New Hackensack Realty, LLC v Lawrence Dev. Realty, LLC
2020 NY Slip Op 35800(U)
January 6, 2020
Supreme Court, Orange County
Docket Number: Index No. EF005062-2019
Judge: Sandra B. Sciortino
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order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
---X
NEW HACKENSACK REALTY, LLC and QUALAMAR CORPORATION,
Plaintiffs,

-against-

LAWRENCE DEVELOPMENT REALTY, LLC; K&J PARTNERS, LLC; JMK CONSTRUCTION MANAGEMENT, INC.; JOHN R. LAWRENCE and KIM REDL-LAWRENCE,
Defendants.
---X

DECISION AND ORDER
INDEX NO.: EF005062-2019
Motion Date: 11/1/2019
Sequence No. 1

SCIORTINO, J.

The following documents numbered 1 to 12 are considered in the defendants' application for dismissal of the complaint pursuant to Civil Practice Law & Rules §§3211(a)(7) and (11) and Civil Practice Law & Rules §3016(b):

PAPERS	NUMBER
Notice of Motion/Affirmation (Poolman)/Exhibit A	1 - 3
Defendants' Memorandum of Law in Support	4
Plaintiffs' Memorandum of Law in Opposition	5
Reply Affirmation (Poolman)	6

The application for dismissal of the breach of contract cause of action is denied; the application for dismissal of the fraud and unjust enrichment causes of actions is granted; the application to dismiss the cause of action to pierce the corporate veil is granted.

The verified complaint, electronically filed on June 28, 2019, contains 27 pages of detailed allegations before setting forth five causes of action: Breach of Contract (First); Fraud and

Fraudulent Inducement (Second); Fraudulent Concealment (Third); Unjust Enrichment (Fourth), and Piercing of the Corporate Veil (Fifth). (Exhibit 1) Plaintiffs seek damages in excess of $1,250,000.

On December 17, 2018, plaintiff Qualamar Corporation entered a Real Estate Purchase and Sale Contract with defendant Lawrence Development Realty, LLC for the transfer of commercial improved property located in the town of Wappinger, Dutchess County. (Exhibit 1C) Qualamar subsequently assigned the contract to plaintiff New Hackensack Realty LLC. The purchase price was $3,450,000. (Exhibit 1C) The closing was held on February 8, 2018.

After the closing and takeover of the premises, plaintiffs learned of circumstances which, they allege, were intentionally withheld or misrepresented by the seller corporation. Alleged discrepancies are numerous: rent obligations set forth in the contract schedule or verbally were inflated; tenants were behind in rent; leases existed on tenancies represented to be month to month; leases claimed to exist did not; septic repair/replacement was necessitated despite representation of a new septic system; claimed expansion potential was non-existent because of necessary new septic installation; construction of apartments was not possible.

During negotiations, plaintiffs claim to have relied on various documents and information provided by or on behalf of the seller. The realtor listing included representations as to size; rental income and improvements. (Exhibit 1A) Engineering plans described septic and water supply system; representations were allegedly made that a new septic system had been installed. (Exhibit 1D) Verbal representations or reassurances as to conditions and obligations were made.

Plaintiffs procured an appraisal of the property in which a value of $3,450,000 as of January 18, 2010 was set. (Exhibit1B) The appraisal was completed by R.P. Hubbell and Company, Inc. (Hubbell) Apparently limited to a "walk-through" inspection, the appraisal contained a disclaimer in Paragraph 15 of the portion of the report entitled Assumptions & Limiting Conditions. The disclaimer, in pertinent part, reads,

> This type of inspection is not the equivalent of an inspection by a qualified engineer. We recommend the client have a qualified building inspection done prior to the disbursement of any loan funds. ... [N]o responsibility is assumed for such conditions as structural, mechanical, etc. that an inspection the equivalent of an engineer's would be required to discover. The client is urged to get an engineer inspection prior to the disbursement of any loan funds. (Exhibit 1B, page 7)

It is not known whether an engineer inspection was completed prior to closing. It is noted, however, there is no reference to such an inspection in the verified complaint.

In the appraisal report, Hubbell also indicates that it had completed a "prior appraisal regarding the [same] property ... within the three year period immediately preceding acceptance of this assignment." (Exhibit 1B, page 8) In determining the property value, Hubbell relied on leases which were provided; rent calculations using the provided leases, and the rent roll provided in the contract. According to the report, expenses history was provided "via the broker and owner although P & L statements were requested ... [and] not provided... ." (Exhibit 1B, page 32) "[T]he subject's expense history as shown ... is assumed accurate." *Id.*

Defendants seek dismissal of the complaint pursuant to Civil Practice Law & Rules §3211(a)(1) and (7) primarily on the grounds that, with transfer of title, plaintiff's claims merged with the deed and are, therefore, extinguished. "[A]ny claims the plaintiff might have had arising from the contract of sale were extinguished by the doctrine of merger unless there was a 'clear intent evidenced by the parties that a particular provision of the contract of sale [would] survive the delivery of the deed' (*Crowley Mar. Assoc. v. Nyconn Assoc.*, 292 A.D.2d 334, 335, 738 N.Y.S.2d 681, quoting *Davis v. Weg,* 104 A.D.2d 617, 619, 479 N.Y.S.2d 553; *see Noufrios v. Murat, supra* at 791, 598 N.Y.S.2d 82)." (*Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006])

The plaintiffs counter. Paragraph 7 of the Rider to Contract, entitled LEASES/TENANT ESTOPPEL LETTERS, states that certain representations delineated in paragraph 7 "shall survive the delivery of the deed." The plaintiffs further argue that, the defendants' misrepresentation, used to induce plaintiffs into the transaction, allow for the claims of fraud.

Certain provisions of the contract (Exhibit 1C) are seen as relevant to this action and this application:

> ¶11. REPRESENTATIONS AND WARRANTIES: For the purpose of inducing Purchaser and Seller to enter into and consummate the transaction contemplated by this Contract:
> (a) Seller makes those representations and warranties set forth in Exhibit C, annexed hereto and made a part hereof, the terms and content of which are incorporated herein by reference.
> ¶20 ENTIRE AGREEMENT: This Contract includes all exhibits and attachments and, together, they embody the entire agreement of the parties with respect to the transaction herein contemplated and supercede all prior communications or agreements, whether oral or written. ...
> ¶24. SURVIVAL: Except as specifically expressed in this Contract, no term, provision, condition or obligation set forth herein shall survive consummation of the transaction contemplated herein or earlier termination of this Contract.
> (b) These representations and warranties of Seller and Purchaser shall continue in full force and effect to and including but not beyond the Closing Date except as extended beyond the Closing date by specific Agreement in this Contract and in no event shall any representation or warranty extend beyond the Closing Date... .

Certain provisions of the Rider are determined to be pertinent to this application:

> ¶4. CONDITION OF THE PREMISES: The condition of the Premises on closing shall be the same as at the time of contract, reasonable wear and tear expected. ...
> ¶5. FINAL INSPECTION: The Seller agrees to allow the Purchaser to make a final inspection of the building within forty-eight (48) hours prior to the closing of title.

¶7. LEASES/TENANT ESTOPPEL LETTERS. ... Seller represents that to the best of his know its knowledge (sic),

a) Seller has completed all work as required in the lease...

d) That Tenant is current with respect to, and is paying full rent and other charges stipulated in the Lease with no offsets, deductions, defenses or claims; and Tenant is not in default under the Lease, except that those lists in Exhibit "A"...

f) That all of the obligations of the Landlord under the Lease have been duly performed and completed, including, without limitation, any obligations of the Landlord to make and to pay Tenant any improvements, alterations or work done on the leased premises.

These representations shall survive the delivery of the deed.

¶13. SELLER'S REPRESENTATIONS AND WARRANTIES. Seller makes the following representations and warranties which shall be accurate at the closing date as if made on that date. All are to the best of Seller's knowledge.

(f): Except as otherwise expressly set forth in this Contract, none of the Seller's covenants, representations, warranties or other obligations contained in this Contract shall survive closing.

¶19. DUE DILIGENCE. For a period of thirty (30) days following the execution of the contract by all parties, Purchaser shall have the right to perform/review all items affecting the Premises, but not limited to, the location, the surrounding area, zoning ordinances, legal descriptions, survey and plot plan, the state of title, Certificate of Occupancy, if any, engineering reports, if any, affecting the Premises, and verification of all information previously presented by Seller to Purchaser in connection with the transaction contemplated herein, and all other studies, tests, reports, and investigations, as Purchaser deems necessary or desirable in its absolute and sole discretion and at Purchaser's sole cost and expense. ("DUE DILIGENCE REVIEW")

(a) During the Due Diligence Period, Buyer, personally or through its authorized agents or representatives, shall be entitled, upon no less than 24 hours' notice to the Seller, to enter upon the premises ... and shall have the right, ... , to make such investigations, including environmental studies and underwriting analysis, engineering studies, zoning, appraisals, soil tests, and any other reviews of the property which may include a septic dye test, potable well water test and feasability , as purchaser deems necessary or advisable. ... Further, during the Due Diligence Period, Seller agrees to make available to the Purchaser, copies of all leases and all documents relating to the Premises and the operation and maintenance thereof. ... Purchaser shall not, without Seller's prior consent (Which seller shall not unreasonable withhold) contact any tenant of the Premises concerning its lease of the premises; Seller may, however, condition such consent on the participation of the Seller or its agent in any discussions between the Purchaser and any tenant of the Premises. Purchaser agrees to indemnify and hold the Seller ... harmless from any damages, liabilities or claims arising out of all inspections and investigations by Purchaser. Notwithstanding any other provision in this Agreement to the contrary,

> this indemnification shall survive the termination of or Closing under this Agreement.

Breach of Contract

In beginning its discussion of the defendants' application, the Court turns to *TIAA Glob. Investments, LLC v One Astoria Sq. LLC*, 127 AD3d 75 [1st Dept 2015]. The Court in *TIAA*, states that, "in analyzing motions brought pursuant to CPLR 3211, ... we must afford the pleading a liberal construction, accept the facts as alleged as true, and accord a plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). *Id.* at 85 "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]) This Court shall analyze the plaintiffs' position accordingly.

TIAA, as does the instant matter, involves post-closing litigation involving claims of breach of contract and fraud. As in the instant matter, the merger doctrine was the primary basis for dismissal application. "The merger doctrine in a real estate transaction provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract." (*Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006]; *TIAA*, 127 AD3d at 85) In *TIAA*, the First Department recognizes an exception to the merger doctrine where the parties "clearly intended that a particular contract provision would survive the delivery of the deed. *Id.* at 85 (*See also, Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006])

Contract paragraph 24 states that no contract provision survives closing "[e]xcept as specifically expressed in this Contract." Except for specified exceptions, merger will occur. In fact, defendants acknowledge that certain provisions in the underlying contract specify survival beyond closing. Such provisions, however, are limited.

Paragraph 7 of the Rider expressly states that "representations [set forth in the section] shall survive the delivery of the deed." Plaintiffs' claims as to rents survive under paragraph 7d. Claims as to the septic system replacement, if required by a lease or leases or work required under a lease or leases, would survive under paragraphs 7 a and f.

Purchasers' obligation to indemnify and hold the Sellers harmless for damages or liability arising from property inspections is deemed to survive the closing in paragraph 19a. No such claims have been made in this pre-answer stage of the litigation.

<u>Fraud</u>

The plaintiffs' claims sounding in fraud require different analysis. In *Crowley Marine Associates v NYCONN Associates, L.P.*, 292 A.D.2d 334 [2d Dept 2002], causes of action for breach of contract and fraud were dismissed on summary judgment. The *Crowley* plaintiff claimed that the defendant misrepresented annual property taxes during negotiations. The Appellate Division found that the merger doctrine extinguished the breach of contract action. As to the fraud claims, the Court found that the claim was "essentially one to recover damages for breach of contract, since the alleged false representation was set forth in a rider to the contract of sale." *Id.* at 682. (*See also, Ka Foon Lo, supra)*

Claims of fraud in post-closing actions may be viable where the "representations alleged to be false are collateral or extraneous to the terms of the agreement." *Id.* A cause of action sounding in fraud must be dismissed when "the alleged falsity was a provision of the contract of sale." (*Ka Foon Lo,* 29 A.D.2d at 526) In this matter the defendants' alleged misrepresentations of rent; leases and/or terms of lease; obligations to tenants; and septic condition or adequacy are all addressed in the contract, contract schedules and/or rider. They properly belong in the breach of action claim.

Plaintiffs' fraud claims also allege reliance on proposed expansion plans provided by the defendant corporation. Such plans were not incorporated into the contract. Contract paragraph 11 states that certain representations and warranties "[f]or the purpose of inducing Purchaser and Seller to enter into and consummate the transaction contemplated by this Contract." None of the representations and warranties survived the closing. Perhaps more significant, none of the documents relied upon by plaintiffs in the complaint supports such an allegation. The realtor listing (Exhibit 1A), while referencing "plans for a 3,200 SF Pad Site along with 9 apartments units above the retail units," parenthetically advises "contingent upon town approval." Similarly, the Hubbell appraisal report (Exhibit 1B) states that the property "has an attic space that has been proposed for residential use; however, an exterior stairway and planning board approval are required. In addition the owner of the property has a proposed site plan for a 3200 square foot pad site that also requires planning board approval. A sample floor plan was provided regarding the second floor." (Exhibit 1B, page 30)

Hubbell utilizes the Sales Comparison and Income Approaches to determine market value. (Exhibit 1B, page 12) Valuation was not dependent on proposed expansion plans.

"In order to establish a *prima facie* case of fraud, the plaintiff must establish: (1) that the defendant made material representations that were false; (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff; (3) that the plaintiff justifiably relied on the defendant's representations; and (4) that the plaintiff was injured as a result of the defendant's representations." *(Giurdanella v Giurdanella*, 226 A.D.2d 342, 343 [2d Dept 1996]) "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages." *(Lingechetty v. Shukla,* 114 A.D.3d 832 [2d Dept 2014], quoting *Eurycleria Partners, L.P. v Seward & Kissel, L.L.P.,* 12 N.Y.3d 553, 559)

Documentary evidence obviates plaintiffs' claim of justifiable reliance on proposed plans. Documents provided in the motion, and which the plaintiffs incorporate into their complaint, expressly state that plans are subject to municipal approval. No allegation of assurance of such approval is made.

The causes of action sounding in fraud are dismissed.

Unjust Enrichment

In *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, (14 AD3d 644 [2d Dept 2005]), the Second Department reversed the lower court's denial of an application for dismissal of the complaint based on CPLR 3211(a)(7). The Court found that the claim of unjust enrichment was duplicative of a breach of contract claim "because both causes of action seek damages for events arising from the same subject matter that is governed by an enforceable contract." *Id. at* 645. (*See also, Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 469 [2d Dept 2002]) Plaintiffs' reliance on *Mandarin Trading Ltd. v Wildstein* (16 NY3d 173) is misplaced. The parties in *Mandarin* had no contract as exists in the instant action. Plaintiffs have recourse in this matter.

The cause of action for unjust enrichment is dismissed.

Piercing the Corporate Veil

The plaintiffs' final cause of action, piercing of the corporate veil, is also dismissed. Civil Practice Law & Rules§ 3013 requires that statements in a pleading be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

While the allegations of the fifth cause of action arguably meet the latter standard, plaintiffs have failed to allege with requisite particularity, statements detailing fraud or other corporate misconduct that would warrant piercing the corporate veil. (*Sheridan Broadcasting Corp. v. Small*, 19 AD3d 331 [1st Dept 2005]; *Sheinberg v. 177 E,. 77 Inc.*, 248 AD2d 176 [1st Dept 1998]) Conclusory statements that the corporate principals "exercised complete domination of the various corporate entities" is simply insufficient to withstand a motion to dismiss. (*Cf., Grammas v. Lockwood Assocs., LLC*, 95 AD3d 1073 [2d Dept 2012]) (factors to be considered include failure to adhere to LLC formalities, inadequate capitalization, etc.)

Conclusion

On the basis of the foregoing, defendants' application is granted as to the second, third, fourth and fifth causes of action, and denied as to the first cause of action.

The parties shall appear for Preliminary Conference on February 6, 2020 at 9:00 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 6, 2020
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*