SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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BRIAN STEMPECK,

Plaintiff,

- v -

TOWNHOUSE WEST 83RD, LLC,CARRIE CHIANG, SPENCER TING

Defendant.

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INDEX NO. 159092/2022

MOTION DATE 03/31/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISS.

In October 2022, plaintiff Brian Stempeck, as Trustee of the Stempeck Miura Family Trust, commenced the instant action against defendants Townhouse West 83rd, LLC, Carrie Chiang, and Spencer Ting (as owners and principal members of Townhouse), asserting breach of contract, breach of covenant of good faith and fair dealing, and three fraudulent inducement/misrepresentation causes of action arising out of plaintiff's purchase of a luxury home from defendants. In this motion sequence (002), defendants move to dismiss pursuant to CPLR 3211 (a) (1) based on documentary evidence and 3211 (a) (7) for failure to plead a cause of action. Plaintiff opposes. For the following reasons, defendants' motion is granted in its entirety.

BACKGROUND

In February 2022, plaintiff and defendant entered into a residential contract of sale for a single-family home located at 51 West 83rd Street, New York, New York (hereinafter, "the premise"). Before entering the contract, plaintiff hired Precision Inspections LLC to conduct a visual inspection of the premise. (NYSCEF doc. no. 22, inspection report.) With respect to the premise's HVAC system, the report twice recommended "further evaluation by a qualified heating and cooling contractor for an in-depth technical inspection of the components since a home inspection is not technically exhaustive." (*Id.* at 19, 20.) As pled in plaintiff's complaint, the inspection also found evidence of a prior water leak near the hot water heater. (NYSCEF doc. no. 1 at ¶20, complaint.) Plaintiff did not hire a qualified contractor to further inspect the premise.

After closing title on May 4, 2022, plaintiff alleges that he discovered the premise's HVAC system was defective and in severe disrepair. (*Id.* at ¶ 30.) Amongst other problems, he alleges that the air filters were never accessed or cleaned as defendants built a wall limiting or

even foreclosing access to the systems (*id*. at ¶ 34) and the HVAC ducting was not properly connected, which allowed air to circulate through the walls but not into the premise itself (*id*. at 36.) In paragraph 2, the contract of sale's second rider states that "[s]eller represents that the air conditioning, hot water heater, plumbing, furnace, electrical system, fireplaces…included in this sale will be in good working order…at time of closing of title." (NYSCEF doc. no. 23 at ¶ r2, contract of sale.) Plaintiff maintains that condition in which he found the HVAC unit violated this provision because it was not in "good working condition" upon closing. (NYSCEF doc. no. 1 at ¶ 39.)

Paragraph 2, however, is not the only relevant contractual provision. Paragraph 11, subsection (c) of the contract, entitled "Seller's Representations," provides "[e]xcept as otherwise expressly set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive closing." (NYSCEF doc. no. 12 at ¶ 11.) Immediately thereafter, in paragraph 12's "Condition of Property," plaintiff "acknowledge[d] and represent[ed]" that he was "fully aware of the physical condition and state of repair of the premise" and that:

> "[Plaintiff] is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements, or representations, written or oral, as to the physical condition, state of repair, use, cost of operation, or any other matter related to the [p]remise…given or made by [defendants]…and shall accept the same 'as is' in their present condition and state of repair…(except as otherwise set forth in paragraph 16 [e])." (*Id*. at ¶ 12.)

Paragraph 16 (e) then provides "This contract and *Purchaser's obligation to purchase* the premises are also subject to and conditioned upon the fulfillment of the following conditions precedent: (e) [a]ll plumbing…heating and air conditioning…located on the property and all appliances which are included in this sale being in working order as of the date of [c]losing. (emphasis added)" (*Id*. at ¶ 16.)

The first rider to the contract contains three similar provisions.

Paragraph 3 states that

> "the acceptance of a deed by the [plaintiff] shall be deemed to be full performance and discharge of every agreement and obligation on the part of [defendants] to be performed pursuant to the provisions of this Agreement except those, if any, which are herein specifically state to survive the delivery of the deed." (*Id*. at ¶ r3.)

Paragraph 7 of the first rider provides that plaintiff: (1) "represents that, it has examined and inspected the Premises…to its satisfaction, that it has independently investigated, analyzed, and appraised the value and profitability thereof," (2) "agrees to take the Premises in its 'as is' condition on the date of closing," and (3) "has not relied on any representations or warranties, and [defendants] ha[ve] not made any representation or warranties…with respect to… (f) except as set forth herein, the present and future condition and operating state of any and all machinery or equipment on the premise." (*Id*. at ¶ r7.) And paragraph 21, after reiterating that the premise is

being sold in its 'as-is' condition," specifically notes that this "includ[es] but not limited to the appliances, [and] heating and cooling systems." (*Id.* at ¶ r21.)

Lastly, paragraph 16 of the first rider entitles the prevailing party in litigation shall be entitled to recover all legal fees, costs, and expenses.

Noted above, parties closed title on May 4, 2022, and plaintiff took possession of the property in June 2022. Plaintiff commenced the instant action on October 25, 2022, asserting causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing against Townhouse West 83rd (numbered one and two, respectively), for fraudulent inducement against, in order, Townhouse West 83rd, Ting, and Chiang (numbered four through six), and an award of attorney's fees (number three). Herein, defendants move to dismiss each cause of action pursuant to CPLR 3211 (a) (1), arguing that the contract of sale and plaintiff's investigation report conclusively demonstrates a defense as a matter of law, and/or CPLR (a) (7), arguing that plaintiff has failed to state a cause of action which plaintiff opposes.

DISCUSSION

On a motion to dismiss under CPLR 3211 (a) (1), courts may grant such relief only where the "documentary evidence" is of such nature and quality—"unambiguous, authentic, and undeniable"—that it utterly refutes plaintiff's factual allegation, thereby conclusively establishing a defense as a matter of law. (*See Phillips v Taco Bell Corp.*, 152 AD3d 806, 806-807 [2d Dept 2017]; *VXI Lux Holdco S.A.R.L v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019 ["A paper will qualify as 'documentary evidence' of if…(1) it is 'unambiguous,' (2) it is of 'undisputed authenticity,' and (3) its contents are 'essentially undeniable'"].) As the First Department explained, the documentary evidence relied upon must "definitely dispose of the plaintiff's claim." (*Art & Fashion Group Corp. v CyclopsProd., Inc.* 120 AD3d 436, 438 [1st Dept 2014].) Moreover, unlike with motions to dismiss under CPLR 3211 (a) (7) (*see infra*), courts are not required to accept factual allegations that are plainly contradicted by the documentary evidence. (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003].) Generally, documents that reflect out-of-court transactions such as contracts, mortgages, and deeds are properly considered documentary evidence because the contents meet the three above-described criteria. (*Prott v Lewin & Baglio, LLP*, 150 AD3d 908 [2017])

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) A courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764.)

Plaintiff's Breach of Contract Claim

Pursuant to CPLR 3211 (a) (1), defendants contend that the terms of the contract of sale (which is indisputably within the definition of "documentary evidence") definitively disposes of

plaintiff's breach of contract claim. Specifically, they argue that the doctrine of merger bars plaintiff from bringing claims related to the condition of the house at the time of closing. Under this merger doctrine, contractual provisions providing for the sale of real property merge with the deed, and thus, after closing title, any and all claims for breach under the original contract are extinguished. (*Guoba v Sportsman Properties, Inc*., 200 AD3d 658, 660 [2d Dept 2021]; *TIAA Global Investments, LLC v One Astoria Square LLC*, 127 AD3d 75, 85 [1st Dept 2015] [Explaining that "once the deed is delivered, its terms are all that survive, and the purchaser is barred from prosecuting any claims arising out of the contract"].) Parties may expressly limit the doctrine's applicability, however, by exempting particular contractual provisions from merging. (*Id*.)

Here, as argued by defendants, the contract of sale (1) contains a specific merger clause in paragraph 11, subsection (c) that states all provisions of the contract will merge unless the parties expressly provide otherwise (NYSCEF doc. no. 23 at ¶ 11); and (2) paragraph 16, which plaintiff relies upon to bring this claim, does not contain an express provision for it to survive closing. Paragraph 16 (e) frames the heating and air conditioning being in "good working order" as a condition precedent to plaintiff's obligation to purchase the premise and establishes that plaintiff could have chosen to cancel the contract without penalty over a failure to provide an HVAC in good working order, but only before closing title. Once plaintiff accepted the deed, every obligation on the part of defendants was to be considered fully performed and discharged (*see id*. at ¶ 12) and plaintiff was required to accept the premise in its "as is" condition. (*Id.* at r3; *TIAA Global Investments*, 127 AD3d at 85 [Noting that an "as is" clause in a contract to real property will ordinarily bar a claim for breach of contract].) Since paragraph 16 provided that the conditions of the premises' heating and air were simply conditions to the plaintiff's obligation to close title, there is no evidence that the parties intended it to survive the closing. (*See Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006].)

Plaintiff does not dispute this clear and unambiguous reading of the contract. Rather, he argues that the merger doctrine does not apply where the complained-of condition involves latent defects (such as when the HVAC's defects are hidden behind a wall). Yet the First Department has not adopted a latency exception to the merger doctrine. (*Id.* ["The concept (of a latency exception) has not been adopted by any of the Appellate Divisions or by the Court of Appeals, and we are not adopting it here."]) And the cases he cites are inapposite. In *Ting-Wan Liang v Malawista* (70 AD2d 415 [2d Dept 1979]), the purchasers not only contracted to purchase a house but also to do extensive renovations and remodeling and it was the construction "plans and specifications" for the remodeling that did not merge into deed. (*Id.* at 420.) The same issue is at the heart of *Metro Group Constr. Corp v Town of Hempstead*. (24 AD3d 632, 633 [2d Dept 2005] ["The parties' undertakings with respect to the development of the property were collateral to the conveyance and, therefore, did not merge with the deeds."]) These cases do not undermine the application of the merger doctrine to contracts for real property with no collateral or separate construction contracts attached to it. Accordingly, because the contract of sale is complete, clear, and unambiguous on its face, the Court must enforce the plain meaning that paragraph 16 was intended to merge with the deed. (*Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Ninth Ave, L.L.C.*, 1 AD3d 65, 69 [1st Dept 2003].) As such, plaintiff is barred from asserting his breach of contract cause of action.

Plaintiff's Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

Defendants are entitled to dismissal of this claim under both CPLR 3211 (a) (1) and (a) (7). First, under (a) (1), the covenant of good faith and fair dealing is implied in all New York contracts (including those for real property) and obligates parties to avoid doing anything that has the effect of destroying or injuring the right of the other party to receive the benefits of the contract. (*511 W. 2322nd Owners Corp. v Jennifer Reality Co.*, 98 NY2d 144, 153 [2002]). Nonetheless, the covenant is based in principles of contract law and the merger doctrine is applicable to all claims arising from the contract that are not expressly exempt. (*See Gouba*, 200 AD3d at 661 [holding that the Supreme Court properly granted branch of defendants' motion for summary judgment on plaintiff's breach of the implied covenant arising from the sale of real property "insofar as asserted against them pursuant to the merger doctrine"], citing *Sentlowitz v Cardinal Dev., LLC*, 63 AD3d 1137, 1138 [2d Dept 2009].) Thus, for the same reasons described above, the contract of sale conclusively provides a defense as a matter of law to this claim.

Second, under CPLR 3211 (a) (7), courts properly dismiss claims for the breach of the implied covenant of good faith and fair dealing as duplicative of the breach of contract claim where both claims are based on the same facts and seek the exact same damages. (*320 West 115 Reality LLC v All Building Construction Corp.*, 194 AD3d 511, 512 [1st Dept 2021].) Here, the breach of the implied covenant is predicated on the alleged systemic defects in the HVAC unit, the resulting cost of repairing it to good working order, and how such costs destroyed plaintiff's full benefit of the contract of sale. The same is said for plaintiff's breach of contract claim. As such, the breach of the implied covenant is duplicative. For these reasons, plaintiff's breach of the implied covenant cause of action is dismissed.

Plaintiff's Fraudulent Inducement and Misrepresentation Claims

For a fraudulent inducement claim to be considered a separate, cognizable cause of action, the fraud or misrepresentations alleged must concern an interest collateral to the opposing party's contractual obligations. (*Cronos Group Ltd. v XCompIP, LLC*, 156 AD3d 54, 67 [1st Dept 2017]; citing *Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557 [1st Dept 2012]; *see also Coppola v Applied Electric Corp.*, 288 AD2d 41, 42 [1st Dept 2001] [Where it is clear that the claimed fraud was not collateral or extraneous to the contract, plaintiff did not allege any damages that would not be recoverable under a contract measure of damages, and plaintiff failed to plead a breach of duty separate from a breach of contract, dismissal is warranted].)

To reiterate, here, both the fraudulent inducement/misrepresentation and breach of contract claims are premised on defendants' failure to provide a heating and cooling system in good working condition (*Compare* NYSCEF doc. no 30 at 18, plaintiff's memo. of law in opp. [Plaintiff adequately pleaded a fraudulent misrepresentation cause of action by asserting: "(a) knowing misrepresentation of material fact relating to the HVAC system and property being free of leaks"] with NYSCEF doc. no. 30 at 12 [Plaintiff pleads a breach of contract by alleging "defendant Townhouse's failure to deliver the property and its systems and/or appliances in good working order at closing"].) That plaintiff bases the two causes of action on the condition of the HVAC not being in working order is significant in that, as plaintiff acknowledge, the HVAC's

condition was specifically provided for as a condition precedent in paragraph 16, meaning any fraudulent misrepresentations concerning its condition cannot be collateral or separate from obligations contained in the contract. Further, it demonstrates that, under either theory, plaintiff's damages are recoverable under a contract measure of damages, i.e., the cost of repairing the HVAC to the condition allegedly promised in the contract sale.[1] (*See Ka Foon Lo*, 29 AD3d at 526 ["Merely alleging scienter in a cause of action to recover damages for breach of contract, unless the representations alleged to be false are collateral or extraneous to the terms of the agreement, does not convert a breach of contract cause of action into one sounding in fraud."])

That the misrepresentations concerned "latent, hidden, untestable, and unviewable building issues (such as the HVAC system concealed within the walls)" is of no moment. Plaintiff has not asserted a cause of action for fraudulent concealment and thus has not alleged that defendants thwarted his effort to fulfill due diligence responsibilities fixed by the doctrine of caveat emptor. (*Platzman v Morris*, 283 AD3d 561, 562 [2d Dept 2001].) To this end, he does not allege that defendants in any way limited his inspectors' access to the premise, nor allege that they attempted to interfere with plaintiff hiring the heating and cooling specialists the initial inspector recommended. And in paragraphs 12 and r7, plaintiff specifically stated that he was entering into the contract of sale solely upon his own inspection and investigation of the premise and not upon any representation, warranties, statements, or information provided by defendants. These causes of action are dismissed pursuant to CPLR 3211 (a) (7).

Lastly, defendants move to dismiss plaintiff's third cause of action for attorneys' fees under CPLR 3211 (a) (7), arguing that attorneys' fees are a form of relief and not a separate cause of action. The Court agrees. Additionally, the Court notes that plaintiff framed this cause of action as a declaratory judgment action in the event that he is deemed to be the prevailing party. (NYSCEF doc. no. 1 at ¶ 79.) Given that each cause of action has now been dismissed, plaintiff cannot be deemed to be the prevailing party. On this ground, this cause of action is dismissed.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants Townhouse West 83rd, LLC, Carrie Chiang, and Spencer Ting's motion to dismiss pursuant to CPLR 3211 (a) (1) and (a) (7) is granted in its entirety and the complaint is dismissed; and it is further

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

ORDERED that counsel for defendants shall serve a copy of this order, along with a notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

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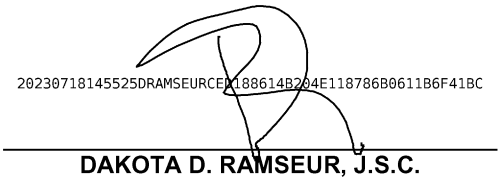
[1] Although plaintiff seeks $5,000,000 on his fraudulent inducement claim, and not either the $2,000,000 in damages for breach of contract or the $1,000,000 that he alleges it *might* cost to repair the HVAC unit, plaintiff has not identified any other source of injury in the fraud causes of action other than what the Court has already described in great length.



7/18/2023
DATE

DAKOTA D. RAMSEUR, 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		REFERENCE