Board of Mgrs. of the Factory House Condominium v RDG-Stonecutter 43rd Ave Owner LLC
2024 NY Slip Op 35639(U)
December 16, 2024
Supreme Court, Queens County
Docket Number: Index No. 721714/2022
Judge: Joseph Risi
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA PART 3

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THE BOARD OF MANAGERS OF THE FACTORY HOUSE CONDOMINIUM,

Plaintiff,

-against-

RDG-STONECUTTER 43RD AVE OWNER LLC, RDG-STONECUTTER 43RD AVE LLC, RDG-STONECUTTER MANAGING MEMBER BBC, RISING DEVELOPERS GROUP LLC, STONECUTTER CAPITAL MANAGEMENT LLC, JOSEPH PALUMBO, JR., JOSEPH ESCARFULLERY, MOSHE JACOBOWTIZ, CHARLIE WONG, SCOTT ZUCKER, ROBERT KUNZWEILER, ALFREDO T. FREDERICKS, R.A. and DOUGLAS ELLIMAN, LLC,

Defendants.

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Index Number: 721714/2022

Motion Sequence #1

DECISION / ORDER

The following numbered papers read on the motion by defendants RDG-Stonecutter 43rd Ave Owner LLC, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers Group LLC, Stonecutter Capital Management LLC, Joseph Palumbo, Jr., Joseph Escarfullery, Moshe Jacobowitz, Charlie Wong, Scott Zucker, Robert Kunzweiler, and Alfredo T. Fredericks, R.A. (collectively referred to as moving defendants), to dismiss the complaint against them pursuant to CPLR 3211(a)(1) and (7), and to dismiss the complaint against Alfredo T. Fredericks (Fredericks), R.A., pursuant to CPLR §§3211(a)(5) and 214(6).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 23-33
Answering Affidavits - Exhibits..	EF 38-42
Reply Affirmation..	EF 43-47

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff, Board of Managers of The Factory House Condominium ("plaintiff"), commenced the instant action by summons with notice sounding in causes of action for breach of contract, fraud in the inducement, constructive fraudulent conveyance while insolvent, constructive fraudulent conveyances causing unreasonably small capital, and intentional fraudulent conveyances. In the complaint, plaintiff has alleged that RDG-Stonecutter 43rd Ave Owner LLC ("the Sponsor"), was the Sponsor that developed a residential condominium building located at 42-60 Crescent Street, in the County of Queens, that RDG-Stonecutter 43rd Ave LLC, is the sole member of the Sponsor, and that RDG-Stonecutter Managing Member LLC, is the Sponsor's manager.

Plaintiff has alleged that the Sponsor is a joint venture comprised of Rising Developers Group LLC ("Rising Developers"), and Stonecutter Capital Management LLC ("Stonecutter Capital"), and that Joseph Palumbo, Jr. ("Palumbo"), Joseph Escarfullery ("Escarfullery"), Moshe Jacobowitz ("Jacobowitz"), and Charlie Wong ("Wong"), were principals of Rising Development. Plaintiff has alleged that Scott Zucker ("Zucker') and Robert Kunzweiler ("Kunzweiler"), were principals of Stonecutter Capital. Plaintiff has alleged that Fredericks was an architect that provided his services for the development of the condominium, and that he prepared the plans and specifications.

Plaintiff has alleged that, among other things, the Offering Plan for the subject premises promised purchasers a building that would be safe to live in and designed and constructed in compliance with all applicable laws and the terms of the Offering Plan. Plaintiff has further alleged, however, that those who purchased units of the condominium, were instead left with a building rife with defective conditions that in numerous respects violate applicable government regulations, compromise the quality of life of residents, and deviate from express promises and material representations in the Offering Plan. Plaintiff has alleged that the Sponsor, which developed the condominium, failed to construct it in accordance with the promises and representations in the Offering Plan, pursuant to which, the Sponsor offered units of the condominium for sale. Plaintiff has further alleged that, due to the actions and inactions of moving defendants, plaintiff has sustained damages.

The court notes that although plaintiff named defendant Douglas Elliman, LLC, as a defendant in the summons with notice (E-Doc. No. 1), and stated that the nature of the action against it was to recover damages resulting from fraud, fraud in the inducement, and aiding and abetting fraud, committed in connection with the marketing and sale of the condominium units, in the complaint (E-Doc. No. 21), plaintiff, nevertheless, has omitted Douglas Elliman, LLC, as a defendant in the complaint and did not set forth any allegations against it. As such, the court's instant determination does not address any causes of action that appear to have been alleged against Douglas Elliman, LLC.

Moving defendants have moved to dismiss the complaint against them pursuant to CPLR §3211(a)(1) and (7). CPLR §3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence...” “To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim’ ” (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods*., 273 AD2d 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Bonavita v Govt. Employees Ins. Co*., 185 AD3d 892, 893 [2d Dept 2020]; *Lakhi Gen. Contractor, Inc. v N.Y. City Sch. Const. Auth*., 147 AD3d 917 [2d Dept 2017]).

CPLR §3211(a)(7) provides that a party may move to dismiss an action on the ground that “the pleading fails to state a cause of action.” “On a motion to dismiss pursuant to CPLR 3211, the complaint is to be afforded a liberal construction” (*Benitez v Bolla Operating LI Corp*., 189 AD3d 970 [2d Dept 2020]; CPLR §3026; *see Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]). “ ‘In reviewing a motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court’s function is to determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Benitez v Bolla Operating LI Corp*., 189 AD3d at 970, quoting *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; *see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; *Gorbatov v Tsirelman*, 155 AD3d at 836). The parties are reminded that, in general, “[t]he court is limited to ‘an examination of the pleadings to determine whether they state a cause of action’ ” (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc*., 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc*., 20 NY3d 342, 351 [2013]).

In the complaint, plaintiff has alleged the following causes of action: (1) breach of contract for construction defects against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler; (2) fraud in the inducement against the Sponsor and Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler; (3) breach of contract against Fredericks; (4) fraud in the inducement against Fredericks; (5) constructive fraudulent conveyances while insolvent against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler; (6) constructive fraudulent conveyances causing unreasonably small capital against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler; and (7) intentional fraudulent conveyances against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler.

As to the first cause of action for breach of contract for construction defects, moving defendants have argued, among other things, that plaintiff has failed to state a cause of action against all non-Sponsor defendants, which are RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter

Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler, in that plaintiff has failed to allege the existence of a contract between any of these non-Sponsor defendants and plaintiff, and that Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler cannot be held personally liable for contracts made by the entities.

"The essential elements of a cause of action to recover damages for breach of contract, are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018 [2d Dept 2021]). Based upon a thorough review of the allegations in the complaint, the court finds that when those allegations are afforded a liberal construction, accepting them as true and according plaintiff the benefit of every possible favorable inference, plaintiff has failed to sufficiently allege the requisite elements of a cause of action for breach of contract against RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler (CPLR §3211[a][7]).

As to the Sponsor, moving defendants contend that the complaint fails to state a cause of action for breach of contract. However, after a thorough review of the allegations contained in the complaint, when those allegations are afforded a liberal construction, accepted as true and plaintiff is accorded the benefit of every possible favorable inference, the court finds that plaintiff has sufficiently alleged the requisite elements of a cause of action for breach of contract against the Sponsor (CPLR §3211[a][7]). Moreover, moving defendants have failed to point to sufficient documentary evidence to resolve all factual issues as a matter of law (CPLR §3211[a][7]). Based upon the above, moving defendants are entitled to the dismissal of the first cause of action for breach of contract against RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler, but are not entitled to such relief as to the cause of action as asserted against the Sponsor.

Next, as to the second cause of action for fraud in the inducement against the Sponsor and Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler, moving defendants have argued, among other things, that this cause of action is preempted by the Martin Act, is duplicative of the cause of action for breach of contract, and has not been pled with sufficient particularity. "The elements of fraudulent inducement are: a false representation of a material fact and with scienter; reliance thereon by defendant to its detriment" (*Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 233 [1st Dept 1999]; *see Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Dalessio v Kressler*, 6 AD3d 57, 61 [2d Dept 2004]). " 'A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)' " (*Shahid v Ridgewood Bushwick Senior Citizens Council, Inc.*, 181 AD3d 744, 745 [2d Dept 2020], quoting *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

The Martin Act does not preempt causes of action to recover damages for common-law fraud where, as here, such causes of action have been based upon allegations of affirmative misrepresentations, rather than upon material omissions, in an offering plan (*see generally Caboara v Babylon Cove Dev., LLC*, 82 AD3d 1141, 1142 [2d Dept 2011]; *Bd. of Managers of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, 71 AD3d 935, 936 [2d Dept 2010]). CPLR §3016(b), entitled "Particularity in specific actions," provides the following: "Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

Based upon a thorough review of the allegations, when those allegations are afforded a liberal construction, accepted as true, and defendants have been given the benefit of every possible favorable inference, the court has determined that plaintiff has alleged each with sufficient particularity, each of the elements of a cause of action for fraudulent inducement and that inasmuch as the second cause of action alleges different damages, it is not duplicative of the first cause of action (CPLR §§3016[b]; 3211[a][7]). Nor is this cause of action alleging affirmative misrepresentations preempted by the Martin Act. Moving defendants have failed to point to sufficient documentary evidence to resolve all factual issues as a matter of law as to this cause of action (CPLR §3211[a][1]). Therefore, in light of the above, moving defendants are not entitled to the dismissal of the second cause of action for fraud in the inducement against the Sponsor and Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler.

With regard to the fifth cause of action for constructive fraudulent conveyances while insolvent pursuant to Debtor and Creditor Law §§273 and 278, the sixth cause of action for constructive fraudulent conveyances causing unreasonably small capital brought pursuant to Debtor and Creditor Law §§274 and 278, and the seventh cause of action for intentional fraudulent conveyances asserted against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler, moving defendants have argued that these causes of action have been inadequately pled, and have not been sufficiently alleged against individuals, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler.

Former Debtor and Creditor Law §273, relates to transfers or obligations that are voidable as to present or future creditors, provided the following: "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Debtor and Creditor Law §278, relates to the extinguishment of a claim for relief. In order to state a cause of action for a constructive fraudulent conveyance claim brought under former Debtor and Creditor Law §273, a "plaintiff must allege that: (1) plaintiff was a creditor of the transferor; (2) a transfer was made by the transferor without adequate consideration, thus (3) rendering the transferor insolvent (former DCL §273)" (*Board of Mgrs. of the 443 Greenwich St. Condominium v SGN 443 Greenwich St. Owner LLC*, 2024 NY Slip Op 31662[U], *7 [Sup Ct, NY County 2024] [internal citations omitted]; *see Joslin v Lopez*, 309 AD2d

837, 838 [2d Dept 2003]; *see also McCormack Family Charitable Found. v Fid. Brokerage Services, LLC*, 195 AD3d 420, 422 [1st Dept 2021]).

"The causes of action for constructive fraudulent conveyance pursuant to [former] Debtor & Creditor Law … §273 … are not subject to the particularity requirement of CPLR 3016" (*Bd. of Managers of Lore Condominium v Gateway IV LLC*, 169 AD3d 617, 618 [1st Dept 2019]). "[S]peculative and conclusory allegations of the complaint fail[] to state a cause of action pursuant to Debtor and Creditor Law § 273…" (*Riback v Margulis*, 43 AD3d 1023 [2d Dept 2007]; *see also Eagle Eye Collection Corp. v Shariff*, 190 AD3d 600 [1st Dept 2021]). Debtor and Creditor Law § 274 relates to transfers or obligations voidable as to present creditors and a complaint must allege that the debtors engaged in business for which capital was unreasonably small.

Based upon a thorough review of the allegations in the complaint, the court finds that when those allegations are afforded a liberal construction, accepting them as true and according plaintiff the benefit of every possible favorable inference, plaintiff has failed to allege the requisite elements of the fifth, sixth, and seventh causes of action against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler (CPLR 3211 [a] [7]). Plaintiff's allegations as to the fifth, sixth, and seventh causes of action are speculative, general and conclusory and do not state causes of action under Debtor and Creditor Law.

Therefore, based upon the above, moving defendants are entitled to the dismissal of the fifth cause of action for constructive fraudulent conveyances while insolvent pursuant to Debtor and Creditor Law §§273 and 278, the sixth cause of action for constructive fraudulent conveyances causing unreasonably small capital brought pursuant to Debtor and Creditor Law §§274 and 278, and the seventh cause of action for intentional fraudulent conveyances asserted against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler.

Moving defendants have also moved to dismiss the complaint against Fredericks pursuant to CPLR §§3211(a)(5) and 214(6). CPLR §3211(a)(5) provides that a party may also move to dismiss "one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of ... [the] statute of limitations..." " 'On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired' " (*Deutsche Bank Natl. Tr. Co. v Blank*, 189 AD3d 1678 [2d Dept 2020], quoting *HSBC Bank USA, N.A. v Gold*, 171 AD3d 1029, 1030 [2d Dept 2019]). CPLR §214(6), provides that "[t]he following actions must be commenced within three years: … an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort…"

With regard to the third cause of action for breach of contract and the fourth cause of action for fraud in the inducement against Fredericks, moving defendants have argued, among other things, that plaintiff lacks the standing to assert a breach of contract cause of action against Fredericks inasmuch as plaintiff was not an intended third-party beneficiary to the contract between the Sponsor and Fredericks, and that such causes of action are barred by the applicable statute of limitations and the Martin Act. The elements of a breach of contract cause of action and fraud in the inducement have been set forth above.

Based upon a thorough review of the allegations in the complaint, the court finds that when those allegations are afforded a liberal construction, accepting them as true and according plaintiff the benefit of every possible favorable inference, plaintiff has sufficiently alleged a legally cognizable causes of action for breach of contract and, with sufficient specificity, fraud in the inducement against Fredericks (CPLR §§3016[b]; 3211[a][7]).

Inasmuch as the Martin Act does not preempt causes of action to recover damages for common-law fraud based upon allegations of affirmative misrepresentations and, based upon a thorough review of the complaint, the allegations set forth against Fredericks have been of affirmative misrepresentations, rather than upon material omissions, the fourth cause of action for fraud in the inducement against Fredericks is not preempted (*see generally Caboara v Babylon Cove Dev., LLC*, 82 AD3d at 1142; *Bd. of Managers of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, 71 AD3d at 936).

Lastly, to the extent that moving defendants contend that plaintiff's causes of action against Fredericks are barred by the statute of limitations, based upon a careful reading of the allegations contained in the complaint, the gravamen of plaintiff's causes of action against Fredericks are in the nature of breach of contract and fraud, both of which have a six-year statute of limitations (CPLR §213). Inasmuch as moving defendants contend that the building at the premises was complete and certificate of occupancy was issued in or around October 2017, plaintiff commenced the instant action within six years of that date. Moving defendants have failed to otherwise sufficiently demonstrate that these two causes of action are barred by the statute of limitations. Therefore, based upon the above, moving defendants are not entitled to the dismissal of plaintiff's third cause of action for breach of contract and the fourth cause of action for fraud in the inducement against Fredericks.

The parties' remaining contentions have been considered and found to be unavailing. Any relief not expressly granted herein in denied.

Accordingly, the branch of moving defendants' motion to dismiss plaintiff's first cause of action for breach of contract is granted only against RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler, and that cause of action is, hereby, dismissed against them, but this branch of moving defendant's motion is denied as to the Sponsor.

The branch of moving defendants' motion to dismiss plaintiff's fifth cause of action for constructive fraudulent conveyances while insolvent, sixth cause of action for constructive fraudulent conveyances causing unreasonably small capital, and the seventh cause of action for intentional fraudulent conveyances is granted against the Sponsor, RDG-Stonecutter 43rd Ave LLC, RDG-Stonecutter Managing Member LLC, Rising Developers, Stonecutter Capital, Palumbo, Escarfullery, Wong, Jacobowitz, Zucker, and Kunzweiler, and those causes of action are, hereby, dismissed.

Moving defendants' motion is denied in all other respects.

This is the decision and order of the Court.

Dated: December 16, 2024

Hon. Joseph Risi, A.J.S.C.