plaintiff could have investigated their alleged misrepresentations, plaintiff is under no obligation on a motion to dismiss to make an evidentiary showing in support of his allegations. *TIAA Global Investments*, 127 A.D.3d at 89. Further, while the issue is not discussed by the parties or the caselaw, it would be unfair to hold plaintiff, who was merely leasing an apartment for one year, to the same due diligence standards as a purchaser of real estate or a tenant entering into a commercial lease. Thus, the fraud claim cannot be dismissed on this basis.

Further, the Broker Defendant's argument that the \$500 rent abatement somehow negates plaintiff's damages lacks merit, particularly given that the abatement was negotiated based on the alleged misrepresentations. The Broker Defendant also argues that it cannot be held liable because it was acting as an agent for a disclosed principal. Although this theory is generally true for a breach of contract claim, an agent for a disclosed principal may be held liable to a third party where the agent committed fraud, as alleged in plaintiff's complaint. *Mastropieri v. Solmar Construction*, 159 A.D.2d 698, 700 (2d Dep't 1990) (internal citation omitted). Accordingly, the fraud claim will not be dismissed.

The Broker Defendant also seek to dismiss plaintiff's claim under General Business Law § 349, arguing that this is a private dispute between plaintiff and the Owner Defendants that is not consumer-oriented. To make out a prima face case for unlawful deceptive acts and practices under General Business Law § 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result. *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2004)(subsequent case history omitted). Further, the alleged acts, if permitted to continue, must have a "broad impact on consumers at large." *Thompson v. Parkchester Apts. Co.*, 271 A.D.2d 311 (1st Dep't 2000). The present dispute revolves around what the Defendants told plaintiff about the condition of the apartment and the Local Law 11 renovation, which is a private dispute and thus does not fall within the ambit of the statute. *Id.* at 312. Accordingly, it is

ORDERED that the motion is granted to the extent that the sixth cause of action is dismissed as against defendant Mirador Real Estate LLC and is otherwise denied; and it is further

ORDERED that the parties shall appear for the previously scheduled preliminary conference on August 8, 2019 at 9:30 a.m.

7/30/19
DATE


PAUL A. GOETZ, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☐

DENIED

☒

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE