Lorne v 50 Madison Ave. LLC
2020 NY Slip Op 33850(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 602769/07
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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SIMON LORNE and LUDMILLA LORNE,

Plaintiffs,

-against-

50 MADISON AVE, LLC, et al.,

Defendants.

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Index No. 602769/07
Motion Sequence 27

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

This case arises out of a dispute between the purchasers of a condominium unit, the sponsor, and the managing agent over alleged defects in the unit, in particular the flooring. Plaintiffs Ludmilla and Simon Lorne's initial complaint, filed on August 20, 2007, includes causes of action for breach of contract, breach of warranty, fraud, and violations of General Business Law §§ 349 and 350. After over thirteen years of litigation, almost thirty motions, significant third-party litigation, several judicial assignments and changes of attorney, and appellate practice, Plaintiffs filed their note of issue signaling the completion of discovery. Defendants 50 Madison Avenue, LLC and Samson Management (Defendants) now move for partial summary judgment dismissing Plaintiffs General Business Law (GBL) and fraud causes of action. As more fully set forth below, Defendants' motion is granted in part and denied in part.

BACKGROUND

On or January 24, 2005, Plaintiffs entered into an agreement to purchase the 7th floor unit in the building located at 50 Madison Avenue in Manhattan for $3,075,000. Plaintiffs closed on the property on September 28, 2005 and moved into the unit in November of 2005. After moving in they allegedly discovered certain construction defects in the apartment which rendered the unit uninhabitable. In 2010 Defendants moved for partial summary judgment dismissing the fraud

and GBL causes of action before Justice Goodman, who was originally assigned to this case. As discussed by Justice Goodman in her June 20, 2011 decision,[1] the heart of this case is the condition of the flooring:

> The floors were designed as "floating floors," meaning that the hardwood flooring lies flat on the concrete substrate, unattached to the concrete substrate, and is held down by its own weight. The flooring consisted of three levels: the concrete substrate, a plywood subflooring, and the hardwood flooring surface. At some point after they moved in, plaintiffs determined that the concrete substrate was neither flat nor level.

Justice Goodman denied Defendants' motion. With respect to the fraud claims, she wrote:

> Here, there is evidence that Sponsor defendants represented in the offering plan that the unit would be properly constructed, and also made oral representations at the closing and inspection that the unit was properly constructed and ready for occupancy, and that the punch list items were minor. However, it has not been established when the floor or concrete substate in the unit was completed, and whether Sponsor defendants knew of the defects in the unit. Thus, the court concludes that there are issues of fact as to whether Sponsor defendants or their agents misrepresented material, existing facts, including the condition of the flooring and concrete substrate, and whether plaintiffs relied upon those representations in purchasing their unit. . . . Accordingly, Sponsor defendants' motion for summary judgment dismissing the second cause of action is denied.

As for the GBL claims, Justice Goodman held that further discovery was needed before a ruling could be made on the merits, citing CPLR 3212(f). Accordingly, she denied that aspect of Defendants' motion "without prejudice to renew after Plaintiff files the Note of Issue, but within 45 days of such filing." Consistent with the body of the decision, the decretal paragraph explicitly denied Defendants' motion on the fraud claim outright but granted Defendants leave to renew their motion with respect to the GBL claim:

> ORDERED that the motion . . . of defendants . . . for partial summary judgment is denied as to the fraud cause of action . . . and is denied as to the General Business Law §§ 349 and 350 cause of action . . . without prejudice to renewal after Plaintiff files the Note of Issue...

Neither Plaintiffs nor Defendants appealed from Justice Goodman's decision.

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[1] NYSCEF Doc. 41.

Almost a decade later, Plaintiffs have now certified that discovery was complete. Thereafter Defendants once again moved for an order dismissing the fraud and GBL claims. Defendants argue, among other things, that: (1) the fraud claims must be dismissed as duplicative of Plaintiffs' breach of contract claims; (2) the fraud claims must be dismissed as redundant of Plaintiffs' breach of contract claims; and (3) Plaintiffs have no viable claim under the GBL. In opposition, Plaintiffs' argue that: (1) Defendants' motion to dismiss the fraud claims is barred by law of the case; (2) Plaintiffs' fraud claims are not duplicative of their breach of contract claims; (3) there are questions of fact that preclude Defendants' motion on the merits.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

The First Department has made clear that successive summary judgment motions are highly disfavored except where there is a showing of newly discovered evidence or other sufficient justification like a change in the law. *See Jones v 636 Holding Corp.*, 73 AD3d 409, 409 (1st Dept 2010); *see also Phoenix Four v Albertini*, 245 AD2d 166, 167 (1st Dept 1997) (citing *Levitz v Robbins Music Corp*, 232 NYS2d 769, 770-71 (1st Dept 1962) ("Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment.").

Here, Defendants cite two New York Supreme Court cases that were decided after Justice Goodman issued her 2011 decision to show that Plaintiffs are barred from asserting a fraud claim in the context of a condominium offering. *See Alexander Condominium v East 49th St. Dev. II, LLC,* 2018 NY Misc. LEXIS 3832 (Sup. Ct. NY Co. Sept. 11, 2018, Reed, J.); *Board of Mgrs. of the Vetro Condominium v. 107/31 Development Corp.*, 2014 NY Misc. LEXIS 4639 (Sup. Ct. NY Co. Oct 21, 2014, Scarpulla, J). Since both cases are factually unique, Defendants' contentions are unavailing.

Both *Vetro Condominium* and *Alexander Condominium* involved the sale of units within a building by the sponsor, and in both cases, plaintiffs asserted that the sponsor failed to complete the construction of various promised features in accordance with the respective offering plans. Each court granted the defendant's motion to dismiss the plaintiff's fraud claims on the ground that such claims were duplicative of the breach of contract claims and that any private cause of action based upon misrepresentations or omissions in the offering plan were barred by the Martin Act. This case is different in two respects: first, both *Vetro* and *Alexander* involved a motion to dismiss pursuant to CPLR 3211(a)(5) and (7). This is a summary judgment

motion brought pursuant to CPLR 3212. Second, unlike *Vetro* and *Alexander,* this case does not turn on omissions in an offering plan, but rather Samson's alleged actual knowledge that the floors were defective and its alleged material representation to the Plaintiffs that the unit was nonetheless ready for occupancy at closing. Also, notwithstanding the fact that *Vetro* and *Alexander* are factually unique, neither decision is binding appellate authority. Accordingly, Defendants cannot argue that the law has changed such that a successor summary judgment motion should be permitted.

In this same vein, there are no facts or evidence presented on this motion that were unavailable to Defendants prior to moving before Justice Goodman. Defendants argue to the contrary, relying in part upon the deposition testimony of Steven Tolli who was deposed on May 28, 2020 in a separate but related action.[2] Mr. Tolli was hired by Defendants to inspect the floor and did so in July of 2006. In his August 2006 report,[3] Mr. Tolli noted that the concrete substrate was checked for flatness and that no areas of the floor needed to be marked for future leveling. To the extent Defendants argue that Mr. Tolli's testimony and report absolves them of liability in terms of Plaintiff's fraud claims, it bears repeating that Mr. Tolli conducted his inspection and filed his report in 2006. Had Defendants wished to depose Mr. Tolli before filing for summary judgment in 2010, they certainly could have done so. Under these circumstances, the court sees no reason to allow Defendants a proverbial second bite at the apple. This is precisely why courts generally do not permit more than one dispositive motion, and why parties typically wait until after the filing of the notice of issue to move for summary judgment.

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[2] NYSCEF Doc. 47.

[3] NYSCEF Doc. 52.

Defendants' motion to dismiss Plaintiff's fraud claims is also barred by law of the case. *See Martin v Cohoes*, 37 NY2d 162, 165 (1975). "The doctrine of law of the case provides that once an issue is judicially determined, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation." *Weiss v Phillips*, 157 AD3d 1, n. 12 (1st Dept 2017). "Thus, where a legal issue was necessarily resolved on the merits in a prior decision, the court's decision on that issue becomes the law of the case, precluding further litigation." *Stryker v Stelmak*, 2008 NY Misc. LEXIS 10073, *5 (Sup. Ct. NY Co. Aug. 4, 2008, Lowe, J.) (citing *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]).

In her prior decision, Justice Goodman carefully and explicitly denied Defendants' prior motion to dismiss the fraud claims on the merits, noting that there are "issues of fact as to whether Sponsor defendants or their agents misrepresented material, existing facts, including the condition of the flooring and concrete substrate, and whether plaintiffs relied upon those representations in purchasing their unit." Justice Goodman was also very clear in affording Defendants the opportunity to refile for summary judgment on the General Business Law claims once discovery was completed. In other words, that part of the motion was decided on procedural, not substantive grounds. The fact that Justice Goodman made this distinction not once, but twice in her decision, eliminates any uncertainly in this regard.

Needless to say, even if this motion was not barred by the rule against successive summary judgment motions and the law of the case, summary judgment would not be appropriate here. "The elements of a fraud cause of action consist of "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Pasternack v Laboratory Corp. of Am.*

Holdings, 27 NY3d 817, 827 (2016). Each element of a fraud cause of action must be established by clear and convincing proof in opposition to a summary judgment motion. *Valenti v Trunfio*, 118 AD2d 480, 484 (1st Dept 1986). This is not to say that all elements have to be proven by clear and convincing evidence, just that Plaintiffs must raise an issue whether such elements could be established at trial under this higher standard. And here, Plaintiffs have raised such an issue of fact.

Annexed to Plaintiff's opposition papers is an affidavit by plaintiff Ludmilla Lorne. She describes how she retained a company called Elite Consulting to inspect the floors in December of 2006. During this inspection, she "noticed yellow markings painted on the concrete substate bearing various measurements and inquired as to their significance. I was advised by Elite that these markings were indicative of the concrete being un-level." Of course, what is most important is for Plaintiffs to show that Defendants knew about such alleged defects before the closing, and in this regard they present a report prepared by the building's architect, Sital Patel.[4] The April 13, 2005 inspection report (five months before Plaintiffs closed on the unit) provides (emphasis added):

> At the 3rd, 4th and a few other floors the concrete slab will need to [be] chopped level – the concrete in these areas are not smooth and not in any condition to receive a finished floor system.

The court notes that this building had only nine floors. Plaintiffs' argument that at least two and a "few" others had flooring issues gives rise to a reasonable inference that Defendants knew about the issues facing Plaintiff's unit on the 7th floor. By no means is this evidence conclusive, but it is in this court's opinion enough to raise a triable issue of fact.

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[4] NYSCEF Doc. 86.

The other remaining issue is Plaintiff's claims under GBL §§ 349 and 350, which this court will address on the merits. GBL § 349 make it unlawful to engage in "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service...." GBL § 350 makes it unlawful to engage in "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service . . . ." A plaintiff seeking to assert a claim under either section must prove three elements: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v Chemical Bank*, 95 NY2d 24, 29 (2000); *see also Andre Strishak & Assocs., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609 (2d Dept 2002); *Reit v Yelp!, Inc.*, 29 Misc. 3d 713, 718 (Sup. Ct. NY Co., Sept. 2, 2010, Solomon, J.).

Despite Plaintiff's arguments to the contrary, the fact that the Sponsor advertised the unit in question via an offering plan before entering into a private contract with the Plaintiff does not make this situation "consumer-oriented." Caselaw from the First Department makes clear that disputes concerning the sale of a condominium unit are unique to the parties as opposed to transactions that have ramifications for the public at large. As such, they do not fall within the scope of the either GBL § 349 or GBL § 350 transactions contemplated by the statute. *See Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311-312 (1st Dept 2000); *Devlin v 645 First Ave. Manhattan Co.*, 229 AD2d 343, 344 (1st Dept 1996); *Quail Ridge Assoc. v Chemical Bank*, 162 AD2d 917, 920 (3d Dept 1990); *Board of Mgrs. of the 231 Norman Ave. Condominium v 231 Norman Ave. Prop. Dev.*, 2012 NY Misc. LEXIS 3993, *44 (Sup. Ct. Kings Co. July 20, 2012, Demarest, J.); *see also Waverly Properties, LLC v KMG Waverly, LLC,* 824 F Supp 2d 547, 566 (SDNY 2011). The single case cited by Plaintiff on this issue, *Board of Mgrs. of the*

Baxter St. Condominium v Baxter St. Dev. Co. LLC, 2013 NY Misc. LEXIS 5052, *17 (Sup. Ct. NY Co. Oct. 24, 2013, Singh, J.) involved a motion to dismiss and is therefore of no probative value here.

Plaintiffs are correct that the General Business Law does have broad applicability, just not to situations like the case at bar. For instance, in *Plavin v Group Health Inc.*, 35 NY3d 1 (2020), the Court of Appeals held that an insurance company's misleading representations about the terms of its insurance plan fell within the scope of the General Business Law because the company marketed its plans to hundreds of thousands of New York City employees. In *Karlin v IVF Am., Inc.*, 93 NY2d 282 (1999), the Court held that a couple could maintain a claim against an IVF clinic for deceptively misrepresenting its success rates and underrepresenting certain health risks. And in *People v Coalition Against Breast Cancer, Inc.*, 134 AD3d 1081 (2d Dept 2015), the New York Attorney General was awarded an injunction against a professional fundraiser, preventing him from soliciting and collecting charitable contributions from the public, after establishing that the fundraiser's actions on behalf of a cancer prevention organization misrepresented the extent of the organization's ability to help women survive breast cancer. This case is clearly distinguishable on its facts.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment with respect to Plaintiff's fraud claims is denied; and it is further

ORDERED that Defendants' motion for summary judgment with respect to Plaintiff's consumer fraud cause of action is granted; and it further

ORDERED that Plaintiff's fifth cause of action alleging violations of NY General Business Law §§ 349 and 350 is severed and dismissed.

Counsel are directed to appear for a virtual conference on December 14, 2020 at 9:30AM.

The Clerk of the court is directed to enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 11.18.20

SHERRY KLEIN HEITLER, J.S.C.