5506-40 Linden Blvd Brooklyn LLC v Linden 40 LLC
2022 NY Slip Op 34307(U)
December 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 512113/2022
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

5506-40 LINDEN BLVD BROOKLYN LLC, 5507-58 LINDEN BLVD BROOKLYN LLC, 5508-95 LINDEN BLVD BROOKLYN LLC, 5509-130 MARTENSE STREET BROOKLYN LLC, 5510-345 LEFFERTS BLVD BROOKLYN LLC, and 5511-777 ST. MARKS AVENUE BROOKLYN LLC,

Plaintiffs,

- against -

LINDEN 40 LLC, LINDEN 58 LLC, LINDEN 95 LLC, MARTENSE 130 LLC, LEFFERTS BLVD 345 LLC, 777 ST. MARKS REALTY, LLC, and EDWARD LIFSHITZ,

Defendants,

Decision and Order

Index No. 512113/2022

December 12, 2022

PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiffs have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the amended complaint, on June 26, 2015 the parties entered into a purchase and sale agreement whereby the plaintiffs agreed to purchase properties from the defendants. The properties are 40 Linden Boulevard, 58 Linden Boulevard, 95 Linden Boulevard, 130 Martense Street, 345 Lefferts Boulevard and 777 St. Marks Avenue all located in Brooklyn. The properties contain, in the aggregate, three hundred and eighty apartments (see, Affirmation in Opposition, ¶¶3, 6 [NYSCEF Doc. No. 56]). The plaintiff received a deed conveying title to each building on

August 3, 2015. Paragraph 30(a) of the agreement states that the "Seller represents that it or its predecessors have registered all residential apartment units located at the Premises with The Division of Housing, Community and Renewal ("DHCR") and re-registered the same prior to July 1, 2014; to Seller's knowledge, the rents set forth on Schedule B annexed hereto do not exceed the maximum legal rent which may be collected from any tenants of the Premises pursuant to the Leases" (see, Contract of Sale, ¶ 30(a) [NYSCEF Doc. No. 16]).

The plaintiffs commenced this lawsuit and have alleged the defendants misrepresented the correct rents for various apartments. Specifically, the amended complaint alleges that the defendants misrepresented the allowable rent for apartments 2E and 2F located at 40 Linden Boulevard, apartments 1G, 2H and 5H located at 130 Martense Street, apartment 4B located at 345 Lefferts Boulevard and apartment 2A located at 777 St. Marks Avenue. Thus, the amended complaint alleges improper rental amounts for seven out of three hundred and eighty apartments, less than two percent of the total apartments located within the properties. The plaintiffs assert these misrepresentations were made to induce the plaintiffs to enter into the agreement. The plaintiffs have asserted causes of action for fraud and indemnification.

The defendants have now moved seeking to dismiss the lawsuit

on the grounds it fails to allege any cause of action.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Further, pursuant to CPLR §3016(b) to plead fraud the complaint must "sufficiently detail the alleged conduct" and contain facts that "are sufficient to

permit a reasonable inference of the alleged conduct" (Pludeman v. Northern Leasing Systems Inc., 10 NY3d 486, 860 NYS2d 422 [2010]).

In this case, concerning the fraud cause of action and defendant Lifshitz, the amended complaint does not describe any specific misrepresentation made by Lifshitz at all. Rather, the amended complaint states that "Plaintiffs purchased the Buildings from Defendants pursuant to certain material representations that were made that directly impacted the value of the Buildings" (see, Amended Complaint, ¶10 [NYSCEF Doc. No. 43]). The misrepresentations are never explained within the amended complaint, however, they are alluded to by the ensuing recitation of the facts. Indeed, the following paragraph states that "Defendants made representations that the rent rolls for each of the Buildings was accurate and reflected the lawful legal registered rent for each apartment in each of the Buildings" (id). Thus, a complaint that alleges fraud "absent specific and detailed allegations establishing a material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused thereby, is insufficient to state a cause of action for fraud" (Old Republic National Title Insurance Company v. Cardinal Abstract Corp., 14 AD3d 678, 790 NYS2d 143 [2d Dept., 2005]). Therefore, no fraud claim can exist regarding

defendant Lifshitz and the motion seeking to dismiss that claim as to defendant Lifshitz is granted.

Concerning the remaining defendants, the basis for such claim is the defendants violated paragraph 30 of the contract regarding the legality of the rent roll. However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v.Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]).

Thus, the amended complaint concerning the fraud cause of action asserts "that Defendants knowingly represented that the rent rolls, as set forth above, were true and accurate. That Defendants knew that their representations were false. That Defendants made such representations knowing that they will be relied upon by Plaintiffs in deciding whether to purchase the Buildings" (see, Amended Complaint, ¶¶ 49, 50, 51 [NYSCEF Doc. No. 43]). These allegations are repeated verbatim regarding the breach of contract cause of action (see, Amended Complaint, ¶¶ 60, 61, 62 [NYSCEF Doc. No. 43]). Consequently, the entire fraud cause of action is duplicative of the breach of contract cause of action and consequently, the motion seeking to dismiss the fraud cause of action is granted in its entirety.

Concerning the cause of action seeking indemnification, the amended complaint states that "Real Property Law §253(6) provides that the covenants made in a Deed give rise to claims for contractual indemnification against damages suffered by Plaintiffs" and that "the Buildings have been encumbered by judgments and stipulations totaling $517,599.68 solely based on the judgments and agreements awarded to date, but believed to be in excess of $1,000,000.00 as will be determined at trial" (see, Amended Complaint, ¶¶ 64, 65 [NYSCEF Doc. No. 43]).

RPL §253(6) states that "a covenant that the grantor 'has not done or suffered anything whereby the said premises have been incumbered,' must be construed as meaning that the grantor has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or incumbered in any manner or way whatsoever" (id). It should be noted that "there is no statutory definition of the word 'encumbrance'" (see, In re Smith's Estate, 188 Misc 814, 65 NYS2d 457 [Surrogate's Court New York County 1946]). Thus, citing earlier authority the court held that "if it affects the land either in itself or in its value or in the way in which it can be enjoyed, it is an incumbrance" (id). Thus, an encumbrance is "whatever charges obstruct, burden, or impair the

use of the land, depreciate its value, or impede its transfer, such as a lien, a servitude, or an easement" and that "every diminution of whatever kind or degree of the ownership in fee simple absolute, other than a highway easement, is an encumbrance" (see, New York Law and Practice of Real Property, §22:22, Chapter 22. Marketable Title, D: Encumbrances [June 2022 Update]).

Thus, illegal rents that existed at the time of the conveyance can be defined as encumbrances since they reduced the degree of ownership the plaintiff expected. If such rents were erroneous at the time of the conveyance then the encumbrances existed at that moment, as well as in the future. Therefore, they satisfy the language of the deeds which state that they "covenant[] that [Sellers] [have] not done or suffered anything whereby the [Properties] have been encumbered in any way whatsoever" (see, Memorandum of Law, page 16 [NYSCEF Doc. No. 47]). Further, misrepresenting the accuracy of the rent roll is surely an act done by the owner in support of this allegation. Further, the mere fact DHCR judgements are not liens does not mean they are not encumbrances. As noted, encumbrances are not defined as liens. Therefore, at this stage of the litigation there are surely questions whether the inaccurate rent rolls created improper encumbrances permitting a claim for indemnification. Consequently, the motion seeking to dismiss the

second cause of action as to all defendants is denied.

So ordered.

ENTER:

DATED: December 12, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC