SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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MARY ELLEN VON ANCKEN and ROBERT VON ANCKEN,

Plaintiffs,

Index No. 156497/13

-against-

7 EAST 14 LLC; NEST SEEKERS INTERNATIONAL LLC; and NEST SEEKERS LLC,

Defendants.

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DEBRA JAMES, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

Defendant 7 East 14 LLC (7 East) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint (motion sequence number 004). Defendants Nest Seekers International LLC and Nest Seekers LLC (together, Nest Seekers) move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint as against them on the grounds that it fails to state a cause of action and is barred by documentary evidence (motion sequence number 005).

The following facts are undisputed.

Plaintiffs Mary Ellen Von Ancken and Robert Von Ancken purchased a co-op apartment from defendant 7 East in March 2011. Nest Seekers was the sales agent for the apartment.

In July 2013, plaintiffs commenced this action, alleging that they were damaged because a floor plan of the apartment

provided by Nest Seekers represented that the apartment was 1,966 square feet, when the actual square footage of the apartment is 1,495. Plaintiffs contend that they would not have paid the purchase price of $2,125,000 if they had known the actual square footage of the apartment.

The purchase agreement (Agreement) for the co-op does not set forth the square footage of the apartment, but lists the number of shares being purchased, the purchase price, and the apartment number. Agreement ¶ 9 states that the purchasers acknowledge that they inspected the apartment and agree to accept it in "AS IS" condition. Agreement ¶ 11 recites the warranties included in the purchase agreement, which consist of those concerning the status of the shares and the seller's ownership of the shares. Agreement ¶ 24 makes further representations and warranties, which concern the condition of the plumbing, heating, air conditioning and electric systems, possession of the unit, and that permits required for any alterations were properly obtained. Agreement § 28 provides that access to the apartment was permitted "in order to take measurements and make other arrangements for [purchasers'] intended occupancy thereof."

Both the Agreement ¶ 29 and the offering plan specifically state that such constitutes the entire agreement between the parties, "set forth the only representations made to Purchaser, that the Purchaser has not relied upon any other representations,

statements or warranties, written or oral, as to any matter or estimate that are not set forth herein or in the Plan." That paragraph of the agreement further provides:

> Purchaser understands that no one has been authorized to make any representation or warranty not set forth herein or in the Plan, as amended. ... Purchaser has not relied upon any representations, statements or warranties, written or oral, whether expressed or implied, made by Sponsor/Seller or by any agent, employee or other representative of Sponsor/Seller, or by any broker or any other person representing or purporting to represent Sponsor/Seller that are not set forth herein or in the Plan, as amended. Purchaser acknowledges that he has had full opportunity to make such examination and investigation as Purchaser deemed necessary.
>
> All representations, understandings and agreements had between the parties with respect to the subject matter of this Agreement are fully merged in this Agreement which alone fully and completely expresses their agreement.

Schedule A of the offering plan lists each apartment number; the number of rooms, bathrooms, and whether there is a terrace; the share allocation; the purchase price per share; the proportionate share of the mortgage; the estimated maintenance charges; and the estimated annual income tax deduction. It does not include square footage. The footnotes to the schedule include, in footnote 2:

> Any floor plan or sketch shown to a prospective purchaser is only an approximation of the dimensions and layout of a typical apartment. The original layout of an apartment may have been altered. All apartments and terraces appurtenant thereto are being offered in their 'as is' condition. Accordingly, each apartment should be inspected prior to purchase to determine its

actual dimensions, layout and physical condition.

The footnotes further state that the allocation of shares is determined "based upon each apartment's floor space, location, uniqueness, overall dimensions, layout and other factors of relative value to other apartments in the Building." *Id.*, ¶ 3. The purchase price is based on the number of shares allocated to the unit.

Plaintiffs commenced this action for breach of express warranty and contract (against 7 East) (first cause of action); fraud (second cause of action); aiding and abetting fraud (against Nest Seekers) (third cause of action); negligent misrepresentation (against Nest Seekers) (fourth cause of action); and violations of General Business Law (GBL) §§ 349 and 350 (fifth cause of action). These motions to dismiss followed.

DISCUSSION

Nest Seekers incorporates by reference the arguments made by 7 East, and merely emphasizes certain points in its memorandum of law. As the issues and arguments are virtually the same in both motions, the court addresses them jointly.

Breach of Express Warranty and Contract

Plaintiffs maintain that 7 East's alleged affirmative representation that the apartment was approximately 1,966 square feet constituted an express warranty. The representation upon which plaintiffs rely was contained in the listing and floor plan

(the Listing) that Nest Seekers provided to plaintiffs. Plaintiffs contend that the Listing implied that a purchaser would have recourse against the sponsor in the event of errors in the Listing other than minor inaccuracies between the floor plan and the actual unit layout and size. They rely on a paragraph contained at the bottom of the floor plan, in type so small that it is totally illegible on the copy provided to the court. When viewing a digital copy, magnified on the computer screen, it can be deciphered with some difficulty.[1] It states:

> The Unit layout, square footage and dimensions are approximate and subject to normal construction variances and tolerances. Square footages exceed the usable floor area. The floor plan is based on construction drawings. Minor inaccuracies between this floor plan and the actual Unit layout when building will not excuse a Purchaser from completing the purchase of a Unit without abatement in price and without recourse against the Sponsor. Sponsor reserves the right to make changes in accordance with the Offering Plan. The complete offering terms are in an offering plan available from the sponsor.

Plaintiffs' argument that this language constitutes a warranty is unpersuasive. Leaving aside the fact that plaintiffs were unlikely to rely on a statement that was too small to read without the aid of a powerful magnifying lens, the language does not support plaintiffs' position that it is a warranty. At most, it may be construed as a basis for a purchaser to seek a price

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[1]The level of difficulty in reading this statement can be deduced from the fact that plaintiffs were apparently unable to decipher the word "inaccuracies" and quoted it as "discrepancies."

abatement before purchasing the unit, or to decline to complete the purchase in the event of a significant discrepancy. Here, plaintiffs did neither.

Moreover, this statement does nothing to contradict the terms of the agreement or offering plan, which expressly preclude plaintiffs from relying on any other documents or representations. Plaintiffs' reliance on footnote 2 to Schedule A of the offering plan, is likewise without basis. The footnote does not incorporate any promises or statements contained in the Listing. Rather, it again cautions the prospective purchaser against relying on the dimensions set forth in the Listing. See Danann Realty Corp. v Harris, 5 NY2d 317, 320-321 (1959); Goldberg v KZ 72nd, 171 AD2d 525, 527 (1st Dept 1991)(reliance on alleged misrepresentations not justified where the purchase agreement, which incorporated the offering plan, contained a clause specifically disclaiming reliance on any other written or oral statements outside the agreement or offering plan).

Defendants have met their burden of coming forth with irrefutable documentary evidence that defeats plaintiffs claim for breach of express warranty or breach of contract. Consequently, the first cause of action shall be dismissed.

Fraud

Defendants assert that the documentary evidence likewise defeats plaintiffs' amended complaint to the extent that it

pleads a material misrepresentation of an existing fact contained within the contract, plaintiffs' justifiable reliance thereon, and resulting injury, which are the elements of a cause of action for fraud. See Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 (1996).

As discussed above, the Agreement did not include any representation regarding the square footage of the apartment, and in fact, specifically disclaimed any such representation. Thus, defendants prevail on their defense that documentary evidence refutes plaintiffs' fraud claim, and the second cause of action shall be dismissed.

Aiding and Abetting Fraud

Plaintiffs assert a cause of action against Nest Seekers for aiding and abetting fraud. Since the fraud cause of action must be dismissed, the aiding and abetting fraud cause of action must likewise must fall.

Negligent Misrepresentation

Nester Seekers argues that plaintiffs' cause of action as buyers against it, the seller's broker, for negligent misrepresentation where the misrepresentation is made to a known buyer, whose reliance on the misrepresentation was reasonably anticipated, is insufficiently pled and/or defeated by documentary evidence.

This court disagree with plaintiffs' contention that the

appropriate test is not the tort test of justifiable reliance because the plaintiffs are relying on an express contractual warranty. As discussed above, there was no express warranty in the contract. Therefore, plaintiffs must overcome defendants' arguments with respect to their failure to meet the standard for the tort test of justifiable reliance. To have done so, plaintiffs must have alleged: the existence of a special or privity-like relationship which imposes a duty on the defendant to provide correct information to the plaintiff; that the defendant provided incorrect information; and that the plaintiff reasonably relied on that information. See J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007).

The documentary evidence defeats plaintiffs' allegations of the facts of their claim that they reasonably relied on the alleged misrepresentation. The Listing was not part of the agreement or the offering plan and plaintiffs signed the agreement stating that they did not rely on any outside information; therefore, any reliance on the Listing was not reasonable, as a matter of law. Goldberg v KZ 72nd, 171 AD2d at 527. Further, the agreement specifically warned purchasers that the dimensions were only an approximation of a typical apartment and that the purchaser should make his own investigation. Finally, even the Listing upon which plaintiffs assert reliance warns prospective purchasers that they are construction drawings,

that actual usable floor space is smaller, and that it is subject to change. Consequently, the documentary evidence demonstrates that any reliance on any square footage recited could not reasonable. Nor can plaintiffs overcome the unrefuted documentary evidence that no special relationship existed between them and defendants, since there was no relationship of trust and confidence, or the fact that defendants did not have superior knowledge since plaintiffs could have measured the apartment themselves under the Agreement. See J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d at 148-149; cf. Kimmell v Schaefer, 89 NY2d 257, 264 (1996). Accordingly, the cause of action for negligent misrepresentation must be dismissed.

GBL §§ 349 and 350

Plaintiffs maintain that this portion of the motion that attacks the sufficiency of their statutory claims or seeks dismissal thereof based on documentary evidence is premature because plaintiffs have not had an opportunity to obtain discovery, which would prove that there were many other purchasers of defendants' apartments who were victim to the deceptive representations made regarding the size of the apartments. Plaintiffs reject defendants' comparison of this case to the rental of Shea Stadium in a single shot transaction (Genesco Entertainment v Koch, 593 F Supp 743 [SD NY 1984]), or other transactions that were unique to the parties involved.

In order to state a claim under GBL § 349 (h), "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." City of New York v Smokes-Spirits.Com, Inc., 12 NY3d 616, 621 (2009). Conduct is considered consumer-oriented when "the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 (1995). Where a dispute involves alleged misrepresentations made to individuals purchasing units in a particular residential complex, such misrepresentations do not have a broad impact on consumers at large, and it is not subject to relief under GBL § 349. Thompson v Parkchester Apts. Co., 271 AD2d 311, 311-312 (1st Dept 2000); see also Plaza PH2001 LLC v Plaza Residential Owner LP, 98 AD3d 89, 104 (1st Dept 2012)(GBL § 349 claim dismissed because misrepresentation to a purchaser of a penthouse apartment did not have broad impact on consumers at large when the apartment was not built to specifications set forth in purchase agreement and offering plan).

As a matter of documentary evidenced, the offering plan and agreement at issue in this action involve only the residential apartment house. They are not part of a general advertising

campaign aimed at the general consumer population, nor do they have any impact on consumers at large. Rather, they involve only a focused single sale involving a private dispute. As such, GBL § 349 is not implicated. Similarly, GBL § 350, which prohibits false advertising, is not implicated since there was no impact on consumers at large, based upon the documentary evidence. Andre Strishak & Assoc. v Hewlett Packard Co., 300 AD2d 608, 609 (2d Dept 2002). Consequently, the fifth cause of action must be dismissed.

Accordingly, it is hereby

ORDERED that the motion of 7 East 14 L.L.C. to dismiss the complaint as against it (motion sequence number 004) is granted and the complaint is dismissed with costs and disbursements to such defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the motion of Nest Seekers International LLC and Nest Seekers, LLC to dismiss the complaint as against them (motion sequence number 005) is granted and the complaint is dismissed as against said defendants with costs and disbursements to such defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 25, 2017

ENTER:

J.S.C.
DEBRA A. JAMES

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