At an IAS Part 83 of the Supreme Court Of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of November, 2021.

P R E S E N T: HON. INGRID JOSEPH, J.S.C
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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CHING YU,

Plaintiff,

-against-

138 WILLOUGHBY LLC,

Defendant.

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Index No.: 501807/2021

DECISION/ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of defendants' motions:

Papers	NYSCEF Nos.
Notice of Motion/Affidavit/Memorandum of Law/Exhibits	5 - 16
Memorandum in Opposition	19
Reply	22

In this matter, defendant, 138 Willoughby LLC ("defendant"), moves by notice of motion (Motion Seq. 1) to dismiss the complaint filed by plaintiff, Ching Yu ("plaintiff"), pursuant to CPLR § 3211 (a)(1) and (7).

Plaintiff commenced this matter by the filing of a Summons and Complaint on January 25, 2021, for rescission of an Option Agreement dated April 19, 2019, based upon mutual mistake, unilateral mistake, unconscionability, and unjust enrichment grounds. In the complaint, plaintiff alleges that she visited a luxury, mixed-use condominium development with a broker on April 4, 2019 in downtown Brooklyn. Plaintiff states that the defendant showed her the plan and model unit for the one-bedroom condominium units and represented to her that such plan was the same as the unit that was available for purchase (Unit 32K). Plaintiff, who asserts she speaks no English, states that the defendant further represented that plaintiff would need to sign a contract as soon as possible to secure the apartment. Plaintiff states that she signed the option agreement on April 19, 2019 to purchase Unit 32K for $1,189,089, after repeated demands by

defendant. Plaintiff asserts that she remitted a down payment of $119,696 initially, then an additional $59,848 on October 19, 2019. Plaintiff states that she inspected Unit 32K on or about November 20, 2020 after receiving a call that the unit was ready to be delivered. Plaintiff states that it was then that she discovered the unit was different from the model unit initially shown to her. Plaintiff alleges that she contacted the defendant through her broker immediately thereafter to request a different unit or that defendant return plaintiff's initial payment to no avail. Plaintiff states that her attorney also contacted the defendant, and the defendant's response was that it will retain the total sum remitted by plaintiff as liquidated damages.

In support of the motion to dismiss, defendant argues that plaintiff is a defaulting purchaser with a classic case of buyer's remorse. Defendant contends that the plaintiff was fully apprised of the Plan and schematic for Unit 32K and expressly acknowledged and agreed that she was not relying on sale plans, advertisements or any statement made by the defendant or its agents. Defendant argues that it also provided plaintiff with detailed disclosures that provided the exact layout of units, including Unit 32K. Defendant argues that the Option Agreement, which plaintiff signed, contains express provisions at Paragraphs 39 and 51, entitled "Entire Agreement" and "No Representations," respectively, that warrant dismissal of plaintiff's causes of action. Defendant contends that the Plan also comports with the regulations under Part 21 of Title 13 of the NYCRR, Regulations Governing Newly Constructed and Vacant Cooperatives ("Regulations"), which was enacted by the legislature to promote stability and consistency in the cooperative and condominium real estate realm.

In response, plaintiff argues that the merger clause and disclaimer lack specificity and does not preclude claims based on fraudulent inducement. Additionally, plaintiff contends that the Option Agreement is ambiguous, since it does not provide specifics regarding the layout of units in the development. Plaintiff argues, in the alternative, that even if the provisions of the Option Agreement are viewed as sufficiently specific, a purchaser may not be precluded from claiming reliance on misrepresentations of facts that are only within the seller's knowledge.

Under CPLR § 3211, a party may move to dismiss one or more causes of action asserted against it, based upon (1) a defense founded upon documentary evidence and (7) for failure to state a cause of action. In addressing a motion to dismiss, the court must accept the facts alleged in the complaint as true and determine only whether such facts fit within any cognizable legal theory (*see Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2d Dept 2000]). "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]). Therefore, the court "is not concerned with determinations of fact or the likelihood of success on the merits" (*Detmer v Acampora*, 207 AD2d 477, 477 [2d Dept 1994]; *see Stukuls v State of New York*, 42 NY2d 272, 275 [1977]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claim (Fontanetta v Doe, 73 AD3d 78, 83-84 [2d Dept 2010]).

The elements of a cause of action based upon fraudulent inducement requires a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2d Dept 2009]; *High Tides, LLC v DeMichele*, 88 AD3d 954, 957 [2d Dept 2011]; *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2d Dept 2010]). A plaintiff's statements in the pleading must be sufficiently particular to give the court, and the parties, notice of the transactions and occurrences to be proven and the material elements of the cause of action for fraud and the pleading must provide factual detail (CPLR §§ 3013, 3016 (b), *see Barclay Arms v Barclay Arms Assoc.*, 74 NY2d 644, 646-647 [1989]; *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 [2d Dept 2001]; *Walden Terrace v Broadwall Mgt. Corp.*, 213

AD2d 630 [2d Dept 1995]). This heightened specificity requires the pleader to "support each element with an allegation of fact" (*Fink v Citizens Mtge. Banking*, 148 AD2d 578, 578 [2d Dept 1989]). Critical to a fraud claim is that a complaint alleges the basic facts to establish the elements of the cause of action, which should not be confused with unassailable proof of fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). This criteria may be met when the facts are sufficient to permit a reasonable inference regarding the alleged conduct (*id.* at 492).

In this case, the court finds that plaintiff' first cause of action for mutual mistake is subject to dismissal. Plaintiff alleges that she believed the unit she would purchase had the same floor plan as the model one bedroom unit and states that the defendant mistakenly believed that the unit plaintiff would purchase may have a floor plan that differed from the model one bedroom unit. As plaintiff has described it, there was no oral agreement showing a mistake that was made by both parties that later differed in a written instrument. Rather, plaintiff has described a situation in which she believed there would be consistency between the model and the unit she would purchase, while the defendant believed the plaintiff would purchase a unit that differed from the unit that was shown to plaintiff.

Defendant has failed to establish that plaintiff's second, third, fourth and fifth causes of action are subject to dismissal for failure to state a cause of action. The factual assertions underlying each cause of action, when read together, create cognizable claims. Plaintiff set forth basic facts with specific allegations of fraud, which the remedy of rescission based upon unilateral mistake may be based. Moreover, since plaintiff remitted a down payment of $179,544, failing to rescind the Option Agreement could result in the defendant's unjust enrichment at plaintiff's expense. Further, plaintiff's claim for rescission based upon unconscionability is cognizable at law, given her assertions that she speaks no English, was a first time home buyer, and was pressured by the defendant to act quickly in order to secure a unit in the development.

Regarding that branch of the motion to dismiss based on documentary evidence, the court finds that the merger and disclaimer clauses under Paragraphs 39 and 51 of the Options Agreement, respectively, do not conclusively dispose of plaintiff's claims, nor do the provisions resolve all of the factual issues raised in this case. The disclaimer, or "no representations" clause , under Paragraph 51 provides, in pertinent part,

> "[t]he Purchaser acknowledges that Purchaser has not relied upon any architects' plans, sale plans, selling brochures, advertisements, representations, warranties, statements or estimate of any nature whatsoever, whether written or oral, made by Sponsor, Selling Agent, Sponsor's counsel, Sponsor's attorneys, Escrow Agent or otherwise, including, but not limited to, any relating to the description or physical condition of the Property, the Building or the Tower Residence, or the size of the dimensions of the Tower Residence or the rooms therein contained in any other physical characteristics thereof, ... or any other data, except as herein or in the Plan specifically represented, Purchaser having relied solely on Purchaser's own judgement and investigation in deciding to enter into this Agreement and purchase the Tower Residence. ...No oral representations or statement shall be considered a part of this Agreement.....Purchaser agrees to purchase the Tower Residence, without offset or any claim against, or liability of, Sponsor, whether or not any layout or dimension of the Tower Residence or any part hereof, as shown on the Floor Plans on file in Sponsor's office is accurate or correct, ... Purchaser shall not be relieved of any of Purchaser's obligations hereunder by reason of any immaterial or insubstantial inaccuracy or error."

A fair reading of this provision reveals that the defendant may be relieved of her obligations under the Option Agreement if the underlying reason relates to a material or substantial inaccuracy or error. Plaintiff's causes of action are based upon her contention that the Option Agreement obligates plaintiff to purchase a unit with a layout that differs from the model unit that she was shown. The issue is whether this alleged difference constitutes an inaccuracy or error and if so, whether such inaccuracy or error is material or substantial enough to relieve plaintiff from her obligations under the Option Agreement.

The above provision is also contracted by language contained in the Plan, which specifically inoculates the defendant if there exists inaccuracies or errors in floor plans. This raises the specter of ambiguity as to the defendants obligations, since the Option Agreement and

Plan contain discrepant provisions. Another example of ambiguity can be found in the Plan (setting forth the layout of units) when compared to the disclaimer clause, because the defendant ultimately disclaims all representations in the Plan, including the floor plan, size, layout, and dimension of units. Thus, it appears that the specific details of Unit 32K, which could not be ascertained by plaintiff, may have been peculiarly within the defendant's knowledge, since plaintiff could not physically inspect the unit prior to remitting the down payment and the defendant disclaimed all of the details of the Plan.

Based upon the above findings,

Defendant's motion to dismiss is granted solely to the extent that plaintiff's First Cause of Action for Mutual Mistake is dismissed.

This constitutes the decision and order of the court.

ENTER,

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

KINGS COUNTY CLERK
FILED
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