

Simoni v Fifth on the Park Condo, LLC

2013 NY Slip Op 32457(U)

October 8, 2013

Sup Ct, New York County

Docket Number: 150839/13

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: RAKOWER
Justice

PART 15

Index Number : 150839/2013
SIMONI, JR., JOHN B
vs.
FIFTH ON THE PARK CONDO, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3
Answering Affidavits — Exhibits _____ No(s). 4, 5, 6, 7
Replying Affidavits _____ No(s). 8

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 10/8/2013


HON. EILEEN A. RAKOWER 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 15

-----X
JOHN B. SIMONI, JR.,

Plaintiff,

- v -

FIFTH ON THE PARK CONDO, LLC,
EYTAN BENJAMIN, ROBERT EZRAPOUR,
ARTIMUS CONSTRUCTION, INC., EVAN
KASHANIAN,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
150839/13

**DECISION
and ORDER**

Mot. Seq. 1

This is a case alleging claims for breach of contract and fraud arising from Plaintiff John B. Simoni, Jr.'s ("Plaintiff") purchase of apartment 15K, located in the building known as Fifth on the Park Condominium, located at 1485 Fifth Avenue, New York, NY 10035.

Presently before the Court is Defendants' motion to dismiss the Complaint, pursuant to CPLR §3211(a)(1) and (7) and Plaintiff's cross-motion, pursuant to CPLR §3025(b), to amend the Complaint to include a cause of action for breach of express limited warranty. Plaintiff's proposed amended Complaint does not add any allegations concerning its first and second causes of action for breach of contract and fraud respectively. Defendants oppose Plaintiff's cross motion to add a third cause of action.

After the filing of Defendants' motion, the action was discontinued as against defendants Eytan Benyamin, Robert Ezrapour, and Evan Kashania. The action remains as against defendants Fifth on the Park Condo, LLC ("Fifth on the Park Condo"), and Artimus Construction, Inc ("Artimus").

As alleged in the Complaint, Plaintiff resides in apartment 15K at the building known as Fifth on the Park Condominium, located at 1485 Fifth Avenue, New York, NY 10035 (“the Building”). Defendant Fifth on the Park Condo is alleged to be the sponsor of the Condominium. Defendant Artimus is alleged to be the Fifth on the Park Condo’s general contractor/and or construction manager for some or all of the construction of the Building.

Plaintiff alleges that on or about May 31, 2012, he entered into a written purchase agreement with the Sponsor to purchase the Apartment, and under the terms of the Home Contract, “a) the Unit and the fixtures and the personal property contained therein are being sold and delivered as described the Offering Plan; b) Sponsor is obligated to construct the Building in accordance with all applicable codes and filed building plans and specifications as well as provisions of the FOP Offering Plan.”

In this action, Plaintiff alleges that notwithstanding the representations made in the Home Contract and FOP Offering Plan, the Apartment he purchased “suffers from substantial design and construction defects, inadequate and negligent workmanship, missing and defective products and materials, deviations from the FOP Offering Plan, deviations from materials and construction and conditions called under all applicable laws and codes, deviations from the plans and specifications prepared for construction of the Building and Residential Units and conditions that show disregard for acceptable standards of quality.”

The Complaint lists the alleged defects discovered to date, which include, the following: “failure to provide fire stopping around the United walls, penetration, and perimeter; failure to abide by the New York State energy code in that there is an absence of insulation in and around the Home windows and Heat Pump units and in that there is constant and substantial draft at and around the windows; failure to provide ventilation and exhaust in the master bedroom, second bedroom, kitchen; “failure to provide exhaust from the stove through the Common Element exhaust system even though the Revised Architect Report had no such limitation; “failure to supply exhaust ventilation for the dryer unit,” defective heat pumps and thermostat in the bedrooms, defective plumbing, defective installation/placement of dishwasher, and no permanent certificate of occupancy for the Apartment.

The Complaint alleges that despite demand to Fifth on the Park Condo, the Sponsor, Fifth on the Park Condo has failed and refused to cure the alleged defects.

Presently before the Court is Defendants' motion to dismiss the breach of contract and fraud claims of the Complaint.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence;

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

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

The first cause of action alleges breach of contract against defendant Fifth on the the Park Condo for breach of the May 31, 2012 Home Contract entered between defendant and Plaintiff. This cause of action is not asserted as against defendant Artimus. “The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant’s failure to perform, and resulting damage.” (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]). Here, the Complaint alleges that Fifth on the Park Condo breached the Home Contract by failing to deliver the Apartment in accord with the FOP Offering Plan, the Home Contract, and applicable law and codes. The Complaint alleges that the defects in Plaintiff’s Apartment are a material breach of the Home Contract, FOP Offering Plan, and applicable laws and codes, and Fifth on the Park Condo has further failed to cure the subject defects, causing resulting damages. Accepting the allegations as true, the four corners of the Complaint state a claim for breach of contract as against Fifth on the Park Condo. In addition, Defendant Fifth on the Park Condo’s submission does not flatly contradict the legal conclusions and factual allegations of the complaint.

The second cause of action of the Complaint alleges fraud against all defendants, including against Fifth on the Park Condo and Artimus. “The elements of a cause of action for fraud are (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance, and (5) injury.” *House of Spices (India), Inc. v SMJ Servs., Inc.*, 2011 N.Y. Misc. LEXIS 1922 (N.Y. Misc. 2011). “[E]ach of these essential elements must be supported by factual allegations sufficient to satisfy CPLR §3016(b), which requires, in the case of a cause of action based on fraud, that ‘the circumstances constituting the wrong shall be stated in detail.’” (*Id.*) (citations omitted).

Here, the second cause of action of the Complaint alleges that defendants, collectively, “engaged in fraud and fraudulent concealment by a) knowingly misrepresenting that the Unit had proper ventilation, b) by knowingly misrepresenting the condition of the Unit concerning the firestopping, heat pumps, ventilation, and thermostat, c) by concealing the failure of the stove to be exhausted through the building ventilation system, d) by concealing the absence of insulation at the windows and near the heat pumps, e) by concealing the absence of fire stopping at the Unit perimeter walls and barriers, f) by supplying a dryer in knowing violation of the applicable code and law.” The Complaint further alleges that Plaintiff relied upon the

misrepresentations and has suffered damages as a result. However, aside from the conclusory allegations contained in the second cause of action made with respect to all defendants collectively, there are no factual, specific allegations detailing the alleged fraud committed by either defendants Fifth on the Park Condo or Artimus. As such, the second cause of action fails to meet the heightened pleading requirements of CPLR §3016(b) and is dismissed.

Plaintiff cross moves to amend the Complaint to add a third cause of action for breach of warranty. Defendants oppose.

Pursuant to CPLR §3025(b), “A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time by leave of court.... Leave shall be freely given upon such terms as may be just....” “CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice” (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

The proposed third cause of action asserts breach of limited warranty as against Fifth on the Park Condo. It alleges that, “As part of the Home Contract and FOP Offering Plan, the Sponsor agreed to provide and did provide for an express limited warranty.” That alleged warranty is contained with the 30th Amendment of the FOP Offering Plan, which sets forth the Sponsor’s obligation to repair any defective item of construction. Plaintiff alleges that the defects in his Apartment are a violation of the Contract, the FOP Offering Plan, as well as a breach of the alleged Warranty. Defendants oppose the amendment, contending that it is duplicative of the breach of contract claim and that Plaintiff is precluded from recovering under this theory as a result of his own actions.

Here, Plaintiff is entitled to amend its Complaint. There is nothing in the record indicating that any prejudice will result from amendment nor is the proposed amendment plainly lacking in merit.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss is granted to the extent Plaintiff's fraud claim is dismissed; and it is further

ORDERED that the Complaint is dismissed as against defendant Artimus Construction, Inc. in its entirety; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross motion to amend its Complaint is granted and the amended Complaint in the proposed form annexed to the moving papers subject to the dismissal of the second cause of action shall be deemed served on defendant Fifth on the Park Condo, LLC, upon service of a copy of this Order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: OCTOBER 8, 2013



EILEEN A. RAKOWER, J.S.C.