

**Dorvilier v Bank of Am., N.A.**

2023 NY Slip Op 33344(U)

September 26, 2023

Supreme Court, New York County

Docket Number: Index No. 655395/2018

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 41

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HARRY DORVILIER,

Plaintiff

Index No. 655395/2018

-against-

DECISION AND ORDER

BANK OF AMERICA, N.A.,

Defendant,

ESTATE OF PETER A. LUSK,

Defendant Estate,

LOMBARDY - 111 EAST 56TH STREET, INC.,  
and its Board of Directors,  
Individually and in Their Official  
Capacity as Directors,

Defendant Cooperative

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

The subject of this action is residential cooperative apartment unit 1700 in the building at 111 East 56th Street, New York County, known as the Lombardy cooperative. In 2005, unit 1700's former owner, Peter A. Lusk, pledged the 510 shares of stock that correspond to his ownership interest in the unit to a nonparty bank as collateral for a series of loans. That bank assigned those loans to defendant Bank of America, N.A. (BOA).

After Lusk died November 19, 2016, BOA served his estate with 90 days' notice that his loans were in default and that BOA intended to foreclose on the unit's shares.

## II. UNIDISPUTED MATERIAL FACTS

BOA on May 22, 2018, served and subsequently published a "Notice of Public Sale of Collateral" pursuant to New York Uniform Commercial Code (UCC) §§ 9-610 and 9-611(b). NYSCEF Docs. 151, 152. This notice recited that:

THE COLLATERAL TO BE SOLD [unit 1700] IS SECURITY FOR CERTAIN INDEBTEDNESS OWED TO SECURED PARTY [BOA], which indebtedness includes, among other things, the debt evidenced by (i) that certain Promissory Note dated June 13, 2005 in the principal amount of \$270,000.00 ("First Note") and (ii) that certain Promissory Note dated June 13, 2005 in the principal amount of \$450,000.00 ("Second Note"; together with the First Note, the "Notes"), executed by the Borrower in favor of United States Trust Company of New York. The Borrower is in default under the Notes. The total amount due under the Notes as of May 21, 2018 (including the aggregate amounts of principal, interest, and advanced maintenance fees, but excluding attorney's fees and other fees and charges), which will increase until the date of sale, is \$890,230.29. THE DEBTOR IS ENTITLED TO AN ACCOUNTING OF THE UNPAID INDEBTEDNESS SECURED BY THE COLLATERAL THAT SECURED PARTY INTENDS TO SELL. . . .

. . . .

The Collateral will be sold to the person who has submitted the highest bid at such public sale. Any prospective purchaser who is the highest bidder, other than the Secured Party, will be required to pay the purchase price of the Collateral in accordance with the Bidding Procedures, (i) a ten (10%) percent deposit is required with a successful bid, . . . and (ii) the balance of the purchase price shall be payable within thirty (30) days by cashier's check, or in other immediately available funds. . . .

THE COLLATERAL WILL BE SOLD ON AN "AS IS, WHERE IS" BASIS AND WITHOUT RECOURSE, REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY. SPECIFICALLY, BUT WITHOUT LIMITING THE FOREGOING, THERE WILL BE NO WARRANTY RELATING TO VALIDITY, TITLE, POSSESSION, QUIET ENJOYMENT OR THE LIKE MADE OR GIVEN IN THIS DISPOSITION.

NYSCEF Doc. 151 at 2-3 (emphases in original).

On June 20, 2018, plaintiff was the highest bidder at the public auction of the unit. Plaintiff acknowledges that he was aware of the terms of the unit's sale before the auction, received the Terms of Sale, and received and signed the Memorandum of Sale after the auction.

The Terms of Sale imposed the following requirements on plaintiff. (1) He was to pay a deposit of 10% of his bid at the conclusion of the auction and pay the balance within 30 days. (2) He was to assume responsibility for both the unit's ongoing maintenance payments and its outstanding maintenance arrears and to pay those arrears to BOA. (3) He was to submit an application to purchase the unit to the building's board of directors within five days after the auction. (4) He was to pay all the attorneys' fees that arose from the unit's foreclosure. (5) He irrevocably waived all claims, counterclaims, affirmative defenses, setoffs, and rights of recoupment against BOA.

Plaintiff also acknowledged as follows. (1) Time was of the

essence, and, in the event that he failed to pay the balance of his bid by the closing date, June 20, 2018, 30 days after the auction, or any extended date, he would forfeit the deposit to BOA. (2) If he did not obtain the board's approval to purchase the unit by July 20, 2018, his rights would be terminated, and BOA would be authorized to accept the next highest bid or re-notice the unit's sale. (3) If he did not comply with any of the Terms of Sale, BOA could retain his 10% deposit as liquidated damages for his failure or refusal to consummate the sale. (4) No representations or warranties were made regarding the shares, the proprietary lease, or the unit, including its physical condition and appearance. The unit was being sold "as is." NYSCEF Doc. 154. Finally, he represented to BOA that his bid was without regard to any examination or inspection of the shares, the proprietary lease, and the unit, whether or not an examination or inspection had occurred.

Nevertheless, although plaintiff paid the deposit of 10% of the purchase price at the auction, he did not submit an application to the building's board of directors within five days, did not pay the unit's maintenance arrears to BOA, and did not pay the balance of the auction bid price or any of the other amounts due within the specified closing period of 30 days. Therefore BOA sent plaintiff a "notice of breach" and "notice of

termination" August 7 and August 15, 2018, respectively. NYSCEF Docs. 155-57.

### III. THE MOTIONS TO DISMISS THE AMENDED COMPLAINT

BOA and the building's board of directors now move to dismiss plaintiff's amended complaint filed February 17, 2022. C.P.L.R. § 3211(a)(1) and (7). The unit's foreclosure and sale were conducted in accordance with the UCC and controlling New York law and without any misrepresentation or concealment of material facts. Plaintiff admits that he is in breach of the Terms of Sale and Memorandum of Sale that he received and signed at the auction June 20, 2018. Since he is in breach, he may not sustain his claim that BOA breached the contract. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021). His claim for breach of the contract's implied covenant of good faith and fair dealing merely duplicates his breach of contract claim. New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318 (1995); Rosetti v. Ambulatory Surgery Ctr. of Brooklyn, LLC, 125 A.D.3d 548, 549 (1st Dep't 2015); Mill Fin., LLC v. Gillett, 122 A.D.3d 98, 104-105 (1st Dep't 2014); Netologic, Inc. v. Goldman Sachs Group, Inc., 110 A.D.3d 433, 434 (1st Dep't 2013). Since the contract governed the parties' transaction, he may not sustain his unjust enrichment claim. Panwest NCA2 Holdings LLC v. Rockland NCA2 Holdings, LLC, 205


A.D.3d 551, 552 (1st Dep't 2022); Mintz Fraade Law Firm, P.C. v. Federal Ins. Co., 193 A.D.3d 654, 655 (1st Dep't 2021); Polaris Venture Partners VI L.P. v. AD-Venture Cap. Partners L.P., 179 A.D.3d 548, 548 (1st Dep't 2020). None of plaintiff's other claims against BOA, for breach of warranties, violations of the UCC and New York General Business Law, fraudulent inducement, conversion of his deposit, and equitable relief survive scrutiny under even the lenient standard of review that applies to motions pursuant to C.P.L.R. § 3211(a)(1) and (7). Chanko v. American Broadcasting Cos. Inc., 27 N.Y.3d 46, 52 (2016); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002).

Against the Lombardy defendants, plaintiff fails to plead that they were state actors, to sustain his claim of unconstitutional racial discrimination. 42 U.S.C. § 1983; American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50-51 (1999); DiPalma v. Phelan, 81 N.Y.2d 754, 756 (1992); SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 502 (1985); Callaghan v. United Fedn. Of Teachers, 133 A.D.3d 412, 412-13 (1st Dep't 2015). See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295-96 & n.2 (2001); Consumers Union of U.S., Inc. v. State of New York, 5 N.Y.3d 327, 347 n.14 (2005). He fails to plead any contract with these defendants, to sustain his breach of contract claim, or duty of

care they owed to him, to sustain his negligence claim.

Consequently, the court grants both motions for the reasons set forth by the two co-defendants in support of their motions and set forth on the record July 5, 2023, and dismisses plaintiff's amended complaint against defendants Bank of America, N.A., Lombardy - 111 East 56th Street, Inc., and its Board of Directors, individually and in their official capacity as Directors. C.P.L.R. § 3211(a)(7). The Clerk shall enter a judgment accordingly in favor of each defendant.

DATED: September 26, 2023



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C