Board of Mgrs. of the Sunrise Manor Condominium Assn. v Sunrise Enter., Inc.
2018 NY Slip Op 30781(U)
March 8, 2018
Supreme Court, Queens County
Docket Number: 703755/14
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

BOARD OF MANAGERS OF THE SUNRISE MANOR CONDOMINIUM ASSOCIATION, INDIVIDUALLY AND ON BEHALF OF ALL UNIT OWNERS OF THE SUNRISE MANOR CONDOMINIUM,

Plaintiffs,

-against-

SUNRISE ENTERPRISE, INC., ARKADY ZIRKIEV, ZOYA AKSAKALOVA, 99-31 HOLDINGS LLC, and ROBERT ARONOV and ILANA ARONOV as TRUSTEES OF THE AKSAKALOVA IRREVOCABLE TRUST,

Defendants.

Index Number: 703755/14

Motion Date: 10/17/17

Motion Seq. Nos.: 8 & 9

FILED
MAR 14 2018
COUNTY CLERK
QUEENS COUNTY

ARKADY ZIRKIEV,

Third-Party Plaintiff,

-against-

TIPP CONS. INC. a/k/a TIPP ROOFING COMPANY, BUSKO CORP., VULKAN HVAC INC., MERCON CONTRACTING CORP., KINGS ELECTRIC CO., INC., and BLC DRYWALL CORP.,

Third-Party Defendants.

The following papers numbered E207 to E233 were read on this motions by defendants, Zoya Aksakalova, and Robert Aronov and Ilana Aronov as Trustees of the Aksakalova Irrevocable Trust (Seq. 8), to dismiss the First and Second Causes of Action of plaintiff's amended complaint as against them, pursuant to CPLR 3211 (a) (7), and motion by defendants, Sunrise Enterprise, Inc. (Sunrise), Arkady Zirkiev, and 99-31 Holdings, LLC (99-31) (Seq. 9), to dismiss plaintiff's amended complaint as against them, pursuant to CPLR 3211 (a) (7).

	Papers Numbered
Notices of Motion - Affirmations - Exhibits	E207-211; E222-226
Answering Affirmations - Exhibits	E220;227
Reply Affirmation - Exhibits.....	E228; E230-E233

Upon the foregoing papers, it is ordered that defendants' motions to dismiss, are determined as follows:

In this action for, among other things, fraud, negligent misrepresentation, and breach of contract, defendants, Aksakalova and the Aronovs, moved to dismiss the First and Second Causes of Action, and defendants, Sunrise, Zirkiev, and 99-31, moved to dismiss the entire complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action against them. Plaintiff opposes.

Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Cheslowitz v Board of Trustees of the Knox Sch.*, 156 AD3d 753 [2d Dept 2017]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; *see Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]; *Fogan-Chew v Poughkeepsie Dept. Of Public Works*, 135 AD3d 702 [2d Dept 2016]; *Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901[2d Dept 2014]).

On a motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all the facts alleged therein, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Murphy v Department of Educ. of the City of N. Y.*, 155 AD3d 637 [2d Dept 2017]; *Olivieri Const. Corp. v WN Weaver Street, LLC*, 144 AD3d 765 [2d Dept

2016]). A motion to dismiss merely addresses the adequacy of a pleading, and does not reach the substantive merits of plaintiff's cause of action (*see Kaplan v New York City Dep't. of Health and Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (*see Kaplan v New York City Dep't. of Health and Mental Hygiene*, 142 AD3d 1050; *Lieberman v Green*, 139 AD3d 815; *Tooma v Grossbarth*, 121 AD3d 1093 [2d Dept 2014]).

In the case at bar, after appropriately affording a liberal construction to the pleadings (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Hampshire Properties v BTA Building & Developing, Inc.*, 122 AD3d 573 [2d Dept 2014]; *Carillo v Stony Brook Univ.*, 119 AD3d 508 [2d Dept 2014]), plaintiff has sufficiently asserted a First and Second Cause of Action for fraud and negligent misrepresentation (*see generally Lewis v Wells Fargo Bank, N.A.*, 134 AD3d 777 [2d Dept 2015]; *Blanco v Polanco*, 116 AD3d 892 [2d Dept 2014]). Contrary to the Aksakalova and the Aronov defendants' assertion that the Martin Act (General Business Law art 23-A) bars plaintiff's causes of action based on fraud herein, citing *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 (2009), plaintiff's said causes of action are not predicated solely on alleged violations "of the Martin Act or its implementing regulations;" would have existed absent the statute; and are, therefore, not preempted by that act (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]; *see Meadowbrook Farms Homeowners Ass'n, Inc. v JZG Resources, Inc.*, 105 AD3d 820 [2d Dept 2013]; *see generally Excess Line Ass'n of New York (ELANY) v Waldorf & Associates*, 130 AD3d 563 [2d Dept 2015]). "Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies" (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.* at 353).

Further, while "sponsor principals ... cannot be held individually liable for the breach of contract ... based solely on alleged violations of the offering plan, merely by their certification of that offering plan in their representative capacities on behalf of the sponsor, in accordance with the requirements of the Martin Act" (*Board of Mgrs. of the 125 N. 10th Condominium v 125North10, LLC*, 150 AD3d 1065 [2d Dept 2017]), a principal of a sponsor may be held separately liable where the principal executes the certification to the offering plan in his separate capacity, and thereby knowingly and intentionally advanced the misrepresentations of the offering plan (*see Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680 [2d Dept 2016]). In the case at bar, Zirkiev signed the certification of the offering plan as President of Sunrise, and both he and Ilyau Aronov, also signed it individually. As such, plaintiff's adequately pleaded allegations against the sponsor principals are viable in this action, and movants have failed to demonstrate entitlement to dismissal of said causes of action.

Plaintiff has sufficiently asserted a Third and Fourth Cause of Action for breach of contract and breach of implied warranty, pursuant to General Business Law § 777-a, against Zirkiev and Sunrise, warranting the denial of defendants' dismissal motion in that regard. To maintain a cause of action for breach of contract, plaintiff must only establish the existence of a contract between plaintiff and defendant, performance by plaintiff, failure to perform by defendant, and resulting damages (*see Bennett v St. Farm Fire & Cas. Co.*, 137 AD3d 727 [2d Dept 2016]; *JP Morgan Chase v J. H. Electric of New York, Inc.* 69 AD3d 802 [2d Dept 2010]). Plaintiff has established, prima facie, through the offering plan and other documentary evidence, "a manifestation of mutual assent" that it and the sponsor were "in agreement with respect to all material terms", thereby creating an alleged binding contract between them (*Zheng v City of New York*, 19 NY3d 556, 577 [2012], quoting *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). Additionally, plaintiff has alleged in its complaint that Zirkiev "exercised complete domination of the sponsor" in the subject transaction, and has minimally incorporated the requisite language alleging "[c]onduct constituting an abuse of the privilege of doing business in the corporate form ... a material element of any action seeking to hold the owner personally liable for the actions of his or her corporation under the doctrine of piercing the corporate veil" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126-127 [2d Dept 2009]; *see Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002 [2d Dept 2016]). As such, plaintiff's complaint pleads sufficient facts to hold the individual defendant sponsor principal, Zirkiev, liable under a theory of piercing of the corporate veil (*see Allstate ATM Corp. v E. S. A. Holding Corp.*, 98 AD3d 541 [2d Dept.2012]). Again, whether plaintiff's said causes of action have merit is not determined pursuant to this section of the statute.

Consequently, all four causes of action herein have been sufficiently stated and adequately pleaded against the appropriate defendants (*see Alliance National Ins. Co. v Absolut Facilities Management, LLC*, 140 AD3d 810 [2d Dept 2016]; *Tudor Ins. Co. v Unithree Investment Corp.*, 137 AD3d 1259 [2d Dept 2016]), and both of defendants' motions to dismiss, based upon CPLR 3211 (a) (7), are denied.

Accordingly, the motions by Zoya Aksakalova, and Robert Aronov and Ilana Aronov, as Trustees of the Aksakalova Irrevocable Trust, to dismiss the First and Second Causes of Action of plaintiff's amended complaint as against them, and the motion by defendants, Sunrise Enterprise, Inc., Arkady Zirkiev, and 99-31 Holdings, LLC, to dismiss plaintiff's amended complaint as against them, both pursuant to CPLR 3211 (a) (7), are denied.

Dated: March 8, 2018

J.S.C.

FILED
MAR 14 2018
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QUEENS COUNTY