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Arco Acquisitions, LLC v Tiffany Plaza LLC
2021 NY Slip Op 51039(U)
Decided on November 4, 2021
Supreme Court, Suffolk County
Emerson, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 4, 2021

Supreme Court, Suffolk County

Arco Acquisitions, LLC, Plaintiff,

against

Tiffany Plaza LLC, 1075 FARMINGVILLE LLC, ATHANASIOS TZIVAS, AND CHRISTANTHY TZIVAS, Defendants.

Index No. 607246-21

LIEB AT LAW, P.C.
Attorneys for Plaintiff
308 West Main Street, Suite 100
Smithtown, New York 11934

TWOMEY, LATHAM, SHEA, KELLEY, DUBIN & QUARTARARO, LLP
Attorneys for Defendants
33 West Second Street, PO Box 9398
Riverhead, New York 11901

Elizabeth H. Emerson, J.

Upon the following papers read on this motion*to dismiss* ; Notice of Motion and supporting papers *12-31* ; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers*32-39*; Replying Affidavits and supporting papers*40-45* ; it is,

ORDERED that this motion by the defendants for an order dismissing the complaint is granted.

On October 4, 2017, the plaintiff entered into an agreement to purchase a parcel of commercial real property from the defendants Tiffany Plaza LLC and 1075 Farmingville LLC (the "sellers") for $10.5 million. In accordance with the parties' agreement, the sellers provided the plaintiff with tenant-estoppel certificates and a certified rent roll "detailing all rents, security deposits, taxes and arrears if any per the leases." Those documents did not reflect that any of the tenants were in arrears. After the closing, two tenants could no longer pay their monthly rent. The plaintiff commenced this action alleging that the rent roll and estoppel certificates were fraudulent, that the two tenants in question had been in arrears, and that the defendants misrepresented the rent roll and obtained false estoppel certificates from the tenants in order to inflate the rent roll and increase the value of the property. The complaint contains causes of action for fraud, aiding and abetting fraud, and piercing the corporate veil. The defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), (7), and (10).

The parties' agreement provides in pertinent part as follows:

> "5.1 Except as is expressly set forth in this Agreement to the contrary, Purchaser is expressly purchasing the Property in its existing condition "AS IS, WHERE 1S, AND WITH ALL FAULTS" with respect to all facts, circumstances, conditions and defects existing on the date of this Agreement. Seller has no obligation to determine or correct any such facts, circumstances, conditions or defects or to compensate Purchaser for same. **Seller has specifically bargained for the assumption by Purchaser of all responsibility to investigate the** Property, Laws and Regulations, Rights, Facts, Condition, **Leases**, Open Permits and Violations and of all risk of adverse conditions existing on the date of this Agreement **and has structured the Purchase Price and other terms of this Agreement in consideration thereof. Purchaser has, as of the date hereof, undertaken all such investigations and review of the** Property, Laws and Regulations, Rights, Facts, Condition, **Leases**, Open Permits, Violations or **Tenancies**, as Purchaser deems necessary or appropriate under the circumstances as to the status of the

> Property and based upon this Agreement, **Purchaser is and will be relying strictly and solely upon such inspections and examinations and the advice and counsel of its own consultants, agents, legal counsel and officers, and Purchaser is and will be fully satisfied that the Purchase Price is fair and adequate consideration for the Property**, and by reason of all of the foregoing, subject to the terms and conditions hereof, **Purchaser assumes the full risk of any loss or damage occasioned by any fact, circumstance, condition or defect existing on the date of this Agreement and pertaining to this Property**." (emphasis added)

This case is on all fours with **Danann Realty Corp. v Harris**(5 NY2d 317). In that case, the purchaser of a lease on a building sought damages for fraud, claiming that it had entered into the contract of sale as a result of the selling defendants' false representations "as to the operating expenses of the building and as to the profits to be derived from the investment" (**Id**. at 319). The contract, however, contained the following clause:

> "The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, **expenses**, **operation** or any other matter or thing affecting or related to the aforesaid premises, except as hereinspecifically set forth, and the Purchaser hereby **expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is'*** * * It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, **and that the same is entered into after full investigation, neither party relying upon any statement or representation**, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition." (**Id**. at 320 [emphasis included])

After noting that a general and vague merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract, the Court of Appeals went on to say that the plaintiff's fraud claim was barred by its express disclaimer in the contract of any reliance on the specific representation:

> "[P]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations (citation omitted)."

Dannan, therefore, stands for the principle that, when parties to an agreement have expressly allocated risks, the judiciary shall not intrude into their contractual relationship (**Grumman Allied Indus., Inc. v Rohr Indus., Inc.**, 748 F2d 729, 735 [2nd Cir]).

When a fraud claim has been dismissed, the disclaimer has been sufficiently specific to match the alleged fraud (**Manufacturers Hanover Trust Co. v Yankas**, 7 F3d 310, 317 [2nd Cir]). Thus, the **Danann** rule operates when the substance of the disclaimer provisions tracks the substance of the alleged misrepresentations (**Aetna Cas. & Sur. Co. v Aniero Concrete Co., Inc.**, 404 F3d 566, 576 [2nd Cir]). When the contracting parties are sophisticated business people and the disclaimer clause is the result of negotiations between them, the specificity requirement is more relaxed (**Id**.).

Here, the parties are sophisticated business people, and their agreement is the result of negotiations between them. The substance of the plaintiff's allegations is that the defendants misrepresented that there were no tenants in arrears in order to inflate the rent roll and increase the value of the property. These allegations clearly track the language used in the disclaimer, which specifically includes "leases" and "tenancies." The court finds that, like the disclaimer language in **Dannan**, the disclaimer language in this case is sufficient to estop the plaintiff from claiming that it entered into the agreement because of fraudulent representations. As the Court of [*2]Appeals noted, to hold otherwise would be to say that it is impossible for two businessmen dealing at arm's length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact (**Dannan**, supra at 323).

Contrary to the plaintiff's contentions, the facts that were allegedly misrepresented were not matters peculiarly within the defendants' knowledge, and the plaintiff had the means available to it of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation (**Id**. at 322). The plaintiff does not allege, nor does the record reflect, that the defendants prevented the plaintiff from contacting the tenants prior to the closing to determine the accuracy of the rent roll and tenant-estoppel certificates (*cf*., **651 Bay St., LLC v Discenza**, 189 AD3d 952, 954). Accordingly, the first cause of action for fraud is dismissed.

In the absence of a viable claim for fraud, the second cause of action for aiding and abetting fraud and the third cause of action for piercing the corporate veil (which, in any

event, is not a cause of action) also fail. Accordingly, they are dismissed.

Dated: November 4, 2021

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