

**J. Carey Smith 2019 Irrevocable Trust v 11 W. 12
Realty LLC**

2023 NY Slip Op 32432(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 651000/2021

Judge: Verna L. Saunders

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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 651000/2021

J. CAREY SMITH 2019 IRREVOCABLE TRUST and NANCY
M. SMITH 2019 IRREVOCABLE TRUST,
Plaintiffs,

MOTION SEQ. NO. 001

- v -

11 WEST 12 REALTY LLC,
ICON REALTY MANAGEMENT, LLC,
TERRENCE LOWENBERG,
TODD COHEN,
QRS CONSTRUCTION, INC.,
N B PLUMBING & HEATING INC.,
Y.S. ELECTRIC CO.,
ACE SOLUTIONS,
ARROW ELEVATOR INC., and
OLD HOUSE INSPECTION COMPANY, INC.,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 39, 54, 55, 59, 76, 78

were read on this motion to/for

DISMISSAL

This action concerns the purchase of an iconic single-family townhouse located at 11 West 12th Street, New York, New York 10011 in Greenwich Village (“townhouse”), previously owned by the publisher Malcolm Forbes. As alleged in the complaint, in 2012, defendants Todd Chen (“Chen”) and Terrence Lowenberg (“Lowenberg”), developers of Icon Realty Management, LLC (“Icon”), purchased the townhouse for \$7.25 million from the Forbes family. The townhouse reportedly underwent “gut renovation” and was sold, on June 14, 2019, to plaintiffs for \$19.9 million. Plaintiffs now allege that the townhouse is plagued with a myriad of construction defects, including “a faulty HVAC system, an improperly installed roof, faulty sump pumps, improper wiring of boilers, thermostats and radiant heating zones, roofing systems and drains, and improperly functioning exhaust vents – [and that] even the façade of the Townhouse had hidden, catastrophic defects.” (*Id.* at ¶ 6). The townhouse, claim plaintiffs, is unsafe and uninhabitable since the closing, resulting in remedial costs in the amount of at least \$1,310,426.70, and still increasing.

Plaintiffs assert claims against defendants for breach of contract; fraudulent concealment; private nuisance; violation of New York General Business Law § 777; violations of NY unfair trade practices; RICO — 18 USC § 1962(c) and (d); and unjust enrichment (NYSCEF Doc. No. 1, *summons and complaint*).

Defendants 11 West 12 Realty LLC, Icon, Lowenberg, and Cohen (hereinafter “the moving defendants” or “defendants”) now move the court, pursuant to CPLR 3211(a)(1) and (7), dismissing the claims asserted against them (NYSCEF Doc. No. 29, *notice of motion*).¹

In its memorandum of law, the moving defendants argue that all claims asserted against them should be dismissed for fatal pleading deficiencies since the allegations are vague, indefinite, and conclusory as to the alleged breach of the moving defendants. As it relates to the breach of contract claims, they contend that said claims are wholly refuted by the contract. First, Icon, Lowenberg and Cohen (collectively, “the Icon defendants”) were not parties to the contract and, thus, no breach of contract claim lies as against said defendants. Moreover, the contract claims as against the seller, defendant 11 West 12 Realty LLC, are refuted by the terms of the contract. The moving defendants further contend that the general allegations that defendants misrepresented and/or concealed the fact of defective conditions at the premises to induce plaintiff to purchase the property are insufficient to establish a cause of action for fraud. They also argue that the fraud claims are duplicative of the contract claims and that they are precluded by the terms of the contract. As for the private nuisance claim, this cause of action, argue defendants, should be dismissed as frivolous because, not only do plaintiffs assert conclusory allegations of misconduct in support of this claim, but the entire concept of private nuisance is inapposite to the facts alleged in the complaint.

The moving defendants further argue that plaintiffs’ claim against them for violation of the Housing Merchant Implied Warranty of New York GBL § 777 is frivolous and subject to dismissal. They maintain that GBL § 777, which applies to new homes, does not apply to the renovation of the townhouse here. Addressing the New York Unfair Trade Practices Act (BGL § 349), defendants contend that the allegations are deficient on their face and that the Act does not apply to unique real-estate transactions of the kind alleged here. According to the moving defendants, plaintiff also fails to state a cause of action for civil RICO claims, premised on conclusory allegations that defendants acted in concert to defraud plaintiffs. The pleadings lack specificity to support such claims and they are nevertheless merely disguised contract and fraud claims. The unjust enrichment claim also does not lie because it is precluded by the existence of the contract. (NYSCEF Doc. No. 30, *memorandum of law*).

Plaintiffs oppose the motion, arguing, in pertinent part, that they meet the basic pleading standard. They further argue that they allege sufficient facts establishing the moving defendants’ breach of the subject contract and that the “as is” language in the contract does not warrant dismissal of the action given the allegations of defendants’ active concealment of the defects in the building. As for the fraud claims, plaintiffs argue that, not only are the claims sufficiently pleaded, but they are not, as defendants assert, duplicative of the contract claims because the allegations surrounding fraud “are outside of the contract, but induced plaintiffs into entering into the [c]ontract and closing on the purchase of the [t]ownhouse.” They further contend that the defects were hidden and concealed and were not uncovered. Plaintiffs maintain that it properly pleaded all the elements necessary to establish a claim for private nuisance. Specifically, the complaint details numerous, various, and ongoing problems that have rendered the townhouse uninhabitable since closing and which have caused and continue to cause a substantial interference with plaintiffs’ use and enjoyment of the townhouse. Furthermore,

¹ This motion is decided together with Mot. Seqs. 002; 003; and 004.

taking all allegations as true, plaintiffs argue that, because it is alleged that the townhouse was “developed and gut renovated”, the complaint sets forth a General Business Law § 777 claim. They also argue that they have asserted a valid claim under General Business Law § 349 because the moving defendants engaged in a broader scheme to mislead buyers about the quality and completeness of the renovations, which go beyond a “single, private transaction.” The fraud alleged here, claim plaintiffs, represents a coordinated effort between multiple defendants demonstrating a pattern of “racketeering activity” and, thus, the allegations asserted in the complaint are sufficient to establish RICO claims. As to the unjust enrichment claim, plaintiffs contend that it should not be dismissed at this state in the litigation because plaintiff is entitled to alternative theories of recovery. They also argue that the post-closing agreement by the Icon defendants is not precluded by the contract. Since defendants have failed to establish that plaintiffs’ claims are frivolous, sanctions are not warranted (NYSCEF Doc. No. 55, *memorandum of law*).

In reply, the moving defendants argue that the opposition fails to address many of the threshold defects in the complaint as noted in the motion, and that the remaining arguments are meritless (NYSCEF Doc. No. 78, *memorandum in reply*).

In determining a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) A pleading may be dismissed, pursuant to CPLR 3211(a)(7) if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (See CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) Furthermore, “[a] cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014], quoting *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002].)

As an initial matter, although not raised in this motion, this court has already determined in the motion to dismiss of co-defendant QRS Construction, Inc. that plaintiffs lack standing to commence this action because, under New York law, “an express trust vests in the trustee the legal estate, subject only to the execution of the trust.” (EPTL 7-2.1[a]). Thus, “only the trustee can sue *or be sued* in a court of law.” (*Salanitro Family Trust v Gorina*, 49 Misc 3d 153[A], 2015 NY Slip Op 51785[U], *1 [Appellate Term, 2d Dep’t 2015] [emphasis added]; see also *Liveo v Hausman*, 61 Misc 3d 1043, 1044-1045 [Sup Ct., Kings County 2018] [“A trust, however, is a legal fiction, and cannot sue or be sued itself], citing *Natixis Real Estate Capital Tr. 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 132 [1st Dept. 2017]; CPLR 1004). Thus, the action is dismissed.

Notwithstanding the standing issue, dismissal is nevertheless warranted on additional grounds.

Turning first to the breach of contract claims, no breach of contract claim lies as against Icon, Loewenberg, and Cohen insofar as they were not parties to the agreement (*Tutor Perini Bldg. Corp. v Port Auth. of N.Y. & N.J.*, 191 AD3d 569, 570 [1st Dept 2021] [articulating “the general rule that privity between a plaintiff and a defendant is required to support a breach of contract claim.”]; see *Residential Bd. of Managers of Zeckendorf Towers v Union Square-14th St. Assocs.*, 190 AD2d 636, 637 [1st Dept 1993].) Furthermore, this court finds that these causes of action are precluded by the contract of sale. In ¶ 31 of the contract of sale, plaintiffs agreed to buy the subject property “as is” and the document further provides that “no warranties or guarantees are implied, and [p]urchaser specifically acknowledge[d] that [s]eller shall bear no liability for latent and/or patent defects, including warranties of merchantability or fitness for a particular purpose.” Moreover, the contract of sale expressly provides that “none of the representations, warranties, covenants or other obligations of [s]eller or [p]urchaser hereunder shall survive the [c]losing.” (See *Rivietz v Wolohojian*, 38 AD3d 301 [1st Dept 2007]; *Crowley Mar. Assoc. v Nyconn Assoc., L.P.*, 292 AD2d 334 [2d Dept 2002].) To the extent plaintiffs rely on the “conditions to closing” in ¶ 47 of the contract to assert a breach of contract claim against the Icon defendants, “[t]he ‘Conditions to Closing’ are further nails in the coffin of plaintiff’s breach of contract claim” since “‘conditions to closing’ expire with the closing. The remedy for their breach is simply not to close, rather than to sue post-closing.” (*116 Waverly Place LLC v Spruce 116 Waverly LLC*, 2019 NY Slip Op 30300[U] [Sup Ct, NY County 2019].) Therefore, dismissal of the breach of contract claims asserted as against the moving defendants is granted.

“In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996].)

“The elements of a claim for fraudulent concealment are: (1) an omission of a material fact; (2) intent to defraud; (3) duty to disclose, (4) reasonable reliance on the omission, and (5) damages suffered.” (*Katehis v Sovereign Assoc., Inc.*, 2014 NY Slip Op 51215(U), ****8 [Sup Ct, NY County 2014], citing *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011].)

“The elements of a claim for fraudulent inducement are ‘a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’” (*United States Life Ins. Co. in NY v Horowitz*, 192 AD3d 613, 613 [1st Dept 2021], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996].) For fraudulent inducement, it must also be shown that “the defendant had a duty to disclose material information and that it failed to do so” (*P.T. Bank Central Asia v ABN Amro Bank, N.V.*, 301 AD2d 373, 376 [1st Dept 2003].)

Here, this court finds that plaintiffs’ fraud claims fail to satisfy the heightened pleading requirements set forth in CPLR 3016. Notwithstanding the pleading deficiencies, the claims are precluded by the express disclaimers in the parties’ contract, to wit: that seller made no representations or warranties concerning the subject property and that the property was being sold “as is.” In their cause of action for fraudulent inducement, plaintiffs allege, in pertinent

part, that “[d]efendants falsely represented that the townhouse had been renovated ‘to the highest caliber of workmanship and unparalleled quality’ and that ‘that once gas service was restored to the Townhouse, the systems would be functional.’” These representations, claim plaintiffs, induced them to purchase the subject property. However, these claims are belied by the agreement. In the contract of sale and rider, plaintiffs acknowledged that the property was being sold “as is” and that they were entering into the contract “based on [p]urchaser’s own 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]remises.” (Contract ¶ 12; see also ¶¶ 31, 32(a), 49). Thus, the fraudulent inducement claim is barred by the specific terms of the parties’ contract (see *Pappas v Tzolis*, 20 NY3d 228, 233 [2012]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959].)

As for its claim for fraudulent concealment, plaintiffs allege, *inter alia*, that “[e]ach of the [d]efendants concealed that the mechanical, electrical and plumbing systems at the Townhouse were not working, were not complete and were not installed properly”; that they worked together to conceal said defects; and that defendants had superior knowledge of the same. However, the parties agreed that plaintiffs had the right to inspect the premises before closing and that it was entering the contract based solely on its inspection and investigation. (NYSCEF Doc. No. 32, *Contract* ¶ 12). “This renders untenable any claim that information regarding the condition of the building was peculiarly within the defendants’ knowledge” (*116 Waverly Place LLC v Spruce 116 Waverly LLC*, 179 AD3d 511, 512 [1st Dept 2020], citing *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]; *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 278-279 [2011] [if a party can discover “by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations”]). Therefore, the fraud claims are hereby dismissed.

The claim for private nuisance must also be dismissed for failure to state a cause of action. “A claim of private nuisance arises from an interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are: ‘(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to use and enjoy land, (5) caused by another’s conduct in acting or failure to act.’” (*Berenger v 261 W. LLC*, 93 AD3d 175 [1st Dept 2012], quoting *Copart Indus., Inc. v Consol. Edison Co.*, 41 NY2d 564, 570 [1977].) Insofar as case law is clear that “a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]), this court finds that dismissal of said claim is warranted.

The claim premised on General Business Law § 349 must also be dismissed. It is well-settled that “parties claiming the benefit of the section must, at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring, but defendant’s acts or practices must have a broad impact on consumers at large; [p]rivate contract disputes unique to the parties ... would not fall within the ambit of the statute.” (*NY Univ. v Cont. Ins. Co.*, 87 NY2d 308, 320 [1995] [internal quotation marks and citation omitted]; *Oswego Laborers’ Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995].) Here, insofar as the sale

concerns a single, private transaction, a claim pursuant to General Business Law § 349 does not lie. (See *116 Waverly Place LLC v Spruce 116 Waverly LLC*, 179 AD3d at 512.)

Moreover, the gut-renovated townhouse is not a “new home” under General Business Law 777 (*id.*) Thus, plaintiffs fail to state a cause of action under this section and the claim against moving defendants is hereby dismissed.

That branch of the motion seeking dismissal of the RICO claim is also granted. 18 USC § 1962(c) makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” However, RICO claims are subject to a heightened pleading standard, which plaintiffs fail to satisfy, to wit: plaintiffs have failed to set forth sufficient facts to establish that defendants acted as an “enterprise” and engaged in a “pattern of racketeering activity.” Furthermore, a review of the allegations offered in support of the RICO claim amount to nothing more than a contract dispute (*Helios Intl. S.A.R.L. v Cantamessa USA, Inc.*, 2013 US Dist LEXIS 107552, *15 [SDNY July 27, 2013] [“(p)laintiffs cannot turn this case into a RICO case simply by recasting breach of contract . . . as conspiracies of deception and fraud.”])

This court also finds that the unjust enrichment claim is precluded by the existence of the contract of sale, which governs the subject matter in dispute. (see *FM Cost Containment, LLC v +42 W. 35th Prop. LLC*, 203 AD3d 426, 427 [1st Dept 2022]; *Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 [1st Dept 2014].) The unjust enrichment claim is therefore dismissed. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that the motion of defendant 11 West 12 Realty LLC, Icon Realty Management, LLC, Terrence Lowenberg, and Todd Cohen 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 defendants 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 counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)].

July 14, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

X
 X

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER