SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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EYAN ALLEN,

Plaintiff,

- v -

130 WILLIAM STREET ASSOCIATES LLC,

Defendant.

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INDEX NO. 650008/2021

MOTION DATE 09/22/2022, 09/25/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 93, and 96

were read on this motion by defendant for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, and 95

were read on this motion by plaintiff for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, defendant's motion for summary judgment on its counterclaims (Mot. Seq. No. 001), and plaintiff's motion for summary judgment on his complaint (Mot. Seq. No. 002) are consolidated for disposition in accordance with the following memorandum decision.

Background

The parties to this action are the potential buyer of a condominium unit and the sponsor of the condominium, respectively. At issue is the state of the down payment given by plaintiff, which defendant seeks to retain due to plaintiff's failure to close on the specific unit he intended to purchase. Plaintiff commenced this action for return of the down payment, arguing that defendant has breached the purchase agreement and condominium offering plan (the "Plan") by

offering a unit which does not match the dimensions specified in those documents. Plaintiff also alleges a cause of action pursuant to General Business Law § 349. Defendant counterclaimed for retention of the security deposit.

The parties entered into the purchase agreement on December 20, 2018, for Unit No. 18A (the "Unit") in the building located at 130 Williams Street, New York, New York (the "Building") (*see*, purchase agreement, NYSCEF Doc. No. 30). The purchase agreement provides that plaintiff had received and read a copy of the Plan, which was incorporated by reference into the purchase agreement (*id.*, § 1). Plaintiff "adopt[ed], accept[ed] and approve[d] the Plan . . . and agree[d] to abide and be bound by the terms and conditions thereof" (*id.*). Plaintiff further disclaimed reliance on anything other than the purchase agreement and the Plan in making the decision to enter into the purchase agreement (*id.*, § 20). The construction of the Unit itself was to be "substantially in accordance with the Plan" (*id.*, § 16). If plaintiff failed to close on the Unit, he would be in default, and if he failed to cure that default on thirty days' written notice, time being of the essence, defendant was entitled to terminate the purchase agreement and retain the down payment (*id.*, § 12).

The Plan includes detailed specifications as to the units in the Building, and provides the following information as to the height of the ceilings in each unit – the crux of the parties' dispute:

> The clearance between the top of the concrete floor slab and the bottom of the finish ceiling in the Units will generally be approximately 10'-0" in major areas. Certain Units and areas within other Units will have clearances of less than this to accommodate facilities located above the ceiling or otherwise to respond to field conditions. The maximum ceiling height on the 7th through 28th floor . . . is approximately 9'-10 1/2". . . . Ceiling heights are expected to be lower where there are soffits, ducts, and beams required in Residential Units, required typically in the vicinity of bathrooms, hallways, and kitchens.

(Plan [NYSCEF Doc. No. 33], Part II, Description of Property and Specifications at 44-45, ¶ Y4 [the "Ceiling Provision"].)

The Floor Plan for the Unit also specifies that "[a]ll dimensions are maximum . . . and are subject to normal construction variances and tolerances" (floor plan, NYSCEF Doc. No. 55).[1]

Defendant scheduled the closing date for January 4, 2021 (notice of remote closing, NYSCEF Doc. No. 31). Plaintiff, in his affidavit in support of motion sequence number 002, states that he did not close on the Unit because it "did not contain the ceiling heights or room sizes as was required to be constructed pursuant to the terms of [the Plan]" (Allen aff., NYSCEF Doc. No. 45, ¶ 11). Plaintiff filed suit on January 3, 2021, one day before the scheduled closing. On January 11, 2021, defendant sent plaintiff a default notice per the purchase agreement (default notice, NYSCEF Doc. No. 32). After plaintiff failed to cure his default, defendant sold the Unit to another purchaser and sent plaintiff a formal termination notice on August 4, 2021 (termination notice, NYSCEF Doc. No. 38).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial"

[1] Plaintiff submits an "as-built" floor plan for the Unit (NYSCEF Doc. No. 56), which largely matches the stated dimensions of each part of the Unit as set forth in the floor plan contained in the Plan.

(*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

This dispute turns on a matter of contract interpretation, specifically, how the court should read the Ceiling Provision. It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "The court construe[s] the plain and ordinary meaning of the unambiguous terms and conditions of the agreement" (*Edelman v Chubb Indem. Ins. Co.*, 41 AD3d 327, 327 [1st Dept 2007]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*see, e.g., Warner v. Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1996]).

The Ceiling Provision begins with a general clause, specifically, that the ceiling height will "generally be approximately 10'-0" in major areas" (Ceiling Provision, Description of Property and Specifications at 44). The court notes that this general statement is qualified by the word "approximately," and the phrase "major areas," which is not a defined term in the Plan or

purchase agreement. The provision then goes on to further limit the first clause by stating that certain units and parts of units will have lower ceilings, and specifically states that units in a range including the Unit at issue herein shall have a "*maximum* ceiling height*"* of "approximately 9'-10 1/2," (*id.* [emphasis added]), with ceilings expected to be lower in the vicinity of "bathrooms, hallways, and kitchens" to accommodate facilities located in the ceiling.

It is a rule of contract construction that "if there is an inconsistency between a general provision and a specific provision of a contract, the specific provision controls" (*Bank of Tokyo-Mitsubishi, Ltd., New York Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1st Dept 1998]). Thus, the controlling language of the Ceiling Provision is the specific clause setting a maximum height, with certain areas lower to accommodate the internal facilities of the building. In this context, plaintiff cannot state a breach of the Plan or purchase agreement due to the dimensions of the Unit. This clause is unambiguous. The court notes that the as-built floor plan submitted by plaintiff shows that the portions of the Unit with lower ceilings are in the bathroom, kitchen, and hallways, the exact locations where the Plan indicated the ceilings might be lower (As-Built floor plan, NYSCEF Doc. No. 56). Moreover, the area labeled "Living/Dining Rm" has a ceiling height of 9'-9 3/4," only one-quarter of an inch below the provided maximum height.

As plaintiff cannot allege a breach based on the dimensions of the Unit, his first cause of action for breach of contract and third cause of action for rescission must be dismissed. As for his second cause of action under General Business Law § 349, such a claim requires proof that "(1) the defendant's conduct was consumer-oriented; (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 176, *rearg denied*, 37 NY3d 1020 [2021]). The record does not

reflect any deceptive or misleading act or practice by defendant, as the Unit provided was constructed within the specifications set forth in the Plan. To the extent plaintiff attempts to rely on anything outside of the Plan or the purchase agreement, he explicitly disclaimed reliance on all such material by signing the purchase agreement (purchase agreement, NYSCEF Doc. No. 30, § 20).

Turning now to defendant's counterclaims, defendant has established prima facie entitlement to summary judgment on both. A breach of contract claim is established by proof of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Here, defendant submits the purchase agreement, which provides that it is a breach of said agreement for plaintiff not to close on the Unit, and provides that defendant could recover its reasonable attorneys' fees and costs in enforcing the purchase agreement (purchase agreement, NYSCEF Doc. No. 30, §§ 12, 34). Plaintiff does not dispute that he failed to close on the Unit.

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff argues that defendant cannot establish a foundation for the introduction of the contract documents and notices that defendant filed in support of its motion; but plaintiff relies on many of those same documents in support of his own claims, and may not be heard to object to their inclusion in the record (*see, Lois v Flintlock Constr. Servs., LLC*, 202 AD3d 481 [1st Dept 2022]). Plaintiff also argues that defendant breached the purchase agreement by conveying the Unit to a subsequent purchaser without formally terminating the purchase agreement; but by that point, plaintiff was already in breach of the contract by failing to close. Finally, while plaintiff asserts that certain portions of the Celling Provision are ambiguous, plaintiff offers no differing logical interpretation of the

specific clause of the Ceiling Provision discussed above (*Schulte Roth & Zabel LLP v Metropolitan 919 3rd Ave. LLC*, 202 AD3d 641, 641 [1st Dept 2022] ["A contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation"] [citations and quotation marks omitted]).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment on its counterclaims and dismissing the complaint is granted as set forth herein; and it is further

ORDERED that the complaint is severed and dismissed; and it is further

ADJUDGED and DECLARED that defendant is entitled to recover the down payment as set forth in its first counterclaim; and it is further

ORDERED that nonparty Seiden & Schein, PC, the escrow agent designated in the purchase agreement (NYSCEF Doc. No. 30, Schedule B at 1), is directed to disburse the down payment to defendant within ten days of service upon it of a copy of this order with notice of entry; and it is further

ORDERED that defendant is entitled to recover its reasonable attorneys' fees and costs on its second counterclaim pursuant to Section 34 of the purchase agreement, and the amount of such fees and costs is severed and set down for a further hearing before the undersigned; and it is further

ORDERED that the parties shall appear for said hearing on July 27, 2023, at 2:15 PM, in Room 1166, 111 Centre Street, New York, New York.

This constitutes the decision and order of the court.

ENTER:

6/15/2023
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE