

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

2020 NY Slip Op 31196(U)

May 4, 2020

Supreme Court, Kings County

Docket Number: 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

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

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

Table listing numbered papers: Notice of Motion and Affidavits Annexed (1), Order to Show Cause and Affidavits Annexed (2), Answering Affidavits (3), Replying Affidavits, Exhibits, Other.

Upon the foregoing papers, defendant Alexsander Bomstein, P.E.'s motion to reargue his prior motion dismiss plaintiff's fraud 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 its 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.

With regard to Bomstein, the engineer for the condominium construction, plaintiff asserts a claim for fraud. 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.

Procedural History

By motion, dated January 7, 2019, defendant Bomstein asked this court to dismiss plaintiff's fraud claim against him pursuant to CPLR 3211(a)(7). The motion was fully briefed.

By order, dated August 19, 2019, the court denied Bomstein's motion. The court reviewed a copy of Bomstein's report, which stated that, in paragraph (BB), that "[c]ontrolled inspections of the building are being done by the engineer of record." The court also reviewed Bomstein's certification, which stated that, in Bomstein's opinion, "potential investors, purchasers and participants" may use the report's description of the property, including the condition of the property upon completion, to form their judgments. The certification also stated that the report does not contain any "untrue statement of a material fact" nor does it "omit any material fact". The certification further stated that the report "does not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances".

The court evaluated plaintiff's allegations under the standard for a CPLR 3211 motion to

dismiss when the movant has introduced evidence. In such situations, the movant must entirely and indisputably disprove plaintiff's material allegations, such that "a material fact claimed by the plaintiff to be one is not a fact at all" (*Anglero v Hanif*, 140 AD3d 905, 907 [2d Dept 2016]).

Under this standard, the court found that plaintiff sufficiently alleged that Bomstein's statements in the report and certification were actionable as statements about future events (*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]). The court further found that Bomstein's disclaimer in the certification was insufficient to disprove plaintiff's allegation of justifiable reliance because the certification also stated that Bomstein intended people to rely on his report and his inspections. Thus, Bomstein's evidence did not show that a material fact claimed by the plaintiff is not a fact at all.

Analysis

For a motion to reargue, Bomstein must show that this court overlooked or misapprehended a point of law or fact, without resorting to arguments different from those originally stated (*NYCTL 1998-1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966-67 [2d Dept 2016]).

Bomstein first argues that forward-looking statements in an architect's report cannot support a claim for fraud. For this argument, Bomstein relies solely on the First Department's decision in *Bd. of Managers of 147 Waverly Place Condominium v KMG Waverly, LLC* (129 AD3d 549 [1st Dept 2015]). In its decision, the court did not hold that statements in an architect's report are not actionable as fraud. Instead, the First Department held that the statements in that case were predictions of future events, which cannot sustain a fraud claim (147

Waverly Place, 129 AD3d at 550).

The First Department's decision in *147 Waverly Place* is not controlling authority over this court. Moreover, this action does not concern *predictions* of future events, but rather statements about *future plans*. Thus, the Second Department held in *Nerey* and *Aries Fin.* that statements about future plans are actionable if there is a present intent to deceive (*Nerey*, 144 AD3d at 647-48; *Aries Fin.*, 127 AD3d at 902). [2d Dept 2015]). Here, plaintiff alleged that Bomstein misrepresented the construction of the condominium building and he knew the representation to be false because of the inspections of the building that he stated he would perform. Plaintiff further alleges that Bomstein intended to deceive plaintiff and others by issuing a certification that his report, including his intention to perform inspections, was true.

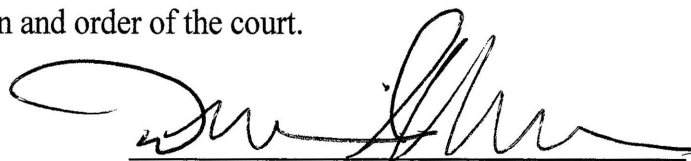
Bomstein next argues that plaintiff has not shown that Bomstein had a present intent to deceive through Bomstein's deposition testimony, in which he testified that he could not recall whether he performed such inspections. Plaintiff does not have the initial burden here. To the contrary, Bomstein has the burden to show that his evidence has indisputably proven that a material fact claimed by the plaintiff – in this case, Bomstein's intent to deceive – is not a fact at all (*Anglero*, 140 AD3d at 907). The court noted that Bomstein has testified that he did not recall whether he performed the required inspections. Thus, the evidence that Bomstein submitted, if anything, may have supported plaintiff's allegations.

For the foregoing reasons, Bomstein's motion is denied.

This constitutes the decision and order of the court.

May 4, 2020

DATE



DEVIN P. COHEN

Justice of the Supreme Court