

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

2019 NY Slip Op 35097(U)

August 19, 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

SEQ 17006

DECISION/ORDER

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

Part 91

BOARD OF MANAGERS OF THE BRIGHTON TOWER II
CONDOMINIUM,

Plaintiff,

against

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.

Papers

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

Upon the foregoing papers, defendant Alexsander Bomstein, P.E.'s motion to dismiss plaintiff's claim against him 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

Defendant Bomstein moves to dismiss the single cause of action against him, for fraud. In its eighth cause of action, plaintiff alleges that Bomstein drafted a report that described the construction of the condominium building. Plaintiff further alleges that Bomstein falsely certified that the condominium building was constructed in accordance with Bomstein's plans and specifications. Plaintiff further alleges that Bomstein knew his certification was false based on the inspections he made of the building, and issued the certification to induce people to buy the condominium units. Plaintiff claims that the unit purchasers relied on the certification and were damaged thereby.

Bomstein moves to dismiss this claim, pursuant to CPLR 3211(a)(7), on the basis that his actual certification does not guarantee the condition of the premises. 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]).

Bomstein submits a copy of the report. The report makes a number of statements as to the present condition of the property. For example, the report describes the dimensions of the site and the condition of the sub-soil. The report also states that the building will be constructed in accordance with plans filed with the New York City Department of Buildings. The report further appears to explain, in narrative format, details about the building's construction pursuant

to those plans. For example, the report explains how the exterior and interior of the building will be constructed, how utilities will be provided, and the security and lighting features. Finally, the report states in paragraph (BB), that “[c]ontrolled inspections of the building are being done by the engineer of record.”

Bomstein submits a copy of his certification, in which he states that he prepared the report, which describes the construction of the building, with the intention that potential purchasers should rely on the report. The certification states that the report:

- (i) sets forth in narrative form the description and physical condition of the property as it will exist upon completion of the construction, provided that construction is in accordance with the plans and specifications that [Bomstein] prepared;
- (ii) in [Bomstein’s] professional opinion affords potential investors, purchasers and participants an adequate basis upon which to found their judgment concerning the description and physical condition of the property as it will exist upon completion of construction, provided that construction is in accordance with the plans and specifications [Bomstein] prepared;
- (iii) does not omit any material fact;
- (iv) does not contain any untrue statement of a material fact;
- (v) does not contain any fraud, deception, concealment, or suppression;
- (vi) does not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances; [and]
- (vii) does not contain any representation or statement which is false, where [Bomstein]:
 - (a) knew the truth;
 - (b) with reasonable effort could have known the truth;
 - (c) made no reasonable effort to ascertain the truth; or
 - (d) did not have knowledge concerning the representation made.

Bomstein argues that the certification and report were not false because they forecasted future

plans. A statement of future expectations is actionable as fraud if there is a present intent to deceive (*Nerey v Greenpoint Mortg. Funding, Inc.*, 144 AD3d 646, 647-48 [2d Dept 2016]; *Aries Fin., LLC v 12005 142nd St., LLC*, 127 AD3d 900, 902 [2d Dept 2015]).

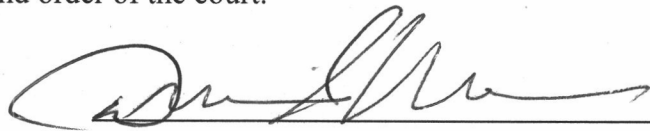
Here, plaintiff alleges that Bomstein knew from his inspections of the building that his representations that the construction would adhere to the condominium’s offering plan were false (*see* complaint at 134-35). While intent is often difficult to prove, Bomstein admitted at his deposition that he did not recall performing any such inspections of the building, despite his statement in the report that he would do so.

Bomstein also argues that the plaintiff could not have justifiably relied on the certification for representations as to the physical condition of the building, because such representations are disclaimed in the certification. The certification states on page two that “[t]his statement is not intended as a guarantee or warranty of the physical condition of the building”. This disclaimer is difficult to reconcile with Bomstein’s statements in the certification: (a) that he intended for people to rely on the certification; (b) about how the building will be constructed; and (c) that confirm he is performing inspections of the building.

Based on plaintiff’s allegations, together with the evidence presented by the parties, plaintiff has shown that it has a cause of action for fraud and Bornstein has not shown that a material fact claimed by the plaintiff is not a fact at all (*Anglero*, 140 AD3d at 907). Accordingly, defendant Bomstein’s motion is denied.

This constitutes the decision and order of the court.

August 19, 2019
DATE


DEVIN P. COHEN
Justice of the Supreme Court

2019 SEP 27 AM 10: 23
KINGS COUNTY CLERK
FILED

