SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH **PART** 12M

Justice

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VB SOHO LLC, on behalf of itself and all others similarly situated,

Plaintiff,

- v -

BROOME PROPERTY OWNER JV LLC,

Defendant.

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INDEX NO. 158844/2019

MOTION DATE 05/23/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69 were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of the purchase and sale of a residential condominium unit in the building known as the 565 Broome Soho Condominium (the Condominium) located at 565 Broome Street, New York, New York. Defendant Broome Property Owner JV LLC moves, pursuant to 3211 and 3212, to dismiss the complaint brought by plaintiff VB Soho LLC. In the alternative, defendant seeks a declaration, pursuant to CPLR 3001, limiting plaintiff's damages. Plaintiff opposes and cross-moves, pursuant to CPLR 3212, for summary judgment on its first cause of action for breach of contract and for an order, pursuant to CPLR 3124 and 3126, compelling defendant to appear for depositions.

Background

Defendant is the Condominium's sponsor (NY Cts St Elec Filing [NYSCEF] Doc No. 38, Alessandro Pallaoro [Pallaoro] aff, ¶ 1). On July 14, 2016, the New York State Attorney General accepted the Condominium's offering plan (the Offering Plan) for filing (*id.*, ¶ 7). The Offering Plan has been amended 14 times since that date (*id.*).

On August 18, 2016, Ayal Hayes (Hayes), as "Purchaser," and defendant, as "Sponsor," executed a purchase agreement (the Agreement) for Unit S12A (the Unit) (NYSCEF Doc. 60, Hayes aff, exhibit 9 at 5-6). Paragraph 11 of the Agreement states:

> "the [Offering] Plan is incorporated herein by reference and made a part hereof with the same force and effect as if set forth at length … Purchaser hereby adopts, accepts and approves the Plan (including, without limitation, the Declaration, the By-Laws and Rules and Regulations contained therein) and agrees to abide by and be bound by the terms and conditions thereof, as well as amendments to the Plan duly filed by the Sponsor"

(*id.* at 16). Regarding warranties, Part I, Section A, subsection 16 of the Offering Plan reads, "[i]n no event will Sponsor be liable for incidental, special or consequential damages" (NYSCEF Doc No. 41, Roxanna Brahimy [Brahimy] affirmation, exhibit V at 24). Section 26.4 in the "Declaration" section of the Offering Plan also reads, in part, that "[i]n no event will Declarant be liable for incidental or consequential damages (whether based on negligence, breach of contract, warranty or otherwise)" (NYSCEF Doc No. 43, Brahimy affirmation, exhibit V at 118).

The Offering Plan describes the Unit as a two bedroom, two and one-half bath residence (NYSCEF Doc No. 42, Brahimy affirmation, exhibit V at 165). Regarding kitchen fixtures and appliances, the Offering Plan states that, "[s]ubject to Sponsor's right to make substitutions of equal or better quality as set forth in the Offering Plan, the Residential Units will be provided with the following appliances" which, for units consisting of two bedrooms and two and one-half bathrooms, included a 24-inch Miele- or Subzero-branded model no. KWT4143UG-1424G/0 wine cooler (NYSCEF Doc No. 43 at 7-8). Hayes later assigned the Agreement to plaintiff (NYSCEF Doc No. 60 at 40), of which Hayes is its sole member (NYSCEF Doc No. 49, ¶ 1).

Prior to closing on the Unit, plaintiff informed defendant's representative that a wine cooler had not been installed (*id.*, ¶ 8; NYSCEF Doc No. 38, ¶ 12). Plaintiff and defendant subsequently executed an "As-Is Statement" (the As-Is Statement) dated April 30, 2019 which reads:

> "The undersigned, constituting all of the purchasers of the Unit hereby acknowledge, agree and declare that I/we have inspected the Unit and I/we hereby accept the Unit in its "**AS-IS, WHERE IS**" condition as of the date hereof without any reservations or liabilities by Sponsor and hereby release Sponsor … from any liabilities with respect to the Unit, excepting for any expressly reserved in the Purchase Agreement for the Unit, and intended to survive Closing"

(NYSCEF Doc No. 57, Hayes aff, exhibit 6). Inserted immediately after the word "condition" appears the following in handwriting: "except for punchlist and the wine cooler as described in the offering plan, which wine cooler will be delivered post-closing" (*id.*). At a closing held April 30, 2019, plaintiff paid defendant the purchase price of $3.6 million for the Unit (NYSCEF Doc No. 38, ¶ 6; NYSCEF Doc No. 49, ¶ 7).

Plaintiff commenced this action on September 11, 2019 after defendant allegedly failed to furnish the subject wine cooler. The putative class action complaint pleads four causes of action: (1) breach of contract; (2) fraud/fraudulent inducement; (3) alleged violations of General Business Law §§ 349 and 350; and (4) negligent misrepresentation (NYSCEF Doc No. 2, complaint). Defendant interposed 14 affirmative defenses in its answer (NYSCEF Doc No. 9, answer). Plaintiff has not moved for an order certifying this action as a class action (*see* CPLR 902) and has not identified any other members of the purported class.

Defendant now moves for summary judgment dismissing the complaint.[1] It relies, among other exhibits, on the Offering Plan, an affidavit from its managing director, Pallaoro (NYSCEF

[1] Although defendant moved for relief under CPLR 3211 and 3212, plaintiff treats the motion as one for summary judgment. In reply, defendant exclusively treats the motion as one made for summary judgment. Accordingly, the court treats defendant's motion as one for summary judgment.

Doc No. 38, ¶ 1) and an affidavit from Robert Laudenschlager (Laudenschlager), an architect with SCLE Architects (NYSCEF Doc No. 65, Laudenschlager aff, ¶¶ 1-2). Plaintiff opposes the motion and cross-moves for summary judgment on the first cause of action for breach of contract and to compel discovery. Plaintiff submits affidavits from Hayes and Julie E. Georgopolous (Georgopolous), an architect with Form Space Image, Architecture, PC (NYSCEF Doc No. 50, Georgopolous aff, ¶ 1), and other exhibits.

Discussion

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party has met its prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*id.* at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

A. The First Cause of Action for Breach of Contract

The complaint alleges that defendant breached its contractual obligations to plaintiff by failing to furnish a kitchen with an integrated wine cooler, sufficient cabinetry and a cutlery drawer (NYSCEF Doc No. 2, ¶¶ 30-34).

Defendant argues that the breach of contract claim lacks merit because plaintiff caused the alleged breach. On this point, Pallaoro avers that after plaintiff complained about the missing wine cooler, the parties agreed that delivery of a wine cooler would be defendant's post-closing obligation (*id.*, ¶ 12). On or about May 21, 2019, defendant offered to install a wine cooler of equal or better quality to the model stated in the Offering Plan in the kitchen or elsewhere in the

Unit or provide a free-standing wine cooler (*id.*, ¶ 12). Pallaoro avers that plaintiff refused defendant's offer because installation of the wine cooler in the kitchen would eliminate an existing cabinet, plaintiff did not want the wine cooler installed anywhere else other than in the kitchen, and plaintiff refused the offer of a free-standing wine cooler (*id.*, ¶ 14). Pallaoro further avers that plaintiff claimed the kitchen would have to be renovated to accommodate the wine cooler and additional cabinetry (*id.*). Defendant also argues that plaintiff's damages, if any, should be limited to the actual cost of the wine cooler and its installation with cabinetry.

Plaintiff counters that it is entitled to summary judgment on the breach of contract claim because the Offering Plan plainly provides for an integrated wine cooler in the kitchen. Hayes avers that the Sponsor had promised to provide a kitchen with a specific, high-end integrated wine cooler (NYSCEF Doc No. 49, ¶ 2). An advertisement on StreetEasy for residential units of similar size to plaintiff's referred to "high-end Dada kitchens that were fully appointed including a high-end wine cooler that was integrated into the kitchen" (*id.*, ¶ 4; NYSCEF Doc No. 56, Hayes affirmation, exhibit 5). However, Hayes attests that a walk-through of the Unit revealed the absence of a wine cooler (NYSCEF Doc No. 49, ¶ 8). In order to proceed with the purchase of the Unit, defendant had to agree to deliver the wine cooler as described in the Offering Plan (*id.*). Plaintiff's architect, Georgopolous, avers that the specific Miele or Subzero wine cooler "cannot be effectively installed" because doing so in the existing kitchen "would not provide reasonable or adequate room for storage" (NYSCEF Doc No. 50, ¶ 3). Georgopolous designed two alternatives for the wine cooler's installation in the Unit. The first design expands the existing kitchen by moving a wall and doorway to accommodate the wine cooler so that is in close proximity to other appliances (*id.*, ¶ 4). The second design envisions installing the wine cooler in a built-in cabinet in the dining room (*id.*). Both designs, however, remove space from elsewhere in the Unit (*id.*).

Plaintiff's contractor proposed completing the first design for $128,170.09 (NYSCEF Doc No. 59, Hayes aff, exhibit 8). Last, plaintiff argues that defendant's motion should be denied under CPLR 3212 (f) as no depositions of defendant's witnesses have been held.

Defendant replies that nothing in the Offering Plan required it to install an integrated wine cooler in the kitchen. In addition, Laudenschlager, who was personally involved in designing the Condominium, avers that there are no Building Code provisions relating to kitchen size, storage or design other than those required for handicap adaptability (NYSCEF Doc No. 65, ¶¶ 4 and 6). Laudenschlager states that Georgopoulos's statement on "reasonable and adequate room for storage" is not a technical or industry term of art in the field of architecture and is entirely subjective (*id.*, ¶ 10). Laudenschlager further attests that the wine cooler could easily be installed in the existing kitchen between the refrigerator and the cooktop (*id.*, ¶ 11).

A cause of action for breach of contract requires the plaintiff to plead and prove the existence of a valid contract, the plaintiff's performance, the defendant's breach, and the plaintiff's resulting damages (*Fawer v Shipkevich PLLC*, 213 AD3d 408, 408 [1st Dept 2023]). A condominium unit that does not conform to the specifications of its offering plan can give rise to a breach of contract claim against the condominium's sponsor (*see Plaza PH2001, LLC v Plaza Residential Owners LP*, 79 AD3d 587, 588 [1st Dept 2010]).

Here, defendant has established its entitlement to summary judgment. A review of the Offering Plan and the Agreement show that nothing in those documents expressly states that the Unit's kitchen shall include an "integrated" wine cooler. The Offering Plan states only that a wine cooler shall be an appliance furnished by defendant. Likewise, the Offering Plan makes no mention of "sufficient cabinetry and a cutlery drawer" as alleged in the complaint (NYSCEF Doc No. 2, ¶ 31). As a result, plaintiff cannot establish a breach of an express provision of the parties'

contract that required an integrated wine cooler, sufficient cabinetry or a cutlery drawer. In addition, defendant has shown that plaintiff prevented it from completing its contractual obligations (*see Frank Brunckhorst Co., LLC v JPKJ Realty, LLC*, 129 AD3d 1019, 1020 [2d Dept 2015]). "[U]nder the doctrine of prevention, when a party to a contract causes the failure of the performance of the obligation due, it cannot in any way take advantage of that failure" (*Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 41 [1st Dept 2020] [internal citation and quotation marks omitted]). Here, defendant offered to install a wine cooler in the existing kitchen or elsewhere in the Unit, but plaintiff refused. Thus, plaintiff's own conduct has prevented defendant from performing its contractual obligations.

Plaintiff fails to raise a triable issue of fact in opposition. Plaintiff has not identified a specific provision in the Offering Plan or the Agreement that required defendant to furnish an integrated wine cooler, sufficient cabinetry or a cutlery drawer (*see Manipal Educ. Ams., LLC v Taufiq*, 203 AD3d 662, 663 [1st Dept 2022]). Moreover, plaintiff does not dispute that defendant offered post-closing to deliver a wine cooler as required by the As-Is Statement. Nor does plaintiff dispute that it rejected defendant's offer to install a wine cooler that would be "integrated" into the existing kitchen because plaintiff did not wish to remove undercounter cabinet space.

Plaintiff's contention that the motion should be denied because of outstanding discovery is unpersuasive. CPLR 3212 (f) allows the court to deny a motion for summary judgment motion if it appears in affidavits submitted in opposition to the motion that "facts essential to justify opposition may exist but cannot then be stated." Plaintiff argues that defendant has yet to produce the witnesses it has identified who have knowledge of the facts surrounding plaintiff's claims for depositions. Although a summary judgment motion made before depositions have been held may be denied as premature (*see Nick's Poultry, Inc. v Seaman Radio Dispatcher, Inc.*, 198 AD3d 462,

463 [1st Dept 2021]), plaintiff has not shown that additional discovery would lead to relevant evidence (*Sangare v 985 Bruckner Blvd. Hous. Dev. Fund Corp.*, 212 AD3d 547, 547 [1st Dept 2023]) or that defendant is in exclusive possession of information necessary for plaintiff to defeat summary judgment (*Natoli v Trader Joe's E. Inc.*, 198 AD3d 572, 573 [1st Dept 2021]). Indeed, plaintiff is in control of the facts necessary to establish an alleged breach. Accordingly, that part of defendant's motion for summary judgment dismissing the first cause of action is granted, and that part of plaintiff's cross-motion for summary judgment on this cause of action is denied.

B. The Second Cause of Action for Fraud/Fraudulent Inducement

In the second cause of action for fraud/fraudulent inducement, the complaint alleges that defendant made false and material representations and omissions regarding "high-end kitchens with integrated high-end appliances including a specific wine cooler integrated into the kitchen that has sufficient cabinetry and a cutlery drawer," such representations and omissions were false, defendant knew such representations and omissions were false, and plaintiff was damaged because it was caused to purchase the Unit (NYSCEF Doc No. 2, ¶¶ 36-44).

Defendant contends this cause of action must be dismissed for two reasons: (1) plaintiff failed to plead the claim with particularity and (2) plaintiff cannot satisfy the reliance element. Plaintiff, in opposition, argues that it has adequately pled a claim for fraud based on the statements in the Offering Plan and on StreetEasy stating that the kitchens would be designed and constructed with integrated wine coolers.

A cause of action for fraudulent inducement requires the plaintiff to plead "that the defendant 'intentionally made a material misrepresentation of fact in order to defraud or mislead the plaintiff, and that plaintiff reasonably relied on the misrepresentation and suffered damages as a result'" (*Rising Sun Constr. L.L.C. v CabGram Dev. LLC*, 202 AD3d 557, 559 [1st Dept 2022

[citation omitted]; *see also Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [setting forth the elements for a fraud cause of action]. Fraud claims are subject to a heightened pleading standard that requires the plaintiff to plead the circumstances constituting the alleged fraud with particularity (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008], citing CPLR 3016 [b]). Vague, conclusory allegations will not suffice (*Dau v S16 Sutton Place Apt. Corp.*, 205 AD3d 533 [1st Dept 2022]).

Under these precepts, defendant has established that plaintiff cannot show that it reasonably relied on any alleged misrepresentation or omission of material fact. Plaintiff was aware prior to closing on the transaction that the Unit lacked a wine cooler, as evidenced by the As-Is Statement and Hayes's averments acknowledging that plaintiff was aware of the missing wine cooler prior to closing. Thus, plaintiff cannot have been fraudulently induced into purchasing the Unit because it knew the Unit lacked an integrated wine cooler (*Board of Mgrs. of the Latitude Riverdale Condominium v 3585 Owner, LLC*, 199 AD3d 441, 442 [1st Dept 2021] [dismissing fraud in the inducement claim where "the unit purchasers had the means to ascertain the truth of the condition when they inspected the apartments"]; *Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012] [plaintiffs knew of cooling tower before purchasing the unit]). Furthermore, the complaint fails to plead specific facts from which the court may reasonably draw an inference of fraudulent intent (*see Massey v Byrne*, 164 AD3d 416, 417 [1st Dept 2018]; *FNF Touring LLC v Transform Am. Corp.*, 111 AD3d 401, 402 [1st Dept 2013]). Given Hayes's awareness of the missing wine cooler, plaintiff fails to raise an issue of fact in opposition. The second cause of action is dismissed.

C. The Third Cause of Action under the General Business Law

General Business Law § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statute

provides a private right of action to "any person who has been injured by reason of any violation of this section may bring an action in his [or her] own name to enjoin such unlawful act or practice, an action to recover his [or her] actual damages" (General Business Law § 349 [h]). General Business Law § 350 declares as unlawful "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." To successfully maintain a claim under either statute, the plaintiff must demonstrate that the defendant engaged in consumer-oriented conduct that is deceptive or misleading in a material way that caused plaintiff injury (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]; *Denenberg v Rosen*, 71 AD3d 187, 194 [1st Dept 2010], *lv dismissed* 14 NY3d 910 [2010] [identical standard for recovery under General Business Law §§ 349 and 350]). The statutes do not apply to purely private disputes (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321 [1995]; *Denenberg*, 71 AD3d at 195).

Applying these precepts, the complaint fails to plead a claim under General Business Law §§ 349 and 350. Although both statutes apply to the sale of condominium units (*see Board of Mgrs. of Bayberry Greens Condominium v Bayberry Greens Assoc.*, 174 AD2d 595, 596 [2d Dept 1991]), this action is a largely private contract dispute about the Unit (*see Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646, 648 [1st Dept 2013]; *Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311 [1st Dept 2000]). Any resolution would be unique to the parties, and thus, the action does not have "a broader impact on consumers at large" (*Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25). The third cause of action is dismissed.

D. The Fourth Cause of Action for Negligent Misrepresentation

The complaint alleges that defendant breached its duty to impart correct information to plaintiff, thereby causing plaintiff damages (NYSCEF Doc No. 2, ¶¶ 55-61).

Defendant posits that the complaint fails to plead a negligent representation in the Offering Plan or that plaintiff's purchase of the Unit was dependent upon a representation that a wine cooler would be included in the Unit. Plaintiff contends the motion should be denied because discovery is necessary into the existence of a special or privity-like relationship between the parties.

To state a claim for negligent misrepresentation, the plaintiff must plead "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007], *rearg denied* 8 NY3d 939 [2007]). As to the first element, "[a] special relationship may be established by 'persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] [citation omitted]).

Here, the complaint fails to plead factual allegations of a special or privity-like relationship necessary to support a negligent misrepresentation claim (*see 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735 [1st Dept 2013]), as the evidence shows that the relationship between plaintiff and defendant exists solely "by virtue of [plaintiff's] purchase of [its] unit[ ] alone" (*Board of Mgrs. of Fifteen Madison Sq. N. Condominium v Madison Park Owner LLC*, 2013 NY Slip Op 32215[U], *8 [Sup Ct, NY County 2013], citing *Board of Mgrs. of 374 Manhattan Ave. Condominium v Harlem Infil LLC*, 2010 NY Slip Op 31518[U], *19-20 [Sup Ct, NY County 2010]). Furthermore, as discussed earlier, plaintiff has not identified specific, express language in the Offering Plan that called for an integrated wine cooler in the kitchen. As such, the alleged representation cannot have been incorrect (*see Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535, 537 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]). Plaintiff's acknowledgement in

the As-Is Statement that the Unit lacked a wine cooler also defeats any claim of reasonable or justifiable reliance (*see Izhaky v Izhaky*, 215 AD3d 588, 589 [1st Dept 2023]).

Plaintiff alleges that discovery is necessary to decipher the relationships between defendant and those with whom defendant communicated with respect to advertising the Unit. Discovery into that relationship, however, would not yield relevant evidence on plaintiff's relationship with defendant, especially where plaintiff's purchase of the Unit was the result of an arms-length transaction (*see Andres v LeRoy Adventures*, 201 AD2d 262, 262 [1st Dept 1994]). The fourth cause of action is dismissed.

E. Defendant's Request for a Declaration as to Damages

In view of the foregoing, the court need not reach defendant's request for a declaration limiting plaintiff's damages to the cost of a wine cooler and any installation costs.

F. Plaintiff's Cross-Motion to Compel

Likewise, the court need not address that part of plaintiff's cross-motion seeking to compel discovery from defendant.

Accordingly, it is

ORDERED that the motion of defendant Broome Property Owner JV LLC (motion sequence no. 002) is granted to the extent that the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the part plaintiff's cross-motion for summary judgment on the first cause of action and to compel discovery is denied; and it is further

ORDERED that within 30 days of entry of this order, counsel for defendant shall serve a copy of this order upon plaintiff, with notice of entry, and shall file such notice via NYSCEF.

This constitutes the decision and order of the Court.

DATE: 2/29/2024

HON. LESLIE A. STROTH
J.S.C.

Check One: [X] Case Disposed [ ] Non-Final Disposition

Check if Appropriate: [ ] Other (Specify _____)