

**Schwartz v El Ad US Holding, Inc.**

2023 NY Slip Op 33061(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 653926/2021

Judge: Verna L. Saunders

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Defendants move to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1) and (7), arguing that the condominium was developed pursuant to New York General Business Law ("GBL") Article 23-A, which requires an offering statement, or "plan", to contain detailed and specific disclosures, and may not omit any material fact or contain any untrue statement of a material fact to afford potential investors, purchasers, and participants an adequate basis upon which to found their judgment to purchase. They further add that the New York State Attorney General's office has promulgated regulations contained in Part 20 of Title 13 of the NYCRR entitled "Regulations Governing Newly Constructed Vacant or Non-Residential Condominiums" ("Regulations") dictating the framework pursuant to which title to every condominium unit in the City of New York must vest. Defendants contend that even though the Sponsor's responsibility survives closing, once they deliver units substantially in accordance with plans and specifications on file with the New York City Department of Buildings ("DOB"), purchasers are required to close once certain prerequisites have been met irrespective of outstanding items of work remaining to be completed in buildings and units, and all purchasers, including plaintiffs, were advised that significant construction in the condominium would be ongoing post-closing. (NYSCEF Doc. No. 13, *motion*, pg 12).

Specifically, defendants argue that plaintiffs' fraud in the inducement claim cannot survive because there is no private right of action under the Martin Act for such claims for reliance based entirely on alleged omissions (*id.*, at pg 19-20). Hence, they maintain that any claim asserted by a purchaser of a condominium unit based upon allegations that the purchaser has been damaged by omissions contained in an offering plan is subject to dismissal for lack of standing. Defendants further articulate that plaintiffs' claim for fraud is duplicative of the breach of contract claim because the only real difference between the two claims is that the fraud claim is premised on the notion that Sponsor was not truthful when it promised to perform its duties under the Contract and Plan, whereas the contract claim alleges that Sponsor failed to perform (*id.*, pg 25). Defendants also maintain that Sponsor's only obligation with respect to construction defects was to "repair or replace" the alleged offending conditions, and that plaintiffs have waived their right to damages under the offering-plan because it states that "in no event shall Sponsor be liable for special or consequential damages (whether based on negligence, breach of contract, warranty, or otherwise, it being intended that Sponsor's sole obligations under the Plan shall be to repair or, at Sponsor's option, replace any defective item of construction") (NYSCEF Doc. No. 8, *Offering Plan*, pg 103).

In addition, defendants contend that plaintiff's implied covenant of good faith and fair dealing (third cause of action) must be dismissed insofar as it merely restates and incorporates the same factual allegations and seeks the same relief as the breach of contract claim (*id.*, at pg 26). They likewise argue that plaintiffs' unjust enrichment claim (fourth cause of action) should be dismissed as the allegations are based on defendants' already existing duties under the Contract and Plan (which details the parties' obligations) to perform various repairs of the unit. As such, defendants set forth that they are not liable for money damages on any cause of action because plaintiffs expressly agreed under the Contract and Plan that, even in the event of the discovery of a material defect, defendants' sole obligation would be to repair or replace (*id.*, at pg 29). Defendants also seek that the action be dismissed as against defendant El Ad because no substantive allegations concerning El Ad are contained in the complaint, it is not a signatory

under the Contract and Plan, and finally, that Sponsor is entitled to recovery of the costs and attorney fees incurred in this action as envisioned under the contract (*id.*, at pg 32-33).

In opposition, plaintiffs reiterate the allegations in their complaint and argue that their fraud in the inducement claim should not be dismissed because, despite knowing that the unit had leaks and other defects, El Ad deliberately made false representations that the unit was ready, and it concealed multiple defects to force defendants to close on the unit under threat that they might lose their \$3.58 million deposit. Plaintiffs maintain that they reasonably relied on El Ad's misrepresentations about the unit's condition and were damaged as a result, including incurring the substantial closing and carrying costs associated with the premature closing (NYSCEF Doc. No. 16, *opposition*, pg 11). Therefore, contrary to defendants' arguments, plaintiffs contend that the Martin Act does not preclude a properly pleaded common law fraud in the inducement claim. In response to defendants' argument that the fraud in the inducement claim is duplicative of the breach of contract claim, plaintiffs assert that it is rather a free-standing claim because El Ad misrepresented present facts such as that the unit had no leaks and was adequately completed when El Ad knew that the unit was defectively constructed and that it wrongfully and actively worked to conceal the unit's severe defects (*id.*, at pg 14). On their breach of contract claim, plaintiffs argue that while the parties' agreement requires El Ad to "correct, repair or replace all defects," it does not prevent them from recovering the significant damages incurred because of El Ad's wrongful and protracted failure to make those required repairs.

Concerning the breach of the covenant of good faith and fair dealing claim, plaintiffs maintain that this cause of action should withstand dismissal because El Ad's misconduct harmed their right to receive the benefits of the contract, including by wrongfully threatening to retain the deposit, forcing plaintiffs to close prematurely on an unfinished unit, and then frustrating plaintiffs' efforts to repair the unit's defects before occupying the unit (*id.*, at pg 18). Turning next to the unjust enrichment claim, plaintiffs assert that it is not duplicative of the contract claim as alleged because the valid claim is based on El Ad's misconduct in avoiding costs of work it was paid to do and in foisting on plaintiff Schwartz the significant carrying costs of the unit before it was fit for closing (*id.*, at pg 19). Plaintiffs further contend that El Ad should not be shielded from liability because it is the developer of the condominium, an affiliate of Sponsor, and shares employees and offices. Hence, plaintiffs contend that their allegations are sufficient to state potential alter-ego liability against El Ad on the breach of contract claim. Additionally, plaintiffs posit that contrary to defendants' position that the entire matter should be dismissed because plaintiffs purportedly waived consequential damages, the agreement expressly provides for said relief and that, since defendants acted in bad faith, they should be estopped from asserting a contractual limitation of consequential damages (*id.*, at pg 21-22).

In reply, defendants maintain that plaintiffs readily concede that the Attorney General has exclusive jurisdiction to prosecute the alleged disclosure violation under the Martin Act insofar as plaintiffs argue that when defendants became aware of leaks within the unit, they should have disclosed this, but instead, "forced" plaintiffs to close under the false assumption that the unit was "substantially in accordance with Plans and Specifications" (NYSCEF Doc. No. 17, *reply*, pg 6). This is so, defendants assert, because the Martin Act required the Plan to include the exact disclosure relied upon by plaintiffs here concerning a sponsor's obligation to build and complete

the condominium in accordance with the building plans and specifications identified in the plan. They further articulate that when the temporary certificate of occupancy for the unit was issued, it served as presumptive evidence that the condominium construction had been substantially completed in accordance with the Plan and Specifications and therefore, defendants were required to close. They add that, to the extent plaintiffs' base their fraud in the inducement claim on any oral representations defendants allegedly made about plaintiffs being able to commence non-structural work immediately after closing, the contract required that written consent must be sought before any alteration work could be done (*id.*, at pg 10-11). Defendants reiterate that the fraud in the inducement cause of action is duplicative of the breach of contract cause of action.

Regarding the money damages sought, defendants assert that the Plan is clear that defendants' sole obligation in the case of purported construction defects, as those alleged by plaintiffs here, is to "repair or replace", and it forecloses recovery for any money damages. As to the breach of the implied covenant of good faith and fair dealing and unjust enrichment claims, defendants argue that they should be dismissed because the issues about which plaintiffs complain, i.e., the alleged condition of the unit and defendants alleged failure to complete and remedy outstanding repairs, are all governed by the contractual language in the contract and Plan. As to dismissal of the action as against El Ad, defendants argue that solely because they share a commercial space, personnel and common business does not, as plaintiffs suggest, give rise to piercing of the corporate veil (*id.*, at pg 15-16). Lastly, defendants assert that they are entitled to reimbursement of costs and expenses, including legal fees in enforcing and defending their rights under the contract.

When considering a defendant's motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (see *Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021]; see also *Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) A CPLR 3211(a)(1) motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law (see *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].)

"In an action to recover damages for fraud, the plaintiff must prove 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" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-579 [2018], citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996].)

"The elements of a claim for fraudulent inducement are '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'" (*United States Life Ins. Co. in NY v Horowitz*, 192 AD3d 613, 613 [1st Dept 2021], quoting *Lama Holding Co. v Smith Barney*, 88



NY2d 413, 421 [1996].) For fraudulent inducement, it must also be shown that “the defendant had a duty to disclose material information and that it failed to do so” (*P.T. Bank Central Asia v ABN Amro Bank, N.V.*, 301 AD2d 373, 376 [1st Dept 2003].)

Here, this court finds that plaintiffs’ fraud claims fail to satisfy the heightened pleading requirements set forth in CPLR 3016. In addition to the pleading deficiencies, the claims are precluded by the express disclaimers in the parties’ contract, that the unit was being sold “as is”. In their cause of action for fraudulent inducement, plaintiffs allege, in pertinent part, that defendants falsely represented that the “unit was ready and concealed multiple defects, to force Schwartz to close on the unit or else jeopardize his \$3.58 million deposit” but that the unit “suffered from a host of design defects, gross construction defects, and material deviations from the operative blueprints and renderings— indeed, the unit was in such poor condition that it had multiple leaks rendering it uninhabitable.” These representations, plaintiffs claim, induced them to purchase the unit. However, these claims are belied by the agreement. In the Offering Plan, plaintiffs acknowledged that the property was being sold “as is” and that the “[p]urchaser of a [u]nit shall inspect such [u]nit prior to the closing date and shall execute at such time an inspection statement acknowledging the Purchaser’s acceptance of the [u]nit in good condition and in accordance with the terms of the Plan.” (NYSCEF Doc. No. 8, *plan*, pg 104). Thus, the fraudulent inducement claim is barred by the specific terms of the parties’ contract (see *Pappas v Tzolis*, 20 NY3d 228, 233 [2012]; *Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959].)

Addressing now the breach of contract claim, this court finds that plaintiff has stated a colorable claim. It is undisputed that the Sponsor has post-closing responsibilities to a purchaser of a unit in the condominium that has identified outstanding repair work. To the extent that the Sponsor is aware of repairs that remain outstanding in plaintiffs’ unit but has not made such repairs in a timely manner, plaintiffs are entitled to damages. It has been held that “the contractual limitation on damages cannot be said to apply as a matter of law, where, as here, the allegation is that there were unreasonable delays in making repairs” (*Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 559-560 [1st Dept 2017], citing *430 W. 23rd Street Tenants Corp. v 23rd Assoc.*, 155 AD2d 237, 238 [1st Dept 1989]), and “(s)uch compensation would give the purchasers more than a ‘fair quantum of remedy’, and likely accords with what the parties intended in the event of a failure by the sponsor to perform” (*430 W. 23rd Street Tenants Corp.*, 155 AD2d at 238). Three years after closing on the unit, plaintiffs allege, *El Ad*, in bad faith, has utterly failed to repair or replace multiple offending conditions. To the extent plaintiffs’ have alleged bad faith, calling into question defendants’ good faith efforts in remedying the construction defects in the unit, dismissal of the claim for consequential damages is denied (see *R&R Third Props., LLC v Federal Ins. Co.*, 191 AD3d 444, 445 [1st Dept 2021]). It is a well-established principle that “a plaintiff is permitted to seek other remedies ‘whenever an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, as a result of later circumstances operates to deprive a party of a substantial benefit of the bargain’” (*Waverly Props., LLC v KMG Waverly, LLC*, 824 F Supp 2d 547, 559 [2nd Cir 2011]). Accepting all facts as alleged in the pleading to be true, and according plaintiffs the benefit of every possible inference, dismissal of the breach of contract claim is not warranted at this juncture.

Turning next to plaintiffs' breach of the implied covenant of good faith and fair dealing claim, this court finds that defendants have successfully demonstrated their entitlement to dismissal of this cause of action as it is well-established that such dismissal is warranted when "it is premised on the same conduct that underlies the breach of contract' claim and seeks (a subset of) the same damages" (*ABN AMRO Capital USA LLC v AMERRA Capital Mgt., LLC*, 211 AD3d 566, 567 [1st Dept 2022], citing *MBIA Ins. Corp. v Lynch*, 81 AD3d 419, 419-420 [1st Dept 2011].) In the instant case, the covenant of good faith and fair dealing claim is dismissed insofar as it arises from the same operative facts as the breach of contract claim such as the defendants' alleged protracted failure to make required repairs in the unit post-closing (see *Mill Fin., LLC v Gillett*, 122 AD3d 98, 105 [1st Dept 2014], citing *Cerberus Int'l, Ltd. v BancTec, Inc.*, 16 AD3d 126, 127 [1st Dept 2005].) Therefore, plaintiffs' breach of the implied covenant of good faith and fair dealing cause of action is dismissed.

This court also finds that the unjust enrichment claim is precluded by the existence of the contract of sale, which governs the subject matter in dispute (see *FM Cost Containment, LLC v +42 W. 35th Prop. LLC*, 203 AD3d 426, 427 [1st Dept 2022]; *Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 [1st Dept 2014].) The unjust enrichment claim is therefore dismissed.

This court notes that on the limited record developed at this early stage of the action, plaintiffs have lodged sufficient allegations supporting an alter-ego liability claim against El Ad. Plaintiffs allege that Sponsor and El Ad "'shared common officers' and 'operations were located in the same offices'" and that El Ad exerted influence over the condominium board to prevent plaintiffs from making necessary repairs in the unit. They also allege that the Sponsor's principal is the President of El Ad, and hence both entities are treated as one and the same. At this pleading stage and viewing all inferences in the light most favorable to plaintiffs, "it cannot be said that the complaint 'is totally devoid of solid, nonconclusory allegations'" in regard to piercing the corporate veil (see *2406-12 Amsterdam Assoc. LLC v Alianza LLC*, 136 AD3d 512, 512 [1st Dept 2016], citing *International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]). "Whether plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). Therefore, the complaint is not dismissed as against El Ad.

Given that this matter is still ongoing, the portion of defendants' motion seeking legal fees and disbursements is denied, without prejudice. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that the motion to dismiss is granted and the first, third, and fourth causes of action of the complaint are dismissed; and it is further

**ORDERED** that that branch of defendants' motion seeking attorney fees and costs is denied, without prejudice; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry,

upon plaintiffs, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

**ORDERED** that defendants shall interpose an answer within twenty (20) days after service of this decision and order with notice of entry; and it is further

**ORDERED** that parties are to appear for a remote preliminary conference on October 25, 2023, details shall be provided no later than October 23, 2023.

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

August 28, 2023

HON. VERNAL L. SAUNDERS, JSC

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"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	