

**Rossa v RHR 160 LLC**

2023 NY Slip Op 33230(U)

September 14, 2023

Supreme Court, New York County

Docket Number: Index No. 651027/2022

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 41

-----x  
 ELIZABETH ROSSA,

Plaintiff

Index No. 651027/2022

- against -

DECISION AND ORDER

RHR 160 LLC, "JOHN DOE," NOS. 1 through 10, and "JANE DOE," NOS. 1 through 10, said names being fictitious and unknown to plaintiff but intended to be the recipients of any voidable transfers made by RHR 160 LLC,

Defendants  
 -----x

LUCY BILLINGS, J.S.C.:

Plaintiff purchaser of a condominium unit at 160 Imlay Street, Kings County, claims defendant seller breached the parties' contract of sale executed September 20, 2021, by failing to remedy specified deficiencies in the construction of the unit and fraudulently misrepresented that defendant would construct and deliver the unit free of such deficiencies. Defendant RHR 160 LLC moves to dismiss plaintiff's breach of contract claims because the contract terms bar her claim for either specific performance to remedy the deficiencies or damages for the cost of repairing the deficiencies herself or the diminution in the unit's value. C.P.L.R. § 3211(a)(1); Seaman v. Schulte Roth & Zabel, 176 A.D.3d 538, 539 (1st Dep't 2019). Since defendant preserved this defense in defendant's answer, its motion on this

ground is timely. C.P.L.R. § 3211(e). Defendant moves to dismiss plaintiff's fraud claim because it duplicates her breach of contract claim. C.P.L.R. § 3211(a)(7).

Defendant claims that plaintiff's breach of contract claims fail because plaintiff elected to close the sale April 18, 2022, despite the outstanding deficiencies and defendant's offer to cancel the sale before the closing. At that point, under ¶ 41 of the Seller's Rider to the contract of sale, all obligations under the contract merged into the deed conveying title to the condominium unit and were extinguished. Specifically, ¶ 41 provides that: "The acceptance by Purchaser of the deed at the Closing shall be and be deemed to be full performance and discharge of every agreement and obligation . . . on the part of the Seller . . . except those, if any, which are herein specifically stated to survive the Closing." Aff. of Jonathan Zalemka Ex. A ¶ 41. See TIAA Global Invs., LLC v. One Astoria Sq. LLC, 127 A.D.3d 75, 85 (1st Dep't 2013).

Paragraph 34 of the contract of sale further provides that, if the seller cannot convey title in accordance with the contract's provisions, the purchaser may accept whatever the seller can convey without liability on the seller's part. In that event, which fits the circumstances here, the seller retains the obligation to cooperate with the purchaser to convey title in accordance with the contract, so this obligation survives the

closing of the sale and delivery of the deed. Because ¶ 34 releases defendant from liability, however, this provision requires defendant to cooperate only to the extent defendant can do so without cost. While performing repairs in plaintiff's unit may constitute cooperation in conveying the unit in accordance with the contract terms, plaintiff does not suggest how defendant might accomplish such cooperation without cost to defendant.

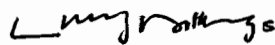
Plaintiff's alternative claim for defendant's anticipatory breach or repudiation, seeking the same relief as her straightforward breach of contract claim, fails for the same reasons, most fundamentally because plaintiff proceeded to perform her obligations under the contract despite defendant's refusal to finish the promised construction work. Defendant's anticipatory breach or repudiation relieved plaintiff from performing her part of the contract, Princes Point LLC v. Muss Dev. L.L.C., 30 N.Y.3d 127, 133 (2017); Norcon Power Partners v. Niagara Mohawk Power Corp., 92 N.Y.2d 458, 462-63 (1998), but both parties agree that she performed her obligations. Defendant's disavowal of any intention to repair the remaining deficiencies in construction constitutes its breach of the contract, but under ¶¶ 34 and 41, plaintiff waived her claim for any breach, except breach of defendant's obligation to cooperate, when she closed the sale.

The court grants defendant's motion to dismiss plaintiff's

fraud claim because it alleges simply that defendant in entering the contract represented that defendant would deliver a condominium unit constructed in a specified way, with luxury fixtures and finishes, when defendant did not intend to fulfill that promise. Bloom v. Papadakis & Gonzalez D.D.S., PLLC, 211 A.D.3d 455, 456 (1st Dep't 2022); 320 W. 115 Realty LLC v. All Bldg. Constr. Corp., 194 A.D.3d 511, 512 (1st Dep't 2021); Cronos Group Ltd. v. XcomIP, LLC, 156 A.D.3d 54, 62-63 (1st Dep't 2017). Moreover, to the extent plaintiff claims she was induced to enter the contract by any unfulfilled promises, another merger provision in ¶ 24 of the contract extinguishes this claim, too. Paragraph 24 provides that: "All prior undertakings and agreements . . . are merged in the Contract," and it "supersedes" all prior undertakings and agreements. *Zalemka Aff. Ex. A ¶ 24.*

Finally, plaintiff does not oppose defendant's motion to dismiss her fourth claim for a fraudulent conveyance. For all these reasons, the court grants defendant's motion to dismiss the complaint. C.P.L.R. § 3211(a)(1) and (7).

DATED: September 14, 2023



LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C