

Pasquier v 53-55 Warren St. Realty LLC

2015 NY Slip Op 30607(U)

April 20, 2015

Supreme Court, New York County

Docket Number: 158550/2014

Judge: Eileen A. Rakower

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

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JAZZ DU PASQUIER and FRANCOIS DU PASQUIER,

Plaintiffs,

- v -

53-55 WARREN STREET REALTY LLC, ZACH
VELLA and BENJAMIN SOLEIMANI,

Defendants.

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

Index No.
158550/2014

**DECISION
and ORDER**

Mot. Seq. 1, 2

This action arises from the construction of condominium unit number 1 (the “Apartment”), located at 53 Warren Street, New York, NY (the “Condominium”), which Plaintiffs, Jazz Du Pasquier and Francois Du Pasquier (collectively, “Plaintiffs”), owners and occupants of the Apartment, allege is defective and was not constructed in compliance with the condominium’s offering plan, applicable regulations and codes, and industry standards. The Complaint alleges, “Among the most significant and dangerous defective conditions existing in the Apartment are those found in the HVAC system and servicing the Apartment and in the electrical wiring in the Apartment.”

As alleged in the Complaint, on or about November 4, 2014, Plaintiffs, and defendant, 53-55 Warren Street Realty LLC (“53-55 Warren”), as the Sponsor, entered into a purchase agreement (the “Purchase Agreement”) for the Apartment. Defendants Zach Vella (“Vella”) and Benjamin Soleimani (“Soleimani”) are alleged to be principals of the Sponsor who were “actively involved in the planning or consummation of the Offering Plan.” Vella is also alleged to be the registered agent for 53-55 Warren. The Complaint alleges that both Vella and Soleimani signed the “Certification by Sponsor and the Sponsor’s Principals” (the “Certification”) contained in the Condominium’s Offering Plan which incorporated by reference the Purchase Agreement. Vella is alleged to have signed the Certification in his

individual capacity and as a member of the Sponsor. Soleimani is alleged to have signed the Certification in his individual capacity.

The first cause of action of the Complaint is for breach of contract. It alleges that 53-55 Warren, as Sponsor, breached its “contractual obligations under the Offering Plan and Purchase Agreement by failing to construct and deliver to Plaintiffs the Apartment as represented in the Offering Plan” and by “failing to cure the serious design and construction defects plaguing the apartment.” The second cause of action asserts a claim for Breach of Express Warranty for failure to cure the defects.

Presently before the Court under Motion Seq. 1 is Soleimani’s motion for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiffs’ Complaint as against him on the basis of documentary evidence and failure to state a cause of action. Soleimani also seeks an award of attorneys’ fees and expenses incurred in this action against Vella, pursuant to the terms of the Assignment and Assumption of Membership Interests dated January 1, 2009 (the “Assignment Agreement”) entered into between Soleimani and Vella. Plaintiffs oppose. Vella opposes the portion of Soleimani’s motion that relates to him.

Also before the Court under Motion Seq. 2 is Vella’s motion for an Order, pursuant to CPLR §3211(a)(7), dismissing Plaintiffs’ Complaint as against him for failure to state a claim. Plaintiffs oppose.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 N.Y. 3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38

A.D.3d 301 [1st Dep't 2007] [citation omitted]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept, 2003] [internal citations omitted]; CPLR § 3211[a][7]). "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 71 A.D. 3d 80, 91 [1st Dept 2009]).

"A member of a limited liability company cannot be held liable for the company's obligations solely by virtue of his or her status as a member thereof." (*Matias ex rel. Palma v Mondo Props. LLC*, 43 A.D. 3d 367, 367-68 [1st Dept 2007]). Rather, "in order to pierce the corporate veil, a doctrine applicable to limited liability companies", the moving party bears the heavy burden of showing that the company was dominated by the owners or members as to the transaction at issue and that such domination resulted in a wrong. (*Matias*, 43 A.D. 3d at 368 [1st Dept 2007]). A plaintiff must plead detailed allegations of fraud or corporate misconduct. (*Sheridan Broadcasting Corp. v Small*, 19 A.D. 3d 331 [1st Dept 2005]).

In *Board of Mgrs. of 184 Thompson St. Condominium St. Owner LLC*, 106 A.D. 3d 542, 544 [1st Dept 2013], the First Department held, "The motion court correctly determined that Non-sponsors may not be held individually liable for any of plaintiff's claims premised solely on alleged violations of the offering plan and certification" ("The statements made by defendants in the certification and the plan were mandated by the Martin Act, and plaintiff does not posit any basis of liability outside of that statute, nor assert that the Non-Sponsors are liable under an alter-ego or other veil-piercing theory.")

The two causes of action asserted in the Complaint are for breach of contract and Breach of Express Warranty are based upon the allegations that 53-55 Warren, as Sponsor, breached its "contractual obligations under the Offering Plan and Purchase Agreement by failing to construct and deliver to Plaintiffs the Apartment as represented in the Offering Plan" and by "failing to cure the serious design and construction defects plaguing the apartment." The second cause of action asserts a claim for Breach of Express Warranty for failure to cure the defects.

Accepting all allegations contained in the Complaint as true and drawing all inferences in favor of the non-moving party, the four corners of the Complaint fail to state a claim against Soleimani and Vella (collectively, "Defendants") in their individual capacities. The Complaint alleges only that Soleimani and Vella were principals of the Sponsor who were "actively involved in the planning or consummation of the Offering Plan" and that that they both signed the "Certification by Sponsor and the Sponsor's Principals" contained in the Condominium's Offering Plan which incorporated by reference the Purchase Agreement. Vella is alleged to have signed the Certification in his individual capacity and as a member of the Sponsor. Soleimani is alleged to have signed the Certification in his individual capacity. There are no allegations of fraud or any wrongdoing by Soleimani and Vella in their individual capacities. In addition, Plaintiff makes no factual allegations in their complaint that support an alter-ego or piecing the corporate veil theory of liability against Defendants. As Defendants' signing of the "Certification by Sponsor and the Sponsor's Principals" alone is insufficient to impose liability and there are no additional factual allegations of any wrongdoing against them, the Complaint fails to state a claim against them. *Board of Mgrs.*, 106 A.D. 3d at 544.

Soleimani also seeks an award of attorneys' fees and expenses incurred in this action against Vella pursuant to the terms of the Assignment Agreement, whereby Soleimani assigned and Vella assumed Soleimani's membership interests in defendant, 53-55 Warren Street LLC. Vella opposes. However, Soleimani has not asserted any claims or cross-claims against Vella. Furthermore, Vella argues that the provision of the Assignment Agreement provides Soleimani with indemnity for damages sustained as a result of Vella's "failure to perform any covenant or agreement" of his obligations under the agreement, and there has been no adjudication that Vella failed to do so.

Wherefore it is hereby,

ORDERED that defendant Benjamin Soleimani's motion to dismiss Plaintiff's Complaint as against him individually is granted and the Clerk is directed to enter judgment accordingly (Mot. Seq. #1); and it is further

ORDERED that defendant Zach Vella's motion to dismiss Plaintiff's Complaint as against him individually is granted and the Clerk is directed to enter judgment accordingly (Mot Seq. #2); and it is further

ORDERED that the remainder of the action as against defendant, 53-55 Warren Street Realty LLC, shall proceed.

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

DATED: APRIL 20 2015



EILEEN A. RAKOWER, J.S.C.