SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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533 EAST 12TH STREET LLC,

Plaintiff, DECISION AND ORDER

Index No. 656408/19

- v -

DS 531 E. 12TH OWNER LLC, KENSINGTON VANGUARD NATIONAL LAND SERVICES OF NY, LLC,

MOT SEQ 001

Defendants.

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DS 531 E. 12TH OWNER LLC,

Plaintiff,

Third-Party Index No. 596124/2019

-against-

ROBERT ZELMAN

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking to recover $175,000 held in escrow upon the sale of an eight-story residential building, the plaintiff, 533 East 12th Street LLC, and the third-party defendant, Robert Zelman, its managing member, move (1) to dismiss the counterclaims asserted against the plaintiff by defendant DS 531 E. 12th Owner LLC's (DS 531) pursuant to CPLR 3211(a)(1) and (7), (2) dismiss the third-party complaint of DS

531 against Zelman individually and (3) for summary judgment against defendant DS 531 on the plaintiff's sole cause of action for breach of contract. DS 531 opposes the motion. The motion is granted in part.

II. BACKGROUND

The plaintiff sold its 49.6955% interest in an eight-story residential building located at 531-33 East 12th Street in Manhattan to DS 531 pursuant to a purchase agreement dated June 27, 2018. Robert Zelman, managing member of the plaintiff, negotiated and executed the agreement on behalf of the plaintiff. Under the terms of the purchase agreement, the plaintiff also assigned all the property's leases to DS 531.

Section 9.1 of the purchase agreement contains an 'as is' clause which states in relevant part that:

> "Purchaser acknowledges that it has made its own analysis and evaluation of the Property, the operation, the income potential, profits and expenses thereof, its condition and all other matters affecting or relating to the transaction underlying this Agreement as Purchaser deems necessary, including, without limitation, the layout, leases, square footage, rents, income, expenses and operation of the Property and will be permitted to conduct such investigations as it may deem proper during the Inspection Period. In entering into this Agreement, Purchaser has not been induced by and has not relied upon any representations, warranties, statements or covenants, express or implied, made by Seller or any agent, employee or other representative of Seller, or by the Broker or any other person, which are not expressly set forth in this Agreement. Purchaser agrees to accept title to the property

> in its 'as-is' condition at the time of closing except as specifically set forth and subject to the provisions of this Agreement."

The purchase agreement also contains a broad merger clause, which provides that:

> "This Agreement constitutes the entire understanding between the parties with respect to the transaction contemplated herein, and all prior or contemporaneous oral agreements, understandings, representations and statements, and all prior written agreements, understandings, representations and statements are merged into this Agreement. Neither this Agreement nor any provisions hereof may be modified, amended, discharged or terminated except by an instrument in writing signed by the party against which the enforcement of such modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument."

Sections 15.1 and 15.2 of the purchase agreement, the "as is" provisions, state in relevant part that:

> "Purchaser agrees to purchase the Property subject to any and all notes or notices of violations of law, or municipal ordinances...or any condition or state of repair or disrepair or other matter or thing, whether or not noted, which, if noted, would result in a violation being placed on the Property. Seller shall have no duty to remove or comply with or repair any condition, matter or thing, whether or not noted, which, if noted, would result in a violation being placed on the Property. Seller shall have no duty to remove or comply with or repair any of the aforementioned Violations, liens or other conditions, and Purchaser shall accept the Property subject to all such Violations and liens, the existence of any conditions at the Property which would give rise to such Violations or liens, if any, and any governmental claims arising from the existence of such Violations and liens...Notwithstanding anything contained herein, Seller shall pay any fines or penalties imposed by reason of any such violations. If such payment of fines or penalties has not been completely

> satisfied prior to the Closing, Seller shall pay to Purchaser's title company (the "Title Company") at the Closing the reasonably estimated amount for such fines or penalties imposed for non-compliance required by the Title Company to insure against collection of same and the estimated cost that Purchaser will incur to remediate such violations."

Additionally, amongst the closing documents incorporated at the time of closing is Exhibit 4 to the purchase agreement, entitled Assignment and Assumption of Landlord's Interest in Leases, which states that:

> "Assignor does hereby agree to indemnify, defend and save Assignee, its successors and assigns, harmless from and against any and all claims and liability asserted or arising in connection with the performance by Assignor under the Leases prior the date hereof."

At closing, the parties entered into an escrow agreement whereby $175,000.00 of the purchase price was held as security for any breach of the representations made in the purchase agreement. The escrow agreement was dated November 1, 2018 and required any claims against the withheld amount to be made within 175 days after the closing. On April 24, 2019, one day prior to the deadline, DS 531 made a demand for the escrow funds, stating that "Purchaser has claims against Seller in excess of the Holdback amount for breach of representations,

warranties and covenants made by Seller in the PSA and closing documentation."

Following a demand by the plaintiff, DS 531, by letter dated June 4, 2019, specified the alleged breaches of the purchase agreement, stating:

> "These breaches by Sellers pertain to, among other things, outstanding and undisclosed Department of Buildings and Fire Department violations pertaining to the Property undisclosed defective conditions pertaining to the façade and roof of the Property, and undisclosed violations of the New York Property Maintenance...
>
> With respect to the façade and roof the Property, Purchaser has experienced water infiltration episodes that have materially and adversely impacted the Property. Purchase has cause to believe that the condition pertaining to the roof and façade of the Property were knowingly and intentionally concealed by Sellers prior to the Closing. Initial estimates of corrective measures and associated costs to remedy the portions of the Property relating to the defective conditions that were concealed and/or not disclosed by sellers are in excess of $290,000. However, the aforesaid breaches of the PSAs are continuing to be investigated by Purchasers, and the full scope and extent of Purchaser's damages has not yet been liquidated."

DS 531 alleges that it thereafter discovered that many walls within the building were not properly fireproofed. DS 531 also alleges that it later discovered false records of leases and tenancies, including falsified documents misrepresenting the existence of certain units in the property, and tenant lease renewals that did not have the necessary paperwork to remove various apartment units' rent-stabilized status.

On October 30, 2019, the plaintiff filed its complaint in this action alleging one cause of action against DS 531 for breach of contract. Specifically, the complaint claims that DS 531 was improperly withholding the escrowed funds by asserting bad faith claims for breach of the purchase agreement. The plaintiff alleges that all of the purported violations asserted by DS 531 are invalid under the 'as is' clause in the purchase agreement.

On December 17, 2019, DS 531 answered the complaint and asserted ten counterclaims. The first counterclaim for breach of contract alleges that the plaintiff breached the warranties put forth in the purchase agreement by concealing the building's various code violations, falsifying tenant documents, rent rolls, and leases, and failing to operate the property in an ordinary and customary manner up until the time of the property's closing, exacerbating the roof's leakage issues.

The second counterclaim for breach of contract alleges that the plaintiff breached the purchase agreement by failing to indemnify DS 531 for costs associated with rent disputes arising from the plaintiff's conduct.

The third counterclaim for fraud alleges the same underlying facts as the first cause of action for breach of contract.

The fourth counterclaim for the breach of the duty of good faith and fair dealing alleges that the plaintiff used false documentation, representations, and warranties to artificially inflate the value of the property.

The fifth counterclaim for tortious interference with contract alleges that the plaintiff interfered with DS 531's contracts with various tenants by making false representations regarding the property's conditions.

The sixth counterclaim for tortious interference with prospective economic relations alleges that the plaintiff's false representations and warranties regarding the property interfered with DS 531's ability to enter into subsequent leases with the tenants in the building.

The seventh counterclaim alleges that the plaintiff's false representations artificially increased the purchase price for the building, unjustly enriching the plaintiff.

The eighth counterclaim asserts a cause of action for negligent misrepresentation based upon the plaintiff's alleged false representations.

The ninth counterclaim asserts a cause of action for *prima facie* tort based upon the plaintiffs alleged misrepresentations made to increase the purchase price of the building.

The tenth counterclaim seeks attorneys' fees pursuant to the terms of the purchase agreement.

On December 17, 2019, DS 531 also filed a third-party complaint as against Zelman individually asserting one cause of action for fraud based upon his purported misrepresentations he made to DS 531 during the sale of the building.

The plaintiff now seeks (i) to dismiss DS 531's counterclaims and third-party complaint pursuant to CPLR 3211(a)(1) and (7), and (ii) for summary judgment on its cause of action for breach of contract.

III. DISCUSSION

A. Dismissal of Counterclaims

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-

Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). Additionally, CPLR 3013 requires that, with regard to claims sounding in fraud, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved."

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010).

1. First and Second Counterclaims for Breach of Contract

In support of its motion to dismiss the first and second and counterclaims pursuant to CPLR 3211(a)(1) and (7), the

plaintiff submits, *inter alia*, the purchase agreement containing the 'as is' clause disclaiming liability for any misrepresentation or breach of warranty except those provided for within the purchase agreement.

Where a contract specifically disclaims the existence of warranties or representations, a cause of action alleging breach of contract based on such a warranty or representation cannot be maintained. See Simone v Homecheck Real Estate Servs., Inc., 42 AD3d 518 (2nd Dept. 2007); Bedowitz v Farrell Dev. Co., 289 AD2d 432 (2nd Dept. 2001). Moreover, a merger clause containing a no-oral modification provision precludes a buyer from claiming that he relied on the oral misrepresentations of a seller. See Ashwood Capital, Inc. v OTG Mgmt., Inc., 99 AD3d 1 (1st Dept. 2012).

The first counterclaim alleges that the plaintiff breached the warranties in the purchase agreement by (i) concealing the building's various code violations, and (ii) failing to operate the property in an ordinary and customary manner up until the time of the property's closing, exacerbating the roof's leakage issues. The second counterclaim alleges that the plaintiff breached the purchase agreement by failing to indemnify DS 531 for costs associated with rent disputes arising from the plaintiff's conduct.

The plaintiff maintains that the purchase agreement makes no warranties as to the condition of the property at the time of the sale, and thus it was incumbent upon DS 531 to have inspected the property and proposed any potential repairs or changes to the purchase price as necessary prior to the closing. Specifically, the plaintiff argues that, pursuant to the purchase agreement, DS 531 agreed to "purchase the property subject to any and all notes or notices of violations of law…or any condition or state of repair or disrepair…which if noted would result in a violation being placed on the property."

However, as correctly noted by DS 531, the plaintiff overlooks or ignores the following clause in the purchase agreement, which states that "[n]otwithstanding anything contained herein, seller shall pay any fines or penalties imposed by reason of any such violations. If such payment of fines or penalties has not been completely satisfied prior to the closing, seller shall pay to purchaser's title company at the closing the reasonably estimated amount for such fines or penalties imposed for non-compliance required by the title company to insure against collection of same and the estimated cost that purchaser will incur to remediate such violations."

The first counterclaim alleges, *inter alia*, that DS 531 received multiple fines for violations of various building

codes, particularly with regard to the lack of fireproofing in the building and the building's defective roof, which they claim should be attributed to the plaintiff under the purchase agreement. It also alleges that the plaintiff has neither paid any fines that resulted from the penalties that arose from its violations or any estimated cost to remediate the violations. As DS 531's claims appear to fall outside of the scope of the 'as is' clause in the purchase agreement, the agreement does not "resolve[] all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" such that dismissal pursuant to CPLR 3211(a)(1) is warranted. See Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002)

Moreover, the plaintiff does not address the portion of DS 531's first counterclaim alleging that the plaintiff breached the purchase agreement by stopping all maintenance and repair on the building, allowing for the roof to deteriorate. Section 10 of the purchase agreement provides that "between the date of this agreement and the closing, owners shall maintain the improvements and utility systems and continue to operate the property in its usual and customary manner." This portion of the first counterclaim also makes allegations within the scope of a provision in the purchase agreement such that dismissal is not warranted.

Similarly, the plaintiff does not address DS 531's second counterclaim alleging that the plaintiff breached the purchase agreement by failing to indemnify DS 531 for the claims made against it by the tenants assigned to it by the plaintiff. Specifically, DS 531 alleges that the plaintiff improperly deregulated various units in the building, leading to claims against DS 531 for rent overcharge. The second counterclaim also alleges that it received claims for water damage and rent abatement due to the plaintiff's failure to maintain its roof. As the plaintiff, in the lease assignment agreement incorporated into the purchase agreement, agreed to indemnify, defend, and hold DS 531 harmless from claims and liability arising in connection with its performance under the leases prior to the closing, DS 531's claims for indemnification also are within the scope of a provision in the purchase agreement.

Therefore, contrary to the plaintiff's contentions, none of the allegations contained within the first and second counterclaims are based upon oral representations made by the seller or are indisputably encompassed by the disclaimers contained within the purchase agreement. As such, the portion of the plaintiff's motion seeking to dismiss the first and second counterclaims pursuant to CPLR 3211(a)(1) is denied.

The allegations in the first and second counterclaims are also sufficient to withstand the portion of the plaintiff's motion to dismiss pursuant to CPLR 3211(a)(7). To plead a cause of action for a breach of contract, a party must sufficiently allege (1) the existence of a contract, (2) the party's performance under the contract, (3) the opposing party's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Here, DS 531 alleges 1) that the parties entered into the purchase agreement for both the building and the related leases, 2) that DS 531 paid for the building and leases pursuant to the purchase agreement, 3) that the plaintiff breached the agreement by failing to reimburse DS 531 for the fines incurred due to its violations of applicable building codes or provide for the remediation thereof, operate the property in its usual and customary manner prior to closing, and indemnify DS 531 against claims from tenants arising from its performance under the leases prior to closing; and 4) damages flowing therefrom.

2. Third and Eighth Counterclaims for Fraud and Negligent Misrepresentation

In support of its motion to dismiss DS 531's third counterclaim for fraud pursuant to CPLR 3211(a)(1) and (7), the plaintiff again relies on the purchase agreement. Specifically, the plaintiff points to the provision that states that DS 531

"has not been induced by and has not relied upon any representations, warranties, statements or covenants, express or implied, made by [the plaintiff]" and that DS 531 agreed to purchase the property 'as is.' The plaintiff argues that, under the purchase agreement, DS 531 was under a duty to inspect the building prior to closing, and its failure to discover the alleged defects within the building constitutes a waiver of the claims being brought in the instant action.

New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment. See Stambovsky v Ackley, 169 AD2d 254 (1st Dept. 1991). Mere silence on the part of the seller, without some act or conduct which deceived the buyer, does not amount to a concealment that is actionable as fraud. See id. To maintain a cause of action to recover for active concealment in the context of a fraudulent nondisclosure, a buyer must show that the seller affirmatively thwarted the plaintiff purchaser's performance of its obligations to diligently inspect the premises for defects. See Jee Foo Realty Corp. v Lemle, 259 AD2d 401 (1st Dept. 1999). However, when a seller omits facts that are peculiarly within its knowledge, and the other party does cannot discover such facts through a

diligent inspection of the premises or the exercise of ordinary intelligence, such an omission may be actionable. See Perez-Faringer v Heilman, 95 AD3d 853, 854 (2012); Danann Realty Corp. v Harris, 5 NY2d 317, 322 (1959).

Here DS 531's counterclaims allege that there were physical latent defects in the roof, façade, walls, ceilings, that could not be discovered without destructive testing, *i.e.*, tearing apart the roof, façade and other structures, and that the plaintiff actively failed to disclose those defects prior to the sale of the building. While these allegations do not plead with any specificity the affirmative actions undertaken by the plaintiff to conceal the issues with the building, DS 531 does sufficiently allege that these latent defects would not have been discoverable upon diligent inspection or the exercise of ordinary intelligence and that they were matters peculiarly within the plaintiff's knowledge. As such, the plaintiff's allegations are sufficient to survive a motion to dismiss on the grounds of caveat emptor or the 'as is' clause in the purchase agreement. See Perez-Faringer v Heilman, supra.

The plaintiff's allegations also sufficiently plead a cause of action for fraud. To establish a cause of action for fraud, a plaintiff must allege, with specificity, that a party 1) made a material representation or omission that was false; 2) with

knowledge of the falsity and intent to deceive the other party; 3) caused the other party's justifiable reliance on the representation or omission; and, 4) caused damages to be suffered by the other party as a result of the representation. See New York Univ. v Continental Ins., 87 NY2d 308 (1995); J.A.O. Acquisition Corp. v Stavisky, 18 AD3d 389 (1st Dept. 2005); Cohen v Houseconnect Realty, 289 AD2d 277 (2nd Dept. 2001).

Here, DS 531 has adequately plead that 1) the plaintiff failed to disclose roof, façade, walls, ceilings, defects, particularly that the walls were not properly fireproofed, 2) the plaintiff knew of these defects at the time that it failed to disclose them, 3) that DS 531 justifiably relied upon the plaintiff's omission, inasmuch as it reasonably assumed that the seller would disclose latent defects not discoverable by ordinary means, and 4) damages flowing therefrom.

Moreover, the plaintiff's motion to dismiss the third counterclaim for fraud makes no mention of the allegations in the complaint that the lease documentation, represented as true in the purchase agreement, included registration of fictitious tenant names and illegal rent overcharges to improperly inflate the value of the leases. These allegations likewise plead a cause of action for fraud as they allege that 1) the plaintiff

materially altered the tenant registration by including fake tenants and illegal rent amounts, 2) the plaintiff knew of the falsity of these records, 3) that DS 531 justifiably relied upon the records produced by the plaintiff regarding its tenants and their respective rents, and 4) damages arising from an inflated purchase price and other expenses relating to the illegal rents charged by the plaintiff. As such, dismissal of the third counterclaim pursuant to CPLR 3211(a)(7) is not warranted.

To the extent that the plaintiff also argues that all of DS 531's claims are insufficient under CPLR 3016(b), such an argument is without merit. CPLR 3016(b) "imposes a more stringent standard of pleading than the generally applicable notice of transaction rule of CPLR 3013." Edison Stone Corp. v 42nd St. Dev. Corp., 145 AD2d 249, 257 (1st Dept. 1989). However, at this early stage of the litigation, "plaintiffs are entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants and plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs." DDJ Mgmt., LLC v. Rhone Grp. L.L.C., 78 AD3d 442, 443 (1st Dept. 2010) citing Pludeman v Northern Leasing Sys., Inc., 40 AD3d 366 (1st Dept. 2007); see also Bernstein v Kelso & Co., 231 AD2d 314 (1st Dept. 1997). Here the pleadings sufficiently appraise the plaintiff of the alleged wrongs, such as its concealment or nondisclosure of latent

defects in the building, and its inflation of the building's price through altered tenant registrations and leases.

In addition to sufficiently pleading a cause of action for fraud, DS 531's counterclaims also adequately assert a cause of action for negligent misrepresentation. For a claim of negligent misrepresentation, a party is required to demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the [other party] to impart correct information to the [party alleging the cause of action]; (2) that the information was incorrect; and (3) reasonable reliance on the information." Ginsburg Dev. Companies, LLC v Carbone, 134 AD3d 890, 894 (2nd Dept. 2015). Although the plaintiff contends that DS 531 cannot establish a special or privity-like relationship, DS 531 is correct in arguing that under the special facts doctrine, "a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosures inherently unfair." See P.T. Bank Cent. Asia v ABN AMBRO Bank N.V., 301 AD2d 373, 378 (1st Dept. 2003).

As discussed herein, DS 531 adequately alleges that the plaintiff had special knowledge of the underlying latent defects in the building including a lack of fireproofing in the walls and a membrane in the roof to prevent leakage, as such defects would only be discoverable by DS 351 through intrusive testing

on the building. DS 531 also adequately alleges the falsity of the plaintiff's statements or omissions, and reasonable reliance thereon, for the reasons already discussed herein.

3. Fourth and Seventh Counterclaims for Breach of the Duty of Good Faith and Fair Dealing and Unjust Enrichment

The plaintiff argues that the fourth and seventh counterclaims for the breach of the duty of good faith and fair dealing and unjust enrichment should be dismissed pursuant to CPLR 3211(a)(7) as they are duplicative of DS 351's breach of contract counterclaim.

The plaintiff is correct in arguing that the fourth counterclaim for breach of the duty of good faith and fair dealing, based upon the plaintiff's non-disclosure of latent defects in the building and provision of false records to inflate the price of the building, is duplicative of DS 351's breach of contract counterclaim as it "arise[s] from the same facts and seek[s] the identical damages for [the] alleged breach." Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 (1st Dept. 2010); see Netologic, Inc. v Goldman Sachs Grp., Inc., 110 AD3d 433 (1st Dept. 2013).

Although not necessarily duplicative, the seventh counterclaim for unjust enrichment is also dismissed pursuant to CPLR 3211(a)(7), as it is well settled that where, as here, a plaintiff seeking to recover under an express agreement has no

cause of action would to recover for an equitable remedy of unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987).

4. Fifth and Sixth Counterclaims for Tortious Interference with Contract and Economic Relations

The plaintiff argues that DS 531's counterclaims for tortious interference with contract and economic relations must be dismissed pursuant to CPLR 3211(a)(7) as the plaintiff did not directly interfere with the contracts or prospective economic relations between DS 531 and the tenants that the plaintiff assigned to them.

To state a cause of action for tortious interference with contract, it is necessary to demonstrate the existence of a valid contract between the party asserting the cause of action and a third party, the other party's knowledge of that contract, the other party's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. See Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413, 424 (1996); see also 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B., 293 AD2d 314, 315 (1st Dept. 2002).

A party asserting a cause of action for tortious interference with prospective economic advantage must plead that it had an economic relationship with a third-party, that the

other party directly interfered with the third-party so as to defeat the economic relationship, and that the other party either employed wrongful means or acted for the sole purpose of inflicting intentional harm on party. See Posner v Lewis, 18 NY3d 566, 570 (2012). "Wrongful means includes physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." Carvel Corp. v Noonan, 3 NY3d 182, 195 (2004).

The counterclaims allege that the plaintiff, in charging its tenants illegal rents and failing to maintain the property, interfered with DS 531's ability to enter into renewed leases with the tenants after it took control of the building. These allegations are insufficient to establish tortious interference with contract as they do not plead i) any breach of contract by the tenants, only a decision not to renew their leases, or ii) any intentional procurement of any breach of contract by the plaintiff. Similarly, DS 531's allegations are insufficient to establish tortious interference with prospective economic relations as they do not show any intent on behalf of the plaintiff to interfere with the continuing economic relations between the tenants and DS 531, who purchased the leases from the plaintiff.

Therefore, the fifth and sixth counterclaims are dismissed pursuant to CPLR 3211(a)(7).

5. Ninth Counterclaim for *Prima Facie* Tort

It is well settled that four elements must be alleged and established in order to successfully plead a prima facie tort; 1) intentional infliction of harm, 2) resulting in special damages, 3) without any excuse or justification, 4) by an act or series of acts which would otherwise be lawful. See Golub v Esquire Publishing Inc., 124 AD2d 528 (1st Dept. 1986). "Disinterested malevolence" is the standard by which intent must be established for prima facie tort. Thus, "the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another." Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 333 (1983) quoting Beardsley v Kilmer, 236 NY 80, 90 (1923). However, if the intent is mixed, so that other motives are present, such as profit, self-interest or business advantage, then this mixture bars recovery under prima facie tort. See Squire Records, Inc. v Vanguard Recording Soc., Inc., 25 AD2d 190 (1st Dept 1966).

Here, DS 531 fails to sufficiently allege that the plaintiff acted with the disinterested malevolence necessary to maintain a cause of action for *prima facie* tort. DS 531's

counterclaims repeatedly allege that the plaintiff concealed defects and falsified tenant records to inflate the purchase price of the building. As such, the ninth counterclaim for prima facie tort is dismissed pursuant to CPLR 3211(a)(7).

6. Tenth Counterclaim for Attorneys' Fees

Section 25.16 of the purchase agreement provides that: "In any action, lawsuit or proceeding brought to enforce or interpret the provisions of this contract and/or arising out of or relating to any dispute between the parties, the prevailing party with respect to each specific issue in a matter shall be entitled to recover all of his or its costs and expenses relating to such issue."

As DS 531 may be found to be a prevailing party in this matter, inasmuch as it still has viable counterclaims, the portion of the plaintiff's motion seeking to dismiss the tenth counterclaim is denied as premature.

B. Motion to Dismiss Third-Party Complaint as Against Zelman

The third-party complaint alleges one cause of action for fraud alleging that Robert Zelman, as manager of the plaintiff, was the individual who engaged in the concealment of the building's latent defects and falsification of the tenant records to induce DS 531 to purchase the building.

Zelman seeks to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (7) for the same reasons that the plaintiff sought to dismiss DS 531's counterclaims. However, as the plaintiff's arguments for dismissal pursuant to CPLR 3211(a)(1) and (7) were found to be without merit, Zelman's motion to dismiss the third-party complaint on those grounds is likewise denied.

Moreover, to the extent, in the third-party complaint, DS 531 seeks to pierce the corporate veil to hold Zelman individually liable, it is sufficient to survive the motion to dismiss. It is well settled that "a corporate officer who participates in the commission of a tort [*i.e.* fraud] may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." Espinosa v Rand, 24 AD3d 102, 102 (1st Dept. 2005) citing American Express Travel Related Servs. Co., Inc. v N. Atl. Resources, Inc., 261 AD2d 310, 311 (1st Dept. 1999).

DS 531's third-party complaint alleges that Zelman, as manager of the plaintiff, engaged in fraud. Specifically, it claims that 1) the Zelman concealed latent defects in the building and materially altered the tenant registration by including fake tenants and illegal rent amounts, 2) the Zelman

knew of the falsity of these nondisclosures and alterations to the records, 3) that DS 531 justifiably relied upon Zelman's nondisclosures and records, as the defects and falsification of the tenant records could not be discovered with ordinary diligence and 4) damages arising from an inflated purchase price and other expenses relating to the illegal rents charged by the plaintiff. See New York Univ. v Continental Ins., supra. Therefore, the portion of the motion which Zelman seeks to dismiss the third-party complaint as against Zelman is denied.

C. Summary Judgment

The plaintiff also moves for summary judgment on its cause of action for breach of contract claiming that (i) DS 531's demand on the escrow funds was impermissibly vague, and thus should not be considered a timely claim on the escrow funds, and (ii) even were DS 531's June 4, 2019 letter specifying the alleged breaches considered, all of the alleged breaches are covered under the 'as is' clause in the purchase agreement.

In support of its motion, the plaintiff submits, *inter alia*, the purchase agreement, the holdback escrow agreement, and DS 531's April 24, 2019 demand that the $175,000 in the escrow account not be disbursed to the plaintiff because it had claims against the plaintiff exceeding that value. These submissions

are wholly insufficient to demonstrate the plaintiff's entitlement to summary judgment.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

The plaintiff claims that its submissions demonstrate that DS 531 did not timely object to the disbursement of the escrow funds, as its April 24, 2019 demand letter was vague. However, the plaintiff fails to point to any provision in either the purchase agreement or the escrow holdback agreement that states that any demand on the escrowed funds needed to be made with any degree of specificity. The only requirement under either agreement is that a notice of any claim against the escrowed funds needed to be made within 175 days of the closing, which the plaintiff concedes was April 25, 2019, one day after DS 531's claim was made. And DS 531 then promptly provided details of its demand upon the plaintiff's request.

The plaintiff further argues that the claims made by DS 531 are not covered by any warranties or representations in the purchase agreement, and therefore those claims are barred by the 'as is' clause. However, the plaintiff does not submit anything beyond the purchase agreement itself to demonstrate that the claims were encompassed by the 'as is' clause. Nor does the plaintiff submit any authority supporting its argument. As previously discussed, DS 531's counterclaims sufficiently allege that the claims against the escrowed funds are covered by the warranties within the purchase agreement. Thus, the plaintiff does not establish its entitlement to summary judgment on the breach of contract claim.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the portion of the motion of plaintiff, 533 East 12th Street LLC, and third-party defendant Robert Zelman seeking to dismiss defendant/third-party plaintiff DS 531 E. 12th Owner LLC's counterclaims as against the plaintiff pursuant to CPLR 3211(a)(1) and (7) is granted to the extent that DS 531 E. 12th Owner LLC's fourth, fifth, sixth, seventh, and ninth counterclaims are dismissed pursuant to CPLR 3211(a)(7), and is otherwise denied; and it is further,

ORDERED that the remaining portions of the motion of plaintiff, 533 East 12th Street LLC, and third-party defendant Robert Zelman seeking (i) to dismiss the third-party complaint as against Robert Zelman, and (ii) summary judgment on plaintiff 533 East 12th Street LLC's complaint, are denied in their entirety; and it is further,

ORDERED that the parties are to contact chambers on or before September 30, 2020 to schedule a preliminary conference.

This constitutes the Decision and Order of the Court.

Dated: August 21, 2020 ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON