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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: RAKOWER Justice

PART 15

Warschauer

-v-

Schneiderman etal

INDEX NO. 104181/11

MOTION DATE

MOTION SEQ. NO. #001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2

Answering Affidavits — Exhibits ____ | No(s). 3, 4, 5

Replying Affidavits ____ | No(s). 6

Upon the foregoing papers, it is ordered that this motion is

FILED

DEC 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/16/11

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CRAIG H. WARSCHAUER, M.D.

Petitioner,

-against-

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, JUDITH KAUFMAN, ASSISTANT ATTORNEY GENERAL OF THE STATE OF THE STATE OF NEW YORK, and RIVER TERRACE APARTMENTS, LLC,

Respondents.

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Index No. 104181/11

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Craig H. Warschauer, M.D. ("Petitioner") brings this petition pursuant to Article 78 of the CPLR to challenge the December 7, 2010 determination by the New York State Attorney General ("AG"), which found that respondent River Terrace Apartments, LLC ("River Terrace") was entitled to retain Petitioner's $149,000 contract deposit in connection with the August 28, 2008 Purchase Agreement for the purchase of Unit 17G of the building located at 515 East 72nd Street in New York County.

Petitioner states that on August 28, 2008, he tendered a contract deposit of $149,000 to River Terrace to be held in escrow and in trust under the Purchase Agreement and applicable regulations. Under the terms of the Purchase Agreement, all notices to Petitioner were to be "hand delivered or sent, postage prepaid, by registered or certified mail, to [Petitioner] at the address given at the beginning of this Agreement." The address provided by Petitioner was his home address: 1365 York Avenue, Apt. 23 C in New York County. Petitioner states that the Purchase Agreement and related escrow agreement required that within ten business days of receipt of the down payment, the escrow agent sent a written notice to Petitioner notifying him that the funds have been deposited into escrow, and setting forth the account number and initial interest rate. If no such notice was

provided within 10 days, the Purchase Agreement gave Petitioner the right to cancel the agreement within 90 days after tender of the down payment.

Petitioner claims that the Escrow Agent never served the required notice on Petitioner, and failed to serve his attorney within ten business days, and Petitioner subsequently exercised his right to terminate the Purchase Agreement. However, River Terrace "refused to acknowledge" Petitioner's right to terminate the Agreement.

In addition, Petitioner claims that River Terrace failed to disclose a number of construction and financial problems that it faced. On February 13, 2008 River Terrace was sued by PHB Catalyst Group for damages in the amount of $149,000 that it allegedly owed for construction management services. PHB also claimed a lien against the premises. On May 22, 2008, Dune Road Group, Inc. sued River Terrace, alleging that River Terrace owed Dune $191,182 for marketing services. Petitioner further points out that, on September 12, 2008, James Sheehan, project manager and "authorized representative" of River Terrace, swore under penalty of perjury in the PHB action that "the construction work completed under [PHB's] supervision as the Construction Manager was substandard and failed to meet the standards and requirements set forth in the Construction Management Agreement." Sheehan further averred that River Terrace discovered construction defects in October 2007. However, neither the defective conditions nor the pending lawsuits against Petitioner were disclosed to Petitioner.

On September 18, 2008, River Terrace sent Petitioner notice that the closing would occur on October 20, 2008. However, Petitioner asserts that he could not have been in default for not closing "because there was a substantial mechanic's lien on the building and his unit at that time." Petitioner states that the mechanic's lien was not discharged until January 23, 2009.

Petitioner further notes that, on May 6, 2009, Pinnacle Contractors of NY, Inc. filed a notice of mechanic's lien against the premises; and that on May 27, 2009, Pinnacle commenced a lawsuit for $6,500,000 in unpaid construction bills.

Petitioner states that River Terrace's financial and construction-related problems were not disclosed to Petitioner, in an amendment to the Offering Plan or otherwise.

Petitioner also alleges that he "was coerced into signing the contract of sale even though [River Terrace] had not provided him with a copy of the Offering Plan." Although River Terrace served a copy upon Petitioner's attorney, Petitioner argues that "[t]he contract of sale ... is a nullity and cannot be enforced by [River Terrace]" because he was never personally served a copy.

In addition, Petitioner alleges that River Terrace's in-house sales agent fraudulently misrepresented to Petitioner that 60 percent of the building's units had been sold. In fact, Petitioner learned after signing the purchase agreement that the only 40 percent of the units were sold. Petitioner claims that "the lenders would not approve a mortgage at the property for that reason, that the building was high risk, and that [River Terrace] could go into bankruptcy."

Petitioner further alleges that the Miraval Spa, which he describes as "the centerpiece of the common areas at the premises, was not completed due to the financial difficulties experienced by River Terrace.

On November 5, 2008, Petitioner (by counsel) sent a notice cancelling and rescinding the contract of sale for failure of the Escrow Agent to send the required notice about the contract deposit amount. River Terrace responded by letter dated November 14, 2008, claiming that it complied with the notification requirement by mailing the Escrow Notice to Petitioner's attorney on September 5, 2008. Petitioner's counsel responded by letter dated November 17, 2008 disputing that Petitioner's prior attorney ever received a copy of the escrow account notice. This was accompanied by an affidavit by the attorney denying that he ever received notification, either orally or in writing, from the Escrow Agent.

Petitioner further alleges that River Terrace has also failed to comply with federal disclosure laws concerning lead paint hazards.

On May 22, 2009, River Terrace submitted an application to the AG pursuant to 13 NYCRR §23.3(q)(2)(ix) seeking a release of the down payment due to Petitioner's failure to close on the closing date and subsequent failure to cure. On July 9, 2009, Petitioner responded to River Terrace's application and applied for release of his down payment based upon the allegations set forth above.

In its December 7, 2010 decision, the AG found that River Terrace was entitled to retain Petitioner's down payment as liquidated damages. Petitioner subsequently commenced this Article 78 proceeding.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

With respect to Petitioner's argument that he was not personally served with the Offering Plan by River Terrace, the AG found that service upon his attorney was sufficient. The AG observed that General Business Law ("GBL") §352-e(5) provides that

> No offering or sale whatever of securities ... shall be made except on the basis of information, statements, literature, or representations constituting the offering statement or statements or prospectus ... and no information, statements, literature, or representations shall be used in the offering or sale of securities ... unless it is first so filed and the prospective purchaser furnished with true copies thereof.

The AG determined that River Terrace's service of Offering Plan upon Petitioner's attorney was proper because attorneys are agents for their clients (*citing Link v. Wabash R. Co.*, 370 U.S. 626 [1962]; *Smith v. Ayer*, 101 U.S. 320 [1879]; and *Lesnick v. Cutter*, 225 A.D.2d 367 [2nd Dept. 1998]). The AG further noted that it is customary to serve an Offering Plan upon an attorney rather than the purchaser, where the purchaser is represented by legal counsel, and consistent with State Rules of Professional Conduct prohibiting direct contact with a party who is represented by counsel (*citing* 22 NYCRR §1200.0).

The court finds that the AG's determination that the Offering Plan was properly served upon Petitioner is supported by a rational basis.

With respect to Petitioner's alleged non-receipt of the Escrow Notice, the AG observed that pursuant to the Offering Plan and 13 NYCRR §20.3(q)(2)(vi),

> Within ten (10) business days after tender of the deposit submitted with the subscription or purchase agreement, the escrow agent shall notify the purchaser that such funds have been deposited in the bank indicated in the offering plan, and provide the account number, and the initial interest rate. If the purchaser does not receive notice of such deposit within fifteen (15) business days after tender of the deposit, he or she may cancel the purchase and rescind within ninety (90) days after tender of the deposit, or may apply to the Attorney General for relief. Rescission may not be afforded where proof satisfactory to the Attorney General is submitted establishing that the escrowed funds were timely deposited in accordance with these regulations and requisite notice was timely mailed to the purchaser.

The AG found that "[t]he Escrow Notice, signed by the Escrow Administrator and dated September 5, 2008, is sufficient evidence that the Escrow Notice was actually mailed on or about September 5, 2008." Since the Escrow Notice was addressed to Petitioner's attorney "at the address indicated on his professional letterhead, it is presumed to have been delivered to that address." The AG also noted that under the Purchase Agreement, "the date of ... mailing shall be deemed to be the date of the giving of notice."

The court finds that this finding was rationally based. Although Petitioner's attorney provided an affirmation of non-receipt of the Escrow Notice, the AG concluded that, under the Purchase Agreement, notice was given on September 5, 2008, irrespective of whether or not Petitioner's attorney actually received the mailing. Further, although River Terrace did not provide an affidavit of service of the Escrow Notice at the administrative level (as it does in this proceeding), the above-cited regulation requires only "proof satisfactory to the Attorney General." Accordingly, the AG was entitled to rely on the date of the Escrow Notice and its listing of Petitioner's attorney as the addressee to conclude that the Escrow Notice was in fact sent to Petitioner's attorney on that date.

The AG further concluded that the liens and lawsuits against River Terrace did not constitute a material adverse change to the offering, such that disclosure was required under the Martin Act. With respect to the lien filed in the PHB action, the AG noted that "it would not have affected [River Terrace's] ability to fulfill its obligations to [Petitioner] pursuant to the Agreement and the Plan as they were bonded prior to the date of the Agreement." The AG further noted that "[t]he Pinnacle Liens and the Pinnacle Action were filed almost a year after [Petitioner] executed the Agreement and months after the Closing Date and the Cure Date, and therefore would not have been relevant to Purchaser's decision to purchase."

Moreover, speaking to the claim that River Terrace should have disclosed, as it alleged in the PHB action, that the construction work performed was "substandard" and "defective," the AG found that Petitioner failed to "provide any substantive evidence to show that the alleged 'substandard' and 'defective' construction work and subsequent property damage were not remedied." The AG further noted that in its counterclaim, River Terrace specifically alleged that it was forced to hire other contractors to *remedy* the alleged defects.

As for the Dune Road action, River Terrace stated that the action was the result of a dispute between Dune Road and River Terrace's former Selling Agent, and that the action was "promptly settled." River Terrace further stated that Dune Road continues to work with River Terrace on marketing the condominium. The AG noted that Petitioner did not dispute any of this.

Based upon the foregoing, the court finds that the AG rationally concluded that the actions and liens cited by Petitioner did not constitute material adverse changes to the Offering Plan.

The AG also rejected Petitioner's argument that he had a right to rescind the Purchase Agreement based upon an alleged misrepresentation by River Terrace's Selling Agent concerning the number of units sold. The AG found that this claim was precluded by Paragraph 23 of the Purchase Agreement, which provided:

> NO REPRESENTATIONS. Purchaser acknowledges that Purchaser has not relied upon any ... advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Sponsor, Selling Agent or otherwise ... except as herein or in the Plan specifically represented, Purchaser having relied solely

> on his own judgment and investigation in deciding to enter into this Agreement and purchase the Unit.

The AG, citing *First Nationwide Bank v. 965 Amsterdam, Inc.*, (212 A.D.2d 469, 471 [1st Dept. 1995]), noted that "where the party alleging fraud has made its own specific representation indicating that it is not relying on the alleged inducement, it is foreclosed from establishing its asserted reliance on the ground that it misrepresented its true intention."

The court finds that this determination was rationally based and therefore cannot be disturbed.

The AG also rationally rejected Petitioner's arguments concerning the spa. As noted by the AG, "[b]oth the Plan and the Agreement disclose that 'Sponsor will determine at what point the LifeStyle Unit will open and owners of Residential Units will be required to commence paying LifeStyle Fees on such date, which dates must be the same.'" The AG found that River Terrace "did not represent that the LifeStyle Unit would be complete before [Petitioner's] Closing Date, and [Petitioner] has not provided any evidence to show that [River Terrace] does not intend to and/or does not have sufficient resources to fulfill its obligation to complete the LifeStyle Unit, or any other part of the Condominium."

Lastly, the AG rejected Petitioner's claim that River Terrace failed to comply with lead paint disclosure requirements. The AG noted that

> The federal government issued a final ban on the use of lead-based paint in 1977, more than ten years before the Condominium building was constructed. Thus, there is no indication that lead-based paint or lead-based paint hazards are present in the Condominium. Furthermore, the Lead-Paint Disclosure Act states: 'Nothing in this section shall affect the validity or enforceability of any sale or contract for the purchase and sale or lease of any interest in residential real property ... nor shall anything in this section create a defect in title.' 45 U.S.C. §4852d(c); *see also* Smith v. Coldwell Banker Real Estate Services, 122 F. Supp.2d 267 (D. Conn. 2000)"

The court finds that this conclusion was rationally based.

In addition to the claims made before the AG, Petitioner advances two additional claims in this Article 78 proceeding.

First, Petitioner claims that the AG's failure to allow him to submit a further reply to submissions made by River Terrace deprived him of his right to due process. "It may ... be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights" (*Pacifica Foundation v. Lewisohn*, 79 Misc. 2d 550, 552 [Sup. Ct., N.Y. Co. 1974], *citing Stuart v. Palmer*, 74 N.Y. 183 [1878]). The AG's authority to determine such disputes is established by 13 NYCRR §23.3(q)(2)(ix)(a), which provides that "[i]n the event of a dispute, the sponsor shall apply and the purchaser or the escrow agent holding the down payment[] in escrow may apply to the Attorney General for a determination on the disposition of the down payment and any interest earned thereon."

Here, review of the record indicates that the AG's actions accorded with due process of law. Petitioner had a full and fair opportunity to respond to River Terrace's application by submitting papers outlining his position to the AG; the subsequent submissions by Riverside Terrace were made at the specific request of the AG, which sought clarification of several issues in Riverside Terrace's application. Petitioner provides no legal authority that would allow this court to dictate, constrain or otherwise interfere with the AG's fact-finding authority in the manner sought by Petitioner herein.

Petitioner further claims that another lawsuit in which River Terrace is named as a defendant filed in January 2008. However, inasmuch as the lawsuit was not raised at the administrative level, it is not properly before the court in this Article 78 proceeding.

Wherefore, it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 16, 2011

FILED

EILEEN A. RAKOWER, J.S.C.

DEC 19 2011