

Foschi v Sag Dev. Partners, LLC
2022 NY Slip Op 33898(U)
November 17, 2022
Supreme Court, New York County
Docket Number: Index No. 654841/2017
Judge: Dakota D. Ramseur
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654841

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR

PART

34M

Justice

-----X
SANDRA FOSCHI

Plaintiff,

- v -

SAG DEVELOPMENT PARTNERS, LLC,

Defendant.

INDEX NO. 654841/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 003 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 105, 106, 107, 108, 116, 117, 118, 119

were read on this motion to/for

DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217

were read on this motion to/for

DISMISS

Plaintiff Sandra Foschi commenced the instant action against defendant Sag Development Partners, LLC for breach of warranty, breach of contract and violation of General Business Law Section 349 arising from the purchase of a condominium unit in defendant's newly constructed luxury apartment complex. In motion sequence 005, defendant moves pursuant to CPLR 3212 for summary judgment on each of plaintiff's three causes of action. In motion sequence 003, defendant moves pursuant to CPLR 3103, 3122, 3124, 3126, and 2304 for orders (1) compelling plaintiff to sit for a deposition and (2) quashing certain non-party subpoenas that plaintiff has served on Arthur Bee and David Kronman. Plaintiff opposes the motion; she also cross-moves for an order compelling defendant to produce Craig Wood, an officer of Sag Development, for a deposition.

For the following reasons, defendant's motion for summary judgment is granted in motion sequence 005 and therefore, both parties' motions in sequence 003 are moot.

BACKGROUND

On October 15, 2013, plaintiff (named in the relevant documents as "Purchaser"), entered into a purchasing agreement with defendant Sag Development (named as "Sponsor") for apartment unit number G-132 in the recently built Watchcase Factory Condominium (the "Condominium") located at 15 Church Street, Sag Harbor, New York. Pursuant to the

agreement, plaintiff agreed to pay \$1,950,000. Before closing, plaintiff requested defendant perform additional work including installing a glass-enclosed fireplace in the living room. For the extra work, plaintiff paid defendant \$33,000. Thereafter, in June 2015, plaintiff closed title to the unit and the limited warranty that was included with the purchasing agreement became effective.

The instant litigation arises from alleged defects in construction that defendants failed to repair as obligated under the terms of the parties' purchase agreement, offering plan, and limit warranty agreement (all of which will be discussed further below). According to a Notice of Warranty Claim submitted by plaintiff in June 2017, plaintiff detailed 23 different defects, including defects in the fireplace's installation, that defendant was obligated, but failed, to repair. (NYSCEF doc. no. 4.) On July 17, 2017, plaintiff commenced this action, in which she asserts breach-of-warranty, breach-of-contract, and General Business Law §349 causes of action against defendant.

Since defendant's motion to dismiss is based on the terms of the purchasing agreement, the offering plan, and the limit warranty agreement referenced therein, the Court describes the relevant provisions of each below.

Section 51 of the purchasing agreement, entitled "Sponsor's Limited Statutory Warranty," provides:

"The Sponsor makes no housing merchant implied warranty or any othe[r][sic] warranties, express or implied, in connection with this agreement or the unit, and all such warranties are excluded except as provided in the Limited Warranty annexed hereto as Schedule B, as required by NYS General Business Law Article 36-B." (NYSCEF doc. no. 235 at ¶51, purchasing agreement.)

The agreement then incorporates by reference the terms of the offering plan that the New York State Department of Law accepted on July 30, 2012. (*See id.* at ¶13.) The offering plan's section "Rights and Obligations of Sponsor," defines the terms of a limited warranty agreement that defendant agreed to provide plaintiff. The terms of that agreement include a "First Year Basic Coverage," a "Two Year Major System Coverage" and a "Six Year Major Structural Defect Coverage." Thereafter, the limited warranty agreement reaffirms that plaintiff is not entitled to any other warranties—express or implied—other than those listed above. (NYSCEF doc. no. 132 at 100.)

Paragraph (q) of that same section provides that defendant will be considered to have discharged its obligation to repair any defects arising under the above-described coverage if: "(a) Sponsor is not notified of the existence of such defect... (b) the Unit Owner fails to allow prompt access to the Unit in question by Sponsor or Sponsor's contractors; or (c) Sponsor has corrected...the defect in accordance with the practice of the industry." (*Id.* at 101.)¹

¹ One of defendant's principal contentions is that plaintiff did not allow it prompt access to repair any defects it was obligated to.

Described as a “punch list,” paragraph (m) requires plaintiff to inspect the unit prior to the closing date and provide defendant with a list of improvements described in the offering plan or the agreement that had not been fully completed. (*Id.* at 99.) Plaintiff inspected her apartment unit per this provision and executed an inspection statement that set forth certain work to be completed by defendant after closing. (NYSCEF doc. no. 137, inspection statement.) Thereafter, defendant was obligated to fix the defects within a reasonable time. (NYSCEF doc. no. 132 at 99.) The limit warranty excludes from its obligation to repair certain “patent defects including defects shown on the punch-list and defects which an examination of the Unit prior to the Effective date of the warranty ought to have revealed.” (*Id.* at 185.) Paragraph (s) also identifies sources of possible “defects” that the sponsor will not be obligated to correct. (*Id.* at 101, paragraph [s].) The sources include a variety of defects in construction, installation or operation of any mechanical equipment and appliances “that are not of a material nature.” (*Id.* at 101, paragraph [s][ii].)

Paragraph (u) purportedly limits the remedies that plaintiff may seek should she contest whether defendant complied with the above sections. It provides: “Nothing contained in this section will be construed so as to render Sponsor liable for money damages (whether based on negligence, breach of contract, breach of warranty, or otherwise), it being intended that Sponsor’s sole obligation under the plan will be [in] [sic] accordance with the limited warranty.” (*Id.* at 104.) Lastly, the offering plan provides that “the warranties shall be void if Purchaser...hire[s] any outside contractor to do any work during the period [of warranty].” (*Id.* at 186.) The limited warranty agreement repeats these provisions. (See NYSCEF doc. no. 238, limited warranty.)

On this summary judgment motion, defendant argues that paragraph (u) of the offering plan, which expressly limits the type of remedies available to plaintiff, precludes her breach-of-warranty and breach-of-contract causes of action for monetary damages. Next, defendant argues that the purchasing agreement and offering plan disclaim common law implied warranties, meaning plaintiff does not have a common-law breach-of-contract cause of action. With respect to the breach-of-warranty, defendant alleges that plaintiff did not allow it or its agents timely access to the apartment and therefore, under paragraph (q) of the offering plan, defendant’s obligations to repair defects were discharged. The same principle, defendant asserts, applies to plaintiff’s use of outside contractors: because plaintiff used electricians to perform work in her apartment, defendant was no longer obligated to repair alleged defects under the limited warranty agreement. For plaintiff’s cause of action based on GBL §349, defendant argues that the complaint describes a private dispute that does not implicate the public at large.

DISCUSSION

Summary judgment is appropriate where “the proponent makes a ‘prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact’ and the opponent fails to rebut that showing.” *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324; see also CPLR 3212 [b].) Once the proponent has made a prima facie showing, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].) Since summary

judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) A summary judgment motion should be denied where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence. (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

Defendant's Argument that the Purchase and Offering Agreements Preclude Monetary Damages

Plaintiff's first two causes of action—for breach of warranty and breach of contract—are for monetary damages “believed to be in excess of \$1 million.” As such, they are dismissed. In *20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, the First Department dismissed a cause of action for monetary damages where an offering plan included a valid and specific limited warranty that accorded with General Business Law §777-b and contained a provision that precluded any claim for damages based upon a breach of the limited warranty. (109 AD3d 733, 734 [1st Dept 2017].) Here, as described *supra*, the offering plan contains a limited warranty agreement and paragraph (u) of the offering plan (which the purchase agreement incorporates by reference) provides that “nothing contained in this section will be construed so as to render Sponsor liable for money damages (whether based on negligence, breach of contract, breach of warranty, or otherwise), it being intended that Sponsor’s sole obligation under the plan will be [in] [sic] accordance with the limited warranty.” Defendant has thus demonstrated entitlement as a matter of law that plaintiff’s causes of action for monetary damages are precluded under the provisions of the offering plan.

Plaintiff’s arguments in opposition to summary judgment are two-fold. First, she argues the existence of material issues of fact preclude summary judgment—namely, the parties’ drastically different accounts of whether plaintiff provided defendant with access to the apartment and the extent of plaintiff’s repairs using outside technicians. Second, she argues that, even with paragraph (u) of the offering agreement, monetary damages are an appropriate remedy under her breach-of-contract theory. Neither line of argument is persuasive.

As to the existence of material issues of fact, the Court no doubt agrees with plaintiff. The parties have presented the Court with affidavits and supporting documentation that only serve to highlight the existence of two plausible interpretations of the facts. Such an acknowledgment on the Court’s part, however, is immaterial to the issue at hand: whether monetary damages is an appropriate remedy under the offering plan. The issue, then, appears more closely related to a CPLR 3211 (a) (1) or (a) (7) motion and requires a determination of law. On this point, plaintiff has not provided any caselaw that refutes or even casts doubt upon the applicability of *20 Pine St.*

The line of cases that plaintiff does cite for the proposition that monetary damages are an appropriate remedy are either off point or precluded by *other* provisions in the offering agreement. (*See* NYSCEF doc. no. 212 at 13.) For example, plaintiff cites to *Fumarelli v Marsam Dev.* (92 NY2d 298, 305-306 [1998]) but this case only implicated whether GBL §§777-a and 777-b supplant a common-law remedy for breach of the housing merchant implied warranty. The Court of Appeals determined that these sections did in fact displace the common-law remedy but also noted that, even if the general business laws had not done so, the limited

warranty contained in the purchase agreement between Fumarelli and Marsam showed that they agreed to exclude all other warranties. So not only is *Fumarelli* irrelevant to the monetary damages issue, but also precludes a breach-of-contract claim to the extent it is based on a breach of an implied warranty.

The same problem arises with plaintiff's citation of *Tiffany at Westbury Condominium by Its Bd of Mgrs. V Marelli Dev. Corp.* (80 NYS2d 74, 77 [2d Dept].) Plaintiff cites it for the proposition that "while the limited warranty contained in the owners' purchase agreements precludes their assertion of causes of action for breach of contract based on the common-law implied warranty," nothing prevents the plaintiff from bringing causes of action for breaches of provisions in the contract that are outside the limited warranty. (NYSCEF doc. no. 212 at 13.) Yet, on the critical issues here, *Tiffany at Westbury* is silent and cannot be read to permit a plaintiff to assert a remedy that the purchase agreement and offering plan expressly preclude. As such, because the offering agreement and the limited warranty limit plaintiff's remedy to specific performance, defendant has demonstrated it is entitled to summary judgment on plaintiff's causes of action that seek monetary damages.

Defendant's Entitlement to Summary Judgment on Plaintiff's Breach-of-Contract Claim

With respect to the breach-of-contract claim, defendant has shown that it is entitled to summary judgment on an additional ground. As established in the preceding section, pointing to provisions in the purchase agreement outside the limited warranty that defendant breached represents for plaintiff the only remaining avenue to establishing a viable breach-of-contract claim.² (See *Tiffany at Westbury*, 80 NYS2d at 77 [holding that a plaintiff may bring a breach of contract claim where it alleges breaches of provisions other than those pertaining to the limited warranty].) Yet plaintiff does not put forth any allegations as to which other provisions defendant breached. (NYSCEF doc. no. 1, at 10, 11.) For instance, in paragraph 34 of the complaint, which describes the breach of contract, plaintiff asserts that "Defendant's failure to repair and/or cure the myriad of construction defects fully described in Plaintiff's Notice of Warranty Claim..., represents a breach of the Purchase Agreement, including the Limited Warranty. (emphasis added)" (NYSCEF doc. no. 1 at ¶34.) Indeed, plaintiff uses nearly the exact language to describe its breach of warranty cause of action. (Compare *id.* at ¶34 with *id.* at ¶23.) Plaintiff's affidavit in opposition provides no further allegations that can be seen as separate from the limited warranty. The essence of plaintiff's allegations for both causes of action is focused on defendant's alleged failure to repair defects in construction according to the limited warranty. By contrast, in *Tiffany at Westbury*, 80 NYS2d at 77, the First Department held that the plaintiff had a separate cause of action where it alleges that construction was not substantially built according to the plans filed with the building department and where defendant breached its duty to use substitute materials that were of comparable value to those set forth in the offering plan.

² To avoid being duplicative of plaintiff's breach of warranty claim, plaintiff must allege a breach outside the limited warranty section. But, to reiterate the above section, plaintiff cannot allege a breach of any implied warranties because GBL 777-a and 777-b supplants a common-law cause of action and Section 51 of the purchasing agreement (a section identical to the one at issue in *Fumarelli*) expressly disclaims any implied warranties. Plaintiff's breach-of-contract claim—to the extent it is based on implied warranties—is foreclosed by *Fumarelli*. (92 NY2d at 307.)

Here, plaintiff does not put forth any sort of similar, global allegations that are independent of obligations in the limited warranty. As such, plaintiff has not asserted a separate claim for breach of contract.

Defendant's Entitlement to Summary Judgment Under GBL §349

Defendant has shown entitlement to summary judgment under General Business Law §349. Pleading a cause of action under this statute requires a plaintiff to assert allegations that defendant's practices "have a broad impact on consumers at large." (*See Walsh v Liberty Mut. Ins. Co.*, 289 AD2d 842, 844 [2001].) Private, single-shot transactions do not create a cognizable cause of action under the statute. (*Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 147 [2d Dept].) To reiterate, the gravamen of the dispute here is particular to defendant's obligations and performance under the limited warranty. The resolution of such a dispute impacts only, as is unique to, the parties—there are no ramifications for the public at large. Put slightly differently, whether the alleged defects fall within the ambit of the limited warranty, whether plaintiff failed to allow defendant access to perform repairs, and whether she hired outside contractors such that defendant's obligations are considered discharged: these are not public-oriented issues. (*See Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 312 [1st Dept 2000]; *Merin v Precinct Developers LLC*, 74 AD3d 688, 689 [1st Dept 2010].) Plaintiff's argument to the contrary is unpersuasive. GBL §349 is not intended to remedy the allegations that plaintiff cites that purportedly affect or endanger consumers at large, i.e. that defendant performed work that is not to code and/or failed to properly inspect the premise. In any event, plaintiff does not cite any cases to support its position.

To the extent that defendant seeks summary judgment on other grounds—e.g., that there are no material issues of fact as to whether plaintiff failed to provide access to the apartment, plaintiff made repairs using outside contractors, or that the defects constituting plaintiff's claim are not included in the limited warranty—defendant has not demonstrated entitlement at this juncture. The parties' warring affidavits, without deposition testimony under oath (which, due to this summary judgment motion, neither party has fully completed), are insufficient to demonstrate as a matter of law entitlement to summary judgment.

Lastly, defendant is entitled to reasonable attorneys' fees incurred in defending this action. Paragraph 37 of the agreement provides, "Purchaser shall be obligated to reimburse Sponsor for any legal fees and disbursements incurred by Sponsor in defending Sponsor's rights under this Agreement." As agreements that provide for recovery of attorneys' fees are valid and enforceable (*see Sempra Energy Trading Corp. v PG&E Texas VGM, LP*, 284 AD2d 253, 254 [1st Dept 2001]), defendant has demonstrated its entitlement.

Accordingly, it is hereby

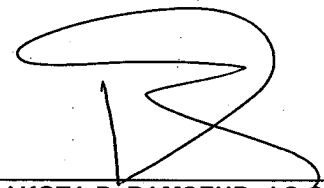
ORDERED that defendant Sag Development Partners, LLC's motion for summary judgment pursuant to CPLR 3212 on plaintiff Sandra Foschi's three causes of action for breach of contract, breach of warranty, and violations of GBL §349 is granted and plaintiff's complaint is dismissed (Mot. Seq. 005); and it is further

ORDERED that defendant's motion pursuant to CPLR 3103 to compel plaintiff's deposition and CPLR 2304 to quash non-party subpoenas, and plaintiff's cross-motion pursuant to those same rules (Mot. Seq. 003) are rendered moot by the Court's order in Mot. Seq. 005; and it is further

ORDERED that defendant's motion for its reasonable attorneys' fees is granted and that a hearing to determine a specific award of attorneys' fees shall be held on December 8, 2022 at 11:00 a.m. at 80 Centre Street, Courtroom 326; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for defendant shall serve a copy of this order, with notice of entry, on all parties within ten (10) days.



11/17/2022

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE