SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

LINDEN BOULEVARD PARTNERS, LLC,

Plaintiff, Decision and order

- against - Index No. 500211/2024

SAPPHIRE AMBER LLC, LINDEN BROOKLYN LLC, ROCK BAY LLC, DANIEL KIMIABAKHSH, JOSEPH RASTEGAR, and JOHN KHANI,

Defendants, July 11, 2024

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint for the failure to allege any causes of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments were held. After reviewing all the arguments this court now makes the following determination.

On October 25, 2022 the plaintiff purchased properties from the defendants pursuant to a contract of sale for $13,200,000.00. The properties consist of an entire City block located between Linden Boulevard to Dumont Avenue, between Amber Street and Sapphire Street in Kings County. On May 11, 2023 the contract was amended extending the closing time to June 12, 2023 time being of the essence and by requiring the plaintiff to pay an additional down payment. On July 10, 2023 the plaintiff terminated the contract and sought the return of the down payment. The termination notice alleged the New York City Department of Citywide Administrative Services [hereinafter 'DCAS'] intended to acquire the properties. A few days later the

defendants responded and pointed out that pursuant to the contract the seller, in its sole judgement, had the authority to determine whether a condemnation proceeding had commenced and that "Seller is not in receipt of any notice of a potential or threatened action to condemn the Property now or in the future" (see, Letter, dated July 14, 2023, page 2 [NYSCEF Doc. No. 8]). The parties engaged in further negotiations and ultimately the closing never occurred. The plaintiff instituted this action seeking essentially the recovery of the down payment. The complaint asserts causes of action for fraud, negligent misrepresentation, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, conversion and a declaratory judgement. The defendants have now moved seeking to dismiss the complaint on the grounds it fails to state any cause of action. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc.,

v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

Section 14.1 of the original contract states that "in the event of the commencement of a proceeding for condemnation of the Premises, or any portion thereof, between the date hereof and the Closing Date, either party shall have the option to terminate this Contract by written notice to the other. For purposes of this Section, the receipt of a formal or informal notice of an intent, or any communication in any form or manner that Seller determines in its sole judgment indicating a potential or threatened action to condemn now or in the future shall constitute the commencement of a proceeding" (see, Contract of Sale, ¶14.1 [NYSCEF Doc. No. 4]). On June 22, 2022, Charles Olson the Chief of Urban Stormwater Planning for the New York City Department of Environmental Protection sent a letter to the defendants which stated that the City was "interested in acquiring the referenced property" and that the defendants should reach out to Debbra McAllister the Director of Acquisitions, Real Estate Services NYC Department of Citywide Administrative

Services "for information regarding the acquisition process" (see, Letter dated June 22, 2022 [NYSCEF Doc. No. 3]). That letter was never forwarded to the plaintiff. According to the complaint the plaintiff discovered the contents of the letter on June 5, 2023 (see, Complaint, ¶36 [NYSCEF Doc. No. 2]). Further, on July 10, 2023 Debbra McAllister sent an email to the principles of the purchaser which stated that "I would like to inform you that on behalf of DEP, DCAS intends to acquire that certain property located on Linden Boulevard to Dumont Avenue, between Amber Street and Sapphire Street" (see, Email sent July 10, 2023 12:03 PM [NYSCEF Doc. No. 6]). The defendants then sent a letter to McAllister confirming whether indeed DCAS intended to acquire the properties. McAllister responded in an email dated October 2, 2023. The email stated that "the property referenced above was identified by NYCDEP to be a part of the Jewel Street Bluebelt. My role here at NYCDCAS is to negotiate an arm's length transaction with the seller on behalf of NYCDEP" (see, Email sent October 2, 2023 12:21 PM [NYSCEF Doc. No. 13]). That response prompted Mitchell Gluck, a senior underwriter with First American Title Insurance Company to note an exception to title based upon "the possibility that the City will seek to acquire some or all of the property through a condemnation type proceeding" (see, Email sent October 2, 2023 1:15 PM [NYSCEF Doc. No. 14]). This was true because there existed "knowledge of

facts which make an attempt by the City to acquire some or all of the property through a condemnation type proceeding a possibility if voluntary negotiations with the City fail, and we need to make it clear to our insured that the policy will not cover that possibility by raising an appropriate exception in the title policy to be issued" (id). On November 8, 2023 Steve Mortman, the deputy general counsel for the New York City DCAS sent an email explaining that the agency in question does not conduct condemnation proceedings but rather does negotiate acquisitions of property. Further, Mr. Mortman explained that if the City of New York would pursue condemnation proceedings then a lengthy process is required and that process had not yet begun (see, Email sent November 8, 2023 12:55 PM [NYSCEF Doc. No. 32]).

The defendants do not explain why they failed to disclose the existence of the June 22, 2022 to the plaintiff. As noted by Mr. Gluck, it is quite possible that the City's interest in acquiring the property through purchase may evolve into a condemnation proceeding if negotiations concerning the purchase prove fruitless. The existence of that letter may have been a "communication...indicating a potential or threatened action to condemn now or in the future" (see, Contract of Sale, ¶14.1 [NYSCEF Doc. No. 4]). It is true the defendants maintained the "sole judgement" to determine whether any communication required disclosure, however, ss with any contract provision, such

judgement must be exercised with good faith. There are surely questions of fact whether the failure to disclose the letter constituted a breach of the contract. The subsequent correspondences, even the one from Mr. Mortman, do not alleviate that potential concern looming over the properties. In fact, no representative of the City ever stated no condemnation would ever take place. Of course, no such statement is required in every case. However, where the City expressed specific interest in purchasing the property, the reality of a condemnation may not be too far behind. Consequently, the motion seeking to dismiss the third cause of action for breach of contract is denied.

Turning to the claim of fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Further, to succeed upon a claim of fraudulent concealment it must be demonstrated that in addition to the above requirements there was a fiduciary or confidential relationship which would impose a duty upon the defendant to disclose material

information (Mitschele v. Schultz, 36 AD3d 249, 826 NYS2d 14 [1st Dept., 2006], Wallkill Medical Development LLC v. Catskill Orthopaedics P.C., 178 AD3d 987, 115 NYS3d 67 [2d Dept., 2019]). Moreover, even absent a fiduciary relationship a duty to disclose may arise under the 'special facts' doctrine where one party maintains superior knowledge of essential facts as to render the entire transaction inherently unfair absent the disclosure (Jana L. v. West 129th Street Realty Corp., 22 AD3d 224, 802 NYS2d 132 [1st Dept., 2005]).

However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v.Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]).

The defendants seek to dismiss the fraud claim on the grounds the fraud is the same as the breach of contract claim. The plaintiff opposes that contention arguing the breach of contract claim is not duplicative of the fraud claim since the fraud alleges misrepresentations independent of contractual obligations. The breach of contract claim essentially alleges that defendants failed to disclose the June 22 letter which would have permitted them to cancel the contract. The fraud claim

alleges virtually the identical claim. Indeed, the breach of contract claim states that "Defendants also breached Section 14.1 of the Contract by failing to comply with its obligation to provide to Plaintiff "a copy of any notice or communication received regarding a possible taking." The June 22 Letter, among other secret communications between Defendants and the City, constituted a "communication regarding a possible taking."" (see, Complaint, ¶84 [NYSCEF Doc. No. 2]). The fraud claim alleges "Defendants, upon information and belief, made each of these misrepresentations and omissions, did not disclose the June 22 Letter, and otherwise concealed any knowledge of the City's intended taking with the intent of inducing Plaintiff to enter into the Contract, the Amendment, the payment of an additional deposit, and allow the wrongful taking of its full $2.6 million deposit" (see, Complaint, ¶58 [NYSCEF Doc. No. 2]). The plaintiff argues the fraud claim is distinct from the breach of contract claim because the fraud claim is comprised of duties not included within any breach of contract.

It is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only

to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v. Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The

first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract. (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "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, 941 NYS2d 59 [1st Dept., 2012]). Concerning independent duties, in Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company, 70 NY2d 382, 521 NYS2d 653 [1987] the court explained that the independent duty "must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (id).

In this case the fraud alleges the defendants failed to disclose the June 22 letter. The breach of contract claim alleges the defendants failed to disclose the June 22 letter. These two claims arise from the same circumstances. Therefore, the motion seeking to dismiss the first cause of action is granted.

Likewise, the claim of negligent misrepresentation is duplicative of the breach of contract claim and the motion seeking to dismiss the second cause of action is granted (see, Pollak v. Moore, 85 AD3d 578, 926 NYS2d 434 [1st Dept., 2011]).

The fourth cause of action alleges the breach of the implied covenant of good faith and fair dealing. It is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). However, that cause of action is not applicable when it is duplicative of a breach of contract claim (P.S. Finance LLC v. Eureka Woodworks Inc., 214 AD3d 1, 184 AD3d 114 [2d Dept., 2023]). Even if pled in the alternative, the claim of any breach of any implied covenant is based upon the same facts as the breach of contract claim, namely the failure to satisfy all the contractual provisions. That is duplicative of the breach of contract and consequently, the motion seeking to dismiss the fourth cause of action is granted.

The next cause of action alleges unjust enrichment. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The defendants argue that unjust enrichment could be available since they are permitted to plead alternative theories of liability. However, unjust enrichment is usually reserved for cases where though a party committed no wrongdoing has received money to which he or she is not entitled (Corsello, supra) a truism inapplicable in this case. As the court explained in Corsello, "plaintiffs allege that Verizon committed actionable wrongs, by trespassing on or taking their property, and by deceiving them into thinking they were not entitled to compensation. To the extent that these claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects. The unjust enrichment claim should be dismissed" (id). Likewise, in this case, if for whatever reason the contract cause of action fails then the unjust enrichment claim will not be available. Consequently, the motion seeking to dismiss the claim of unjust enrichment is granted.

The next cause of action seeks conversion. Where a

conversion claim arises from the same circumstances as the breach of contract claim then such conversion claim is duplicative (Connecticut New York Lighting Company v. Manos Business Management Company Inc., 171 AD3d 698, 98 NYS3d 101 [2d Dept., 2019]). "To determine whether a conversion claim is duplicative, courts look both to the material facts upon which each claim is based and to the alleged injuries for which damages are sought" (Medequa LLC v. O'Neill and Partners LLC, 2022 WL 2916475 [S.D.N.Y. 2022]). In this case the breach of contract claim essentially asserts the defendants breached the contract and must return the deposit. The conversion claim seeks a return of the same deposit. Thus, the conversion claim relies upon the same facts as the breach of contract claim and seeks the same damages. Therefore, "if Plaintiff were to recover on each claim, it 'would in effect be paid twice'" (id). Therefore, the motion seeking to dismiss the conversion claim is granted.

The last cause of action seeks a declaratory judgement concerning the rights pursuant to the contract and that the plaintiff is entitled to the deposit. It is well settled that "a motion to dismiss the complaint in an action for a declaratory judgment "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration"" (DiGiorgio v. 1109-1113 Manhattan Avenue Partners

LLC, 102 AD3d 725, 958 NYS2d 417 [2d Dept., 2013]). The basis for this cause of action is the allegation the defendants breached the contract. Thus, where the plaintiff maintains "an 'adequate, alternative remedy in another form of action' - namely, the...cause of action for breach of contract" then the cause of action for declaratory judgement is duplicative. Thus, the motion seeking to dismiss this cause of action is granted.

Turning to the motions seeking to dismiss the remaining cause of action for breach of contract against the individual defendants, it is well settled that if the defendants so dominated the activities of the corporation then piercing of the corporate veil would be permitted and defendant could then be liable personally (see, Matter of Morris v. New York State, 82 NY2d 135, 603 NYS2d 807 [1993]). However, dominance of a corporation, standing alone is insufficient to pierce the corporate veil (First Capital Asset Management Inc., v. N.A. Partners, L.P., 300 AD2d 112, 755 NYS2d 63 [1st Dept., 2002]). New York courts take piercing the corporate veil very seriously and will pierce the corporate veil only when necessary to prevent fraud or to achieve equity (see, Morris v New York State Department of Taxation and Finance, 82 NY2d 135, 603 NYS2d 807 [1993]). To succeed on a request to pierce the corporate veil the plaintiff must demonstrate that "(1) the owners exercised complete dominion of the corporation in respect to the

transaction attacked and (2) that such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Conason v. Megan Holding LLC, 25 NY3d 1, 6 NYS3d 206 [2015]). As the Court of Appeals observed, at the pleading stage "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (East Hampton Union Free School District v. Sandpebble Builders Inc., 16 NY3d 775, 919 NYS2d 496 [2011]). Rather, the plaintiff must allege facts demonstrating such dominion over the corporation and that "through such domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff such that a court in equity will intervene" (Oliveri Construction Corp., v. WN weaver Street LLC, 144 AD3d 765, 41 NYS3d 59 [2d Dept., 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" (see, Grammas v. Lockwood Associates LLC, 95 AD3d 1073, 944 NYS2d 623 [2d Dept., 2012]). Thus, mere conclusory statements that the individual dominated the corporation are insufficient to defeat a motion to dismiss (AHA Sales Inc., v. Creative Bath Products Inc., 58 AD3d 6, 867 NYS2d

169 [2d Dept., 2008]).

In this case the complaint does not allege any facts at all demonstrating any of the acts necessary to pierce the corporate veil at all. Indeed, other than noting the occupations and addresses of the individual defendants they are not mentioned in the complaint. In opposition, the plaintiff, argues in conclusory fashion that "the Defendant LLCs were paper entities that were so informally regarded by the Individual Defendants that one Defendant, John Khani, couldn't even remember the name of the LLC that he was representing at the closing on January 8, 2024" (see, Memorandum in Opposition, page 18 [NYSCEF Doc. No. 39]). However, there are no facts whatsoever supporting that allegation. Thus, there is no explanation how the individual defendants disregarded the corporate form, inadequately capitalized the company or used corporate funds for personal purposes. Thus, merely reciting the legal standard or blanket allegations without any supporting facts renders the cause of action conclusory. In Albstein v. Elany Contracting Corp., 30 AD3d 210, 818 NYS2d 8 [1st Dept., 2006] the court granted the motion seeking to dismiss the piercing of the corporate veil on the grounds the plaintiff alleged "nothing more than that the corporation was 'undercapitalized' and functioned as" the individual's "alter ego" (id). The court further noted the plaintiff failed to "plead any facts to substantiate such

conclusory claims" and did not "sufficiently allege that the corporate form was used to commit a fraud against her" (id).

Therefore, based on the foregoing, the motion seeking to dismiss all of the causes of action against defendants Daniel Kimiabakhsh, Joseph Rascegar, and John Khani is granted.

So ordered.

ENTER:

DATED: July 11, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC