SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAPNICK Justice PART 39

B&C REALTY CO.

- v -

159 EMMUT PROPERTIES LLC. et al.

INDEX NO. 601110/10

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2/13/12

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39

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B&C REALTY CO.,

Plaintiff,

- against -

159 EMMUT PROPERTIES LLC,
530 EMMUT PROPERTIES, LTD. and
JOHN YOUNG,

Defendants.

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DECISION/ORDER
Index No. 601110/10
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

The instant action involves the 5000-square-foot mixed-use rental building located at 159-161 Bleecker Street (a/k/a "159 Bleecker Street") (the "Building") in Greenwich Village. Plaintiff B&C Realty Co. ("B&C Realty") alleges that defendants 159 Emmut Properties LLC ("159 Emmut"), 530 Emmut Properties, Ltd. ("530 Emmut"), and John Young ("Young")[1] fraudulently induced it to purchase the Building at an inflated price by hiding various zoning violations.

Background

In 2004, the initial building plans for 159 Bleecker were filed with the New York City Department of Buildings ("DOB").

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[1] B&C Realty is a New York general partnership. 159 Emmut is a New York limited liability company. Young is the sole owner of 159 Emmut and 530 Emmut and is also Vice President of 530 Emmut, which is a New York corporation. 159 Emmut's membership consists of 530 Emmut, Young, and Young's wife.

Plaintiff alleges that defendants, in the initial plans, falsely represented to the DOB that the Building would consist, in part, of student housing, a misrepresentation that entitled defendants to file under conventional zoning regulations without height restrictions, which allowed for an eight-story building. Complaint, ¶ 11; Affidavit of Christopher V. Papa, an architect, sworn to on August 31, 2010, ¶ 9.

In April 2007, defendants filed amended building plans with the DOB. The plans indicated that 159 Bleecker was now subject to the Quality Housing Program Zoning Regulations, which, as relevant here, cap building heights at seventy-five feet. Papa Aff. ¶¶ 11, 18-20. Those plans contemplated a building seventy-five feet tall with eighteen dwelling units, 14,338 square feet of residential floor area and 32,780 total square feet. *Id.*, ¶ 11, Ex. B. The plans were "represented to the [DOB] to be the final 'As Built' building plans." *Id.*, ¶ 12. At that time, however, the Building already had an eighth floor which exceeded the seventy-five foot cap and which was originally meant to be residential, but had allegedly been converted into a boiler room. *Id.*, ¶¶ 21, 32.

The Building received some fifteen (15) temporary Certificates of Occupancy ("C of O") before receiving a final C of O in August 2010. All of the temporary Certificates indicated that the

Building had eight (8) stories. However, the "as-built" plans and the final C of O both indicate that the Building has only seven (7) stories. Papa Aff., ¶27-28.

On February 28, 2008, non-party Shlomo Karpen ("Karpen") (and another party) contracted with 159 Emmut to purchase 159 Bleecker for $23,000,000.00 (the "Contract") with the closing to take place on May 15, 2008 and with time being of the essence.

Sections 5.01 and 5.02 of the original Contract provide, in pertinent part:

> §5.01 Purchaser has inspected the Premises, is fully familiar with the physical condition and state of repair thereof, and subject to the provisions of §7.01, §8.01, and §9.04, shall accept the Premises "as is" and in their present condition...
>
> §5.02 Before entering into this contract, Purchaser has made such examination of the Premises, the operation, income and expenses thereof and all other matters affecting or relating to this transaction as Purchaser deemed necessary. In entering into this contract, Purchaser has not been induced by and has not relied upon any representations, warranties or statements, whether express or implied, made by Seller or any agent, employee or other representative of Seller or by any broker or any other person representing or purporting to represent Seller, which are not expressly set forth in this contract, whether or not any such representations, warranties or statements were made in writing or orally.

Karpen and 159 Emmut amended the Contract twice. The second amendment, entered into on November 14, 2008, extended the closing date to January 7, 2009, and decreased the purchase price to $18,025,000. Karpen deposited $1,000,000.00 into an escrow account to secure the purchase; however, the parties never closed on the deal.

Around this time, B&C Realty expressed interest in acquiring Karpen's purchase rights, and having recently realized gains on real-estate sales, wanted to treat the purchase as a "like-kind exchange" under Section 1031 of the Internal Revenue Code (the "Code"), which excludes exchanges of investment property from income gains "if such property is exchanged solely for property of like kind." 26 USC 1031(a)(1) (2006). The Code disallows this exclusion, however, if the exchange is not completed within 180 days of the gain-producing transaction. 26 USC 1031(a)(3)(B)(i). For B&C Realty, this meant that the 180-day window would close on January 6, 2009, a fact about which it "repeatedly informed Young." Complaint, ¶ 25.

Accordingly, B&C Realty severed the transaction into two phases. The first phase was the "like-kind exchange," which consisted of the purchase of a 7% tenant-in-common fee interest for

[* 6]

$2,000,000.00, and was to be completed by January 6, 2009. In the second phase, B&C Realty planned to purchase the remaining 93% interest for $16,025,000.00 by October 6, 2009. *See* "3rd Amendment to Sale-Purchase Agreement" (the "Third Amendment").

According to plaintiff, "B&C Realty entered into a written agreement with Mr. Karpen" around November 2008. This agreement assigned to B&C Realty "Mr. Karpen's rights to acquire the remaining 93% fee in [Karpen's twice-amended contract with 159 Emmut]." Complaint, ¶ 31.

Karpen, 159 Emmut, and B&C Realty then executed the Third Amendment, dated as of December 31, 2008, which provided that 159 Emmut would sell to B&C Realty the 7% fee for $2 million ($1 million of which was to come from Karpen's contract deposit), closing to take place "on or before January 6, 2008 [*sic, recta* 2009]." The Third Amendment specifically provided in paragraph 4 that

> In the event the closing for the purchase of the remaining undivided 93% interest in [159 Bleecker] does not take place on or before October 6, 2009, time being of the essence against [Karpen], as a result of [Karpen's] acts, then . . . [B&C Realty] shall transfer its undivided 7% interest in [159 Bleecker] back to [159 Emmut] for zero consideration and forfeits the purchase price paid to [159 Emmut].

Further, the Third Amendment required B&C Realty to place the deed

for its 7% interest in escrow and authorized its immediate release to 159 Emmut upon non-payment. *Id.* The parties also "agree[d] that they shall not file a Lis Pendens against [159 Bleecker] for any reason [...]" *Id.*, ¶ 4.

Additionally, the Contract of Sale entered into pursuant to the Third Amendment, dated January 6, 2009, contains the following merger clause: "[A]ll [prior] understandings and agreements . . . between the parties [to this contract] are merged in this contract, which alone fully and completely expresses their agreement."

The Contract of Sale also contains a disclaimer clause which states that "the [contract] is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other."

Finally, the Contract of Sale contains an as-is clause which states that "[t]he purchaser has inspected the buildings standing on [159 Bleecker] and is thoroughly acquainted with their condition and agrees to take title 'as is' and in their present condition."

B&C Realty completed the 7% purchase pursuant to the Contract of Sale dated January 6, 2009, but the remaining 93% purchase never

took place. B&C Realty contends that it was only after it entered into the Contract of Sale with 159 Emmut and paid them $2,000,000 that B&C Realty discovered that it had been induced to do so as the direct and proximate result of defendants' fraudulent scheme. Complaint, ¶ 38.

Plaintiff thereafter sought to rescind the Contract of Sale and recover the $2,000,000 from defendants to no avail. Complaint, ¶ 43. B&C Realty further asserts that defendants "fraudulently and otherwise unlawfully filed the 'Return Deed' provided to 159 Emmut . . . sometime in March 2009." Complaint, ¶ 44.

According to plaintiff, the "fraudulent scheme" consists of the following misrepresentations made by Young, on behalf of Emmut 159, to Benjamin Hirsch, the managing general partner of B&C Realty:

(1) the Building was a legally constructed and then-existing eight story rental building aggregating 37,643 square feet of space;

(2) the eighth floor housed the boiler room and two legally constructed and then-existing units;

(3) the Building contained twenty four legally constructed and then-existing units;

(4) the Building contained 20 legally constructed and then-

existing residential units; and

(5) the Building contained 3 legally constructed and then-existing office units and a ground floor unit that included a mezzanine level and a basement.

Complaint, ¶ 17.

Plaintiff further alleges that Young made materially fraudulent statements when he told Hirsch on multiple occasions that the final C of O was still pending only because the "floor area ratio" ("FAR") was slightly in excess of the maximum FAR allowed by the New York City Zoning Resolution and that this situation was "insignificant," would be remedied and a final C of O secured. Complaint, ¶ 19.

Plaintiff claims that it only discovered the following misrepresentations and omissions of material facts in or around January 2010, more than a year after it had entered into the Third Amendment in December 2008, which render the Building illegal:

(1) that the DOB audited the initial plans filed by the defendants (on or about September 22, 2004) and discovered material violations of the zoning laws;

(2) that the Building exceeds the height restrictions of the zoning law, which limits the height of the Building to a

maximum height of 75 feet;

(3) that on or about April 11, 2007, the defendants filed an amendment to the building plans with the DOB which falsely represented that the ceilings of the individual floors were going to be lowered so that the total height of the Building would be under 75 feet;

(4) that despite the representations made to the DOB regarding intended changes to the building plans, defendants nevertheless built the Building according to the original plans, making it above 75 feet and in violation of the zoning laws; and

(5) that sometime after B&C Realty entered into the Third Amendment in December 2008, the defendants sheet-rocked the entranceway to the eighth floor to conceal the illegal eighth floor from inspection by plaintiff and the DOB. Defendants also programmed the elevator to skip the eighth floor and go directly to the roof, which constituted another building code violation and an inherently dangerous condition.

Complaint, ¶ 39.

Plaintiff filed the instant Verified Complaint on or about April 27, 2010. Plaintiff asserts therein eight causes of action:

(1) fraudulent inducement based on the assertion that defendants owed plaintiff a legal duty independent of the contractual one and that the defendants made material misrepresentations to plaintiff with the intent to deceive; (2) fraud; (3) promissory estoppel; (4) bad faith/breach of good faith and fair dealing; (5) breach of contract; (6) conversion based on the fact that B&C Realty was the lawful owner of the $2,000,000 that it paid to defendants and the defendants converted and intentionally interfered with the foregoing assets by improperly exercising dominion and control over them; (7) economic duress based on the assertion that plaintiff was forced to agree and accede to the Third Amendment by means of wrongful threats of the defendants not to sell the 7% fee interest by January 6, 2009; and (8) specific performance.

Concurrent with commencing the instant action, plaintiff filed a notice of pendency (the "Notice of Pendency") against the Building. Complaint, ¶ 99.

Defendants now move for an order:

(1) pursuant to CPLR 3211(a)(7) dismissing the Verified Complaint against Young and 530 Emmut on the ground that the Complaint fails to state a cause of action against them;

(2) pursuant to CPLR 3211(a)(1) dismissing the Verified

Complaint on the ground that all defendants have a complete defense founded upon documentary evidence; and

(3) dismissing and vacating the Notice of Pendency placed against 159 Bleecker.

To the extent that defendants succeed on their motion in whole or in part, plaintiff requests leave to amend its Complaint.

Discussion

It is well settled that

> [o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 NY2d 83, 87-88 (1994) (internal citations and quotation marks omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13

NY3d 358, 373 (2009); (citing *Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-34 [1st Dep't 1994]).

Motion to Dismiss Pursuant to CPLR 3211(a)(1)

First, Second and Third Causes of Action - Fraudulent Inducement, Fraud and Promissory Estoppel

Plaintiff's first three causes of action all require an element of justifiable or reasonable reliance. Therefore, the Court will analyze them together.

First, to establish a claim for fraudulent misrepresentation, "a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" *Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 178 (2011) (quoting *Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 [1996]).

Reliance is not justified where "'a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means.'" *Arfa v. Zamir*, 76 AD3d 56, 59 (1st Dep't 2010), aff'd 17 NY3d 737

(2011). In *Arfa*, the alleged misrepresentations included "fail[ing] to disclose structural and foundational defects . . . and building code violations." *Id.* at 57. The Appellate Division found that had plaintiffs performed due diligence and investigated the building, the alleged misrepresentations - "all of which concerned the physical condition of the building as reflected in engineering reports and noticed violations - presumably would have been revealed." *Id.* at 59. However, plaintiffs there did not allege "that they conducted any such due diligence, . . . that [the defendant] prevented them from doing so, [or] . . . even allege that they asked [for] the engineering reports . . . at any time before entering into the . . . Agreement." *Id.*

Second, "[i]n order to establish fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 (1st Dep't 2011).

Third, "[t]he elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *MatlinPatterson ATA Holdings LLC v.*

Federal Express Corp., 87 AD3d 836, 841-42 (1st Dep't 2011).

At oral argument held on the record on December 23, 2010, plaintiff's counsel stated that plaintiff performed "[t]he due diligence that would be undertaken by any buyer of a real estate property," which was "to go to the Department of Buildings [and] look at the [...] 'as-built building plans' and ancillary documents[...]" Oral Arg. Transcript at 16:18-24. Plaintiff has not pled or otherwise indicated that it performed a physical inspection of the Building, that defendants prevented plaintiff from physically inspecting the Building, or that plaintiff requested or was denied engineering reports.

Moreover, in the Papa Affidavit submitted by plaintiff in opposition to defendants' motion to dismiss, Papa indicates that Moshik Regev ("Regev"), a client of his firm who was considering the possibility of selling residential units in the Building, had reviewed the plans filed with the DOB and other documentation and inspected the Building to the extent he could secure access which "raised serious issues [as to] whether the [Building] was actually constructed in accordance with the Amended Building Plans as well as whether the [Building] conform[ed] with the New York City Zoning Resolutions." Papa Aff., ¶¶ 3-4. Regev inspected the same documents on file with the DOB which plaintiff's counsel claimed at

oral argument that plaintiff had inspected. However, unlike plaintiff, Regev took the additional step of physically inspecting the Building which "in his opinion raised serious issues." *Id.*

Because plaintiff, a realty partnership, did not even conduct a physical inspection of the Building, it has failed to show that it performed its due diligence. Moreover, as discussed earlier, the Contract of Sale contained an "as-is" clause in which plaintiff represented it had inspected the Building, was "thoroughly acquainted" with [its] condition and agreed to take title "as is" with the Building "in [its] present condition." It is clear, as in *Arfa*, that plaintiff "ha[d] the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fail[ed] to make use of those means." *Id.* at 60. Accordingly, plaintiff's reliance on any alleged misrepresentations or omissions by defendants was neither reasonable nor justified. Plaintiff's first three causes of action are, therefore, dismissed.

Fourth Cause of Action - Bad Faith and Breach of Implied Covenant of Good Faith and Fair Dealing

"[T]he implied covenant of good faith and fair dealing 'embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 NY3d 208, 228 (2011) (quoting *Dalton v.*

Educational Testing Serv., 87 NY2d 384, 389 [1995]).

Here, despite plaintiff's claims that the Building is in violation of various city zoning laws, which fact might deprive plaintiff of its full benefits under the Third Amendment, a final C of O was, in fact, issued by the DOB. Thus currently, in the eyes of the law, there are no violations on the Building. To the extent that plaintiff may seek to have the C of O invalidated or vacated, plaintiff should address itself to the DOB which issued the certificate, not to this Court. Accordingly, plaintiff has not shown that its right to receive the fruits of its contract was either destroyed or injured by defendants' alleged conduct. For the foregoing reasons, plaintiff's claim for breach of the implied covenant of good faith and fair dealing is dismissed.

Fifth Cause of Action - Breach of Contract

Plaintiff's fifth claim is for breach of contract. "The elements of [a breach of contract] claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dep't 2010).

Here, even assuming that plaintiff fully performed its contractual obligations as it pleads in the Complaint, plaintiff fails to plead with any specificity defendants' actions or

omissions which might constitute breach of contract. Instead, plaintiff merely alleges that 159 Emmut breached the Third Amendment "by failing to perform thereunder" (Complaint, ¶ 80), and does not provide any additional color as to the nature of defendants' alleged conduct. These bare legal conclusions, with no factual specificity, "are insufficient to survive a motion to dismiss." *Godfrey v. Spano, supra.* However, because plaintiff alleges in a footnote in its opposition papers that defendants breached Section 7 of the Contract of Sale by not removing or complying with any violations pre-dating the Contract of Sale, this Court, in the exercise of its discretion, grants plaintiff's request for leave to amend its breach of contract claim.

Sixth Cause of Action - Conversion

Under a traditional construct, conversion is "'the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.'" *Thyroff v. Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-89 (2007) (*quoting State v. Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 (2002)). "Where the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner." *Republic of Haiti v. Duvalier*, 211 AD2d 379, 384 (1st Dep't 1995). "'[A]n action sounding in conversion does not lie where the property involved is

real property.'" *Benn v. Benn*, 82 AD3d 548, 550 (1st Dep't 2011) (quoting *Dickinson v. Igoni*, 76 AD3d 943, 945 (1st Dep't 2010)).

Here, to the extent that plaintiff bases its argument on the alleged conversion of its 7% interest in the Building, such claim would fail under *Benn*, which bars claims for conversion of real property. Alternatively, if plaintiff is alleging that defendants converted the $2,000,000 which plaintiff paid to defendants in exchange for their 7% interest in the Building, that position would necessarily be premised on the theory that no legal transfer in title ever took place and, therefore, ownership of the funds always remained with plaintiff. The Court finds this argument unavailing and belied by the facts, particularly given plaintiff's claim that defendants improperly filed the Return Deed; there could be no return of title to defendants if title had not been transferred to plaintiff in the first instance. In any event, plaintiff's conversion claim must fail under the *Republic of Haiti* case, *supra*, because plaintiff has not alleged or shown that the $2,000,000 is "specifically identifiable and [...] subject to an obligation to be returned or to be otherwise treated in a particular manner." 211 AD2d at 384. Thus, plaintiff's claim for conversion is dismissed.

Seventh Cause of Action - Economic Duress

"The existence of economic duress is demonstrated by proof

that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand." *805 Third Ave. Co. v. M.W. Realty Associates*, 58 NY2d 447, 451 (1983).

Here, plaintiff contends that it was forced to agree and accede to the terms of the Third Amendment because, in essence, time was running out before the close of the window in which plaintiff could make its section 1031 "like-kind exchange," and defendants somehow benefitted from this time restraint. Plaintiff's claim is deficient because the alleged conduct took place *before* the parties entered into the Third Amendment. Accordingly, plaintiff's claim for economic duress is dismissed.

Eighth Cause of Action - Specific Performance

Because plaintiff is granted leave to amend its claim for breach of contract, it would be premature to dismiss its claim for specific performance at this time.

Motion to Dismiss Pursuant to CPLR 3211(a)(7)

Defendants move for an order dismissing the Verified Complaint against defendants Young and 530 Emmut on the ground that the Complaint fails to state a cause of action against them.

Limited Liability Company Law ("LLC Law") section 609(a) provides that

> "[n]either a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company.

Here, Young executed the Third Amendment on behalf of 159 Emmut, a limited liability company, in his official capacity as member. Further, 530 Emmut, which is also a member of 159 Emmut, is not a signatory to the Third Amendment. Since all the causes of action except for breach of contract and specific performance have been dismissed with prejudice, that portion of the motion to dismiss the Complaint insofar as it is pled against Young and 530 Emmut is granted.

Motion to Dismiss and Vacate Notice of Pendency

Defendants also move for an order dismissing and vacating the Notice of Pendency based on their assertion of plaintiff's bad faith and the specific language of paragraph 4 of the Third Amendment pursuant to which B&C Realty agreed not to "file a *Lis*

Pendens against the Premises for any reason."

Given that plaintiff did not specifically oppose this request in its papers and that the language of the Third Amendment is clear and unambiguous, the Notice of Pendency is hereby vacated and dismissed.

Plaintiff is directed to serve an Amended Complaint as to it claims for breach of contract and specific performance against defendant 159 Emmut only within 20 days. Defendant 159 Emmut shall have 20 days to serve an answer or otherwise move with respect to the Amended Complaint.

This constitutes the decision and order of this Court.

Dated: 3/13, 2012

Hon. Barbara R. Kapnick, J.S.C.

J.S.C.

BARBARA R. KAPNICK
J.S.C.