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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ION BAROI, et al.,

Plaintiffs,

v.

PLATINUM CONDOMINIUM
DEVELOPMENT, LLC; MARCUS
HOTELS, INC.; and MARCUS
MANAGEMENT LAS VEGAS, LLC,

Defendants.

2:09-CV-00671-PMP-GWF

ORDER

Presently before the Court is Defendants’ Motion for Partial Summary Judgment on Count 14 (Doc. #165), filed on December 23, 2011. Plaintiffs filed an Opposition (Doc. #193) on February 8, 2012. Defendants filed a Reply (Doc. #216) on February 29, 2012. Defendants filed a Notice of Supplemental Authority (Doc. #221) on April 17, 2012. Plaintiffs filed a Response (Doc. #223) on May 4, 2012.

This case arises out of Plaintiffs’ purchases of condominium units in Defendant Platinum Condominium Development, LLC’s (“Platinum Development”) condo/hotel project, the Platinum, located in Las Vegas, Nevada. The Platinum hotel was run by Defendant Marcus Management Las Vegas, LLC (“Marcus Management”). Plaintiffs brought suit in Nevada state court in March 2009, and Platinum Development removed the action to this Court. (Pet. for Removal (Doc. #1).)

1 Among the various claims Plaintiffs assert against Defendants are violations of
2 the Interstate Land Sales Full Disclosure Act (“ILSA”) (count 14). (Third Am. Compl.
3 (Doc. #89).) Specifically, Plaintiffs allege Defendants violated 15 U.S.C. § 1703(a)(1)(A)-
4 (D), which generally require a seller involved in a real estate sale covered by ILSA to make
5 certain disclosures to purchasers. (Id. at 39-40.) Plaintiffs also allege Defendants violated
6 15 U.S.C. § 1703(a)(2)(A)-(C), which prohibit the seller from engaging in fraud in relation
7 to ILSA-covered real estate sales. (Id. at 40.) Plaintiffs seek damages and rescission of the
8 Purchase Agreements. (Id. at 45.)

9 The Court set forth the factual background in this matter in a separate order filed
10 this date. The Court will not repeat the facts here except where necessary to resolve the
11 present motions.

12 Defendants move for summary judgment on Plaintiffs’ ILSA claims in count 14.
13 First, Defendants argue ILSA does not apply to Defendants’ sales of units at the Platinum
14 because the Platinum falls within an exception to ILSA’s coverage where the seller is
15 contractually obligated to complete construction within two years. Second, Defendants
16 contend the applicable statute of limitations bars Plaintiffs’ claims under § 1703(a)(1) and
17 for rescission. Plaintiffs respond that the exception to ILSA coverage does not apply
18 because the two-year obligation in the Purchase Agreements is illusory. Plaintiffs concede
19 some of their claims are time-barred, but contend their fraud-based ILSA claims and the
20 rescission remedy are not time-barred.

21 **I. LEGAL STANDARD**

22 Summary judgment is appropriate if the pleadings, the discovery and disclosure
23 materials on file, and any affidavits show that “there is no genuine dispute as to any
24 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
25 56(a), (c). A fact is “material” if it might affect the outcome of a suit, as determined by the
26 governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An

1 issue is “genuine” if sufficient evidence exists such that a reasonable fact finder could find
2 for the non-moving party. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th
3 Cir. 2002). Initially, the moving party bears the burden of proving there is no genuine issue
4 of material fact. Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002). After the
5 moving party meets its burden, the burden shifts to the non-moving party to produce
6 evidence that a genuine issue of material fact remains for trial. Id. The Court views all
7 evidence in the light most favorable to the non-moving party. Id.

8 **II. DISCUSSION**

9 ILSA is aimed at preventing fraud in interstate land transactions. De Luz
10 Ranchos Inv., Ltd. v. Coldwell Banker & Co., 608 F.2d 1297, 1302 (9th Cir. 1979). ILSA
11 pursues this goal by requiring persons engaged in certain interstate land sales to make a
12 variety of disclosures. 15 U.S.C. § 1703(a)(1). It also prohibits those persons from
13 engaging in fraud in relation to such land sales. Id. § 1703(a)(2). Specifically as it relates
14 to the present lawsuit, ILSA makes it unlawful for a seller to use interstate transportation,
15 communication in interstate commerce, or the mails—

16 (1) with respect to the sale or lease of any lot not exempt under section
17 1702 of this title--

18 (A) to sell or lease any lot unless a statement of record
19 with respect to such lot is in effect in accordance with
20 section 1706 of this title;

21 (B) to sell or lease any lot unless a printed property
22 report, meeting the requirements of section 1707 of this
23 title, has been furnished to the purchaser or lessee in
24 advance of the signing of any contract or agreement by
25 such purchaser or lessee;

26 (C) to sell or lease any lot where any part of the
statement of record or the property report contained an
untrue statement of a material fact or omitted to state a
material fact required to be stated therein pursuant to
sections 1704 through 1707 of this title or any
regulations thereunder; or

(D) to display or deliver to prospective purchasers or
lessees advertising and promotional material which is
inconsistent with information required to be disclosed in
the property report; or

(2) with respect to the sale or lease, or offer to sell or lease, any lot not

1 exempt under section 1702(a) of this title--
2 (A) to employ any device, scheme, or artifice to defraud;
3 (B) to obtain money or property by means of any untrue
4 statement of a material fact, or any omission to state a
5 material fact necessary in order to make the statements
6 made (in light of the circumstances in which they were
7 made and within the context of the overall offer and sale
8 or lease) not misleading, with respect to any information
9 pertinent to the lot or subdivision; [or]
10 (C) to engage in any transaction, practice, or course of
11 business which operates or would operate as a fraud or
12 deceit upon a purchaser

13 Id. § 1703(a). ILSA provides a private right of action against a seller who violates these
14 provisions. Id. § 1709(a).

15 ILSA does not apply to “the sale or lease of any improved land on which there is
16 a residential, commercial, condominium, or industrial building, or the sale or lease of land
17 under a contract obligating the seller or lessor to erect such a building thereon within a
18 period of two years.” Id. § 1702(a)(2). To determine whether the contract obligates the
19 seller to erect the building within two years, and thus exempts the seller from ILSA’s
20 requirements, the Court evaluates the contract’s language in light of both federal and state
21 law. Stein v. Paradigm Mirasol, LLC, 586 F.3d 849, 854 (11th Cir. 2009). First, the Court
22 interprets ILSA under federal law because ILSA is a federal statute. Id. Under federal law,
23 a contract “obligates” completion within two years when it “imposes a legal duty on the
24 developer to perform his promise to construct the condominium or other building within
25 two years.” Id. “A legal duty, contractual or otherwise, is one that the law will require a
26 party to perform, or to pay for not performing, by bringing to bear public force.” Id. at 855.

The Court looks to state law to determine whether the contractual obligation is
one which the relevant state law will require the seller to perform. Id. at 854. If state law
will compel performance through remedies such as specific performance or rescission plus
reimbursement and actual damages, then the contract obligates completion within two
years. Id. at 855 (“Specific performance or injunctive relief, if vigorously pursued,

1 ordinarily will be enough to force a seller to fulfill its contractual obligations within the
2 time a contract requires.”).

3 Additionally, the contractual duty must be one that does not render illusory the
4 promise to erect the building within two years. Id. at 857-58. A contractual promise to
5 build within two years may be illusory if the contract provides a mechanism for the seller to
6 evade the requirement for reasons that are within the seller’s discretion or control. Id.
7 However, that does not mean the seller’s obligation to meet the two-year deadline must be
8 “unconditional.” Atteberry v. Maumelle Co., 60 F.3d 415, 420 (8th Cir. 1995). For
9 example, a force majeure clause in a contract does not render the two-year completion
10 promise illusory so long as the events triggering the clause are beyond the developer’s
11 control. Stein, 586 F.3d at 857-58. Additionally, the contractual force majeure clause may
12 be broader than the state’s law regarding the defense of impossibility, so long as the state
13 would enforce such a force majeure clause as a matter of contract law. Id. Consequently,
14 even if a contract “excuses delays beyond the seller’s control, it is still one ‘obligating’ [the
15 seller] to complete construction of the condominium within two years for purposes of
16 § 1702(a)(2).” Id. at 858.

17 Nevada will enforce contractual obligations through the remedy of specific
18 performance where appropriate, particularly in real estate transactions because real property
19 is “unique,” and damages therefore may be an inadequate remedy. Stoltz v. Grimm, 689
20 P.2d 927, 930 (Nev. 1984). Additionally, Nevada will enforce contractual provisions
21 excusing performance that are broader than the common law defense of impossibility so
22 long as the “contingency is provided for in the contract.” Nebaco, Inc. v. Riverview Realty
23 Co., 482 P.2d 305, 307 (Nev. 1971).

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1 Here, Defendants entered into the first Purchase Agreements for sale of units at
2 the Platinum in March 2004.¹ (Defs.’ Opp’n to Pls.’ Mot. Summ. J. (Doc. #152), App. A.)
3 Section 9 of the Purchase Agreements sets forth the contractual duty to perform within two
4 years:

5 SECTION 9-CLOSING AND OCCUPANCY: At Seller’s office or
6 the office of the Title Insurer within 30 days after Seller gives Buyer
7 notice of the substantial completion of the Unit, but not later than
8 December 31, 2005, with the specific date and at a time to be
9 determined by Seller (the “Closing Date”) (or at such other date, time
10 and place as the parties mutually agree). The Closing Date may be
11 extended by Seller in accordance with Section 18 hereof.

12 (Pls.’ MSJ, Ex. 2.) Section 18, in turn, is a force majeure clause which states:

13 SECTION 18-CONSTRUCTION DELAYS: The parties acknowledge
14 that the Unit will be part of a newly-constructed condominium project.
15 If Seller is delayed in the construction of the Unit for reasons beyond
16 the control of Seller, then the time for performance of Seller’s
17 obligations shall be extended for the period of such delay. Reasons
18 beyond the control of Seller shall include, by way of illustration, acts
19 of God, fire, earthquake, flood, explosion, acts of governmental
20 agencies or delays in construction resulting from labor disputes,
21 shortages of construction materials, weather or unexpected adverse soil
22 or other site conditions.

23 (Id.)

24 Section 5 provides that five days prior to Closing, the buyer and a representative
25 of Defendants will inspect the unit, “during which inspection the parties shall agree in
26 writing upon which items, if any, respecting the Unit are incomplete or require some
corrective action.” (Id.) Defendants then must complete or repair the identified items,
referred to as “Punch List Items,” “as expeditiously as possible.” (Id.) However,
Defendants’ “failure . . . to complete all Punch List Items by the date of Closing shall not

24 ¹ Plaintiffs concede that four unit purchases are not covered by ILSA under the first clause of
25 § 1702(a)(2) because Plaintiffs purchased those units after the Platinum was constructed. 15 U.S.C.
26 § 1702(a)(2) (exempting from ILSA’s coverage “the sale or lease of any improved land on which there
is a residential, commercial, condominium, or industrial building . . .”); (Pls.’ Opp’n to Mot. of Defs.
for Partial Summ. J. (Doc. #193) at 9 n.3.).

1 result in a delay of the Closing . . . unless the nature of the incomplete Punch List Items is
2 such that the Unit is not substantially complete by the date scheduled for Closing, in which
3 case the Closing shall be delayed until such time as the Unit is substantially complete.”

4 (Id.) Pursuant to Section 5, a unit is substantially complete “when it may be legally
5 occupied as a hotel rental unit.” (Id.)

6 Defendants contend that Section 18 does not render the two-year completion
7 promise illusory because it permits extensions only for circumstances beyond Defendants’
8 control. Plaintiffs respond that Section 18 makes the two-year completion promise illusory
9 because the contract allows for delays beyond what Nevada law would permit under a
10 common law impossibility defense. Additionally, Plaintiffs contend some of the acts within
11 the section are within Defendants’ control, such as labor disruptions, fires, or explosions.
12 Plaintiffs also argue Section 5 renders the promise to perform within two years illusory
13 because it permits a delay of closing until the unit is complete, and it remained within
14 Defendants’ discretion and control as to when to complete a unit.

15 Defendants reply that a force majeure clause such as Section 18 may be broader
16 than the state’s common law impossibility defense so long as the clause permits delays due
17 only to events beyond Defendants’ control. As to Section 5, Defendants contend it permits
18 a delay in closing, but any such delay may not exceed the December 31, 2005, date in
19 Section 9. Defendants also argue Section 5 requires the parties to agree on the Punch List
20 Items, and therefore it is not solely within Defendants’ control to delay closing based on
21 Section 5. Finally, Defendants argue that whether a unit is substantially complete is
22 measured by an objective standard under the contract as a unit which can be legally
23 occupied as a hotel room. Defendants thus contend the timing of closing was not within
24 their discretion or control.

25 Section 5 does not render Defendants’ obligation to perform within two years
26 illusory. Nothing in Section 5 suggests that Defendants may extend the Closing Date

1 beyond the December 31, 2005, date in Section 9. Section 9 indicates that the only
2 contractual means by which Defendants could extend the Closing Date beyond December
3 31, 2005, was through Section 18, not Section 5.

4 Section 18 also does not render the two-year completion promise illusory.
5 Section 18 permits extension of Defendants' performance only for "reasons beyond the
6 control of Seller." (Pls.' MSJ, Ex. 2.) Section 18 then gives examples of reasons beyond
7 Defendants' control. While theoretically a fire, explosion, or labor dispute could be within
8 Defendants' control, the contract does not allow an extension of the time of performance
9 unless the reason is beyond Defendants' control. Thus, to the extent any fire, explosion, or
10 labor dispute was within Defendants' control, Section 18 would not excuse a delay in
11 performance.

12 The fact that an impossibility defense under Nevada common law may be
13 narrower than Section 18 does not render the promise illusory because to the extent
14 Defendants missed the two-year deadline for a reason not within their control, Plaintiffs
15 could have exercised their rights under Section 17 of the Purchase Agreements and Nevada
16 breach of contract law to pursue "all applicable legal and equitable remedies, including,
17 without limitation, specific performance." (Id.) The force of Nevada contract law and the
18 availability of specific performance as a remedy are sufficient to compel Defendants'
19 performance such that they were obligated to perform within two years within the meaning
20 of § 1702(a)(2).

21 The Court therefore will grant Defendants' Motion for Partial Summary
22 Judgment on Count 14 because ILSA does not apply to Plaintiffs' purchases of units at the
23 Platinum. Because ILSA does not apply, the Court need not address the parties' arguments
24 regarding whether Plaintiffs' ILSA claims are time-barred.

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1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that Defendants' Motion for Partial Summary
3 Judgment on Count 14 (Doc. #165) is hereby GRANTED.

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5 DATED: July 10, 2012

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7 PHILIP M. PRO
8 United States District Judge
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