

Board of Mgrs. of 280 St. Marks Ave. Condominium v Escorial 280 SMA, LLC
2025 NY Slip Op 31375(U)
April 1, 2025
Supreme Court, New York County
Docket Number: Index No. 656196/2023
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

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THE BOARD OF MANAGERS OF 280 ST. MARKS AVENUE CONDOMINIUM,

Plaintiff,

INDEX NO. 656196/2023

MOTION DATE 08/30/2024

MOTION SEQ. NO. 001

- v -

ESCORIAL 280 SMA, LLC, DAVID BERGER

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant’s motion is denied.

Background

Escorial 280 SMA, LLC (“Business Defendant”), a business entity whose principal is David Berger (“Individual Defendant”, together with the Business Defendant the “Defendants”), was the sponsor-developer for the development of a condominium in Brooklyn. The condominium is managed and run by the Board of Managers of 280 St. Marks Avenue Condominium (“Plaintiff”). The Business Defendant provided an offering plan and marketing materials regarding the quality of the building to prospective purchasers. The offering plan was also signed by the Individual Defendant in his personal capacity, in the Sponsor Certification. Plaintiff alleges that the building’s condition deviated from in the offering plan, violating several building codes, and that the building contained several construction defects that were not apparent until after the unit owners moved in. Plaintiff brought the underlying proceeding with

claims for breach of contract, breach of warranty, and fraud and/or negligent misrepresentation. Defendants bring the present motion to dismiss.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, “the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference.” *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, “[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

Discussion

The fraud claim in the third cause of action is predicated on a representation in the Offering Plan, stating that the sponsor “has no knowledge of any material defects or need for major repairs to the property” except for what was set forth in the description of property and specifications. It is also based on the representation in the Sponsor Certification that the Offering Plan was complete, current and accurate; did not omit material facts; and did not make untrue statements of material fact. Defendants are moving to dismiss the third cause of action pursuant

to CPLR § 3211(a)(7), arguing that the claim is for fraudulent omissions in the offering plan and therefore it is preempted by the Martin Act. Plaintiff opposes the motion on the grounds that the Martin Act only preempts fraud claims for omissions, and that here their fraud claim is based on affirmative misrepresentations, which are not preempted. For the reasons that follow, Plaintiff has sufficiently alleged affirmative misrepresentations that are not preempted by the Martin Act.

The Martin Act

The Martin Act, New York's so-called blue-sky law, authorizes the attorney general to investigate fraud and misrepresentation relating to the marketing of securities in the state. NY CLS Gen. Bus. § 352. Included in this are the representations made in offering plans for the sale of condominiums. Gen. Bus. § 352-e. The Martin Act, as it relates to condominiums, is largely a “disclosure statute” and requires that certain statements and material be included in the offering plan. *Council for Owner Occupied Housing, Inc. v. Abrams*, 72 N.Y.2d 553, 557 (1988). According to the relevant regulation passed by the attorney general pursuant to this Act, certain language is required to be in the sponsor certification, including that the offering plan does not omit any material fact or contain any false statements. 13 N.Y.C.R.R. § 20.4(b). The attorney general has the sole enforcement responsibility for the Martin Act, and there is no private right of action in the statute. *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236, 243 (2009).

Offering Plan Omissions Versus Affirmative Misrepresentations

As there is no private right of action, a claim for fraud that “relies entirely on alleged omissions from filings required by the Martin Act and the Attorney General’s implementing regulations” must be dismissed. *Kerusa*, at 246. But not all common law fraud claims by private litigants are preempted by the Martin Act, and a fraud claim that does not completely overlap

with the Martin Act requirements can be viable. *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 N.Y.3d 341, 353 (2011). In other words, to the extent that a fraud claim is based on omissions in the offering plan it is preempted, but claims based on affirmative misrepresentations are not preempted. *Board of Mgrs. of the S. Star v. WSA Equities, LLC*, 140 A.D.3d 405, 405 (1st Dept. 2016).

Here, the parties dispute whether the allegations in the complaint (that Defendants knew of the existence of certain construction defects, but they still stated in the offering plan that it “has no knowledge of any material defects”) constitute an affirmative misrepresentation or an omission. Essentially, Plaintiff argues that the statement disavowing knowledge of any material defects (other than that already disclosed) was an affirmative misrepresentation, because Defendants allegedly were aware of the hidden defects at that time. Defendants, however, argue that the language regarding material defects is required by regulation pursuant to the Martin Act, and Plaintiff’s claim is based on the *omission* of the relevant construction defects from the offering plan.

Cases where allegations have been considered affirmative misrepresentations generally involve specific misrepresentations. *Board of Mgrs. of the Walton Condominium v. 264H2O Borrower, LLC*, 2018 N.Y. Misc. LEXIS 42430, *7 (Sup. Ct. NY County 2018) (allegations of misrepresentations about the roof’s waterproof status), aff’d *Board of Mgrs. of the Walton Condominium v. 264H2O Borrower, LLC*, 180 A.D.3d 622, 622 (1st Dept. 2020); *Von Ancken v. 7 E. 14 L.L.C.*, 171 A.D.3d 440, 442 (1st Dept. 2019) (allegations that the apartment dimensions were misrepresented); *Bhandari v. Ismael Leyva Architects, P.C.*, 84 A.D.3d 607, 608 (1st Dept. 2011) (allegations that the unit floor dimensions were misrepresented); *Board of Mgrs. of 570*

Broome Condominium v. Soho Broome Condos LLC, 231 A.D.3d 424, 425 (1st Dept. 2024) (allegations that accuracy of common charges and operating budget misrepresented).

Examples of cases where allegations of fraud are considered to involve an omission rather than an affirmative misrepresentation include the total omission of the location and operation of a cooling tower. *Berenger v. 261 W. LLC*, 93 A.D.3d 175, 184 (1st Dept. 2012); *see also Board of Mgrs. of 184 Thompson St. Condominium v. 184 Thompson St. Owner LLC*, 2012 N.Y. Misc. LEXIS 6146, * 11 (Sup. Ct. NY County, 2012) *aff'd Board of Mgrs. of 184 Thompson St. Condominium v. 184 Thompson St. Owner LLC*, 106 A.D.3d 542, 544 (1st Dept. 2013) (allegations that the correct unit offering price was omitted). Defendants cite to *Kerusa* as support for their argument that allegedly attesting to the absence of any undisclosed construction defects, when the existence of said defects is known, is not an affirmative misrepresentation in the context of the Martin Act, but rather an omission. There, the plaintiff had alleged that the sponsor stated in the offering plan amendment that “there have been no material changes of facts or circumstances”, and that this statement “concealed and omitted various construction and design defects.” *Kerusa*, at 240. This claim was held by the Court of Appeals to be preempted by the Martin Act because it “relies entirely on alleged omissions from filings required by the Martin Act.” *Id.*, at 247.

Kerusa is distinguishable from the facts here. There, the allegations were that design defects were omitted from the offering plan amendments. Here, the complaint alleges that Defendants stated that it had no knowledge of any material defects. It also alleges that Defendants in fact had knowledge at that time of various building code violations and material construction defects in areas such as the ventilation, plumbing, and exterior walls. Plaintiff here does not simply allege that various material defects were omitted from mention in the offering

plan, but rather that Defendants specifically swore that certain defects they had knowledge of did not exist. This is sufficient on a motion to dismiss standard to consist of allegations of an affirmative misrepresentation, rather than simply an omission. Accordingly, it is hereby

ADJUDGED that the motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

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4/1/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE