Baik v Riverside Ctr. Site 5 Owner LLC
2022 NY Slip Op 30675(U)
March 1, 2022
Supreme Court, New York County
Docket Number: Index No. 650668/2021
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

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DONNA BAIK,

Plaintiff,

- v -

RIVERSIDE CENTER SITE 5 OWNER LLC, and EL AD US HOLDING INC.,

Defendants.

---X

INDEX NO. 650668/2021

MOTION DATE 05/03/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 30

were read on this motion for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss the complaint pursuant to CPLR 3211 is granted, based upon the following memorandum decision.

Background

In this action for breach of contract, plaintiff Donna Baik ("plaintiff") asserts five causes of action: breach of contract (first cause of action); breach of the implied housing warranty (second cause of action); negligence (third cause of action); violation of General Business Law § 349 (fourth cause of action), and violation of General Business Law § 350 (fifth cause of action). Defendants Riverside Center Site 5 Owner LLC ("sponsor") and El Ad US Holdings Inc. ("El Ad") now move to dismiss the complaint based on documentary evidence and failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (a)(7). Defendants also seek to recover their reasonable attorney's fees for defending this action.

Pursuant to a condominium offering plan and option agreement, plaintiff purchased from sponsor Unit 28D in the condominium building located 1 West End Avenue, New York, New York (the "Unit") (NYSCEF Doc. Nos 3-4, 11). The offering plan, the provisions of which were incorporated into the option agreement and plaintiff agreed to be bound by (NYSCEF Doc. No. 3, ¶¶ 11.2-11.3), provides that, in the event of a dispute between Sponsor and any purchaser

> "In no event shall Sponsor be liable for special or consequential damages (whether based on negligence, breach of contract, warranty, or otherwise), it being intended that Sponsor's sole obligations under the Plan shall be to repair or, at Sponsor's option, replace any defective item of construction (whether arising as a result of defects in material or improper workmanship or material substantially at variance with the Plans and Specifications), subject to the terms and conditions set forth in this paragraph, provided however, that nothing contained herein is intended to relieve Sponsor of liability for actual damages resulting from property damage or personal injury arising as a result of negligence of Sponsor or its authorized agents or employees in connection with the transactions contemplated in the Plan" (NYSCEF Doc. No. 11 at 103).

Further, the offering plan expressly states that "[t]he Housing Merchant Implied Warranty Law (New York State General Business Law Article 36-B) does not apply to this offering" and, indeed, that "Sponsor will not warrant the materials or workmanship of any Unit or any of the Common Elements" (*id.* at xxviii, 104). Separate from the offering plan, the option agreement obligated plaintiff to "reimburse Sponsor for any legal fees and disbursements incurred by Sponsor in defending Sponsor's rights under [the] Agreement . . . the provisions of this Article shall survive closing of title or the termination of this Agreement" (NYSCEF Doc. No. 3, ¶ 35). Plaintiff represented that she agreed to the provisions of both the offering plan and the option agreement, which had "been agreed to voluntarily, after negotiation, without duress or coercion by any party upon any other party, and with each party having been (or having had full and adequate opportunity to be) represented and advised by counsel, accountants, brokers, appraisers and other experts and advisors of its own choosing" (*id.*, ¶ 12[d]).

Plaintiff closed on the Unit on December 19, 2017 (NYSCEF Doc. No. 14, ¶ 19). Prior to closing, plaintiff inspected the Unit and created a punch list of several items remaining to finish in the Unit, all of which plaintiff signed were complete as of June 13, 2018 (NYSCEF Doc. No. 13). Aside from the punch list items, plaintiff represented that she found "the apartment in good condition, free of chips, mars, breaks or other defects" (*id.*).

Plaintiff alleges that she purchased the apartment to lease it (NYSCEF Doc. No. 14, ¶ 20). Shortly after the Unit was listed, there were "major water leaks causing damage to the interior of the unit beginning on February 4, 2018, and on five other occasions thereafter, with the most recent on January 2020 (*id.*, ¶¶ 22-24). Plaintiff claims that Sponsor was the aware of the leaks and either inadequately repaired them or failed to repair them at all, causing her lost rental income due to difficulty renting the Unit (*id.*, ¶¶ 25-32, 36-38).

Plaintiff commenced this action by filing a summons and complaint on January 29, 2021 (NYSCEF Doc. Nos. 1-2). Defendants appeared and filed the instant pre-answer motion to dismiss.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "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" (*511 West 232nd Owners Corp. v Jennifer*

Realty Co., 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

As an initial matter, the claims against El Ad must be dismissed. El Ad is a member of Sponsor, and an LLC's members are not responsible for the debts or other liabilities of its members (Limited Liability Company Law § 609[a]; *e.g. Retropolis v 14th Street Development LLC*, 17 AD3d 209 [1st Dept 2005]). The complaint does not allege grounds to pierce the corporate veil and hold El Ad liable for Sponsor's conduct. Corporate veil piecing is warranted only where a party has complete dominion over a corporation and abuses the corporate form to perpetrate some fraud or wrong on the injured party (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141-42 [1992]).

The limitation on remedies contained in the offering plan is binding on plaintiff and requires that plaintiff's common law causes of action be dismissed. Simply put, Sponsor is not liable for special or consequential damages, "whether based on negligence, breach of contract, warranty, or otherwise," arising out of the sale or the condition of the Unit (NYSCEF Doc. No. 11 at 103). Plaintiff's complaint alleges damages in the form of lost rental income (NYSCEF Doc. No. 14, ¶¶ 25-32; NYSCEF Doc. No. 23, ¶ 14), which is a form of consequential damages (*e.g. 126 Newton St., LLC v Allbrand Com. Windows & Doors, Inc.*, 121 AD3d 651, 653 [2d Dept 2014] ["Consequential or special damages usually refer to loss of expected profits or economic opportunity caused by a breach of contract"]). Accordingly, the first through third causes of action, which seek consequential damages under theories of breach of contract, breach

of the implied housing warranty, and negligence, must be dismissed.[1] To the extent that plaintiff claims that she may still proceed in spite of the provision due to the exception for personal injury or property damage claims arising out of Sponsor's negligence, the complaint does not allege either personal injury or property damage as the cause of its damages.

Plaintiff seems to argue that the limitation on remedies provision should not be enforced as it would be "unjust and unconscionable." *Kalisch-Jarcho, Inc. v City of New York* (58 NY2d 377, 385 [1983]), cited by plaintiffs is unavailing, as plaintiff's allegations, taken as true, do not show conduct that is "fraudulent, malicious . . . prompted by the sinister intention of one acting in bad faith . . . [or that] betokens a reckless indifference to the rights of others." Moreover, "[f]reedom of contract is a deeply rooted public policy of this state," and "our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law" (*159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 359 [2019]). "Freedom of contract prevails in an arm's length transaction between sophisticated parties . . . and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain" (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]). Indeed, as Sponsor points out, Courts enforce limitations on remedies where a purchaser seeks consequential damages of lost rental income (*e.g. Masiach v 420 W. Invs., LLC*, 103 AD3d 466, 466-67 [1st Dept 2013]). This is not a contract of adhesion, involving "onerous contractual terms which one party is able to impose [upon] the other because of a significant disparity in bargaining power" (*159 MP Corp.*, 33 NY3d at 360). It was entered into by "sophisticated parties negotiating at arm's length" (*id.* at 363; NYSCEF Doc. No. 3, ¶ 12[d]).

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[1] The Court further notes with respect to the claim for breach of the implied housing warranty, that plaintiff expressly agreed that no such warranty would apply to the sale of the Unit (NYSCEF Doc. No. 11 at xxviii, 104).

Turning to plaintiff's claims pursuant to General Business Law §§ 349 and 350, plaintiff alleges that defendant made or allowed to be disseminated false and misleading representations in the offering plan, amounting to deceptive acts and false advertising (NYSCEF Doc. No. 14, ¶¶ 55-71). Claims under those provisions of the General Business Law must allege conduct that "must have a broad impact on consumers at large; private contract disputes unique to the parties would not fall within the ambit of the statute" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995] [internal quotation marks and citations omitted]). Further, it is settled law that claims of fraud under General Business Law §§ 349 and 350 are committed to the exclusive jurisdiction of the Attorney General under the Martin Act (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244, 248 [1st Dept 2001], *affd in part*, 98 NY2d 144 [2002]). Here, plaintiff both lacks standing to bring these claims and fails to allege sufficient public-facing conduct even if it had standing, and these claims must be dismissed.

Finally, Sponsor has established, and plaintiff does not meaningfully dispute, Sponsor's entitlement to attorney's fees as provided in the option agreement (NYSCEF Doc. No. 3, ¶ 35).

Accordingly, it is hereby

ORDERED that the motion of defendants Riverside Center Site 5 Owner LLC and El Ad US Holdings Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that defendants are entitled to their reasonable attorneys' fees incurred in this action in an amount to be heard and determined by a Judicial Hearing Officer ("JHO") or Special Referee at inquest; and, therefore, it is

ORDERED that the issue of such fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of defendants' said fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the Decision and Order of the court.

ENTER:

Louis L. Nock

3/1/2022
DATE

LOUIS L. NOCK, J.S.C.

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