SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN, J.S.C.** PART 57

Index Number : 114680/2008
HIRALION REAL ESTATE
VS.
225 5TH LLC
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. 114680/08
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for Def dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Memor M1-M3

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

Dated: 3-23-10

MARCY S. FRIEDMAN, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

HIRALION REAL ESTATE, INC.

Plaintiff,

Index No.: 114680/08

- against -

DECISION/ORDER

225 5th, LLC, EL-AD PROPERTIES NY LLC, CANTOR & PECORELLA, INC., and D'AGOSTINO, LEVINE & LANDESMAN, L.L.P., as escrow agents,

Defendants.

In this action for declaratory relief, plaintiff Hiralion Real Estate, Inc. ("Hiralion") seeks a judgment declaring that it is entitled to rescission of a contract to purchase a condominium apartment and return of its purchase deposit. Defendants 225 5th, LLC, El-Ad Properties NY LLC, Cantor & Pecorella, Inc., and D'Agostino, Levine & Landesman, L.L.P., the sponsor and its agents (collectively "Sponsor"), move for partial summary judgment on their first and second counterclaims to cancel the purchase agreement and to release the purchase deposit, and also seek dismissal of the complaint. Plaintiff moves for partial summary judgment on its complaint.

The relevant facts are as follows: Hiralion entered into a purchase agreement with 225 5th, LLC, the sponsor of the condominium plan, dated June 23, 2006, for Hiralion's purchase of a duplex penthouse apartment for $6.6 million. (Sponsor's Motion, Ex. D.) The apartment was to be constructed by combining an existing unit on the 12th floor with a 13th floor unit to be newly

built on top of the 12th floor roof. Pursuant to the purchase agreement, Hiralion tendered a $990,000 purchase deposit to Sponsor and deposited $250,000 into escrow to be used by Sponsor for the custom work costs in combining the two units. A time of the essence closing was scheduled for November 7, 2008. However, prior to the closing date, Hiralion moved for a preliminary injunction enjoining Sponsor from closing and Sponsor cross-moved to cancel the notice of pendency filed by Hiralion. This court denied Hiralion's and Sponsor's motion and cross-motion by orders dated December 18, 2008 and February 18, 2009, respectively.

Hiralion claims that Sponsor fraudulently induced Hiralion to enter into the purchase agreement for the penthouse by concealing the presence of an 8'- 8" parapet wall on the 12th floor roof that would become the 13th floor terrace. Hiralion further claims that Sponsor represented that the views from the floor are sprawling, notwithstanding that an existing parapet completely obscures the views of the park from that floor. In support of its fraud claim, Hiralion contends that the Offering Plan inaccurately described the parapet and that Sponsor prevented Hiralion from viewing the 13th floor prior to executing the purchase agreement. In the alternative, Hiralion contends that Sponsor failed to perform custom work on the penthouse in accordance with the purchase agreement, and that Sponsor therefore materially breached the agreement, entitling Hiralion to cancel it.

Sponsor does not dispute that the 8'-8" parapet on the 12th floor roof obstructs park views from that roof, and that the parapet in effect creates a courtyard in which the only views are of the sky. However, Sponsor contests Hiralion's fraud claim, contending not only that the parapet was fully disclosed in the Offering Plan, but also that the merger clause of the purchase agreement precludes Hiralion from relying on any oral representations as to the views from the

penthouse. Sponsor further argues that the purchase agreement required Hiralion to take title notwithstanding non-completion of the custom work, and that the custom work was merely a "punch list" item to be resolved post-closing. Sponsor thus contends that because Hiralion defaulted on the closing date, Sponsor is entitled to retain the deposit as liquidated damages.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

As a threshold matter, the court holds that a triable issue of fact exists as to whether Sponsor failed to accurately describe the parapet in the Offering Plan. It is undisputed that the Offering Plan contains both a written description of the parapet and floor plans. While the court rejects Hiralion's contention that the written description is ambiguous as to the location of the parapet, the court finds that Hiralion raises a triable issue of fact as to whether the floor plans create an ambiguity as to the height of the parapet.

More particularly, paragraph 3 of the Offering Plan's "Description of Property and Building Conditions" (Sponsor's Motion, Ex. C) makes the following disclosure: "The existing approximately 8'-8" high parapet and cornice facing the street on the main roof will remain." Hiralion contends that paragraph 3 is unclear as to whether the "main roof" is the existing roof

which is located over the 12th floor of the building and over the lower floor of the penthouse, or whether it is a new roof to be built over an upper or 13th floor that was to be constructed for the penthouse on top of the 12th floor roof. In support of this contention, Hiralion relies on the following further statement in paragraph 3: "On the main roof (Penthouse Roof) or [sic] railings will rise to a minimum height of 3'-6" above the new roof." While this latter statement is somewhat confusing and appears to contain a typographical error, the earlier statement that the existing parapet on the main roof will remain is consistent only with the interpretation that the parapet was located on the existing 12th floor roof and not on a new roof to be constructed on the new upper floor of the penthouse.

Hiralion also submits the affidavit of an expert witness, Diane Lewis, a licensed architect, who reviewed the floor plans from the Offering Plan, and opines: "[I]t appears from the Unit Floor Plans that the perimeter of the terrace is a low parapet. Here, we are faced with a situation where at the perimeter of the terrace we have an 8'-8" wall, which is incorrectly referred to as a 'parapet', which under commonly accepted architectural standards should be indicated as a thick blackened line. In this case, there is no thick blackened line and as a result an indication is made that a low parapet is present." (Lewis Aff., ¶ 4[e].) Sponsor does not offer the opinion of an expert challenging these assertions. Hiralion's expert's affidavit raises a triable issue of fact as to whether there was an ambiguity in the Offering Plan as to the height of the parapet – that is, an inconsistency between drawings showing a low parapet and the written statement giving the height as 8'-8".

The court further finds that Hiralion raises a triable issue of fact as to whether Sponsor made oral representations that there were park views from the 12th floor roof. Hiralion submits

the affidavit of its representative, Sabina Nasser, detailing meetings with Sponsor in which Sponsor made representations regarding the views from the roof. In particular, she details a meeting on March 8, 2006 in which Hiralion stated that it wished an apartment with "spectacular views from the penthouse terraces," and Erica Miller, Sponsor's representative stated that "south facing penthouse units within the [building] would be a perfect match, because their terraces offer views" of Madison Square Park and other landmarks. (Nasser Aff. In Opp., ¶ 4.) Nasser also represents that Hiralion engaged an architect to formulate a design that would move the entertaining space from the existing 12th floor to the new thirteenth floor in order to take advantage of the views, and that plans for this change were presented to Sponsor prior to execution of the purchase agreement. (Id., ¶ 6.) In opposition, Sponsor does not deny that it made the claimed representations regarding the views or that it was aware of Hiralion's architectural plans. Rather, it contends that Hiralion is barred from claiming reliance on oral representations by Sponsor as to the views from the 12th floor roof.

It is well settled that while "a general merger clause is ineffective to exclude parol evidence of fraud in the inducement," a party who disclaims reliance on statements as to a particular matter may not then claim that it relied on statements as to that matter. (Citibank, N.A. v Plapinger, 66 NY2d 90, 94 [1985], rearg denied 67 NY2d 647 [1986].) Here, the purchase agreement, paragraph 12, includes a merger clause that provides, in pertinent part, as follows:

> Except as herein or in the [Offering] Plan specifically set forth, Purchaser acknowledges that he has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties or statements of any nature, whether made by Seller, Seller's Counsel or Selling Agent or otherwise, including, but not limited to, any relating to the description or physical condition of the Building or the Unit, the size or the dimensions of the Unit or the rooms therein contained or any other physical characteristics thereof, the building services or amenities, the estimated Common Charges and expenses allocable to the Unit or the right to any income tax

deduction on account of any real estate taxes and/or mortgage interest paid by Purchaser.

The doctrine of "inclusio unius est exclusio alterius," which is applicable in interpreting contracts, provides that the inclusion or specification of certain items in the contract implies the exclusion of other items. (See 28 NY Prac., Contract Law § 10:13.) Here, if the Sponsor had intended to preclude purchasers from relying on representations about views from the penthouse it could easily have said so in the merger clause. The court holds that the clause at issue is not sufficiently specific to preclude representations about views as opposed to representations about the description or physical condition of the unit.

The court also finds that Hiralion raises a triable issue of fact as to whether Sponsor actively concealed the absence of views from the 12th floor roof. As the Court of Appeals recently held, a buyer's common law fraud claim cannot be based on a sponsor's alleged omissions from Martin act disclosures, but may be based on the sponsor's "active concealment" of information unrelated to the alleged Martin Act omissions. (Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, 12 NY3d 236, 245-246 [2009].) Under the common law doctrine of caveat emptor, no duty is imposed on the seller or seller's agent to disclose any information concerning the premises when the parties deal at arm's length, "unless there was some conduct on the part of the seller or the seller's agent . . . constituting active concealment. . . . To maintain a cause of action to recover damages for active concealment, the plaintiff would have to show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill . . . responsibilities fixed by the doctrine of caveat emptor." (Id. at 245 [internal brackets omitted], citing Jablonski v Rapalje, 14 AD3d 484, 485 [2d Dept 2005].)

Hiralion attests that it made a request to inspect the 13th floor prior to entering into the

purchase agreement, and that Sponsor denied the request on the ground that an inspection would be too dangerous due to ongoing construction. (Nasser Aff. In Opp., ¶ 19.) Sponsor does not deny this contention. (See Answer, ¶¶ 15-17 [Sponsor's Motion, Ex. B].) An issue of fact exists as to whether Sponsor's undisputed refusal to permit Hiralion to inspect the roof, prior to execution of the purchase agreement, prevented Hiralion from ascertaining the significant extent to which the parapet obstructed views from the roof or the height and bulk of the parapet and supporting buttresses.

Contrary to Sponsor's contention, this court's prior denial of the preliminary injunction motion is not law of the case or a determination on the merits. (See Town of Concord v Duwe, 4 NY3d 870, 875 [2005].) Having had the benefit of a more developed record on these motions, the court holds that triable issues of fact exist on Hiralion's fraud claims and that these issues preclude determination of whether Sponsor is entitled to cancel the purchase agreement and retain the purchase deposit. Sponsor's motion for summary judgment must accordingly be denied.

The court rejects Hiralion's alternative contention that Sponsor materially breached the purchase agreement by not complying with the specified provisions for estimating and charging for the cost of construction work to combine the two units, or by not properly completing the construction work. The purchase agreement, Rider paragraph 4, sets forth procedures for performance of the work and for estimating and subsequently accounting for the costs. However, paragraph 18(i) of the purchase agreement expressly provides that the buyer "shall accept title (without abatement in or credit against the purchase price or provision for escrow) notwithstanding that construction of (a) minor details of the Unit, including custom work . . .

have not been completed. Minor details referred to in (a) above shall include but not be limited to any items which Purchaser may set forth or which are set forth on the Punchlist Inspection Statement." The purchase agreement thus by its terms precludes Hiralion from excusing its default in closing based on non-completion of the construction work. Indeed, Hiralion in fact sent Sponsor a Punch List listing various problems with the combination of the units, including failure to create an open stairway in conformity with drawings. (See Sponsor's Motion, Ex. E.) Under these circumstances, Sponsor's failure to complete the custom work or to comply with the procedures for performance of the work and computation of costs is not a "material breach" of the purchase agreement, giving rise to a right of rescission on Hiralion's part. (See generally Grace v Nappa, 46 NY2d 560, 566 [1979].)

It is accordingly hereby ORDERED that defendants' motion for summary judgment is granted to the following extent: Plaintiff Hiralion's seventh cause of action for a declaratory judgment that it is entitled to cancel the purchase agreement is dismissed to the extent that it is based on a claim of breach of contract; and defendants' motion is otherwise denied; and it is further

ORDERED that plaintiff Hiralion's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 23, 2010

MARCY FRIEDMAN, J.S.C.