SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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BERNADETTE PANZELLA

Plaintiff,

Index No.600954/2007

-against-

DECISION/ORDER

THE EL-AD GROUP, EL-AD PROPERTIES, NY LLC & LADIES MILE, INC.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Plaintiff has brought the present action against defendants based on her claim that defendants breached their agreement with her because the condominium unit she purchased had less square footage than what was stated in the offering plan and that she suffered damages as a result of the alleged decrease in square footage. She has brought a motion to vacate the referee's report, which resolved a discovery issue regarding privileged documents. Defendants brought a cross- motion to confirm the referee's report and for summary judgment dismissing the complaint. Plaintiff then brought a separate motion for summary judgment. All of the motions are consolidated for disposition. For the reasons stated below, the motion to vacate the referee's report is denied, the cross-motion to confirm the referee's report is granted, the cross-motion for summary judgment dismissing the complaint is granted and the motion for summary judgment by plaintiff is denied.

The relevant background is as follows. In February 2005, decedent Angela La Ponzina executed a purchase agreement (the "Agreement") to purchase Unit Number 2E in the O'Neill Condominium (the "Unit") with the sponsor defendant Ladies Mile, Inc. La Ponzina

subsequently assigned all of her interests and rights in the Agreement for the Unit to the plaintiff on or about June 1, 2007. Plaintiff closed on her purchase of the Unit on June 13, 2007 and then sold the Unit in July 2011. The offering plan, which was provided to the plaintiff prior to the closing, set forth a description of the Unit with an estimated actual square footage and also set forth the purchaser's rights and remedies with respect to a discrepancy in the square footage of the Unit. Schedule A to the offering plan stated that the estimated interior square footage for the Unit was 1628 square feet. The offering plan stated that in "the event the actual useable square footage of the Unit, using the methods described in the Declaration, is diminished by more than 5% of the square footage set forth on the Floor Plans, then Purchaser's sole remedy shall be to rescind the contract and receive its Deposit and any interest earned thereon." The foregoing term, as well as the other terms of the offering plan, was incorporated into the Agreement between the parties. The purchase Agreement provides that the language of the offering plan is incorporated by reference and that the terms of the offering plan prevail if there are any inconsistencies.

At the time plaintiff commenced this action and filed her initial complaint in March of 2007, the closing for the Unit had not yet taken place and plaintiff was bringing an action for specific performance of the contract. Plaintiff then filed an amended verified complaint in April 2007, also before the closing of the Unit, in which she claimed that she was entitled to specific performance of the Agreement to purchase the Unit and also claimed that she was entitled to contractual damages for "the sum of $1,151.72 for each square foot under the 1628 square feet represented by defendants to be the square footage of Unit 2E at the time the Purchase Agreement was signed." In the amended complaint, she specifically alleges in her cause of

action for breach of contract that defendants represented that the square footage of the Unit was 1648 square feet, and that in defendants' eighth amendment to the offering plan, for the very first time, there is a contradictory reference to a reduction in the square footage of the Unit from 1628 square feet to 1517 square feet. She further alleges in the complaint that the "reduction in square footage of Unit 2E constitutes a breach of the Purchase agreement by the defendants" and that she has been damaged in the sum of $127,840.92 based on a 111 square feet reduction in the Unit. Despite her clear allegations in the amended verified complaint that defendant had breached the contract based on its representations with respect to the square footage of the Unit, plaintiff elected to pursue her claim for specific performance rather than to exercise her right to pursue her claim for rescission of the contract. It was not until she filed her second verified complaint in 2010, long after she closed on the apartment, that she first decided to assert a claim for rescission, which she then abandoned by selling the Unit in 2011.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, defendants have established their prima facie right to summary judgment dismissing plaintiff's breach of contract claim based on the unambiguous provisions of

the offering plan and the Agreement. The offering plan unambiguously provides that plaintiff's sole remedy in the event that the actual useable square footage of the Unit is diminished by more than 5% of the square footage set forth in the floor plans shall be to rescind the contract and to receive back the deposit. Based on the foregoing unambiguous language, plaintiff does not have any right to bring a breach of contract claim to recover monetary damages based on the diminishment of the square footage of the Unit. Rather, her only remedy was to rescind the contract and receive back her deposit, which right she decided to forego when she made the decision to pursue her claim for specific performance and purchase the Unit rather than to pursue a claim for rescission in her first amended complaint. At the time plaintiff made the election to purchase the Unit rather than pursue a claim for rescission, she had already received the eighth amendment to the offering plan which allegedly stated that there was a reduced square footage and had already asserted a claim for breach of contract based on the reduced square footage rather than pursue a claim for rescission. Based on the foregoing, plaintiff waived her right to pursue the claim for rescission provided to her in the offering plan and Agreement and instead decided that she would rather purchase the Unit despite her awareness of the alleged misrepresentation. Tellingly, plaintiff chose not to assert her claim for rescission until she filed a second amended complaint after she purchased the Unit although this remedy was clearly available to her when she filed the first amended complaint. Moreover, rather than pursuing the claim for rescission which she did assert in the second amended complaint, plaintiff again made the voluntary choice to sell the Unit at a profit. Under these circumstances, it is plaintiff's own actions which caused her to not have the remedy of rescission available and she does not have any available remedy for contractual damages pursuant to the unambiguous terms of the offering

plan and Agreement.

In opposition to defendants' motion for summary judgment, plaintiff has failed to produce any evidentiary proof requiring a trial or to raise any legal issue which would prevent defendants from being granted summary judgment. Plaintiff's primary argument in opposition to defendants' motion for summary judgment and in support of her motion for summary judgment is that defendants have violated 13 NYCRR, Part 20 which governs condominiums. She argues that the provisions of 13 NYCRR, Part 20, prevent defendants from limiting plaintiff's remedy in the event that there is an inaccurate statement concerning the size of a condominium unit to a rescission of the purchase of the unit. To support this argument, plaintiff relies on 13 NYCRR section 20.1(m) which provides that the requirements set forth in 13 NYCRR part 20 shall not be negated or contradicted " by provisions purporting to discharge liability or to terminate the continuing effect of representations in the offering plan upon an event such as the closing or the deliver of the deed."

This court finds, based on its review of the offering plan and the provisions of 13 NYCRR, Part 20, that plaintiff has failed to establish that there has been any violation by defendants of 13 NYCRR, part 20 based on the provision in the offering plan limiting plaintiff's remedy to rescission in the event that there is an inaccurate statement concerning the size of the Unit. Initially, the provision in the offering plan limiting plaintiff's remedy to a rescission of the contract does not attempt to discharge the sponsor's liability for any incorrect statement regarding the square useable feet of the Unit–it simply limits plaintiff's remedy to rescission rather than contractual damages. Moreover, plaintiff's right to pursue the remedy of rescission was not terminated because of a provision in the offering plan purporting to terminate the

continuing effect of representations in the offering plan upon closing or delivery of the deed. Rather, her right to pursue the claim of rescission ended based on her own voluntary decision to purchase the Unit and pursue her claim for specific performance rather than pursue a claim for rescission despite alleging in her own complaint that there was a breach of the Agreement based on defendants' misrepresentation of the useable square footage of the Unit and despite having had the unit inspected and measured by her own engineer and her subsequent voluntary decision to sell the Unit for a profit rather than pursuing her claim for rescission as stated in her second amended complaint after she purchased the Unit.

Therefore, her first cause of action alleging breach of contract and seeking monetary damages must be dismissed as she does not have a right to seek monetary damages pursuant to the terms of the Agreement and offering plan. Moreover, her second cause of action for rescission must also be dismissed as her decision to sell the Unit rather than pursue her rescission cause of action renders her rescission claim moot.

This court also finds that the referee's report should be confirmed. The issue that the court referred to the special referee was to make a determination as to whether various documents in defendants' possession were privileged as a result of which they were not required to be turned over. The referee determined, after hearing argument from the parties and conducting an in-camera review of the documents, that the documents were privileged and did not have to be turned over. The court finds no basis for disturbing this finding and therefore confirms the report of the special referee. Contrary to plaintiff's position, there was no need for the referee to have a formal hearing–all that she was required to do, which is what the court would have done if the issue was not referred, was to hear the arguments of the parties and

conduct an in-camera review of the documents to determine whether they were privileged. Since she clearly performed this task, her report is confirmed.

Accordingly, it is hereby ordered that the report of the referee is confirmed and that defendants are granted summary judgment dismissing the complaint in its entirety. This constitutes the decision, order and judgment of the court.

Dated: 6/20/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.