

<b>105 W. 55th St. LLC v Melohn Found., Inc.</b>
2021 NY Slip Op 32341(U)
November 16, 2021
Supreme Court, New York County
Docket Number: Index No. 652095/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR ENGORON PART 37**

*Justice*

-----X

105 WEST 55TH STREET LLC,  
  
Plaintiff,

- v -

THE MELOHN FOUNDATION, INC., PATTERSON  
BELKNAP WEBB & TYLER, LLP,

Defendants.

-----X

INDEX NO. 652095/2020

MOTION DATE 08/27/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to DISMISS

Upon the foregoing documents and for the reasons stated hereinbelow, defendant’s motion is granted in part and denied in part and plaintiff’s cross-motion is granted.

Background

On September 24, 2019, plaintiff, 105 West 55th Street LLC (“Buyer”), entered into a Purchase and Sale Agreement (“PSA”) with defendant The Melohn Foundation, Inc. (“Seller”), pursuant to which Buyer agreed to purchase from Seller a multiple dwelling building located at 105 West 55th Street, New York, New York (“the Property”), for a contract price of \$40,750,000. NYSCEF Doc. No. 126. Simultaneously with the execution of, and pursuant to, the PSA, Buyer delivered a ten-percent contract deposit of \$4,075,000 (“the Deposit”) to defendant, Patterson Belknap Webb & Tyler, LLP (“Escrow Agent”). *Id.*

Pursuant to Section 5.2.1 of the PSA, Seller was required to obtain Buyer’s prior written consent before entering into any new lease or lease renewal in the Property. NYSCEF Doc. No. 126. Buyer asserts that Seller materially breached the PSA by improperly renewing and extending multiple leases in the Property without plaintiff’s prior written consent. NYSCEF Doc. No. 94.

In a letter dated March 19, 2020, Buyer notified Seller that it had “materially defaulted under the PSA,” giving Seller ten business days to cure. NYSCEF Doc. No. 99.

In a letter dated April 6, 2020, Buyer notified Seller that, due to Seller’s failure to cure its alleged material default, “the PSA is deemed terminated and Seller must return the Deposit to Buyer.” NYSCEF Doc. No. 100.

Neither Seller nor Escrow Agent returned the Deposit.

On May 28, 2020, plaintiff initiated the instant lawsuit seeking: (1) a declaratory judgement that Seller materially breached the PSA; (2) a declaratory judgement that Escrow Agent is required to return the Deposit to Buyer; and (3) an order directing Escrow Agent to specifically perform its obligations under the PSA and deliver the Deposit to Buyer. NYSCEF Doc. No. 1.

As a non-profit, Seller was required to obtain consent and approval from the Attorney General of the State of New York for any sale of the Property and, in an Order dated June 29, 2020, under Index No. 154128/2020, this Court authorized Seller to sell the Property. NYSCEF Doc. No. 32.

On June 30, 2020, Seller held a “closing” without Buyer (“the Closing”). At the same time, Buyer filed an Order to Show Cause seeking a stay of a finding of default for the purported closing. NYSCEF Doc. No. 20. In response, this Court denied Buyer’s request to stay a finding of default based on Plaintiff’s non-appearance at “the purported scheduled closing” and granted Buyer’s request that Escrow Agent be enjoined from releasing the Deposit subject to a final, non-appealable determination of the rights of parties, and ordering Escrow Agent to hold the deposit in escrow until that determination is made. NYSCEF Doc. No. 69.

On August 17, 2020, Seller moved to dismiss the instant lawsuit asserting, inter alia, that its alleged breaches were not material to the PSA. NYSCEF Doc. No. 22.

In a Decision and Order dated March 5, 2021, this Court denied Seller’s motion. NYSCEF Doc. No. 70.

On March 15, 2021, Seller answered the complaint with affirmative defenses and two counterclaims: (1) breach of contract; and (2) breach of the implied covenant of good faith and fair dealing. NYSCEF Doc. No. 72.

In late March 2021 Buyer “became aware that the Property received J-51 tax benefits from 1987 through June 30, 2010,” a fact it alleges Seller failed to disclose. NYSCEF Doc. No. 120.

On April 5, 2021, Buyer filed an amended complaint adding two causes of action: (4) in the alternative to the first cause of action, a declaratory judgement that Buyer was permitted to terminate the PSA, pursuant to Section 7.4.2 of the same, based on Seller’s misrepresentations regarding the Property’s previous J-51 tax status; and (5) for fraud. NYSCEF Doc. No. 94.

On April 26, 2021, pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7), Seller filed the instant motion to dismiss Buyer’s amended complaint. NYSCEF Doc. No. 111.

In a stipulation dated May 12, 2021, the parties agreed to adjourn the return date of the instant motion from May 25, 2021, to June 23, 2021. NYSCEF Doc. No. 117.

On June 1, 2021, Buyer cross-moved, pursuant to CPLR 3025(b), to amend its amended complaint. NYSCEF Doc. No. 119. The proposed second amended complaint added another basis to its fourth cause of action: that Buyer also has a right to terminate the PSA under Article 9 of the same as Seller had allegedly not satisfied a condition precedent to closing. NYSCEF Doc. No. 121.

### Discussion

As an initial matter, the Court freely grants plaintiff's cross-motion for leave to amend its amended complaint. CPLR 3025(b).

Dismissal pursuant to CPLR 3211(a)(1) is warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR(a)(5) is warranted when "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." And dismissal pursuant to CPLR 3211(a)(7) is warranted when, "afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference," the complaint fails to assert to the court facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

#### 1. Fourth Cause of Action

Seller moves to dismiss Buyer's fourth cause of action, seeking a declaratory judgement of Buyer's right to terminate the PSA based on Seller's misrepresentations regarding the rent regulatory status of seven units in the Property, based on the plain language of Section 7.4.2 of the PSA, which reads:

7.4.2 The representations and warranties of Seller in this Agreement shall be deemed to be repeated by Seller, at and as of the Closing Date with the same force and effect as if first made as of such date, and all such representations and warranties and any representations and warranties made by Seller in any Closing Documents to which it is a party shall be true and correct as of the Closing Date in all material respects, except as the representations and warranties of the Seller set forth in this Agreement shall have been updated by Seller in writing prior to Closing to maintain accuracy due to one or more factual changes arising after the date hereof (it being understood by the parties hereto that Seller shall not have the right to update any of its representations and warranties because of a factual change arising from a breach of Seller's obligations hereunder or a prior material misrepresentation by Seller) and any factual changes arising from actions Seller is permitted to take hereunder. In the event any update of such representations and warranties of Seller results in any adverse change to the Property or the rights to be received by Buyer under this Agreement and Seller does not cure (or does not cause the same to be cured) prior to the Closing, Buyer shall have the right to terminate this Agreement and receive a refund of the Deposit.

Seller argues, essentially, that 7.4.2 only allows Buyer to terminate based on "updateable" misrepresentations, that the rent regulatory status of the seven units in question are not updateable as material misrepresentations and, therefore, Buyer cannot terminate the PSA based upon them. Seller's reading of 7.4.2 is unpersuasive. Instead, rather, Section 7.4.2 repeats as true and correct all of the representations of Seller, including Section 7.2.1 ("As of the date hereof, the Rent Roll is true, correct, complete, and accurate and sets forth all leases with respect to the Property"), and

reiterates them as true on the day of Closing, *except* for representations that Seller might update in the interim (and with the understanding that Seller cannot update certain misrepresentations), and allows Buyer to terminate the PSA and receive a refund of Deposit if updates of Seller's representations or warranties result in adverse change to the Property or the rights to be received by Buyer, and are not cured. While 7.4.2 might not allow *Seller* to update their own prior material misrepresentations it does not bar *Buyer* from updating those misrepresentations so as to trigger termination of the PSA. And, in any event, read as a whole the purpose of section 7.4.2 is clearly to protect and help the Buyer and not give succor to the Seller.

Buyer's amended fourth cause of action also claims that Seller's alleged misrepresentations regarding the Property's J-51 rent regulatory status were not "true and correct in all material respects" at the time of the purported Closing, as required by Section 9.2.3, titled "Seller's Representations and Warranties," and, therefore, Seller also triggered Section 9.3 of the PSA, titled "Failure of Conditions."

Affording the complaint a liberal construction, taking its allegations as true, and providing plaintiff the benefit of every possible inference, there is a cognizable claim that Buyer had a right to terminate the PSA pursuant to both Sections 7.4.2 and 9.3 of the PSA based on Seller's alleged misrepresentations regarding the rent regulatory status of seven units in the Property.

Seller's argument that Buyer's fourth cause of action is duplicative of its other claims is unpersuasive as it is a cause of action offered in the alternative based on a different set of underlying alleged misrepresentations by Seller. CPLR 3017(a).

Therefore, Buyer's fourth cause of action is not subject to dismissal pursuant to CPLR 3211.

## 2. Fifth Cause of Action

Seller also moves to dismiss Buyer's fifth cause of action, asserting fraud.

Fraud requires "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). "If the fraud causes no loss, than the plaintiff has suffered no damage." Sager v Friedman, 270 NY 472, 479-481 (1936). In New York the measure of damage is determined using the 'out-of-pocket' rule, under which "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not compensate them for what they might have gained ... [t]here can be no recovery of profit which would have been realized in the absence of fraud." Lama, 88 NY2d at 421 (citations omitted).

Here, Buyer's argument of fraud fails because, although there is an alleged material omission of fact (representations that the Property never received a J-51 tax benefit) made by a representative of Seller (Seller's assistant comptroller, Joseph Gottlieb) for the purpose of inducing Buyer (into signing the PSA) as well as justifiable reliance on that omission (the signed PSA), the damages sought by Buyer are specifically, fatally, to compensate for "other opportunities" that "Buyer would have used ... and made a substantial profit." NYSCEF Doc. No. 121 ¶ 104.

Therefore, because it violates the ‘out-of-pocket’ rule, Buyer’s fifth cause of action is subject to dismissal. In any event, any such profit would be speculative and therefore not recoverable.

Conclusion

Plaintiff 150 West 55th Street LLC’s cross-motion to serve and file a second amended complaint is granted and the proposed second amended complaint is hereby deemed served and filed. Defendant The Melohn Foundation’s motion to dismiss plaintiff’s fourth and fifth causes of action is denied as to the fourth cause of action and granted as to the fifth cause of action only, and the Clerk is hereby directed to enter judgement dismissing the plaintiff’s fifth cause of action in the second amended complaint only.



11/16/2021  
DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE