SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 63
Justice

Index Number : 155615/2012
BEVILACQUA, CHRIS
vs
CRP/EXTELL PARCEL I, L.P.
Sequence Number : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court

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

Dated: 7/9/13

ELLEN M. COIN, J.S.C.

1. CHECK ONE: ..... [ ] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63
----------X
Chris Bevilacqua,

Plaintiff,

-against-

CRP/Extell Parcel I, L.P., CRP/Extell Parcel I GP, L.L.C., Gary Barnett, Gershon Barnett, Gershon Swiatycki, Stroock &, Stroock & Lavan LLP, as escrow agent,

Defendants.
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Index Number:155615/2012
Submission Date: 3/13/13
Motion Sequence:003
DECISION AND ORDER

Appearances:

For Plaintiff
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By Marc J. Held, Esq.
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718-531-9700

For Defendants:
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By Jason Cyrulnik, Esq.
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Papers considered in review of this motion:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition.....	2
Reply Memorandum of Law.....	3

ELLEN M. COIN, J.:

Defendants move pursuant to CPLR §3211(a) to dismiss plaintiff's complaint. For the reasons set forth below, the motion is granted and the complaint is dismissed.

Parties and Underlying Background

Plaintiff alleges that on or about August 23, 2007, he entered into a purchase agreement (the First Agreement) with CRP/Extell Parcel I, L.P. (CRP) to purchase a residential condominium

apartment, Unit 10B, (the First Apartment) in a building (the Building) located at 80 Riverside Boulevard, New York, New York, for a total price of $3.5 million, and that under the First Agreement, he was required to make an initial down payment of $350,000 and an additional payment of $175,000 on the earlier of February 28, 2008 or 15 days after CRP presented an amendment to the Condominium Offering Plan for the Building (the Plan) declaring it effective (Complaint, ¶¶ 3, 12, 22-24, 30).

CRP was the sponsor of the Plan, which it filed with the Attorney General on or about August 11, 2006 (*id.*, ¶¶ 3, 12). CRP/Extell Parcel I GP, L.L.C. (LLC) was CRP's general partner, Gershon Barnett, Gershon Swiatycki and Gary Barnett were CRP's principals. Stroock & Stroock & Lavan (Stroock) was the escrow agent for the down payments and drafted the First Agreement and the Plan (*id.*, ¶¶ 5-7, 26).

Plaintiff states that he made the two payments totaling $525,000 (the Deposit) in accordance with the First Agreement, but that the closing for the First Apartment did not occur by September 1, 2008 as scheduled, but instead occurred on February 12, 2009 and that he was not offered a right to rescind the First Agreement (*id.*, ¶¶ 25, 33-34, 36-40, 48). He further states that on March 5, 2009, he entered into a contract termination agreement with CRP (the Termination Agreement), which released the parties from their obligations under the First Agreement and that the parties entered

into a second agreement (the Second Agreement) under which plaintiff agreed to buy a different apartment, Unit 12B (the Second Apartment), for the same price of $3.5 million with the Deposit transferred to the Second Agreement (*id.*, ¶¶ 62-69).

Plaintiff further alleges that the closing date of May 29, 2009 was not met for the Second Apartment, that he was not offered rescission, that defendants therefore breached the Second Agreement by not returning the Deposit and that they breached the Martin Act by making false, misleading statements and material omissions in connection with their obligations under the Plan (*id.*, ¶¶ 77, 80-81). He seeks rescission of the Second Agreement and damages in the principal amount of the Deposit (*id.*, ¶ 290).

On June 16, 2009, plaintiff filed an application to the Attorney General for determination of the disposition of the down payment, seeking return of the Deposit (motion, Ex. A, item 13 [d]). On June 22, 2010, the Attorney General issued a determination (the Determination), that denied rescission, finding that "[b]y entering into the [Second] Agreement, [plaintiff] and [CRP] established a new contractual relationship [and plaintiff's] contention that any rights [to rescind] he may have had under the [First] Agreement lacks merit" (Determination at 6). The Determination found that the Second Agreement's merger clause barred parol evidence of purported statements made prior to the Second Agreement and that the Termination Agreement released any

claims to rescission under the First Agreement (*id.* at 7).

Plaintiff then brought a petition pursuant to CPLR Article 78 (the Special Proceeding) to challenge the Determination. By order dated April 12, 2011, this Court denied the petition, holding that in considering the Termination Agreement and the Second Agreement, the Attorney General "correctly determined that the down payment was not subject to return" (April 2011 Order at 3). The court's records indicate that there was no appeal filed, but rather that on August 16, 2012, plaintiff commenced this action by filing a summons and complaint.

Defendants seek dismissal based upon the res judicata and collateral estoppel effect of the April 2011 Order and the lack of any private right of action to enforce purported violations of General Business Law §352 and implementing regulations.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are

bare legal conclusions or are inherently incredible, or that are flatly contradicted by the documentary evidence, are not accorded such favorable inferences, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

Res Judicata and Collateral Estoppel

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation [since] ... a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005][citations omitted]). Under New York's "transactional analysis approach [to res judicata] ... once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981][citation omitted]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 474 [1st Dept 2011]).

In distinction to res judicata or claim preclusion, "[c]ollateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue

clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel "applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*id.*; *BDO Seidman LLP v Strategic Resources Corp.*, 70 AD3d 556, 560 [1st Dept 2010]; *Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]).

Moreover, "the doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies," including the Attorney General's determinations on the return of deposits held as part of real estate transactions, as well as Article 78 proceedings that review the same (*Ryan*, 62 NY2d at 499 [italics in original]; *Matter of CRP/Extell Parcel I, L.P. v Cuomo*, 101 AD3d 473, 474 [1st Dept 2012]; *Alamo v McDaniel*, 44 AD3d 149, 153-154 [1st Dept 2007]).

Applying the above mentioned principles to this case, plaintiff's complaint cannot stand. Contrary to plaintiff's argument 13 NYCRR §20.3(o)(3)(viii)(e) does not render Attorney General's determinations meaningless. Instead it allows an

aggrieved party to seek judicial review. CPLR Article 78 special proceeding ordinarily may follow. "The Article 78 proceeding supersedes the common law writs of mandamus, prohibition, and certiorari to review, supplying in replacement of all three of them a uniform device for challenging the activities of an administrative agency in court." (Siegel, NY Prac §557 [5th Ed]). Plaintiff challenged the Determination, and CRP and Stroock were additional respondents in the Special Proceeding. LLC and the individual defendants were CRP's general partner and its principals respectively and are thus in privity with it (*See Buechel v Bain*, 275 AD2d 65, 73-74 [1st Dept 2000], *aff'd* 97 NY2d 295 [2001]]).

While plaintiff sought a refund of the Deposit in the Special Proceeding, and in this action he seeks damages in the amount of the Deposit, res judicata applies "even if [plaintiff is seeking relief in the second action] based upon different theories or if seeking a different remedy" (*O'Brien*, 54 NY2d at 357; *UBS Sec.*, 86 AD3d at 474). Plaintiff has had "a judgment on the merits ... between the same parties [or parties in privity with them] involving the same subject matter" and may not now revisit the same (*Matter of CRP/Extell Parcel I, L.P.*, 101 AD3d at 474; *see also Matter of Hunter*, 4 NY3d at 269; *Sweeney v New York City Dept. of Health & Mental Hygiene*, 91 AD3d 420, 421 [1st Dept], *lv denied* 19 NY3d 802 [2012]; *Fogel v Oelmann*, 7 AD3d 485, 486 [2d Dept 2004]; *Parker*, 93 NY2d at 349).

In sum, plaintiff had an opportunity to seek redress on his claim for the Deposit and the fact that he was unsuccessful does not give him the right to a second bite of the apple. Both res judicata and collateral estoppel seek "'to provide finality in the resolution of disputes' ... [and both] 'judicial economy as well as fairness to the parties mandate, at some point, an end to litigation'" (*Matter of Hunter*, 4 NY3d at 269-270, quoting *Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]; *Sweeney*, 91 AD3d at 421). Accordingly, defendants' motion to dismiss plaintiff's complaint is granted.

The Martin Act

General Business Law article 23-A (the Martin Act) is "New York's 'blue sky' law [enacted 'to create] a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public, and, thereafter, if appropriate, to commence civil or criminal prosecution'" (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 349-350 [2011], quoting *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 277 [1987]). "The Martin Act authorizes the Attorney General to enforce its provisions and implementing regulations ... [and he] 'bears sole responsibility for implementing and enforcing the Martin Act'; [consequently,] there is no private right of action under the statute" (*Kerusa Co.*

LLC v W10Z/515 Real Estate Ltd. Partnership, 12 NY3d 236, 244 [2009] [internal citations omitted]). While common law fraud claims are not preempted, "[t]here is no private right of action where the fraud and misrepresentation relies entirely on alleged omissions in filings required by the Martin Act" (*Berenger v 231 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]).

Plaintiff's allegations that defendants violated the Martin Act by omitting from the Plan and the Second Agreement the financial status and identities of all principals of the sponsor are barred by the Attorney General's "sole responsibility" to enforce the Martin Act (*Kerusa*, 12 NY3d at 244).

The Court has considered plaintiff's remaining arguments and finds them without merit.

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed with prejudice, together with costs and disbursements, as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 9, 2013 ENTER:

Ellen M. Coin, A.J.S.C.