470 4th Ave. Fee Owner, LLC v Adam Am. LLC
2020 NY Slip Op 33277(U)
October 5, 2020
Supreme Court, New York County
Docket Number: 656506/2018
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

----------X

470 4TH AVENUE FEE OWNER, LLC,

Plaintiff,

- v -

ADAM AMERICA LLC,470 4TH AVENUE INVESTORS LLC,DANYA CEBUS CONSTRUCTION, LLC,

Defendant.

----------X

INDEX NO. 656506/2018

MOTION DATE 9/24/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

DANYA CEBUS CONSTRUCTION, LLC

Plaintiff,

-against-

BEST PLUMBING & HEATING INC., AMRA ELECTRICAL CORPORATION, ALL ABOUT AC CORP., MAR-SAL CONTRACTING INC., MILESTONE MASONRY CORPORATION, MEC GENERAL, INC., RED HOOK CONSTRUCTION GROUP-II, LLC, SUPREME FLOORING COVERINGS LIMITED LIABILITY COMPANY, K2 CONSTRUCTION, INC A/K/A K2 CONSTRUCTION LLC A/K/A K2 CONSTRUCTION AND DEVELOPMENTS, INC., RODNEY KATZ

Defendant.

----------X

Third-Party
Index No. 595126/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 29, 31, 33, 37, 38, 39

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 34, 35, 36, 40

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that, with respect to the motion seeking dismissal of all causes of action in the amended complaint as against defendant Danya Cebus Construction, LLC (motion sequence

number 001), said motion is denied in all respects except for the fifth cause of action (breach of warranty against Danya Cebus); and it is further

ORDERED that, with respect to the motion seeking dismissal of all causes of action in the amended complaint as against defendants Adam America LLC and 470 4th Avenue Investors LLC (motion sequence number 002), said motion is denied in all respects, including the request by defendants seeking the imposition of sanctions against plaintiff; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order along with Notice of Entry of all parties within twenty (20) days; and it is further

ORDERED that defendants shall each file an answer to the amended complaint within 20 days after notice of entry of this decision and order.

Memorandum Decision

In this action, 470 4th Avenue Fee Owner, LLC (Plaintiff) alleges that Adam America LLC (Adam America), 470 4th Avenue Investors LLC (Seller) and Danya Cebus Construction LLC (Danya Cebus, along with Adam America and Seller, collectively, Defendants) defectively constructed a luxury residential building located at 470 4th Avenue in Brooklyn, New York (Building), then concealed and misrepresented those defects to induce Plaintiff to purchase the Building for $81 million. By the instant motions (sequence numbers 001 and 002; NYSCEF Doc. Nos. 11 and 18, respectively), Defendants seek an order of the court dismissing all claims asserted in Plaintiff's amended complaint (NYSCEF Doc. No. 8) and other relief. Plaintiff opposes both motions. For the reasons stated herein, the relief requested in the motions is granted in part and denied in part.

Background

The following factual allegations, unless otherwise indicated, are derived primarily from Plaintiff's amended complaint (AC) dated March 21, 2019.

The amended complaint alleges, upon information and belief, that "Seller is partially owned and managed by Adam America," and that Adam America and Danya Cebus (or their affiliates) "have worked together on multiple [building] projects in Brooklyn and in other cities" (AC; ¶¶ 21-22). With respect to the property at issue in this action, the amended complaint alleges that in July 2014, Seller hired Danya Cebus, as the general contractor, to construct the Building pursuant to the construction management agreement between them (CMA) wherein Danya Cebus agreed, among other things, that "the Work will conform to the requirements of the Contractor Documents" and "will be free from defects for a period of one year from the date of Substantial Completion" (*id.*, ¶¶ 23-24). It also alleges that Danya Cebus, "with Seller's

knowledge and acquiescence," cut corners to save money and constructed the Building with multiple defects that, "once installed and constructed, were concealed and undiscoverable without destructive investigation" (*id.*, ¶¶ 27-28). It further alleges that Defendants defectively installed the air conditioning and heating units in the Building, which "caused severe water infiltration and prevented the units from removing condensation" (*id.*, ¶¶ 29-37). Additionally, it alleges that Defendants "took the same approach, disregarding installation instructions and industry standards," in many aspects of the Building's construction in order to "save time and money," such as improperly installing "the foundation, roofing membrane, exterior wall and fenestration systems in ways that departed from the project drawings and product instructions and caused significant water infiltration" in the Building (*id.*, ¶¶ 38-47).

In late 2016, Adam America and Seller began discussions with Plaintiff regarding its potential purchase of the Building; and as the owner and seller with superior knowledge and expertise in building construction and development, defendants represented that they had successfully developed and constructed other similar buildings in the past and, in the course of discussions, they misrepresented the quality of the Building's construction to Plaintiff, even though they knew that Danya Cebus's work did not conform to the approved construction documents (*id.*, ¶¶ 48-61). On March 9, 2018, Plaintiff and Seller signed the Purchase and Sale Agreement (PSA), pursuant to which Plaintiff agreed to purchase the Building for $81 million (*id.*, ¶¶ 62-63). Although the PSA provided for purchase of the Building "as it," it contained "representations and warranties by Seller on which Plaintiff was entitled to, and did in fact, rely [on];" and pursuant to the First Amendment to the PSA dated May 24, 2018 (PSA Amendment), Seller was obligated to fully complete and pay for uncompleted work set forth in a "punch list," and "this obligation survived closing of the purchase" (*id.*, ¶¶ 64-65). After closing, Plaintiff

discovered that the Building sustained substantial water damages and, despite repeated requests, Seller breached its post-closing obligations to remediate the leaks and damages identified in the final punch list attached to the PSA Amendment (*id.*, ¶¶ 88-96). Though the Building is covered by warranties provided to Seller by third parties, including the warranty by Danya Cebus to construct the Building and to maintain it free of defects for one year after substantial completion of construction, Seller failed to assign such warranties to Plaintiff or enforce them, and as a result of the construction defects, Plaintiff has incurred significant expenses to remediate the defects (*id.*, ¶¶ 97-113). Plaintiff commenced the instant action, on December 31, 2018, by filing the original complaint against Defendants (NYSCEF Doc. No. 1).

The amended complaint asserts six causes of action: first (breach of PSA against Seller), second (fraudulent inducement against all Defendants), third (fraudulent concealment against all Defendants), fourth (negligent representation (against all Defendants), fifth (breach of warranty against Danya Cebus), and sixth (negligence against all Defendants). In its motion (sequence number 001), Danya Cebus seeks to dismiss all causes of action against it pursuant to CPLR 3211 (a) (1) and (a) (7). In a joint motion (sequence number 002), Adam America and Seller (hereinafter, collectively, AARE) also seek to dismiss all causes of action against them pursuant to CPLR 3211 (a) (1) and (a) (7), as well as sanctions against Plaintiff.

Applicable Legal Standards

As noted, Defendants seek to dismiss the causes of action in the amended complaint pursuant to CPLR 3211 (a) (1) and (a) (7). In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether the pleading states a cause of action. The motion must be denied if from the pleadings' four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter*

Partners, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are afforded a liberal construction, and the court is to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Nonnon v City of New York,* 9 NY3d 825, 827 [2007]). While factual allegations are given a favorable inference, bare legal conclusions and inherently incredible facts in the pleadings are not entitled to preferential treatment (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

On the other hand, if the movant seeks dismissal pursuant to CPLR 3211 (a) (1) and offers evidentiary or documentary material, the court must determine whether the complaint has a cause of action, not whether it has stated one (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]). When a complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001]).

Discussion

In support of their respective motions to dismiss, each of Danya Cebus and AARE submitted its moving brief (DC Brief and AARE Brief; NYSCEF Doc. Nos. 12 and 27). Responding to each of the two moving briefs, Plaintiff filed its opposition briefs (Plf. Opp. One and Plf. Opp. Two; NYSCEF Doc. Nos. 31 and 32). Thereafter, Danya Cebus and AARE each submitted its reply (DC Reply and AARE Reply; NYSCEF Doc. Nos. 38 and 36). Discussed below are the parties' disputes regarding the requested dismissal of the causes of action.

First Cause of Action (Breach of PSA Against Seller)

Plaintiff alleges that Seller breached section 7.01 (a) of the PSA by failing to complete the work required in the punch list attached to the PSA Amendment under section 2 (d) therein; by failing to assign to Plaintiff the third party and contractor warranties or to enforce them for Plaintiff's benefit in violation of section 7.01 (f) of the PSA; and by breaching the implied covenant of good faith and fair dealing inherent in all New York contracts (AC; ¶¶ 115-134).

Attaching the PSA and the PSA Amendment as documentary evidence (NYSCEF Doc. Nos. 25 and 26), Seller argues that this claim should be dismissed because it is barred by the terms of the PSA, which contains "a broad waiver and release" of Seller from all "claims, demands, causes of action ... whether known or unknown ... which [Plaintiff] has or may have in the future" (AARE Brief at 7, quoting PSA, section 19.15). Seller also argues that, while the amended complaint seeks damages of no less than $8 million, "this claim is defective because damages are not an available under the PSA," as section 21.01 therein states that Plaintiff's remedies are limited to terminating the PSA; waiving the alleged breach and proceed to closing; or seeking specific performance by Seller (*id.* at 8). Seller further argues that, to the extent any punch list items remain uncompleted, the total value of which was capped at $40,000 under section 2 (d) of the PSA Amendment, Seller has deposited said amount into escrow at closing and, thus, "nothing in the PSA allows Plaintiff to sue for damages related to the punch list" (*id.* at 9-10). With respect to the warranties, Seller argues that, pursuant to section 7.01(f) of the PSA, it has delivered to Plaintiff a "blanket assignment, in the form of Exhibit P [to the PSA]" at closing, and Plaintiff "accepted the assignment at closing without objection" (*id.* at 10). As to any alleged breach of the implied covenant of good faith and fair dealing by Seller in concealing or misrepresenting defective construction, Seller argues that, in section 6.02 of the PSA, Plaintiff agreed that it did not rely on (and Seller did not make) any express or implied representations or

warranties, including representations as to "the present or future structural and physical condition of the Building" (*id.* at 10-11; quoting PSA and citing *Bedowitz v Farrell Dev. Co.*, 289 AD2d 432, 432 [2d Dept 2001] [where contract disclaimed existence of warranty or representation, no action for breach of contract could be maintained]).

In opposition, Plaintiff contends that, despite Seller's assertion of a "broad waiver and release" in the PSA, section 19.15 of the PSA does not bar the breach of contract claim because it also contains an explicit "carve out" which states, in relevant part: "Notwithstanding anything to the contrary set forth in this Agreement, the release set forth herein does not apply to the … representations, warranties and obligations of Seller expressly set forth in this Agreement which survive closing . . . or any act constituting fraud by Seller," or any "representation . . . expressly made by Seller in . . . any document delivered by Seller at closing" (Def. Opp. Two at 6, quoting PSA, section 19.15). Plaintiff points out that section 2 (d) of the PSA Amendment (pertaining to the completion of punch list items) and section 7.01 (f) of the PSA (relating to the assignment or enforcement of third party warranties for the benefit of Plaintiff) are obligations imposed upon Seller that survived closing, and that the alleged breach of implied covenant of good faith and fair dealing claim falls within the carve out for acts "constituting fraud by Seller" (*id.* at 5-7). Next, Plaintiff contends that section 21.01 of the PSA does not limit its remedy to specific performance because that section only applies to "pre-closing breaches" by Seller, and absent a clear intent under the PSA that Plaintiff is to waive its post-closing remedies, it can pursue all common law remedies (*id.* at 7-8; citing *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., LP*, 7 NY3d 96, 104 [2006] [waiver should not be presumed and must be based on a clear showing of intent to relinquish a contractual protection]). Plaintiff also contends that, even if section 21.01 might be construed to limit remedies, the court may award damages in lieu

of equitable relief if such relief is "impossible or impracticable" (Def. Opp. Two at 9-10; citing *Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 106 [1st Dept 2015] [*Nomura*] [plaintiff could pursue money damages even if contract provided exclusive remedy of specific performance if granting equitable relief was impossible or impracticable]).

Moreover, Plaintiff contends that section 2 (d) of the PSA Amendment does not limit its damages to $40,000 because Seller's obligations to complete the punch list items survived the closing, and nothing in the PSA or the related "Holdback Escrow Agreement" limits damages to $40,000 (Def. Opp. Two at 11-12; citing *TIAA Global Invs., LLC v One Astoria Square LLC*, 127 AD3d 75, 90 [1st Dept 2015] [*TIAA*] [no limit on damage claim in the absence of a "clear manifestation of intent by the parties that the payment was made, and accepted, in full satisfaction of the claim," where the parties had entered into the escrow agreement before plaintiff alleges it knew the full extent of the defects in the building's construction]). Plaintiff also contends that the blanket assignment form executed by Seller does not satisfy its obligation to assign all warranties to Plaintiff because this obligation survived closing; Seller's failure to seek the consent of "Contractor" (i.e. Danya Cebus) to assign the warranty was a breach of its duty under section 7.01 (f) of the PSA; and even if Danya Cebus could withhold consent to the assignment, Seller remained obligated under section 7.01 (f) to "use commercially reasonable efforts to enforce such warranty" for the benefit of Plaintiff (Def. Opp. Two at 13-14).

Lastly, Plaintiff contends that the "as is" clause in section 6.02 of the PSA does not bar claims of breach of the implied covenant of good faith and fair dealing because all contracts imply such a covenant under New York law (*id.* at 14-16; citing *511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Specifically, as an example, Plaintiff points to the punch list in which Seller "falsely represented that items were removed because repairs have

been completed" to show that Seller's misrepresentation that it repaired the underlying defective conditions that had caused deterioration of the Building constitutes a breach of the implied covenant (Def. Opp. Two at 14-16; referencing Exhibit L to the PSA in which Seller claimed the punch list items were completed). In other words, Plaintiff contends that the general "as is" clause does not "disclaim the more specific misrepresentations made by Seller in the punch list" (*id.* at 16; citing *B&C Realty Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 656 [1st Dept 2013] [the "as is" clause did not bar breach of the implied covenant claim]).

In reply, Seller argues that "each aspect" of Plaintiff's breach of contract claim is barred by documentary evidence (AARE Reply at 1). With respect to its alleged failure to complete the punch list items, Seller argues that the three remedies set forth in section 21 of the PSA are "sole and exclusive," and that while the first two remedies (terminating the PSA; and waiving the alleged breach and proceed to closing) apply pre-closing, the last remedy (specific performance) applies post-closing as well (*id.* at 2). Seller also points out that, under section 21.02, specific performance must be sought by Plaintiff within 60 days *after* the later of the date that (i) Plaintiff has actual knowledge of the default or (ii) the scheduled closing date, as evidence that section 21 applies post-closing, and Plaintiff cannot rewrite the PSA to seek money damages (*id.* at 2-3). Seller also argues that, unlike the cases cited by Plaintiff where the courts granted money damages to the plaintiffs despite of the limitations contained in the debt instruments because requiring a curing of the defects in the thousands of securitized loans would be "impracticable and impossible," the number of incomplete punch list items is limited, and thus the cited cases are inapplicable (*id.* at 4; referencing *Nomura* and related cases). Seller further argues that under the PSA, a failure to complete the punch list items has a $40,000 cap, which limits the amount of money damages sought by Plaintiff (*id.* at 4, n 2). With respect to the alleged failure to assign

warranties to Plaintiff, Seller argues that it did not breach the PSA because it did exactly what the PSA requires: delivery of a blanket assignment to Plaintiff in the "exact form" at closing, which was accepted by Plaintiff without objection (*id.* at 5). As to the breach of the implied covenant, Seller argues that the implied covenant cannot be used to "create terms that do not exist" in the contract and "cannot be construed so broadly as to create independent contractual rights" (*id.* at 6-7, citing, among other cases, *National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006]).

Seller's arguments are unpersuasive. Even if the remedy of specific performance applies post-closing and the PSA contains a $40,000 cap on damage claims, as argued by Seller, the First Department held, in *TIAA*, a case unrefuted by Seller, that the plaintiff-buyer of a defective apartment building did not waive its rights to seek money damages against the defendant-sellers by entering into pre-closing escrow agreements that limited its claim, because "those agreements were fashioned before plaintiff alleges it knew the full extent of the defects in the building's construction," and such agreements did not clearly manifest the intent of the parties that the payment thereunder "was made, and accepted, in full satisfaction of the claim" (*TIAA*, 127 AD3d at 89-90). Here, the amended complaint alleges that, although Plaintiff conducted due diligence of the Building prior to closing, "Defendants did not permit Plaintiff . . . to inspect behind walls, lift floor boards, or conduct any invasive testing," and thus, "Plaintiff was forced to rely on Defendants' representations concerning the quality of the construction" (AC, ¶¶ 52-55). Also, while Seller asserts that the number of incomplete punch list items is limited, there is no factual evidence to support its assertion because no discovery has been conducted in this case. Further, Plaintiff counters that it has "already expended substantial resources mitigating its damages" due to "extensive water damage" to the Building and "could not wait for a court order requiring

Seller to perform its obligations," and that only money damages can adequately address Seller's breaches (Plf. Opp. Two at 10). Moreover, Seller does not refute Plaintiff's assertion that, even if the warranties were assigned to Plaintiff by delivering the blanket assignment form at closing, Seller is still required by section 7.01 (f) of the PSA to enforce such warranties "for the benefit of Buyer," and Seller's failure to do so constitutes a breach of contract. Furthermore, the "as is" clause does not bar this claim based on Seller's alleged breach of the implied covenant because, as discussed above, Plaintiff specifically pointed to an exhibit which appears to show that Seller misrepresented that it had completed the punch list items.

Importantly, despite of Seller's argument that the PSA contains a broad waiver clause in its favor, it fails to address the "carve out" in section 19.15 of the PSA, which is an integral part of the contract and, as such, undermines Seller's argument. Because the documentary evidence relied on by Seller does not flatly or unequivocally contradict the factual claims of the amended complaint, and the court is required to accord Plaintiff the benefit of every possible favorable inference, the first cause of action (breach of contract against Seller) survives.

Second Cause of Action (Fraudulent Inducement Against All Defendants)

As a threshold issue, Danya Cebus argues that all claims against it must be dismissed pursuant to CPLR 3211 (a) (1) because documentary evidence shows it owed no duty to Plaintiff (DC Brief, ¶ 42). Specifically, Danya Cebus argues that it only entered into the CMA with Seller for construction of the Building and under the CMA, Seller is prohibited from assigning the CMA to other parties without its consent, and that Plaintiff is not a third-party beneficiary of the CMA (*id.*, ¶¶ 44-46). Danya Cebus also argues it is not a party to the PSA, which "expressly disclaims and bars the causes of action alleged in the Complaint," and as such, the documentary evidence establishes a "complete defense" to Plaintiff's claims (*id.*, ¶¶ 48-51).

The above arguments are without merit. As discussed, the broad waiver and release clause in the PSA does not bar Plaintiff's claims if they fall within the carve-out provision. Moreover, because Danya Cebus is not a party to (or a third-party beneficiary of) the PSA, it cannot rely on the terms therein for defenses, if at all (*Freeford Ltd. v Pendleton*, 53 AD3d 32, 38 [1st Dept 2008] [only parties in privity of contract may enforce its terms]). Whether the CMA bars contract claims, in the context of the alleged warranty assignment, is analyzed below in connection with the fifth cause of action (breach of warranty) against Danya Cebus. In any event, Danya Cebus does not and cannot assert that the CMA, as documentary evidence, bars tort claims against it, because such claims do not require privity of contract.

To state a fraudulent inducement claim, the complaint needs to plead: a misrepresentation of material facts, which is intended to deceive and induce another party to act on it, and the plaintiff reasonably relied upon the misrepresentation, thus resulting in damages (*GoSmile Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]). In the amended complaint, the description in support of the various factual elements of this claim is set forth, generally, in paragraphs 135-146.

Danya Cebus argues that the "full extent" of this claim against it is found only in paragraph 57-58 of the amended complaint, where it alleges that during Plaintiff's site visits to the Building, a Danya Cebus representative falsely represented to Plaintiff or its agent that there were no problems with the air conditioning and heating (PTAC) units and there was no evidence of leakage at the roof or windows and, as such, this claim is insufficiently pled, as required by CPLR 3016 that a fraud claim be stated with specificity and particularity (DC Brief, ¶¶ 58-63). This argument is unavailing. Besides paragraphs 57-58 and 135-146, the amended complaint contains many allegations in support of this claim: paragraphs 27-47 (alleging that Danya Cebus, with the knowledge and acquiescence of AARE in order to save time and money, introduced and

caused many construction defects in the Building, including the PTAC units, foundation, roof, facade and fenestration systems), paragraphs 49-61 (alleging that, despite knowing and causing the defects, Defendants, including Danya Cebus, made material misrepresentations to Plaintiff that there were no problems), and paragraphs 142-146 (alleging that Plaintiff reasonably relied upon the fraudulent representations and sustained damages). Taken together, these allegations sufficiently plead a fraudulent inducement claim (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [requirement of CPLR 3019 (b) was satisfied where alleged facts were sufficient to permit a "reasonable inference" of fraud]; *see also* Plf. Opp. One, at 7-10 [describing a detailed explanation in support of this claim]). The reply of Danya Cebus adds nothing to support its position that this claim should be dismissed, and its reliance on *Weiss v Shapolsky* (161 AD2d 707 [2d Dept 1990]) for a proposition of law that a non-party to a contract could use its terms for defense is misplaced because the defendant in that case was a party to the contract (DC Reply, ¶¶ 18-25). Thus, as against Danya Cebus, this claim survives.

With respect to AARE, they argue that section 6.02 of the PSA bars this claim because it states that Plaintiff "has not relied on any representations or warranties, and Seller has not made any representations or warranties," including representations with respect to the "present or future structural and physical condition of the Building" (AARE Brief at 12; quoting PSA). They also argue that the broad waiver and release clause in section 19.15 bars this claim because it alleges misrepresentations about the quality of the Building's construction (*id.* at 12-13). Notably, AARE do not challenge the sufficiency or specificity of the complaint's allegations.

Plaintiff contends that section 6.02 does not bar this claim, relying on the "special facts doctrine" stated in *TIAA* (Plf. Opp. Two at 16-17). In *TIAA*, the First Department held that under this doctrine, a contractual disclaimer could not preclude a fraud claim when the underlying facts

were peculiarly within the defendant's knowledge (*TIAA*, 127 AD3d at 87). Noting that even though the purchaser of the defectively constructed building had the right to investigate its conditions, the court stated that it was "impossible to determine at this stage of the proceedings whether it would truly have been practical for plaintiff, prior to taking possession of the building, to do the requisite testing, some of it possibly destructive, that would have been necessary to reveal the alleged defects" (*id.* at 88). Here, the amended complaint alleges, among other things, that Defendants did not permit Plaintiff to "inspect behind the walls, lift floor boards, or conduct any other invasive testing," thus Plaintiff "was forced to rely on Defendants' representations concerning the quality of construction," and "despite being asked directly for information about any latent defects, issues with the integrity of the Property … Defendants failed to disclose any of the Construction Defects" (AC, ¶¶ 55-61). The facts in this case closely resemble those in *TIAA*; thus, application of the "special facts doctrine" is warranted.

Without directly addressing *TIAA*, AARE argue that the doctrine is inapplicable here because "Plaintiff admits in its Amended Complaint to having been aware of each of these conditions prior to closing and these exact items were included in the punch list (AARE Reply at 9; referencing AC, ¶¶ 66-67 [punch list items included deteriorated finishes at painted window sills, base boards around PTAC units, hardwood flooring etc.]). The argument is unpersuasive, in light of the allegations stated in paragraphs 55-61 of the amended complaint that Plaintiff was not allowed to conduct invasive testing to discover and ascertain the extent of the latent defects. Moreover, the $40,000 cap in the escrow agreement for completing the "uncompleted punch list items" seems low, and the amount appears to reflect money to be used for repairing items that were observable in plain sight, as opposed to latent defects that required invasive or destructive testing, as noted in *TIAA*. Indeed, AARE do not dispute that the alleged construction defects,

latent or otherwise, are within their knowledge. Also, as discussed above, the carve-out provision in section 19.15 of the PSA, which excepts "any act constituting fraud by Seller," militates against the "broad waiver and release" clause and does not preclude this fraud claim. In any event, at the pre-discovery stage, dismissal of this claim against AARE is unwarranted.

Third Cause of Action (Fraudulent Concealment Against All Defendants)

To state a fraudulent concealment claim, the complaint must allege that the defendant concealed a material fact which it had a duty to disclose; the defendant intended to defraud the plaintiff thereby, and the plaintiff reasonably relied on the representation resulting in injury (*see generally Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 900 [2d Dept 2013]).

Danya Cebus argues that because it is a non-party to the PSA, it is not "duty-bound" to disclose information to Plaintiff, and the fraudulent concealment claim fails (DC Opp., ¶ 69). It also argues that merely having "superior knowledge" does not impose a "special duty," and that Plaintiff has not pleaded facts to establish "Danya Cebus' awareness of the alleged concealed material facts" (*id.*, ¶¶ 71-72; citing, among other cases, *Ravenna v Christie's Inc.*, 289 AD2d 15 [1st Dept 2001]). Thus, Danya Cebus argues that this claim must be dismissed.

The arguments are unavailing. First, the cited *Ravenna* and related cases do not involve a fraudulent concealment claim; instead, they involve claims of negligent misrepresentation. Thus, Danya Cebus' reliance on these cases is misplaced. On the other hand, as Plaintiff pointed out, a fraudulent concealment requires, in addition to the elements required for a fraudulent inducement claim, an allegation that the defendant had "a duty to disclose material facts" but failed to do so, and that under the "special facts doctrine," a duty to disclose arises "where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (Plf. Opp. One at 11; citing *P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376-378

[1st Dept 2003]). Here, as discussed above, the amended complaint sufficiently alleges that Danya Cebus, as the general contractor of the Building, had superior knowledge of the material facts relating to the alleged construction defects and knew of such defects but failed to disclose same to Plaintiff. Moreover, the alleged latent defects, which were unknown to Plaintiff unless it was permitted to undertake invasive or destructive measures to uncover same, rendered the transaction without disclosure inherently unfair. Also, as pointed out by Plaintiff, a defendant "need not be a party to a contract to have to duty to disclose materially damaging information" (Plf. Opp. One at 11; citing *Standish-Parkin v Lorillard Tobacco Co.*, 12 AD3d 301, 303 [1st Dept 2004] [denied summary judgment motion by defendant-cigarette manufacturers seeking to dismiss class action plaintiffs' fraudulent concealment and related claims based on their failure to disclose public health risks from smoking]). Under such circumstances, Plaintiff has established a cognizable fraudulent concealment claim against Danya Cebus.

AARE again argue that the fraudulent concealment claim should be dismissed because of the "waiver and release" clause contained in section 19.15 and the "no representation" and "as is" clauses in section 6.02 of the PSA (AARE Brief at 13-14). Additionally, AARE argue that, under the doctrine of caveat emptor, to maintain a fraudulent concealment claim, "the buyer must show . . . that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor" (*id.*; quoting *Mancuso v Rubin*, 52 AD3d 580, 584 [2d Dept 2008]). Thus, AARE argue that, while Plaintiff alleges that Defendants prohibited it from performing invasive testing prior to closing, "under the PSA, Plaintiff did not have the right to perform invasive testing" (*id.*; referencing AC, ¶ 138), which, "standing alone," bars this claim.

For the reasons stated above in connection with the fraudulent inducement claim, sections 6.02 and/or 19.15 of the PSA do not conclusively establish that the amended complaint does not

plead cognizable claims. Also, AARE's reliance on the *Mancuso* case is misplaced because the court's dismissal of the fraudulent concealment claim was based on "the plaintiff's conclusory allegation that the Rubins 'concealed and obstructed' the alleged termite infestation and water damage from view, without any factual details as to the manner in which these conditions were concealed" (*Mancuso*, 52 AD3d at 584). Here, as discussed above, the amended complaint sufficiently pleads how Defendants, including AARE, concealed the latent construction defects, prevented Plaintiff from taking invasive measures to uncover same, and that there was a special duty to disclose material damaging information to Plaintiff. Therefore, the allegations in the amended complaint are non-conclusory, and are supported by plausible facts that should be construed in Plaintiff's favor in the context of a CPLR 3211 (a) (7) motion to dismiss. Further, contrary to AARE's assertion, paragraph 138 of the amended complaint does not state that Plaintiff does not have the right to perform invasive testing under the PSA. At any rate, regardless of whether the assertion is due to a scrivener's error (i.e., referencing an incorrect paragraph number or otherwise), Plaintiff has stated a cognizable fraudulent concealment claim against AARE in the amended complaint and pursuant to applicable law, based on the alleged concealment by Defendants in covering up the alleged latent construction defects.

Fourth and Sixth Causes of Action
(Negligent Misrepresentation and Negligence Against All Defendants

To state a negligent misrepresentation claim, the plaintiff must plead the existence of a special or privity-like relationship imposing a duty on the defendant to give correct information to plaintiff; the information was incorrect; and the plaintiff's reasonable reliance, thus causing injury (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). On the other hand, for a claim sounding in negligence, the plaintiff must allege facts that the defendant violated a legal

duty independent of the contract or that the action should be transformed into a tort claim (*Clarks-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Danya Cebus argues that, because it has "no contract, agreement, special or privity-like relationship" with Plaintiff, the negligent misrepresentation claim against it must be dismissed (DC Brief at ¶¶ 76-79). Likewise, it argues that because the amended complaint "fails to allege any legal duty owed by Danya Cebus independent of any contract," there is no tort liability in favor of Plaintiff with respect to the negligence claim (*id.* at ¶¶ 94-95).

The Court of Appeals has held that a special relationship may be established by "persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179-180 [2011] [*Mandarin*] [citations omitted]). In that case, the Court dismissed the negligent misrepresentation claim, even though the complaint pled a special relationship of trust or confidence existed between the parties, because the complaint did not allege whether the defendant had any contact with the plaintiff, whether the plaintiff solicited the appraisal directly from the defendant or whether the defendant was even aware of the plaintiff's existence (*id.* at 180). Here the amended complaint alleges, among other things, that Defendants (Danya Cebus and AARE), as the builder-contractor and the developer-owner, had special knowledge and expertise regarding the Building's quality of construction, its latent defects and the lack of remediation for such defects, and that Defendants directly made material false representations to Plaintiff regarding the quality of construction which Plaintiff reasonably relied on, thus sustaining injuries (AC, ¶¶ 156-168). Indeed, in opposition to the motion, Plaintiff alleges that Danya Cebus "made numerous representations and omissions about the quality of its own construction, with the understanding that Plaintiff was

contemplating the purchase of the [Building,] and knowing that the misrepresentations were material to Plaintiff's [purchase] decision" (Plf. Opp. One at 13). Therefore, unlike the facts described in *Mandarin*, Plaintiff has adequately alleged a negligent misrepresentation claim against Defendants, including Danya Cebus. The same is true as to the negligence claim because the amended complaint alleges, among other things, that Defendants, including Danya Cebus, owed Plaintiff a duty of care, and that they "breached their duty of care by performing and supervising construction that failed to conform with the Contract Documents and with the customs and standards of the industry and by introducing and failing to remedy the Construction Defects," which directly and proximately caused Plaintiff injury (AC, ¶¶ 180-183).

With respect to AARE, they argue that the negligent misrepresentation claim is expressly barred by the waiver and release clause in section 19.15 and the disclaimer in section 6.02 of the PSA (AARE Brief at 15). They also argue that the negligence claim should be dismissed because it is based upon "the same alleged conduct underlying Plaintiff's breach of contract claim" (*id.*). As discussed above, the two sections in the PSA do not preclude the negligent misrepresentation claim, and as pointed out by Plaintiff, AARE do not argue that the amended complaint failed to allege facts sufficient to sustain these claims (Plf. Opp. Two at 19). With respect to the negligence claim, whether it should be dismissed as duplicative of the breach of contract claim need not be decided at the pre-discovery stage of this action, because a plaintiff may, at the pleading stage, assert "alternative and inconsistent causes of action and to seek alternative forms of relief" (*see generally Gold v 29-15 Queens Plaza Realty, LLC*, 43 AD3d 866, 867 [2d Dept 2007]).

Fifth Cause of Action (Breach of Warranty Against Danya Cebus)

The amended complaint alleges that, while Plaintiff is not a party to the CMA between Seller and Danya Cebus, the PSA provided that "the Seller agreed to properly assign to Plaintiff all warranties associated with the [Building], or if such warranties were not assignable, then to use commercially reasonable efforts to enforce such warranties" (AC, ¶ 173). It also alleges that Danya Cebus breached the warranty by, among other things, "constructing and installing the foundation, roof, façade … that failed to materially conform with the project drawings and written specification . . . and failed to correct the Construction Defects that occurred within one year of substantial completion of construction …" (*id.*, ¶¶ 176-177).

Danya Cebus argues, among other things, that Plaintiff has admitted that Seller never received the consent of Danya Cebus under the CMA to assign the warranty and failed to assign the warranty to Plaintiff, and that there is no contractual privity between Danya Cebus and Plaintiff and, as a result, this breach of warranty claim must be dismissed (DC Brief, ¶¶ pp 83-92; citing *Board of Mgrs. of the 125 N. 10th Condominium v 125 N. 10, LLC*, 42 Misc3d 1214 [A], 2014 NY Slip Op 50035 (U) [Sup Ct, NY County 2014] [dismissed breach of warranty-contract claims by new owner-plaintiff against defendant contractor because new-owner purchaser of building was not in contractual privity with contractor]). In opposition, Plaintiff asserts that because "Contractor contends that the warranties at issue were never assigned [but] Seller contends they were assigned through a blanket assignment form," Plaintiff may allege "in the alternative that, according to Seller, the warranties were assigned" (Plf. Opp. One at 14; citing AC; ¶ 100). Plaintiff also asserts that because the evidence concerning "whether the warranty was actually assigned is peculiarly in the possession of the Defendants," the facts for this claim should be read in the light most favorable to Plaintiff (*id.*). In response, Danya Cebus argues that the CMA, as documentary evidence, requires its consent prior to any assignment of

the warranty; the affidavit by its representative established that Danya Cebus never consented to assign such warranty; and Plaintiff failed to submit documentary evidence which shows otherwise (DC Reply, ¶¶ 7-15).

The documentary evidence clearly refutes Plaintiff's alleged breach of contract/warranty claim based on the lack of contractual privity, as well as its "alternative" theory in support of such claim. Therefore, this claim should be dismissed. Also, to the extent that the amended complaint alleges that Seller failed to use reasonable efforts to enforce the warranty for the benefit of Plaintiff, the allegation is a breach of contract claim against Seller, not Danya Cebus.

Sanctions Sought Against Plaintiff

AARE seek sanctions, in the form of attorneys' fees, against Plaintiff for bringing a "frivolous lawsuit" because the claims "are barred by the express terms of the PSA and New York law," and that Plaintiff refused to withdraw its complaint in spite of AARE's written demand (AARE Brief at 17-18). As discussed above, despite AARE's argument to the contrary, the amended complaint states cognizable causes of action against AARE and, as such, no sanctions should be imposed upon Plaintiff.

Conclusion

For all of the foregoing reasons, it is hereby

ORDERED that, with respect to the motion seeking dismissal of all causes of action in the amended complaint as against defendant Danya Cebus Construction, LLC (motion sequence number 001), said motion is denied in all respects except for the fifth cause of action (breach of warranty against Danya Cebus); and it is further

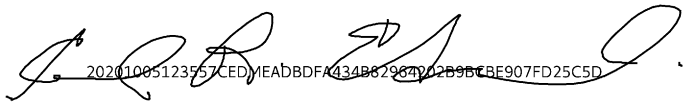
ORDERED that, with respect to the motion seeking dismissal of all causes of action in the amended complaint as against defendants Adam America LLC and 470 4th Avenue Investors

LLC (motion sequence number 002), said motion is denied in all respects, including the request by defendants seeking the imposition of sanctions against plaintiff; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order along with Notice of Entry of all parties within twenty (20) days; and it is further

ORDERED that defendants shall each file an answer to the amended complaint within 20 days after notice of entry of this decision and order.



10/5/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	x	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE