Board of Mgrs. of 266 W. 115th St. Condominium v 266 W. 115th St., LLC
2014 NY Slip Op 33047(U)
December 2, 2014
Supreme Court, New York County
Docket Number: 159552/2013
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

THE BOARD OF MANAGERS OF 266 WEST 115TH STREET CONDOMINIUM,

Plaintiff,

- against -

266 WEST 115TH STREET, LLC, et al.,

Defendants.

Index No.: 159552/2013

DECISION/ORDER

Motion Seq. 001

This action is brought by plaintiff, The Board of Managers of 266 West 115th Street Condominium (Condominium Board or Board), against defendant 266 West 115th Street, LLC, the sponsor-developer (Sponsor) of a seven story, fifteen unit residential building at West 115th Street in Manhattan, and defendants The Community Preservation Corporation, CPC Resources, Inc., CPCR Opportunity Fund, LLC, and Kathleen Dunn (collectively CPC defendants), the alleged alter egos of the Sponsor. Defendants move to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (7).

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [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]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual

allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88.)

The complaint pleads ten causes of action based on the Sponsor's allegedly defective construction of the building. Specifically, "each of the Unit Owners began experiencing conditions indicating that the design and construction of their individual units and the Building was defective, and not constructed in a skillful manner, in that the workmanship and materials used in the construction did not confirm [sic] with (i) the [Offering] Plan; (ii) applicable code and laws; (iii) the plans and specifications filed with the New York City Department of Buildings; and (iv) industry standards." (Complaint, ¶ 29.) Plaintiff engaged Rand Engineering & Architecture, P.C. ("Rand"), an architectural and engineering consulting firm, to survey the defects. (Id., ¶ 32.) Rand issued two reports recommending "proposed courses of action for many defects" and estimating the cost of remediation. (Id., ¶ 33; August 14, 2009 Rand Report [Ex. 1 to D'Angelo Aff. in Opp.]; September 27, 2013 Rand Report [Ex. 5 to D'Angelo Aff. in Opp.].)

Breach of Contract and Breach of Express Warranty

The complaint pleads a first cause of action for breach contract based on the construction defects and the failure to remediate them, and a second cause of action for breach of the express

warranty contained in the Offering Plan, also based on the failure to remediate the defects in the construction of the building. Defendants move to dismiss these causes of action on the ground that plaintiff failed to give defendants timely written notice of the defects, as required by the Offering Plan.

The Offering Plan provides, in relevant part:

> "Sponsor shall not be obligated to correct or cause to be corrected any defects in construction of a Unit or the Common Elements, or in the installation or operation of any mechanical equipment therein, except as set forth herein. . . . Sponsor shall, however, correct or cause to be corrected any defects in construction of the Building and the Residential and Storage Units therein, or the installation or operation of mechanical equipment installed by the Sponsor therein, but only if (i) such defect is due to substantially improper workmanship or materials substantially at variance with the Plans and Specifications, and (ii) Sponsor is notified in writing (x) by the Unit Owner to whom Sponsor sold a Unit, within thirty (30) days following the Unit Closing Date for that Unit if the defect concerns that Unit . . . or (y) by the Board of Managers, within thirty (30) days following the first annual meeting of Unit Owners, if the defect concerns the common elements. . . . If Sponsor is not notified within these time periods, Sponsor shall not have any obligation to remediate the defect even if it otherwise would be eligible for remediation."

(Offering Plan, § N [4] [a] [annexed as Ex. C to Margolis Aff. in Supp.].)

Plaintiff does not dispute that it did not give written notice to defendants within thirty days of the sales of the units, which spanned the period from October 2007 to June 2008, or within thirty days of the first annual meeting held on March 4, 2008. (Complaint, ¶ 17; List of Closing Dates [annexed as Ex. B to Margolis Aff. in Supp.]; Agenda for Annual Meeting [annexed as Ex. I to Margolis Aff. in Supp.].) Rather, plaintiff argues that the written notice requirement was waived by the Sponsor by virtue of its repeated repairs of various defects at the premises over the years. In support of this contention, plaintiff submits the affidavits of Robert

Aldridge, President of the Condominium Board, which attest, among other things, that the Sponsor added sealant to multiple roof railing stanchions to seal gaps in the summer of 2008, installed additional brick and mortar threshold on the emergency roof exits to seal gaps in the summer of 2009, repaired sheetrock and drywall in individual units in the summer and fall of 2009 and fall of 2011, repaired the elevator bulkhead roof and emergency exit bulkhead in the summer of 2012, and applied flexible sealant to the masonry capping stones and the exterior west wall in the summer of 2013. (Aldridge Suppl. Aff. in Supp., ¶ 4.)

Although the complaint does not plead the specific repairs attested to in the Aldridge affidavits, these affidavits may be used to preserve the pleading. (See generally Rovello v Orofino Realty Co., 40 NY2d 633, 635-636 [1976].) Based on the facts attested as to the Sponsor's course of conduct in repairing defects at the premises, the court holds that plaintiff Board raises a triable issue of fact as to whether, and to what extent, the Sponsor waived the written notice requirement in the Offering Plan. (See Siegel v Vector Real Estate Corp., 197 AD2d 477, 477-478 [1st Dept 1993]; Rich v Orlando, 108 AD3d 1039, 1040-1041 [4th Dept 2013]; Randazzo v Zylberberg, 4 Misc3d 109, 110 [App. Term 2004], Terk v 40059 Owners Corp., 194 Misc2d 419, 420-421 [App. Term 2002].) The branch of the motion to dismiss the first cause of action for breach of contract will accordingly be denied.

The second cause of action for breach of the express warranty is based on the same construction defects as the breach of contract cause of action, and seeks the same relief. (See Complaint, ¶¶ 78, 87.) The warranty cause of action will accordingly be dismissed as duplicative. The court notes that plaintiff's argument that the warranty cause of action is

maintainable without a written notice ignores the requirement in section N (4) (a) of the Offering Plan that conditions the Sponsor's obligation to remediate defects on written notice.

Implied Housing Merchant Warranty

The third cause of action pleads breach of the common law implied housing merchant warranty. This Department has squarely held that this common law warranty does not apply to condominiums, like that here, with more than five stories. (20 Pine St. Homeowners Assn. v 20 Pine St. LLC, 109 AD3d 733 [2013].)

Negligence and Negligent Supervision

The complaint pleads a fourth cause of action for negligence and an eighth cause of action for negligent supervision of construction. These causes of action are substantially similar to each other and are both based on the claim that defendants' negligent construction caused the defects in construction and the building's non-compliance with the Offering Plan and building codes. (See Complaint, ¶¶ 103, 105, 144.) They are plainly duplicative of the breach of contract cause of action. A claim for negligence is not stated by alleging that a contract was negligently performed or, put another way, an allegation of a duty of care does not transform a breach of contract claim into a tort claim. (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 390 [1987]; Clemens Realty, LLC v New York City Dept. of Educ., 47 AD3d 666 [2d Dept 2008].)

Fraud

The complaint pleads a fifth cause of action for fraud or negligent misrepresentation based on the allegation that the Sponsor represented that the construction would be completed in accordance with the Offering Plan, and that it would cure any defects in the construction to the extent required under such Plan. (Complaint, ¶¶ 112, 113.) This cause of action is not pleaded

with the specificity required by CPLR 3016 (b). Moreover, the cause of action is in effect based on an allegedly insincere promise to perform the contract. However, it is well-settled that "[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support" a fraud claim. (New York University v Continental Ins. Co., 87 NY2d 308, 318 [1995]; accord Manus v VMS Assoc., LLC, 53 AD3d 451, 453-454 [1st Dept 2008].)

General Business Law § 349

The sixth cause of action alleges deceptive practices under General Business Law § 349, based on allegedly false and misleading statements by the Sponsor. (Complaint, ¶ 126.) The cause of action does not identify specific statements but refers to the statements alleged "previously" in the Complaint. (Id.) Those statements, as discussed above in connection with the fraud claim, involve representations that the building would be constructed in conformity with the Offering Plan and that the Sponsor would remediate defects. These statements do not involve a fraud aimed at consumers at large and therefore do not support the General Business Law claim. (Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 [1st Dept 2013] [dismissing section 349 claim in action by "condop" shareholders to recover damages resulting from defects in the design and construction of the building]; Thompson v Parkchester Apts. Co., 271 AD2d 311 [1st Dept 2000].) The court rejects plaintiff's contention that the claim can be based on alleged frauds by the CPC defendants in connection with other, unrelated projects.

Violation of Interstate Land Sales Act

The seventh cause of action alleges violation of the Interstate Land Sales Act. The statute by its terms exempts "the sale or lease of lots in a subdivision containing less than twenty-five lots" (15 USC § 1703 [a] [1].) As it is undisputed that this building falls in that category, the cause of action is not stated.

Punitive Damages

Punitive damages are "not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." (Rocanova v Equitable Life Assur. Socy. of US, 83 NY2d 603, 613 [1994].) However, if the breach of contract involves a fraud "evincing a high degree of moral turpitude" and "wanton dishonesty," then punitive damages may be recovered if the conduct was "aimed at the public generally." (Id. [internal quotation marks and citation omitted].) Where a lawsuit is based in contract, "the threshold task for a court considering defendant's motion to dismiss a cause of action for punitive damages is to identify a tort independent of the contract." (New York Univ., 87 NY2d at 316.) As held above, plaintiff's action sounds in contract, and its tort claims do not survive. The claim for punitive damages will be dismissed.

Specific Performance and Equitable Relief

The ninth cause of action seeks specific performance compelling the Sponsor and the CPC defendants "to honor the express warranty contained in the [Offering] Plan . . . and remediate the defects in the Building." (Complaint, ¶ 153.) The tenth cause of action seeks equitable relief against the same defendants to compel "the Sponsor to assign the manufacturers' warranties with respect to the equipment and appliances installed in the Units to the Unit Owners

and installed in the common elements to the Board and to deliver a set of "as built" plans to the Board. (Id., ¶ 162.) As the breach of contract cause of action survives this motion to dismiss, the specific performance cause of action survives as well. As to the tenth cause of action for equitable relief, the Sponsor submits evidence that it has provided the Board with the requested documents. (Margolis Aff. in Supp., Ex. D.) The Board does not dispute this evidence. This cause of action will be dismissed without opposition.

Alter Ego Claims

To state a claim for piercing the corporate veil, the complaint must plead not only that an individual "exercised complete dominion and control over the corporation" but also that the individual "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice." (East Hampton Union Free School Dist. v Sandpebble Builders, Inc., 16 NY3d 775, 776 [2011] [internal quotation marks and citation omitted], affg 66 AD3d 122 [2d Dept 2009].) Put another way, a plaintiff seeking to pierce the corporate veil bears the "heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." (TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d 335, 339 [1998].) Factors to be considered in determining whether an individual owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use. (East Hampton Union Free School Dist., 66 AD3d at 127.) In addition, it is well settled that a claim for veil piercing must be based on "particularized facts" and not on mere

conclusory statements. (Andejo Corp. v Seaport Watch Co., 40 AD3d 407, 407 [1st Dept 2007]; Barneli & Cie SA v Dutch Book Fund SPC, 95 AD3d 736, 737 [1st Dept 2012].)

Here plaintiff alleges that defendant Dunn is "an employee, agent, principal and/or agent" of CPCR Opportunity Fund, LLC, and that the latter is the sole member and principal of the Sponsor. (Complaint, ¶¶ 61-62.) Plaintiff alleges further that CPC Resources, Inc. is a wholly-owned subsidiary of The Community Preservation Corporation and is the manager of CPCR Opportunity Fund, LLC. (Id., ¶¶ 63-64.) Plaintiff merely pleads an organizational structure and conclusorily asserts that the Sponsor is "a mere instrumentality and alter ego of the [CPC defendants], which are operated and controlled by the [CPC defendants] to advance their financial interests." (Id., ¶ 66.)

A claim against the Sponsor's principals should be dismissed where the complaint alleges merely "conclusory statements that Sponsor's Principals dominated and controlled Sponsor and each other . . . ." (20 Pine St. Homeowners Assn., 109 AD3d at 735.) Here, however, the record also contains evidence that the Offering Plan was certified "by the Sponsor and Principals of Sponsor." (Margolis Aff. in Supp., Ex. C.) A principal of a sponsor may be held separately liable where it executes the certification to the offering plan in its "separate capacity" and "thereby knowingly and intentionally advanced the alleged misrepresentations of the Offering Plan. . . ." (Birnbaum v Yonkers Contr. Co., 272 AD2d 355, 357 [2d Dept 2000], citing Zanani v Savad, 228 AD2d 584, 585 [2d Dept 1996].) At this juncture, the alter ego claim is therefore maintainable.

Re-Sold Units

Defendants also move to dismiss any claims or entitlement to relief based on the three units that were re-sold after the first sale by the Sponsor. (Ds.' Memo. of Law in Supp. at 20.) To the extent that plaintiff asserts any claims for damages to the three re-sold units, as opposed to the common areas or the other units, any such claims are barred by the express terms of the Offering Plan: "Sponsor's undertaking to correct eligible defects in a Unit, as described above, runs only to Unit Owners who purchase a Unit from Sponsor. It does not run to Owners who purchase Units on resale by other Unit Owners . . . ." (Offering Plan, § N [4] [e].)

Accordingly, it is hereby ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the causes of action for breach of express warranty (second cause of action), breach of the common law implied housing merchant warranty (third cause of action), negligence (fourth cause of action), fraud or negligent misrepresentation (fifth cause of action), violation of General Business Law § 349 (sixth cause of action), violation of the Interstate Land Sales Act (seventh cause of action), negligent supervision of construction (eighth cause of action), equitable relief (tenth cause of action), punitive damages, and any claims based on the resold units; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 60, Room 248, 60 Centre Street, New York, New York on February 5, 2015 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
December 2, 2014

MARCY FRIEDMAN, J.S.C.