Board of Mgrs. of 150 E. 72nd St. Condominium v Vitruvius Estates LLC
2020 NY Slip Op 33322(U)
October 8, 2020
Supreme Court, New York County
Docket Number: 160831/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

THE BOARD OF MANAGERS OF
150 EAST 72ND STREET CONDOMINIUM,

Plaintiff,

-against-

VITRUVIUS ESTATES LLC,

Defendant.

- X

DECISION AND ORDER
Index No.: 160831/2016

Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

Under motion sequence number 004, defendant Vitruvius Estates LLC ("Vitruvius" or "Sponsor") moves as to plaintiff's construction defects claim for partial summary judgment to: (i) dismiss plaintiff's third cause of action for breach of contract; (ii) to strike plaintiff's "indirect" attempt to amend the complaint; and (iii) grant dismissal as to any "new" item deemed "included." (Doc. 146) [1] For the following reasons, defendant's motion is denied insofar as it seeks dismissal of the breach of contract claim and otherwise granted.

I. BACKGROUND

As this is a motion for summary judgment, the following facts are taken from the parties Rule 19-a statements of material facts (Doc. Nos. 147, 204). Defendant Vitruvius is a Delaware company sponsoring the conversion of the subject premises at 150 East 72nd Street, New York, New York (the "Building") from a residential rental building to condominium ownership (Fact Statement ¶ 1 [Doc. No. 204]). Plaintiff is the Board of Managers of 150 East 72nd Street Condominium (the "Board") (*id.* ¶ 2). In June 2011, defendant acquired the Building and began conversion pursuant to a Declaration filed on October 22, 2013 (*id.* ¶ 3). Residential Condominium units were offered for sale at the Building pursuant to an offering plan consisting of the Original Plan which included a Description of Property (*id.* ¶ 4). The parties dispute the number of amendments to the Offering Plan and whether the Description of Property was the only place that defendant set forth the work it promised perform (*id.*). The Plan included disclaimers by defendant stating that it was not promising to perform any work except what was stated specifically in the

[1] References to "Doc" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System ("NYSCEF").

Plan. Such disclaimers outlining risks to be considered by purchaser were included in sections of both the Plan and the form purchase agreement (*id.* ¶¶ 6-12; Def. Aff., Exs. 7-8 [Doc. Nos. 155-156]).

In 2015, the Board commissioned a report from Howard L. Zimmerman Architects PC ("Zimmerman") to investigate the condition of the Building which report was issued on July 28, 2015 (the "2015 Zimmerman Report") (*id.* ¶ 13). The parties dispute whether the 2015 Zimmerman Report identified which alleged Building defects existed as of October 22, 2013 (*id.* ¶ 14). In December 2016, the Board initiated its suit, including its third cause of action for breach of contract involving eleven alleged defects for which defendant was liable (*id.* ¶ 15). Defendant alleges that the Board admitted in a memo to this court that the Plan contained no "promissory statement" as to "substantially all" of the eleven alleged defects. Plaintiff responds by alleging that this court, in a June 15, 2018 decision, held that because plaintiff alleged "defendants agreed to the offering plan to perform at least some of the work that resulted in the construction defects detailed in the complaint," would not be dismissed (*id.* ¶ 16; NYSCEF Doc. Nos. 40 at p. 11, 64 at p. 18). Further, the court dismissed the Board's negligence, federal-statutory, and misrepresentation theories, but held that the complaint sufficiently alleged breach of contract to satisfy the notice pleading standard of CPLR 3013 pleading (Fact Statement ¶ 17).

The parties dispute whether this court granted permission to defendant at a December 18, 2018 conference to issue a Demand for Bill of Particulars which demanded that plaintiff quote language from the Offering Plan which they relied on to claim Sponsor had failed to perform (*id.* ¶ 18). The parties further dispute the details of the meet and confer process held between December 18, 2018 and October 22, 2019 but agree that the court at that time directed defendant to serve interrogatories seeking specific information as to plaintiff's breach of contract claim (*id.* ¶¶ 18-25). Plaintiff also alleges that any dispute regarding the Demand for Bill of Particulars was resolved by Stipulation and Order dated October 22, 2019 (*id.*; Doc. No. 144).

On October 29, 2019, defendant served "Defendant's Second Set of Interrogatories" which asked plaintiff "to set forth by quotation" each promissory statement that, according to plaintiff, was breached by defendant (Fact Statement ¶ 26). Plaintiff did not answer defendant's interrogatory request as to complaint ¶ 64 items "d" through "f" (*id.* ¶¶ 27-29). Defendant alleges that plaintiff, through its interrogatory answers, attempts improperly to add to complaint ¶ 64 fifty-

five new line items without moving to amend the complaint. Plaintiff objects to this allegation as argumentative (*id.* ¶ 30).

II. ARGUMENTS

A. Defendant's Memorandum in Support

Defendant begins by arguing that where an offering plan expressly limit the sponsor's obligation to perform work, a board can only pursue a breach of contract claim if it has pointed to specific plan language where sponsor promised to perform some item of work (Def. Br. at 17 [Doc. No. 166]). Defendant argues that, here, where the building at issue is not a new construction but instead a conversion to condominium ownership, the sponsor is not obligated to generally rehabilitate the building where it has set forth a disclaimer (*id.* at 18). In support, defendant cites *Board of Managers of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 (1st Dept 2010) involving a building constructed in 1910, purchased by sponsor in 1978, and converted to a condominium in 2002. There, the court dismissed the condominium's breach of contract claim regarding alleged but unspecific construction defects as the claim was "flatly contradicted by the 'as is' clause and related disclaimer provisions in those documents" (*id*). Defendant further cites *Board of Managers of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881 (1st Dept 2016), which similarly dismissed the board's breach of contract claim except as to specific exceptions listed to the "as is" clause (Def. Br. at 19-20). Consequently, defendant argues that since the Plan here contained clear "as is" and related disclaimer language, and because plaintiff did not quote any specific promissory language, plaintiff's allegations of breach should be dismissed (Def. Br. at 20).

Defendant next argues that the Board should not be allowed to add additional "items" to its complaint, reiterating that plaintiff's breach of contract claim should be entirely dismissed as plaintiff has now had three opportunities to provide requisite specifics to support its claims and document production has ended (*id.* at 20-21; *see e.g. Tri-State Aluminum Products, Inc. v Wecher*, 128 AD2d 697 [2d Dept 1987] [precluding defendant from counterclaiming damages for supposed defective work that it had not identified previously]; *Tiffany (NJ) Inc. v eBay, Inc.*, 576 F Supp 2d 460, 461 [SD NY 2007] [rejecting plaintiff's claim that it should be allowed to continue adding new items because its complaint had prefaced its list with the phrase "among many others"]).

B. Plaintiff's Opposition Memorandum

In opposition plaintiff argues that summary judgment should be denied for failure to provide evidentiary proof (Pl. Br. at 5 [Doc. No. 200]; *Winegrad v NY Medical Center*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). Defendant cannot obtain summary judgment by merely pointing to gaps in plaintiff's proof, such as the promissory statements upon which plaintiff is relying, as the burden is on the movant to demonstrate the absence of material facts and entitlement to judgment (Pl. Br. at 6; CPLR § 3212[b]; *Coastal Sheet Metal Corp. v Martin Assocs., Inc.*, 63 AD3d 617, 618 [1st Dept 2009]). Plaintiff argues that in a prior appeal of this case, the Appellate Division affirmed this court, holding that "the complaint adequately pleads a cause of action for breach of contract" (Doc. No. 137 at 3). Plaintiff argues that defendant must provide evidentiary proof that no contractual breach occurred, which it fails to do (Pl. Br. at 6; *Coastal Sheet Metal*, 63 AD3d at 618).

Plaintiff next argues that the Offering Plan disclaimers exclude work done pursuant to the Offering Plan (Pl. Br. at 7). Plaintiff argues that the disclaimers relied upon by defendant are limited in that they exclude work that is "expressly provided in the Plan" and work "described in the 'Description of Property'" (Def. Aff., Ex. 7 at 9 [Doc. No. 155]). Plaintiff argues defendant cannot disclaim contractual liability for the work set forth in the Offering Plan, including the Description of Property Architect's Report and its Amendments (Pl. Br. at 7-8). Defendant concedes its disclaimers are ineffective as to work set forth in the Plan as the Board can sustain its breach of contract claim where it identifies "the specific language in the offering plan where the sponsor affirmatively promised to perform the particular work" (Pl. Br. at 8; Def. Br. at 17). Plaintiff argues the Board has set forth the Offering Plan provisions breached in the 2015 Zimmerman Report and the Board's interrogatory answers (Pl. Br. at 8 Doc. 200). As an example, plaintiff argues both the Architect's Report and the Fifth Amendment represented that defendant would replace the Building's windows, an installation which the complaint expressly alleged was faulty and which was documented in the 2015 Zimmerman Report at Section C (*id.* at 8-9; Compl. ¶ 64(k) [Doc. 149]; Def. Aff., Ex. 5 at 8-9 [Doc. 153]; Def. Aff., Ex. 16 at 6-7 [Doc. 164]; Pl. Aff., Ex. A § 5(b) [Doc. 203]).

Plaintiff further argues that defendant was required to perform work set forth in the Plan competently (Pl. Br. at 9-10). Even though defendant argues there was no breach because new

windows were installed, a breach still occurred as implicit in the Offering Plan's representations was a promise that the work promised would be done in a skillful and workmanlike manner, and that failure to do so would constitute a breach (*id.* at 10; *511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153-154 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]; *see also Board of Managers of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 882 [1st Dept 2016]; *TIAA Global Investments, LLC v One Astoria Square, LLC*, 127 AD3d 75 [1st Dept 2015]; *Board of Managers of Lore Condominium v Gateway IV, LLC*, 2017 WL 6734090, at *1 [Sup Ct New York County 2017]; *Board of Managers of 231 Norman Ave. Condo. v 231 Norman Ave. Prop. Dev., LL*, 36 Misc3d 1232(A) [Sup Ct Kings County 2012]). There is no reason contract language must be quoted *in haec verba* to sustain the breach of contract claim as defendant claims (Pl. Br. at 11). Plaintiff argues defendant's cited cases are inapposite to the matter here. With regards to *Board of Managers of Chelsea 19 Condominium*, plaintiff argues that the decision does not address whether the "as is" clauses had exceptions for defendant's work set forth in the Offering Plan or whether such exception was pleaded (73 AD3d at 581). Regarding *Loft Space Condominium*, 142 AD3d at 882 the decision does not require that discovery responses set forth the precise contract language violated *in haec verba* and, instead, the holding sustains plaintiff's argument that where a Board identifies construction defects excluded from an "as is" clause, it can sustain a breach of contract claim (Pl. Br. at 12.

Plaintiff adds that defendant does not address the time limit on the "as is" clause which states "The Residential Units are being sold 'as is' in the condition in which they exist at the time a purchaser signs a Purchase Agreement subject to ordinary wear and tear" (Pl. Br. at 12-13; Def. Aff., Ex. 7 at 7). Both the Purchase Agreement and Offering Plan also provide that defendant has agreed to maintain each unit in "as is" condition as of the time a Purchase Agreement is sold, with the Building in the "as in" condition as it was on August 27, 2012, the Filing Date of the Offering Plan (Pl. Br. at 13; Def. Aff., Ex. 7 at 181; Def. Aff., Ex. 8 at 20 [Doc. 156]). Plaintiff argues that defendant has made no effort to describe what work was performed before or after the Filing Date of the Offering Plan, or the date of signing of any of the Purchase Agreements (Pl. Aff., Ex. 1 [Doc. 202]). Thus, plaintiff argues, defective work after the "as is" date is not covered by the disclaimers because defendant has failed to provide evidence to address what may have been covered by the "as is" clauses (Pl. Br. at 13). If defendant promised in the Plan to keep the Building "as is" as of particular dates, any changes defendant made to the Building after those dates are

unauthorized and constitute a breach of the Plan, particularly if the work performed was defective (*id.* at 13-14).

Plaintiff next argues that its breach of contract claims are not limited to the breaches expressly alleged in the complaint (*id.* at 14). Under New York's liberal pleading standards and because the complaint states that it set forth "construction defects, including, but not limited to" those listed, the allegations of defects have been "properly amplified in discovery" (*id.*; Compl. ¶ 64; CPLR §§ 3013, 3026). Plaintiff argues that all that is required to allege a breach of contract claim is a short, plain statement giving rise to the transaction and occurrences that form the basis of its claims (*Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253, 254 [1st Dept 2002]; *see also United States Aviation Underwriters, Inc. v Textron, Inc.*, 150 AD3d 581, 581 [1st Dept 2017]; *Dabrowski v Abax, Inc.*, 64 AD3d 426, 427 [1st Dept 2009]). Because plaintiff prefaced its allegations regarding the defects with "including, but not limited to the following most serious issues," it sufficiently provided notice to the court and parties of the transactions and occurrences it intended to prove and was not required to list every single defect in its complaint (Pl. Br. at 15; Compl. ¶ 64; CPLR §§ 3013, 3026). Defendant's cited cases as to this point are inapposite (Pl. Br. at 15-16). Regarding *Tri-State Aluminum Prod., Inc. v Wecher*, plaintiff argues that while it may be prohibited from introducing at trial any evidence of construction defects not previously disclosed, *Tri-State* offers no support to defendant's argument that plaintiff's defects claim is limited to those defects specifically listed in the complaint (Pl. Br. at 15-16). Regarding *Tiffany (NJ) Inc.*, 576 F Supp 2d 461-462 plaintiff has provided defendant with sufficient detail to put it on notice of the Building's construction defects and defendant will have opportunities to depose plaintiff and serve post-deposition demands for additional information (Pl. Br. at 16-7).

C. Defendant's Reply Memorandum

In its reply, defendant argues that plaintiff's new legal theory in opposition, that a breach may occur regarding the closing dates of individual purchase agreements, cannot prevail as plaintiff has never asserted any such deterioration or defendant's failure to remedy such issues before this motion (*id.* at 12). This novel argument is precluded by *Gidumal v BPC Mezz LLC* 2013 WL 401368 (1st Dept 2013) which held that claims against Sponsor by individual purchasers as to their individual units cannot prevail unless such defects were identified in the individual closing punch-lists (*id.* at 4-5, 12).

The Plan disclaimed any warranty of good workmanship as the Special Risks section of the Plan states "Sponsor will not warrant the materials or workmanship of any Unit or any of the Common Elements" (Def. Aff., Ex. 7 ¶ 21). The Plan also states that it "sets forth the entire extent of the obligations of Sponsor hereunder and none other should be implied" (Def. Reply at 13). Implied covenants and warranties as to the quality of repair work can be disclaimed and such disclaimers have been held effective in the context of condominium conversions (*id.*; *Rom Terminals, Ltd. v Scallop Corp.*, 141 AD2d 358 [1st Dept 1988]; *20 Pine Street Homeowners Ass'n v 20 Pine Street LLC*, 109 AD3d 733, 734-735 [1st Dept 2013]). Plaintiff cannot rely on the generic implied good faith covenant where the contract at issue has expressly disclaimed such obligations (*see e.g. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 172 AD3d 405, 406 [1st Dept 2019]).

III. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp.*, supra; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J.*

Capalin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York*, supra; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" *(Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

In substance, defendant moves for summary judgment as to two points: (i) plaintiff's breach of contract claim, and (ii) preventing plaintiff from indirectly amending its complaint. To defendant's first point, summary judgment is denied. A party moving for summary judgment must make a *prima facie* showing of entitlement by tendering evidentiary proof. As plaintiff repeatedly points out, defendant has not done so here. Instead defendant, citing no relevant authority, relies solely on the notion that plaintiff's failure to point out what specific promissory statements in the Offering Plan and related documents were breached makes the underlying claim defective. Having failed to show a *prima facie* entitlement, defendant's motion for summary judgment dismissing the breach of contract claim is denied.

To defendant's second point, summary judgment is granted. Plaintiff's response to defendant's second set of interrogatories incorporates fifty-five additional line-item defects from the 2015 Zimmerman Report, none of which were mentioned in the complaint. Inclusion of the phrase "including but not limited to" prior to the original list of construction defects in the complaint is insufficient notice for this purpose (*see* CPLR 3013) even under the liberal pleading standards of 3026. However, as CPLR 3026 also provides defects may be ignored "if a substantial right of a party is not prejudiced" (CPLR § 3026). Treating plaintiff's attempt here as a motion to amend complaint pursuant to CPLR 3025, a court may deny such a request where it is inexcusably late and significantly prejudicial to the other side (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Here, plaintiff's proposed amendment would be prejudicial as it seeks leave to amend nearly three years after initially bringing suit and just prior to the close of discovery. Consequently, defendant's motion for summary judgment to "strike" plaintiff's attempt to amend the complaint is granted.

It is hereby

ORDERED that the motion for summary judgment of defendant Vitruvius Estates, LLC (motion sequence number 004) is granted to the extent it seeks to strike plaintiff's "indirect" attempt to amend the complaint and add new items and is otherwise denied; and it is further

ORDERED that counsel for the parties shall appear at a virtual status conference on Monday, October 26, 2020 at 11:00am. The court will issue invitations.

This constitutes the decision and order of the court.

DATED: October 8, 2020

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.