

Arlus Owner LLC v 829 Mad. Ave. LLC

2023 NY Slip Op 31311(U)

April 20, 2023

Supreme Court, New York County

Docket Number: Index No. 653842/2022

Judge: Barry R. Ostrager

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

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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 ARLUS OWNER LLC, FALU, LLC, FJLU, LLC, and
 829 MADISON WE TIC OWNER LLC,

Plaintiffs,

- v -

829 MAD. AVE. LLC and STANLEY MYER,

Defendants.

INDEX NO.	653842/2022
MOTION DATE	
MOTION SEQ. NOS.	001 and 002

DECISION + ORDER ON MOTIONS

HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on April 20, 2023 on the motion by Defendants 829 Mad. Ave. LLC and Stanley Myer (seq. 001) for an order pursuant to CPLR 3211(a)(1), (5) and (7) dismissing with prejudice: (i) Plaintiffs’ First Cause of Action for breach of contract against Defendant 829 Mad. Ave. LLC (only); (ii) Plaintiffs’ Second Cause of Action alleging fraud and fraudulent inducement against both Defendants; (iii) Plaintiffs’ request for punitive damages in its Wherefore clause; and (iv) Plaintiffs’ request for attorneys’ fees in its Wherefore clause. The Court also considered at that time the motion by Plaintiffs Arlus Owner LLC, FALU, LLC, FJLU, LLC, and 829 Madison WE TIC Owner LLC (Plaintiffs”) for leave to file a sur-reply in connection with Defendants’ motion to dismiss (seq. 002). In accordance with the April 20, 2023 transcript of proceedings, the motions are determined as follows.

This action stems from alleged material breaches of an Agreement of Purchase and Sale dated January 28, 2022 (the “Agreement”, NYSCEF Doc. No. 2), entered into between defendant 829 Mad. Ave. LLC, as Seller, and plaintiffs Arlus Owner LLC, FALU LLX, FJLU LLC, and 829 Mad. Ave. WE TIC Owner LLC, as Buyers, for the purchase of the property at 829 Madison

Avenue, New York, NY, which has four commercial tenants (the “Property/Building”), for \$17 million. Plaintiffs also allege intentional misrepresentations and fraud perpetrated by the defendant Seller and defendant Stanley Myer (a member of Seller) to induce Buyers to purchase the Property. The Complaint (NYSCEF Doc. No. 1) asserts two causes of action: (1) Breach of Contract/Warranty against the Seller 829 Mad. Ave LLC pursuant to Article 5 of the Agreement and the Myer Affidavit of Leases; and (2) Fraud/Fraudulent Inducement against all the Defendants based on alleged misrepresentations regarding the Property and Leases. In addition, Plaintiffs seek punitive and attorney’s fees.

Having reviewed all the papers and having heard counsel on both motions, the Court denies Plaintiffs’ motion for leave to file a sur-reply in connection with Defendants’ motion to dismiss (seq 002). Defendants did not raise any new arguments in their reply papers, and Plaintiffs had an ample opportunity in their opposition papers and during oral argument on the motion to dismiss to address the various relevant clauses in the Agreement of Purchase and Sale and the Myer Affidavit of Leases.

Defendants’ motion to dismiss the Complaint pursuant to CPLR 3211(a)(1)(5) and (7) (seq. 001) is granted in part and denied in part as follows. The Court denies Defendants’ request to dismiss the entire Complaint as barred by the six-month limitations period in Article 5.2 of the January 28, 2022 Agreement of Purchase and Sale. The second part of Article 5.2 provides a nine-month limitations period with respect to claims relating to the representations and warranties contained in the Affidavit of Leases provided by defendant Myer. The Affidavit of Leases is referenced in, attached to, and made a part of the Agreement of Purchase and Sale, and the representations in the Affidavit are central to Plaintiffs’ claims here. It is undisputed that this action was commenced within the nine-month limitations period following the Closing. To the

extent Defendants argue that Plaintiffs' claims are barred by a covenant not to sue contained in the Agreement, the cited provision does not conclusively establish a defense as a matter of law so as to merit dismissal at the pleading stage. *See Leon v Martinez*, 84 NY2d 83 (1994).

The Court denies Defendants' request to dismiss the First Cause of Action sounding in breach of contract. The elements of the claim have been sufficiently alleged, and Plaintiffs have detailed a number of alleged misrepresentations expressly made in the Agreement that arguably fall within the exception to the release language.

The Court denies Defendants' request to dismiss the Second Cause of Action sounding in fraud and/or fraudulent inducement. Plaintiffs have alleged numerous misrepresentations which, if accepted as true, sufficiently state a claim for fraud and/or fraudulent inducement. The Court recognizes that Plaintiffs are sophisticated parties with an express obligation under the Agreement to perform their own due diligence. However, the Court must accept as true at the pleading stage Plaintiffs' allegation that they conducted a diligent investigation but were unable to ascertain key information that was solely in Defendants' possession.

Nor is the fraudulent inducement claim subject to dismissal as duplicative of the breach of contract claim. Plaintiffs have alleged numerous specific misrepresentations that fraudulently induced Plaintiffs to enter into the Agreement of Purchase and Sale. The alleged misrepresentations relate to issues such as the current status of the commercial tenants and the leases, which directly affects the value of the Property. The fraud claim is not limited to Defendants' obligation to perform the terms of the Agreement, and it is not barred as duplicative on the contract claim.

The Court denies Defendants' request to dismiss Plaintiffs' claim for attorneys' fees. Defendants do not dispute that Section 12.8 provides for an award of attorney's fees under

certain circumstances, and those circumstances depend on facts that cannot be determined at the pleading stage. In any event, Defendants’ primary argument appears to be based on the time limitations in the contract, and the Court has declined to find that the Complaint is time-barred.

The Court grants the dismissal of Plaintiffs’ punitive damages claim. Commercial transactions rarely lend themselves to punitive damages, and the conduct alleged does not rise to the level of egregious misconduct needed to support a punitive damages award. However, should discovery reveal additional relevant information, Plaintiffs may move to reinstate the request for punitive damages.

Defendants shall file an Answer to the remaining claims within twenty days. The parties shall meet and confer and prepare a Proposed Preliminary Conference Order using the form available on the Part 61 website and efile it by May 19, 2023 with a cover letter providing a dial-in number for the conference. The Preliminary Conference Order shall provide for the filing of a Note of Issue no later than twenty months from the date of the Order and specific dates for interim deadlines. A preliminary conference is scheduled for Wednesday, May 25, 2023 at 10:00 a.m. If the Proposed Preliminary Conference Order is acceptable, the Court will waive the conference. If counsel cannot agree on the terms of an Order, counsel shall efile brief letters by May 19, 2023 stating the areas of disagreement. Any motion to amend will not stay discovery.

Dated: April 20, 2023



 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE