

**Board of Mgrs. of 229 E. 2nd St. Condominium v 229
2nd St. LLC**

2023 NY Slip Op 34451(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 652579/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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THE BOARD OF MANAGERS OF 229 EAST 2ND STREET
CONDOMINIUM, AS AGENT FOR THE UNIT OWNERS,
Plaintiff,
INDEX NO. 652579/2021
MOTION DATE 06/10/2021
MOTION SEQ. NO. 001

- v -

229 2ND STREET LLC, NATAN VINBAYTEL, ABRAHAM
LOKSHIN, and NAUM LOKSHIN,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37

were read on this motion for PARTIAL SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff's motion for partial summary judgment is denied, defendants' motion for summary judgment is granted, and the action is dismissed, for the reasons set forth in the papers in opposition to the motion and in support of the cross-motion (NYSCEF Doc. Nos. 20, 30-31, 35-37) and the exhibits attached thereto, in which the court concurs, as summarized herein.

This action stems from the settlement of an earlier construction defect litigation between plaintiff, the Board of a condominium located at 229 East 2nd Street, New York, New York, and defendants, who are collectively the sponsor of the condominium conversion and the sponsor's individual members. As part of the settlement agreement, plaintiff herein, and the individual unit owners, transferred what are variously referred to as the air rights or development rights for the property to defendants herein (settlement agreement, NYSCEF Doc. No. 12, ¶ 1[b]). Defendants agreed to pay \$100,000.00 to plaintiff "at the closing of the Sponsor's sale of the Development

Rights (the “Air Rights Payment”) to Daniel Toledano and/or 233 E2 LLC or any other third-party (the “Buyer”), *if said closing takes place (id., ¶ 1[c] [emphasis added])*. The agreement also requires defendants to use their “best and good faith efforts to sell the Development Rights [and] provide to the Board quarterly updates regarding the status of the Development Rights” (*id.*).

Plaintiff commenced this action alleging claims for breach of contract and fraudulent inducement arising out of defendants’ alleged failure to consummate the sale of the air rights and make the Air Rights Payment, as well as defendants’ failure to use their best and good faith efforts to consummate the sale. Plaintiff made the instant motion for partial summary judgment on the first cause of action for breach of contract and to dismiss defendants’ counterclaim, whereupon defendants stipulated to withdraw the counterclaim (stipulation, NYSCEF Doc. No. 18 at 2). Defendant then cross-moved for summary judgment dismissing the complaint in its entirety.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court

should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, the complaint must be dismissed. A breach of contract claim requires proof of the existence of the contract, plaintiff's performance thereunder, defendants' failure to perform, and damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). With respect to the failure to make payment, the settlement agreement clearly conditions defendants' obligation to make the Air Rights Payment on actually closing a deal for the air rights, and there is no explicit time limit for such a sale. There is no mechanism, contrary to plaintiff's position, by which plaintiff can force a sale to anyone who makes an offer. The settlement agreement was the product of counseled negotiation by all parties, and the court is without authority to vary the unambiguous terms thereof (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Plaintiff's suggestion that defendants are simply running out the statute of limitations to avoid making payment is pure speculation with no support in the record. While defendants arguably are in breach of the settlement agreement for failing to report the progress of the sale to the board as required, plaintiff has not submitted any proof of damages. As plaintiff has failed to make out a prima facie case in support of the claim for breach of contract, its motion must be denied (*Alvarez*, 68 NY2d at 324). For the same reason, defendants' motion for summary judgment dismissing the claim is granted, and the first cause of action is dismissed.

The second cause of action for fraudulent inducement must also be dismissed. It arises from the same facts and seeks the same damages as the cause of action for breach of contract.

(e.g., *Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]; *Soni v Pryor*, 102 AD3d 856, 858 [2d Dept 2013]). Moreover, the alleged misrepresentations relate to defendants' ability and intention to perform the contract. A claim for fraud does not lie where a party is alleged to have entered a contract with no intention of performing it (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). Allegations relating to whether a party will be able to perform its obligations, or has no intention of doing so, do not sufficiently allege misrepresentations of present fact that are collateral to the contract, which are necessary to maintain a separate cause of action for fraud (see *Fairway Prime Estate Mgt., LLC v First Am. Intern. Bank*, 99 AD3d 554, 557 [1st Dept 2012] ["if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract"]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012] [dismissing fraud claim based in part on alleged insincere promise regarding the manner of performance]).

Finally, the court declines to grant defendants' request for sanctions at this time. The record does not support a finding of frivolous conduct by plaintiff in bringing this action (Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1[c]).

Accordingly, it is hereby

ORDERED that the motion is denied, and the cross-motion is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of

defendants dismissing the case against them, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock
LOUIS L. NOCK, J.S.C.

12/18/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE