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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

PABLO RIVAS,
Plaintiff,

-against-

Index No.: 113534/09
Motion Seq: 001

LEMADRE DEVELOPMENT, LLC and
D'AGOSTINO LEVINE & LANDESMAN, LLP,
Defendants.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

Cross-Motion: Yes No

Defendant LeMadre Development, LLC (LeMadre) moves, pursuant to CPLR 3211, to dismiss the complaint and/or, pursuant to CPLR 3212, for summary judgment dismissing the complaint and granting it judgment on its counterclaims and/or scheduling a hearing to determine legal fees to be assessed against plaintiff.

BACKGROUND

This action involves an option agreement executed between plaintiff and LeMadre on or about October 31, 2007, whereby plaintiff agreed to purchase from LeMadre certain realty described as unit 8B in the residential condominium apartment building located at 166 West 18th Street, New York, New York (Marc Ravner (Ravner) Aff., Ex. A (Ravner is a member of LeMadre). Pursuant to this agreement, plaintiff was to pay a total purchase price of $2,150,000.00 (*Id.*). As a deposit for the purchase, plaintiff paid into escrow a deposit of $215,000.00, the balance of the purchase price due at the closing. The escrow account is being held by the law firm defendant, D'Agostino Levine & Landesman, LLP, who represented LeMadre in the transaction.

After several reschedules, the closing was set for October 14, 2008. On both June 30,

2008 and September 16, 2008, LeMadre wrote to plaintiff demanding his presence at the closing (Ravner Aff., Ex. C). LeMadre asserts that, on October 14, 2008, it was ready, willing and able to close on the property; however, plaintiff failed to appear at the closing. Rivas Aff.

By letter dated October 16, 2008, LeMadre provided plaintiff with notice of default, pursuant to the agreement. According to the agreement, upon 30 days following the notice of default, plaintiff is deemed to have breached the contract (Agreement, Art. 13). On April 14, 2009, LeMadre notified plaintiff of his failure to cure the default and cancelled the contract (Rivas Aff., Ex. C).

Paragraph 13.2 of the agreement states, in pertinent part:

> "Upon the occurrence of an Event of Default, Purchaser shall have thirty (30) days from the giving of the notice of such default to cure the specified default. If the default is not cured within such thirty (30) days, TIME BEING OF THE ESSENCE, then Sponsor [LeMadre], in its sole discretion, may thereupon cancel this Agreement. If Sponsor elects to cancel, this Agreement shall be deemed cancelled, and Sponsor, as its sole remedy, shall have the right to retain, as and for liquidated damages, the Deposit and any interest earned on the Deposit. Upon the cancellation of this Agreement, Purchaser and Sponsor will be released and discharged of all further liability and obligations hereunder and under the Plan, and the Unit may be sold to another as though this Agreement had never been made, and without accounting to Purchaser for any of the proceeds of such sale."

Paragraph 13.2 of the Agreement specifically states that the deposit shall be considered liquidated damages for any default by plaintiff. In addition, paragraph 38 of the agreement states:

> "Purchaser shall be obligated to reimburse Sponsor for any legal fees and disbursements incurred by Sponsor in defending Sponsor's rights under this Agreement or, in the event Purchaser defaults under this Agreement beyond any applicable grace period, in canceling this Agreement or otherwise enforcing Purchaser's obligations hereunder. The provisions of this Article shall survive the closing of title or the termination of this Agreement."

Paragraph 12.2 of the agreement incorporates the terms of the offering plan in its entirety.

According to the complaint, plaintiff claims that LeMadre breached the agreement by constructing ceilings in the unit that were far shorter than the 10-foot ceilings specified in the

offering plan. Plaintiff alleges that the height of the ceilings was a motivating factor in his interest in the unit, but it is noted that he never alleges that he communicated that fact to LeMadre prior to signing the agreement. In addition, plaintiff asserts that several items were not constructed in accordance with New York City Multiple Dwelling Law and New York City Building Code. Plaintiff states in the complaint that the condominium was a newly constructed building and that he was unable to inspect the unit until a few days before the scheduled closing, at which time he became aware of the differences between the offering plan's description and the actual construction. Plaintiff also averred that, after his inspection of the unit, he orally complained to the selling agent, but plaintiff never alleges that he put his objections regarding the unit in writing to LeMadre.

Sections 18 and 19 of the agreement provide that, if any work requires completion at the time of the closing, as long as it is included in the inspection report, the Sponsor will complete the work within a reasonable time and that such work will not be a bar to closing on the unit. Further, section 18.1 of the agreement states that "[t]he issuance of a temporary or permanent Certificate of Occupancy shall be presumptive evidence that the Building and Unit have been fully completed in accordance with the Plan and the Plans and Specifications."

Section 18.2 of the agreement states, in pertinent part:

> "Purchaser acknowledges and agrees that Sponsor will not be liable for, and will have no obligation to correct, certain variations from the Plan and Plans and Specifications as indicated in the Section of the Plan entitled 'Rights and Obligations of Sponsor' and will only be responsible to correct any construction defects to the extent, and on the terms and conditions, set forth in such Section."

LeMadre contends that plaintiff never delivered a signed inspection report to LeMadre listing what items, if any, needed to be corrected. Lemadre argues that plaintiff breached the agreement and it is entitled to retain the deposit as liquidated damages, as well as to be reimbursed for attorney's fees, in accordance with the agreement executed between the parties.

The complaint asserts three causes of action: (1) breach of contract; (2) breach of the

covenant of good faith and fair dealing; and (3) a temporary and permanent injunction enjoining defendant law firm from releasing the deposit held by it in escrow, pending a final determination of this action. In its answer, LeMadre asserts three counterclaims: (1) breach of contract; (2) breach of the covenant of good faith; and (3) legal fees.

In opposition to the instant motion, plaintiff avers that the offering plan submitted by LeMadre with the motion is not the "true" offering plan that was filed with the city. The Court notes that most of the differences indicated by plaintiff are de minimus, such as a change in the name of the condominium building, and do not concern the items that are the subject of this litigation. However, plaintiff points to what he considers a significant section of the version proffered by LeMadre, dealing with variations, paragraph 39, which states, in pertinent part:

> "No such variation will affect a Purchaser's obligations under an Agreement or the Plan unless the square footage area of the Unit is materially diminished. Such variations by less than five percent (5%)(excluding interior partitions), will be presumed immaterial. In the event that such variations are five percent (5%) or more, Purchaser will have a fifteen (15) day right to rescind an Agreement for a Unit affected by such variation."

In the same section in the offering plan submitted by plaintiff in his opposition, that section states, in pertinent part:

> "No such variation will affect a Purchaser's obligations under an Agreement or the Plan unless the square footage area of the Unit is materially diminished. Such variations by less than five percent (5%)(excluding interior partitions), in any one room, will be presumed immaterial. In the event that such variations are five percent (5%) or more, Purchaser will have a fifteen (15) day right to rescind an Agreement for a Unit affected by such variation."

The difference concerns the diminution of square footage in the entire unit as opposed to any room in the unit.

Section 6.2 (b) of the offering plan states:

> "Measured vertically, each Unit consists of the volume from the top of the concrete floor slab below (located under the finished flooring and sub-floor materials) to the underside of the concrete slab above. The clearance between the top of the concrete floor slab and the bottom of the finished ceiling in the Units is indicated on the floor plans, but certain Units and areas within other Units may have clearances of less than indicated on the floor plans to accommodate facilities located above the same or otherwise respond to field

conditions."

Section 21 of the offering plan states, in pertinent part::

> "Purchaser agrees (a) to purchase the Unit, without offset or any claim against it, or liability of, Sponsor, whether or not any layout or dimension of the Unit or any part thereof, or of the Common Elements, as shown on the Floor Plan is accurate or correct, and (b) that Purchaser shall not be relieved of any of Purchaser's obligations hereunder by reason of any immaterial or insubstantial inaccuracy or error."

In addition, plaintiff states that the "true" version of the plan says that the building will be constructed in accordance with all applicable codes, which, plaintiff maintains, was not done.

In support of his position, plaintiff has provided the affidavit of a professional engineer who opines that ceiling heights in the subject unit were not consistently the 10 feet indicated in the plan and that the unit did not comply with New York codes in two ways: (1) there was no hood above the stove; and (2) the kitchen had no exhaust or draft curtain. The expert also states that the discrepancy between the 10-foot height indicated in the offering plan and the ceiling height in the competed unit could be accounted for by the offering plan referring to the distance between any two floors, which would correspond to the height of the entire structure as given in the certificate of occupancy; hence, the expert states that it may be inferred that the ceiling heights listed in the offering plan were "intended not to refer to the clear ceiling height but to the floor-to-floor difference." Further, the expert states that the areas in the unit that have ceilings shorter than 10 feet are one of the two full bathrooms, the powder room, and corridors to the living room and bedrooms. The court notes that, according to the floor plan provided with plaintiff's opposition, unit 8B consists of a foyer, two bedrooms, two full bathrooms, a powder room, a livingroom/dining room, and a kitchen area, with one hallway leading to the livingroom/dining room, and one hallway leading to the smaller bedroom.

Plaintiff further maintains that section 21 of the offering plan is not applicable to the instant matter because he is not seeking an offset for the differential in the ceiling height, and that it is a question of fact as to whether that differential is material or immaterial.

It is plaintiff's contention that the instant motion should be denied, at least until discovery is completed.

In reply, LeMadre affirms that it inadvertently attached an incorrect, earlier, version of the offering plan, which he only discovered upon reviewing the plan attached with the opposition papers, and agrees that the court should adopt the plan appearing in the opposition. However, LeMadre states that the differences between the two plans are immaterial to the points of contention between the parties, and that plaintiff breached his agreement.

Further, LeMadre states that, according to the offering plan, plaintiff's unit was measured, height-wise, from concrete floor slab to concrete ceiling slab, prior to the addition of the sub-flooring, flooring and ceiling materials were added. Hence, says LeMadre, not only did plaintiff know that the finished unit's ceilings would be lower than 10 feet, but also that the offering plan made no representations regarding the "clear ceiling height": the internal height within the unit. Moreover, as indicated in the offering plan, the only variation that would permit a purchaser to rescind the agreement would be a variation in the square footage of the unit, which is not alleged in the instant action.

In addition, according to the offering plan's section on the rights and obligations of the sponsor,

> "Sponsor will not be obligated to correct, and will not be liable to the Condominium Board or any Residential Unit Owner, any condition that exists as a result of any defects in construction, or the installation or operation of any mechanical equipment, appliances, other equipment, finishes, materials or fixtures (including appliances and bathroom fixtures)."

LeMadre states that any variation in the ceiling height is within the framework of the offering plan's stated possible variations, and that plaintiff never adhered to the offering plan's requirement that any work that needed to be done be sent to it in writing.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted

against him on the ground that:

* * *

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

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory (*see P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]; *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243 [1st Dept 2000]; *Leon v Martinez*, 84 NY2d 83 [1994]. Under CPLR 3211 (a) (1), a dismissal is appropriate only "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Ladenburg*, 275 AD2d at 246; *Leon*, 84 NY2d at 88). "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*, 84 NY2d at 88 [internal quotation marks and citations omitted]).

In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded (*see Khayyam v Doyle*, 231 AD2d 475 [1st Dept 1996]).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006] [internal quotation marks and citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *see*

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

LeMadre's motion is granted (*see Vermont Teddy Bear Co., Inc. v 538 Madison Realty Company*, 1 NY3d 470, 475 [2004][1]; *425 Fifth Avenue Realty Associates v Yeshiva University*, 228 AD2d 178 [1st Dept 1996]). Whether the terms of a contract are ambiguous is a question of law to be determined by the courts (*see South Road Associates, LLC v International Business Machines Corp.*, 4 NY3d 272 [2005]). Under the clear terms of the agreement in question, which incorporates the entire, several hundred page offering plan, the Court agrees with LeMadre that plaintiff breached the agreement by failing to close on the purchase of the condominium unit.

As quoted above, paragraph 39 of the agreement specifically states that the only ground for rescission would be a differential of 5% or more in the square footage of the unit and plaintiff has not alleged that the square footage differs from the offering plan in this regard. Plaintiff's main contention is that the ceilings are not as high as indicated in the offering plan and, had the contractual clause concerning rescission based on square footage embraced cubic footage, it would be LeMadre that was in breach. However, the Court cannot read into the agreement what does not therein exist.

The agreement specifically states in paragraph 6.29(b) that the heights indicated in the offering plan may vary somewhat to accommodate facilities, and plaintiff's own expert opined that the heights indicated in the offering plan could reasonably refer to the floor-to-floor

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[1] The Court of Appeals wrote "When interpreting contracts, we have repeatedly applied the familiar and eminently sensible proposition of law that, when parties set down their agreement in a clear, complete document, their writing should . . be enforced according to its terms. We have also emphasized this rule's special import in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length. In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include [internal quotation marks and citations omitted]."

differential, which, in fact, is what is indicated in the offering plan. Moreover, plaintiff's expert stated that the only ceilings in the unit that were below 10 feet were in one bathroom, the powder room, and two hallways, meaning that the remainder of the unit – the foyer, two bedrooms, one bathroom, the kitchen area, and the living room/dining room – were all within the dimensions noted in the agreement (¶¶ 18.2 and 21).

In addition, the clear language of the agreement, quoted above, states that LeMadre is not responsible for differences caused by construction. Although plaintiff alleges that the main reason that he was interested in the unit was the height of the ceilings, nowhere in the agreement does that specific requirement appear. As previously noted, it is not the function of the court to imply terms in a contract that the parties themselves have failed to include (*see Duane Reade, Inc. v Cardtronics, LP,* 54 AD3d 137 [1st Dept 2008]).

Plaintiff cites to *The Plaza PH2001 LLC v Plaza Residential Owners LP* (79 AD3d 587 [1st Dept 2010]), as supporting his position, because that case held that the allegation in a complaint that a finished condominium unit did not conform to the specifications of the offering plan precluded dismissing the complaint, where the defendants were unable to establish grounds that the unit did conform. However, in the present action, LeMadre was able to establish that the unit did conform to the offering plan, when the plan is read as a whole, indicating what variances are permitted.

Once plaintiff failed to close on the unit, his default entitled LeMadre to retain the deposit as liquidated damages, in accordance with the agreement's provisions (*see* ¶13.2; *see also 115-117 Nassau St., LLC v Nassau Beekman, LLC,* 74 AD3d 537 [1st Dept 2010]). Accordingly, LeMadre is granted judgment on its first counterclaim.

The two other items appearing in the affidavit of plaintiff's expert, argued by plaintiff as a basis for concluding that LeMadre was in breach, concern the code violations. These two violations – failure to have a hood over the stove and an exhaust ventilation – are *de minimus,* when the agreement concerns the purchase of a multi-million dollar apartment. Not only did

when the agreement concerns the purchase of a multi-million dollar apartment. Not only did plaintiff waive any right to object to these alleged code violations by failing to adhere to the contract's requirement of informing LeMadre of the problem in writing, but the alleged problem is easily corrected and not sufficient to deem LeMadre in breach. As a consequence of the foregoing, the complaint is dismissed pursuant to CPLR 3211.

LeMadre is also seeking damages in its second counterclaim for breach of the covenant of good faith and fair dealing. However, "a cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004] [citations omitted]).

Lastly, pursuant to the terms of the agreement between the parties, LeMadre is entitled to attorney's fees for the defense of this action to enforce its right to retain the deposit (paragraph 38). Therefore, the issue of attorney's fees is turned over to a Special Referee to hear and report on the amount of reasonable attorney's fees to which LeMadre is entitled.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of defendant LeMadre Development, LLC's motion that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees said defendant may recover is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for said defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest

[2] Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.

ORDERED that the portion of defendant LeMadre Development, LLC's motion to dismiss the complaint is granted and the complaint is dismissed, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further;

ORDERED that the portion of defendant LeMadre Development, LLC's motion for judgment on its first counterclaim for liquidated damages based on breach of contract is granted, and the Escrowee is directed to deliver $215,000 plus interest at the statutory rate from the date of November 15, 2008, as calculated by the Clerk of the Court, in the total amount of $_____ to LeMadre Development LLC within 30 days of the date of this Order; and it is further,

ORDERED that the portion of defendant LeMadre Development, LLC's motion for judgment on its second counterclaim for breach of the covenant of good faith and fair dealing is denied; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 9-30-11

PAUL WOOTEN, J.S.C.

Check one: | **FINAL DISPOSITION** | **NON-FINAL DISPOSITION**

Check if appropriate: | **DO NOT POST**