SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

MAURICE A. MANN

-v-

APTHORP ASSOCIATES LLC, et al.,

INDEX NO. 102685/11

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1

Answering Affidavits — Exhibits No(s). 2

Replying Affidavits No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8/5/13

HON. ANIL C. SINGH
SUPREME COURT JUSTICE, 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: PART 61

MAURICE A. MANN,

Plaintiff,

-against-

APTHORP ASSOCIATES LLC, BROADWALL MANAGEMENT and ANDREW RATNER,

Defendants.

INDEX NUMBER 102685/2011
Motion Sequence 001
DECISION & ORDER

HON. ANIL C. SINGH, J.:

In this action for alleged breach of contract, defendants Apthorp Associates LLC (Apthorp), Broadwall Management (Broadwall) and Andrew Ratner (Ratner) move to cancel the "Notice of Pendency" placed by plaintiff Maurice Mann against certain property, and, pursuant to CPLR 3211, to dismiss the complaint in its entirety.

BACKGROUND

Apthorp owns real property located at 2201-2219 Broadway, New York County (the Property). Broadwall manages the Property; Ratner is an executive at Broadwall with responsibility for the Property. Plaintiff was a co-developer of the Property, reserving certain rights including an option to purchase a residential unit at the Property. In or about February 2007, plaintiff and Apthorp executed an "Operating Agreement" providing plaintiff, at section 4.1 (e), the right to purchase one residential unit at the Property.[1] Ratner aff, exhibit D. The Operating Agreement was apparently amended on more than one occasion, but the parties focus upon the "Second Amendment of the Operating Agreement," dated April 22, 2009 (*id.*, exhibit

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[1]The complaint specifies Apartment 2C, although the Operating Agreement does not.

[* 3]

E), which deals with plaintiff's right to purchase a residential unit, and the "Omnibus Amendment and Reaffirmation of Loan Documents," dated May 31, 2009 (Omnibus Amendment) (*id.*, exhibit F), which specifies Apartment 2C for the first time, the apartment he had been occupying since November 2008. Defendants refer throughout their papers to the relevant portions of the Operating Agreement and its amendments collectively as the "Option Agreement." For the sake of clarity, the Option Agreement will be the term used herein. Note that none of the agreements were subscribed to by Broadwall or Ratner. Only Apthorp and plaintiff executed them, in addition to other non-parties.

The operative language of the Omnibus Amendment, after defining plaintiff as the Original Guarantor, Apartment 2C as the Option Unit, and the Option Date, provides

> "for a period of thirty (30) days following the Option Date (the 'Purchase Option Period'), Original Guarantor shall have the option, by providing written notice of such election to Administrative Agent, to elect to purchase the Option Unit at a purchase price equal to the average square foot price for the first 25 Residential Units that have either closed or are under [contract, subject to certain adjustments] . . ."

Omnibus Amendment, ¶ 17 (b) (i).

The proposed assignment of Apartment 2A to plaintiff also appears in the "Second Amendment to Building Loan Agreement," dated May 31, 2009 (Second Amendment), in almost identical language to the Omnibus Amendment. Ratner aff, exhibit G, ¶ 34 (b) (i).

According to the complaint (Ratner aff, exhibit A), in October 2009, Broadwall and Ratner asked plaintiff to substitute his right to purchase Apartment 2C for one of several alternate residential units at the Property. Plaintiff selected Apartment 6A, allegedly with the initial agreement of Broadwall and Ratner. However, Broadwall and Ratner informed plaintiff that Apartment 6A was intended for use as a model apartment, and indicated other alternatives. Plaintiff then chose Apartment 10A, but was told that the transfer of this unit could not be

effected until the Property's conversion plan was approved by New York State's Attorney General. When the approval was secured, plaintiff submitted a "Memorandum of Understanding" (the Memorandum)[2] to the defendants. On September 23, 2010, defendants allegedly informed plaintiff that they would not proceed with the transaction. Later financial settlement talks were unsuccessful.

Plaintiff filed a Notice of Pendency against four units at the Property, namely Apartments 2C, 10A, 10M and 11M, on January 21, 2011. Ratner aff, exhibit B. The instant action commenced on March 4, 2011, with the complaint asserting causes of action for specific performance, breach of contract and fraud. On July 13, 2011, the court issued an interim order cancelling the subject Notice of Pendency forthwith. This leaves open defendants' application to dismiss the complaint.

DISCUSSION

Defendants contend that the Option Agreement gave plaintiff a 30-day option period in which to purchase Apartment 2C at a price determined by the average price per square foot of previously-sold apartments. Ratner aff, ¶ 11. They aver that the calculation resulted in a prospective purchase price of over $4.6 million. They argue that the Attorney General approved the Property's conversion plan on May 14, 2010, and attach a letter, signed by an assistant attorney general, confirming this. *Id.*, exhibit H (AG Letter). According to defendants, plaintiff did not exercise his option on or by June 13, 2010, which, therefore, has expired. Consequently, he now has no right to Apartment 2C, or any other residential unit at the Property under the Option Agreement.

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[2]A copy of the Memorandum is attached to the complaint.

Plaintiff claims that, "[i]mmediately upon approval by the Attorney General's office, Mann submitted to Defendant a Memorandum of Understanding reflecting the terms of the exchange of Units 2C for 10A as modified." Complaint, ¶ 22. The AG Letter is undated, but it refers to May 14, 2010 as the "Date Amendment Filed," and states that "the offering plan for the subject premises is hereby accepted and filed . . . effective for the greater of six months from the date of filing this amendment or twelve months from the acceptance of the original offering literature." The Memorandum itself is undated, but defendants maintain that it was first forwarded to their counsel on June 30, 2010, about 45 days after the offering plan's effective date, and more than two weeks after the end of the option period. They provide a copy of an email message, dated June 30, 2010, from plaintiff's counsel attaching a copy of the Memorandum. Rottenberg aff, exhibit A. This is the earliest appearance of the Memorandum.

In his affidavit, plaintiff, without giving specific dates, conveys a different version of events after the offering plan was declared effective.

> "After approval of the plan, I pressed for approval of the exchange agreement so that I could proceed to a closing on Apartment 10A. Mr. Ratner stated that the agreement needed to be approved by the Board of Managers and that there was 'other business' at the partnership, but to be patient that it would be addressed. In an effort to move the process along, I had my counsel draft a memorandum of understanding memorializing the terms of the exchange. In addition, I called for a meeting in Mr. Ratner's office. In that meeting, Mr. Ratner stated to me that he reviewed the written memorandum of understanding and saw no problem with it and that as soon as the Board could meet, he would seeks its approval. I waited several more weeks and then was advised that the agreement was rejected. Furthermore, I was told for the first time that my time to exercise on the original unit – Apartment 2C had passed and I had no rights. In other words, Mr. Ratner delayed me in order to prejudice me."

Mann aff, ¶¶ 29-34.[3]

Plaintiff claims that defendants provided another reason in addition to timeliness to reject

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[3]These sentences are reproduced exactly as they appear in the affidavit, except for eliminating the enumeration of each of the several short paragraphs.

his offer, the purported opposition of their lender.[4] "I was told that the reason for rejecting the agreement, which Mr. Ratner, a week earlier, said looked fine to him and which returned $2,000,000 in value to the Partnership, was that the Bank – Anglo-Irish Bank would not approve it." *Id.*, ¶ 35. He questioned the bank's purported position, even though he "was repeatedly told by Mr. Ratner not to communicate in any way with Anglo-Irish Bank," and states that the "Bank specifically stated to me that Mr. Ratner's statement was false and that Broadwall and Mr. Ratner were using the Bank as a 'foil' to hide their true intentions." *Id.*, ¶¶ 37, 41. He suggests that he received such a candid response from the bank because he had "other business dealings with them." *Id.*, ¶ 37.

Plaintiff's counsel, Giardino, asserts that plaintiff "took repeated and consistent actions regarding his option – for a period of one year prior to June 30, 2010 and continued to seek the benefit of his option rights but for the dilatory conduct of the defendants." Giardino aff, ¶ 8. Plaintiff's counsel contends that he remained in frequent contact with defendants' counsel while approval by the Attorney General was pending. "Immediately upon approval of the Apthorp conversion plan by the Attorney General in May 2010, I contacted [defendants' counsel] to finalize the exchange agreement (See Exhibit 'C')." *Id.*, ¶ 41. In this regard, plaintiff's counsel seemed to contradict himself in oral argument before the court, on April 24, 2013, when he said defendants "never notified Mr. Mann of the date on which the Attorney General approved the conversion kicking off the option time period." Tr. at 13. Exhibit C, attached to Giardino's affidavit, is a short collection of email messages, commencing on Friday, May 21, 2010, originated by Giardino, plaintiff's counsel, requesting a meeting "Thursday morning to address

[4]According to the Second Amendment, Anglo Irish Bank Corporation Limited and its predecessors were the primary lender to this project.

apartment issue and management fees." The communications continued on Monday, May 24, 2010, confirming the meeting to be held with only counsel attending. In other words, plaintiff's counsel's response to the Attorney General's approval, on or about May 14, 2010, was to call a meeting on May 28, 2010, 14 days into the Purchase Option Period.

Enforcement of the Option Agreement is not a simple matter. By May 31, 2009, the terms of the Option Agreement were well settled. They have been stated and restated in the Omnibus Amendment and the Second Amendment. However, the substitution of another still-to-be determined residential unit for Apartment 2C as the Option Unit is the critical factual departure from the Option Agreement. Plaintiff contends that he and Ratner discussed "exchanging my Apartment 2C for a smaller apartment within the Building," beginning in the Spring of 2009. Mann aff, ¶ 7. He states that he "received the paperwork from the Partnership's condominium attorney to confirm the substitution of Apartment 10L in July 2009." *Id.*, ¶ 12. No copy of this paperwork is provided by plaintiff at this time, which is not necessary on a motion to dismiss pursuant to CPLR 3211. Adding to the confusion of what was promised, plaintiff's counsel claims that "I attended a meeting in October 2009 at which Mr. Ratner demanded that Mann identify the apartment Unit to be exchanged for his option within 10 days." Giardino aff, ¶ 11. There is no paper trail from the Option Agreement to the Memorandum, which emerged around June 30, 2010, only email messages among the principals. With the exception of the alleged paperwork regarding Apartment 10L, all of the intermediary agreements were apparently oral, as the Option Unit migrated from Apartment 2C to Apartment 10L to Apartment 6A to Apartment 10A, with only some email messages produced in support.

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the

complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 (1st Dept 1994). CPLR 3211 (a) (1) provides for the dismissal of a complaint based on documentary evidence that "conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 NY2d at 88.

An overriding issue in this action is the prohibition against unwritten waiver found in all the relevant contractual documents. Article 14.4 of the Operating Agreement states that "[n]o provision of the Agreement shall be deemed to have been waived unless such waiver is contained in a written notice . . . " The Omnibus Amendment, at paragraph 35, provides that the "terms of this Amendment may be waived, modified and amended only by an instrument in writing . . . " Yet, much of the complaint traces a series of allegedly broken oral promises to plaintiff about various substitutes for Apartment 2C as the Option Unit. Consequently, defendants maintain that the "entirely tentative . . . inconclusive negotiations" among the parties did not modify the Option Agreement. Defendants' memorandum of Law at 3. *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 (1977) ("if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls").

Additionally, New York's statute of frauds, General Obligation Law § 5-703 (1), requires that, other than a short-term lease, an interest in real property may only be created, granted, assigned, surrendered or declared by a deed or conveyance in writing. According to defendants, the only operative writing among the parties is the Option Agreement, that defines the Purchase

Option Period, which plaintiff was unable to respect.

The instant complaint asserts causes of action for specific performance, breach of contract and fraud. At the outset, the causes of action for specific performance and breach of contract (in a sense two sides of the same coin) shall be dismissed as against Broadwall and Ratner, pursuant to CPLR 3211 (a) (1) and (7). The documentary evidence shows that they are not party to any of the contracts with plaintiff, and there is no allegation that they can fulfill Apthorp's contractual obligations to plaintiff without Apthorp's consent and cooperation. There may be causes of action as against Broadwall and/or Ratner if it can be demonstrated that they impeded or defeated the parties' contractual obligations. But, as non-parties, they cannot be liable for a party's breach of contract. *Black Car & Livery Ins., Inc. v H&W Brokerage, Inc.*, 28 AD3d 595, 595 (2d Dept 2006) ("the breach of contract cause of action was properly dismissed as to the respondent, since he was not a party to the agreement in question").

The cause of action for specific performance, which remains as against Apthorp, requests the conveyance of Apartment 2A to plaintiff, but, as the complaint makes clear, negotiations proceeded through several other residential units. By the time that the Attorney General approved the Property's conversion plan, the supposed trigger for concluding a deal among the parties, the focus had shifted to Apartment 10A. However, it was to be "Apartment 10A, as modified to conform to the floor plan to apartment 6A," a prior substitute for apartment 2C, the original target. Complaint, ¶ 20. Apartment 10L, the only alternative unit allegedly identified in a writing succeeding the Option Agreement, was never the ultimate choice, by all accounts. Plaintiff's counsel, at oral argument, said, "finally in November of 2009 it appears that they have a unit that everybody agreed upon." Tr. at 13. That apartment was not apartment 2C by then, as plaintiff's papers amply demonstrate.

The cause of action for specific performance shall be dismissed as against Apthorp, because of the uncertainty regarding the apartment to which plaintiff believes that he is entitled. "[S]pecific performance is appropriate in situations involving unique articles of property having a special and unascertainable quality." *Matter of Reed Found. v Franklin D. Roosevelt Four Freedoms Park, LLC,* 108 AD3d 1, 4 (1st Dept 2013) (internal quotation marks and citation omitted). The only allegation of a written promise succeeding the initial written promise of conveying Apartment 2C to plaintiff concerns Apartment 10L. Yet, this is not the unit that plaintiff now requests. Under these confused circumstances, none of the referenced units have that special and unascertainable quality that warrants specific performance.

Plaintiff's Memorandum, if timely, might be construed to meet the requirements of the Option Agreement. However, plaintiff, while characterizing his response to the approval of the Property's offering plan as immediate, never attributes a date earlier than June 30, 2010 to the proffer of the Memorandum. This would be outside the Purchase Option Period, and thereby extinguish his option. When plaintiff failed to act on or by June 13, 2010, Apthorp did not breach the contract – that is, the Option Agreement – by refusing to convey an apartment to him.

Plaintiff argues, though, that defendants manifested a pattern of delay as early as October 2009 when the identification of a substitute Option Unit began. He contends that his conduct thereafter was consistent with the requirements of the parties' agreements, and his efforts were frustrated by defendants' behavior. The doctrine of frustration of purpose may not be invoked here. "'In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.'" *Warner v Kaplan*, 71 AD3d 1, 6 (1st Dept 2009), quoting 22A NY Jur 2d, Contracts § 375.

The Operating Agreement did not specify the Option Unit, although plaintiff occupied Apartment 2C. While Apartment 2C was the early focus of negotiations among the parties, they mutually progressed to other units, and the ultimate inability to arrive at an agreement may be tied to plaintiff's failure to provide written notice of his exercise of his option within the designated period. Delays and distractions attributed to defendants before May 14, 2010, are irrelevant to this breach of contract action. In all, the cause of action for breach of contract as against Apthorp shall be dismissed.

CPLR 3016 (b) requires that in asserting a cause of action for fraud "the circumstances constituting the wrong shall be stated in detail."

> "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury."

Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 (1996).

The complaint charges that "Defendant Ratner specifically induced Mann to participate in negotiation of a transaction that Ratner never intended to consummate." Complaint, ¶ 42. The alleged pattern of delay that plaintiff outlines in his papers does not amount to a misrepresentation or a material omission of fact which was false and known to be false by defendant. Plaintiff never maintains that any of the reasons that the parties serially substituted units in their negotiations were false. By his own account, he engaged in a back-and-forth process to meet the Option Agreement. Again, as specified in the Option Agreement, the Purchase Option Period began on May 14, 2010. Plaintiff insists that he immediately submitted his Memorandum to defendants upon approval of the offering plan by the Attorney General's office, although the evidence belies this claim.

Only plaintiff's claim that defendants interposed the invented opposition of "the Bank" to the deal qualifies as a knowing misrepresentation of fact. To maintain a cause of action for fraud "it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged." *Channel Master Corp. v Aluminium Ltd. Sales,* 4 NY2d 403, 406-407 (1958). However, misrepresenting the lender's position was not material to the parties' negotiations. This assertion emerged after defendants ended negotiations for an apartment, and plaintiff recognized it as an unfounded excuse. The cause of action for fraud shall be dismissed, therefore, for failure to state a cause of action.

Accordingly, it is

ORDERED that defendants Apthorp Associates LLC, Broadwall Management and Andrew Ratner's motion, pursuant to CPLR 3211, to dismiss the complaint is granted in its entirety, and the complaint is dismissed, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: August 5, 2013

ENTER:

HON. ANIL C. SINGH
SUPREME COURT JUSTICE
J.S.C.