

**Board of Mgrs. of the Brighton Tower II
Condominium v Brighton Bldr., LLC**

2019 NY Slip Op 35096(U)

August 22, 2019

Supreme Court, Kings County

Docket Number: Index No. 506732/2016

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 506732/2016
SEPT 2015

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

BOARD OF MANAGERS OF THE BRIGHTON TOWER II
CONDOMINIUM,

Plaintiff,

against

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other	<u> </u>

BRIGHTON BUILDER, LLC, MIKHLIN HOLDINGS INC.,
LEON MIKHLIN, ALEXSANDER BOMSTEIN, P.E. AND
JOHN DOES 1-10 (THE FULL INDIVIDUAL, CORPORATE OR
OTHER ENTITY NAME OF "JOHN DOES" BEING UNKNOWN
TO PLAINTIFF, THE PERSON OR ENTITIES INTENDED
BEING THE INDIVIDUALS, CORPORATIONS, LIMITED
LIABILITY COMPANIES OR OTHER PERSONS OR ENTITIES
THAT PARTICIPATED IN THE WRONGS COMPLAINED OF),

Defendants.

Upon the foregoing papers, defendants Brighton Builder, LLC, Leon Mikhlin and Mikhlin Holdings's motion in limine or, in the alternative, to dismiss plaintiff's claims against them, is decided as follows:

Plaintiff's Allegations in the Complaint

Plaintiff is a condominium board for a building located at 3015 Brighton 6th Street, in Brooklyn, New York. Plaintiff alleges in the complaint that, in contravention of the condominium's offering plan, the building is not constructed in accordance with local laws. By way of example, plaintiff alleges that the building has poor ventilation, which causes mold to grow, and that the building has numerous construction defects. Plaintiff further alleges that defendants misappropriated insurance proceeds and maintenance fees, and have not themselves paid maintenance fees. Based on these allegations, plaintiff asserts claims for breach of contract,

fraud, breach of fiduciary duty, and breach of the common law housing merchant warranty.

Analysis

Defendants primarily move “in limine” to preclude plaintiff from introducing any evidence or testimony concerning their liability or any damages they may have caused. In the alternative, defendants move to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), based on the applicable statute of limitations pursuant to CPLR 3211(a)(5), and for failure to state a claim pursuant to CPLR 3211(a)(7).

Defendants’ Motion in Limine

Defendants move “in limine” to bar plaintiff from submitting any evidence or testimony that may be used to show defendants are liable or caused plaintiff to suffer damages. Defendants argue that such evidence should be precluded because plaintiff will not be able to prove its claims against them.

Clearly, defendants seek dismissal of this action on its merits and not the preclusion of specific evidence. Defendants unquestionably seek summary judgment here, but they are out of time to make such a motion. Plaintiff filed the note of issue on March 5, 2018. Defendants moved to vacate the note of issue. By order, dated April 4, 2018, the court (Rivera, J.) declined to vacate the note of issue and set August 6, 2018 as the deadline for any party to move for summary judgment. Defendants did not file this motion until December 18, 2018. Because they are out of time to move for summary judgment, defendants filed this “motion in limine” that effectively seeks summary judgment relief. Such a motion is procedurally improper, and it is denied (*Marshall v 130 North Bedford Road Mount Kisco Corp.*, 277 AD2d 432 [2d Dept 2000]).

Defendants' Motion to Dismiss

Alternatively, defendants move to dismiss pursuant to CPLR 3211(a)(1), 3211(a)(5) and 3211(a)(7). It is rare, but not unheard of, to move to dismiss so late in the action where, as here, the case has been pending in the Jury Coordinating Part since November 2018 and the case is on the eve of trial. However, CPLR 3211(e) provides restraints on when a party may move to dismiss. For example, the statute provides that a motion pursuant to CPLR 3211(a)(1) and (a)(5) must be made “[a]t any time before service of the responsive pleading is required,” or asserted as a defense in the answer (*see, e.g., Bennett v King of Tech., Ny, Inc.*, 8 Misc 3d 1005(A) [Sup Ct 2005]). Defendants move to dismiss long after the time to serve their responsive pleading. While defendants plead their statute of limitations defense in their answer, they do not assert a defense that plaintiff’s claims are refuted based on documentary evidence. Accordingly, defendants’ motion to dismiss pursuant to CPLR 3211(a)(1) is denied.

Defendants’ motion to dismiss pursuant to CPLR 3211(a)(7) is also affected by this action’s procedural posture. In addition to attacking the facial sufficiency of the complaint’s allegations, defendants also seek to introduce evidence against plaintiff’s causes of action. In considering a motion to dismiss pursuant to CPLR 3211(a)(7), a court is permitted to consider evidentiary material (*Anglero v Hanif*, 140 AD3d 905, 907 [2d Dept 2016]). If the court considers such material, and the motion is not converted into one for summary judgment,

the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate

(*id.* [internal citations omitted]). Affidavits cannot be used to determine whether there is evidentiary support for the pleading (*id.* [internal citations omitted]). Consequently, Mr.

Mikhlin's affidavit submitted in support of defendants' motion to dismiss, will not be considered.

First, defendants argue that, in contravention of the pleading requirements of CPLR 3013, the complaint improperly asserts causes of action against a group of defendants referred to in the complaint as the "Sponsor Defendants". Defendants state that this group includes Brighton Builder, Mikhlin Holdings and Mr. Mikhlin. They argue that CPLR 3013 requires plaintiff to assert claims against specific defendants, and not against defendants as a group. First, the complaint defines the "Sponsor Defendants" only as Brighton Builder and Mr. Mikhlin (complaint at ¶ 9). Second, the only case that defendant cites in support is *Bd. of Managers of Caton Ct. Condominium v Caton Dev. LP*, 41 Misc 3d 1231[A], 2013 NY Slip Op 51951[U] [Sup Ct, Kings County 2013] [Rivera, J.] [hereinafter, "*Caton*"]. In *Caton*, the court did not dismiss any claims because they were asserted against a group of defendants. Rather, the court held that certain claims could not be asserted against individual defendants because plaintiff did not properly allege that the corporate veil should be pierced (*Caton*, 41 Misc 3d 1231[A], *8). Accordingly, the complaint does not improperly assert causes of action against the group called the "Sponsor Defendants".

Next, defendants challenge several of plaintiff's causes of action. Defendants argue that plaintiff's first cause of action, for breach of contract, should be dismissed as against Mikhlin Holdings and Mr. Mikhlin. As an initial matter, the first cause of action is asserted only against the "Sponsor Defendants", who are Brighton Builder and Mr. Mikhlin. Defendants argue that Mr. Mikhlin cannot be held liable for breach of an offering plan merely because he signed the certification (*Bd. of Managers of 125 N. 10th Condominium v 125North10, LLC*, 150 AD3d

1065, 1066 [2d Dept 2017], *lv to appeal dismissed*, 30 NY3d 959 [2017], *rearg denied*, 30 NY3d 1086 [2018]). However, plaintiff correctly states that Mr. Mikhlin signed the certification also as an individual. Consequently, Mr. Mikhlin may be held individually liable (*Bd. of Managers of E. Riv. Tower Condominium v Empire Holdings Group, LLC*, 58 Misc 3d 1224(A) [Sup Ct 2018] citing *Birnbaum v Yonkers Contr. Co.*, 272 AD2d 355 [2d Dept. 2000]; *Bd. of Managers of 647 & 649 Place Condominium ex rel. Unit Owners of 647 & 649 Washington Ave. Condominium v 647 & 649 Washington Ave., LLC*, 49 Misc 3d 1216(A) [NY Sup 2015]).

Defendants also argue that plaintiff cannot pierce the corporate veil of Brighton Builder to hold Mr. Mikhlin personally liable as Brighton Builder's sole principal. To pierce the corporate veil, plaintiff must allege that the individual owners of the corporation "exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (*Olivieri Const. Corp. v WN Weaver St., LLC*, 144 AD3d 765, 767 [2d Dept 2016]).

Defendants submit what appears to be every deposition transcript – nearly 1,000 pages of deposition testimony – and challenges plaintiff to identify testimony to support its effort to pierce Brighton Builder's corporate veil. Defendants cannot shift their burden of proof to plaintiff (*Weill v E. Sunset Park Realty, LLC*, 101 AD3d 859, 860 [2d Dept 2012]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). Instead, defendants must identify specific evidence that completely refutes any issue of fact plaintiff has alleged. Defendants have not done so, and so plaintiff's first cause of action, for breach of contract, is not dismissed.

Defendants also move to dismiss plaintiff's second cause of action, for fraud, against Brighton Builder and Mr. Mikhlin. Plaintiff alleges that defendants made numerous

representations in the offering plan, which defendants distributed to the public, intending for them to rely on the representations, and on which the unit owners justifiably relied, causing damages.

Defendants argue the representations referred to in the complaint are required by the Martin Act, and that there is no private right of action for violation of the Martin Act. Indeed, defendants purport to quote a portion of the Court of Appeals holding in *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009] to argue that both omissions and misrepresentations in an offering plan are preempted by the Martin Act (*see* Affirmation of Andrea L. Roschelle, dated December 18, 2018, at ¶ 53). *Kerusa* contains no such language. In fact, *Kerusa* held only that there is not private right of action for fraudulent omissions that should have been disclosed pursuant to the Martin Act (*Kerusa*, 12 NY3d 245-46). There is no such preclusion for affirmative misrepresentations in an offering plan (*id.* at 247 n 5; *Caboara v Babylon Cove Dev., LLC*, 82 AD3d 1141, 1142 [2d Dept 2011]). Here, plaintiffs are alleging affirmative misrepresentations in the offering plan, and so the Martin Act does not preclude plaintiff's claim.

Defendants next argue that the unit owners waived their right to rely in an any representations made by Brighton Builder by disclaiming such reliance in the purchase agreement. Such disclaimers are ineffective for matters peculiarly within the knowledge of defendants (*Culinary Connection Holdings, Inc. v Culinary Connection of Great Neck, Inc.*, 1 AD3d 558, 559 [2d Dept 2003]). Defendants fail to show that this issue of fact "is not a fact at all", and so plaintiff's fraud claim was not waived by the purchase agreement.

Defendants further argue that plaintiff's fraud claim is duplicative of their breach of

contract claim. A fraud claim will be duplicative of a breach of contract claim only when the alleged fraud arises from the failure of a promisor to perform his or her obligations under a contract (*Junger v John V. Dinan Assoc., Inc.*, 164 AD3d 1428, 1431 [2d Dept 2018]; *Neckles Builders, Inc. v Turner*, 117 AD3d 923, 925 [2d Dept 2014]). Conversely, a plaintiff may allege a separate fraud claim if the promisor seeks to induce another party into a contractual relationship under false pretenses (*Neckles*, 117 AD3d at 925).

As alleged, the breach of contract claim asserts that defendants breached the purchase agreements, which incorporated the offering plan by reference, by failing to construct the condominium building in accordance with the provisions of the offering plan, and by failing to construct the building in accordance with the New York City Building Code. Plaintiff's fraud claim, as alleged, asserts that defendants did not disclose their failure to construct the building in accordance with the offering plan and the Building Code. Because these allegations describe a failure to disclose a current fact about performance, rather than a failure to disclose a future intention to dishonor an agreement, the breach of contract and fraud claims impermissibly overlap, and the second cause of action for fraud is dismissed (*Pugni v Giannini*, 163 AD3d 1018, 1020 [2d Dept 2018]; *Neckles*, 117 AD3d at 925).

Next, defendants move to dismiss plaintiff's third cause of action, for breach of fiduciary duty, against Mr. Mikhlin and Mikhlin Holdings. In this cause of action, plaintiff alleges that Brighton Builder and Mr. Mikhlin controlled the governance of the condominium building until the beginning of 2014. During their time in governance, plaintiff alleges that they failed to remedy defects and other damages to the building, and misappropriated insurance funds and maintenance charges. Plaintiff further alleges that Mikhlin Holdings aided and abetted the

breach of fiduciary duty by using the insurance funds to allay the costs of other properties in which Mikhlin Holdings is involved.

Defendants first argue that this cause of action is barred by the statute of limitations. There are two statutes of limitations for breach of fiduciary duty, depending on the relief sought. If the relief sought is equitable, the time period is six years. If the relief sought is monetary damages, the time period is three years (*Scott v Fields*, 85 AD3d 756, 759 [2d Dept 2011]). Because plaintiff seeks monetary damages, the applicable statute of limitations is three years.

For a breach of fiduciary duty claim, the statute “does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated” (*NM v Estate of Grainger*, 171 AD3d 1197, 1198 [2d Dept 2019], quoting *Loeuis v Grushin*, 126 AD3d 761, 764 [2d Dept 2015]). Plaintiff alleges that Brighton Builder and Mr. Mikhlin were in control of the board until “the beginning of 2014” (*see* complaint at ¶ 90). As plaintiff commenced this action on April 26, 2016, it does not appear that the statute of limitations has been violated.

Defendants additionally argue that Mr. Mikhlin cannot be held liable for breach of fiduciary duty for merely failing to act and because he committed no independently tortious acts. However, defendants provide no legal support for this position. Defendants cite *Pomerance v McGrath* (124 AD3d 481 [1st Dept 2015]) and *Peguero v 601 Realty Corp.* (58 AD3d 556 [1st Dept 2009]), neither of which concerns a breach of fiduciary duty claim.

Defendants incorrectly contend that plaintiff does not allege Mr. Mikhlin participated in the breach of fiduciary duty. Plaintiffs allege that Mr. Mikhlin and Brighton Builder, referred to in the complaint as the “Sponsor Defendants”, breached their fiduciary duty by failing to remedy

defects and other damages to the building, and by misappropriating insurance funds and maintenance charges. As explained above, merely referring to the defendants jointly does not equal a failure to allege conduct against Mr. Mikhlin individually.

Defendants also argue that the breach of fiduciary duty claim is duplicative of the breach of contract claim and the conversion claim. The fiduciary duty claim is distinguished from the contractual claim because it involves defendants' duties while in control of the condominium's board, and includes damages other than construction defects. Additionally, defendants reference no legal support for their contention that certain factual allegations may support a claim for breach of fiduciary duty and a claim for conversion. A misappropriation of funds may give rise to a breach of fiduciary duty claim as well as a conversion claim (*see, e.g., Wynkoop v 622A President St. Owners Corp.*, 169 AD3d 1100, 1103 [2d Dept 2019]; *Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777-78 [2d Dept 2017]). Accordingly, plaintiff's third cause of action, for breach of fiduciary duty, is not dismissed.

Defendants also seek dismissal of plaintiff's fourth cause of action, for breach of the common law implied housing merchant warranty. The common law implied housing merchant warranty is superseded by GBL 36-B, which states that the housing merchant warranty applies "only to new single-family homes or new for-sale units in a multi-unit residential structure of 5 stories or less" (*Bd. of Managers of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 683 [2d Dept 2016]). Plaintiff does not oppose this portion of defendants' motion. Accordingly, plaintiffs' fourth cause of action is dismissed.

In addition, defendants move to dismiss plaintiff's fifth cause of action, for conversion. Plaintiff alleges that defendants misappropriated insurance proceeds earmarked for damages

caused by Hurricane Sandy, as well as maintenance fees for the building.

Defendants argue that plaintiff's claim violates the statute of limitations. The statute of limitations for conversion is three years, and the claim accrues on the date the conversion takes place (*Obstfeld v Thermo Niton Analyzers, LLC*, 168 AD3d 1080, 1083 [2d Dept 2019]).

Plaintiff provides copies of documents showing that certain acts of conversion took place within the statutory period. Accordingly, plaintiff's conversion claim is not dismissed.

Defendants move to dismiss, in part, the sixth cause of action, for breach of contract, in which plaintiff alleges that Brighton Builder and Mr. Mikhlin breached the purchase agreement by failing to pay common charges. Defendants argue that Mr. Mikhlin is not responsible for these charges.¹ Plaintiff does not oppose this portion of defendants' motion. Accordingly, plaintiff's sixth cause of action is dismissed as against Mr. Mikhlin only.

Defendants seek dismissal of plaintiff's seventh cause of action, for breach of contract against Mr. Mikhlin, in which plaintiff alleges that Mr. Mikhlin failed to pay maintenance charges for parking spaces. Defendants argue that Mr. Mikhlin is not required to pay the charges because he does not own the parking spaces. Plaintiff does not oppose this portion of defendants' motion. Accordingly, plaintiff's seventh cause of action is dismissed.

Finally, defendants move to dismiss plaintiff's request for punitive damages. A plaintiff may recover punitive damages when the defendant's actions constitute "willful or wanton negligence or recklessness" (*Morton v Brookhaven Mem. Hosp.*, 32 AD3d 381, 381 [2d Dept 2006], quoting *Lee v Health Force*, 268 AD2d 564, 564 [2d Dept 2000]). "Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are

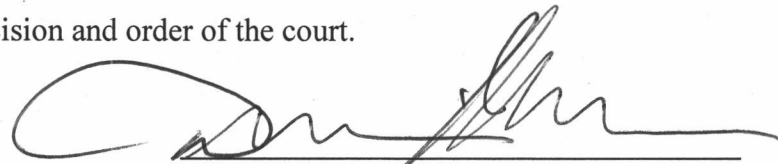
¹ Defendants also argue that Mikhlin Holdings is not responsible for these common charges. However, plaintiff does not assert this claim against Mikhlin Holdings.

primarily questions which reside in the sound discretion of ... the jury, and such an award is not lightly to be disturbed” (*Feldman v Knack*, 170 AD3d 667, 670 [2d Dept 2019], quoting *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978] [alteration in original]). Plaintiff’s allegations, which include causes of action for breach of fiduciary duty and conversion, are sufficient to warrant a request for punitive damages (*see, e.g., Bennett v State Farm Fire and Cas. Co.*, 161 AD3d 926, 929-30 [2d Dept 2018]; *Auguston v Spry*, 282 AD2d 489, 490 [2d Dept 2001]; *Schubert v Marwell*, 218 AD2d 693, 693-94 [2d Dept 1995]).

For the foregoing reasons, defendants’ motion is granted to the extent that the following are dismissed: (a) plaintiff second cause of action; (b) plaintiff’s fourth cause of action; (c) plaintiff’s sixth cause of action as against Mr. Mikhlin; and (d) plaintiff’s seventh cause of action.

This constitutes the decision and order of the court.

August 22, 2019
DATE



DEVIN P. COHEN
Justice of the Supreme Court

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