SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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SAPPHIRE INVESTMENT VENTURES, LLC, and RUBY INVESTMENT VENTURES, INC.,

Plaintiffs

- against -

MARK HOTEL SPONSOR LLC, MARK HOTEL OWNERS CORP., and ALEXICO GROUP LLC,

Defendants

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Index No. 600905/2010

DECISION AND ORDER

APPEARANCES:

For Plaintiffs
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For Defendants
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

This action concerns the renovation by defendant developer Alexico Group LLC of the historic landmark Mark Hotel at 25 East 77th Street, New York County, owned by defendant Mark Hotel Owners Corp., to convert the hotel into luxury hotel units on the lower eight floors and residential cooperative units on the upper floors. The cooperative offering plan listed defendant Mark Hotel Sponsor LLC as the sponsor.

Plaintiffs seek rescission of a purchase agreement between them and defendant Mark Hotel Sponsor LLC for one of the

residential cooperative units defendant Sponsor offered for sale pursuant to the cooperative offering plan, N.Y. Gen. Bus. Law § 352-e, and declaratory relief nullifying the Sponsor's notice of plaintiffs' default in refusing to proceed with closing of the sale. Plaintiffs seek further equitable relief of specific performance requiring the Sponsor to file an amended offering plan with the New York State Attorney General and return of plaintiffs' downpayment. Plaintiffs also seek damages covering losses beyond the downpayment, due to the Sponsor's breach of contract and breach of the covenant of good faith and fair dealing, and due to all defendants' fraudulent inducement, negligent misrepresentation, and deceptive trade practices. N.Y. Gen. Bus. Law § 349.

Defendants move to dismiss the amended complaint based on documentary evidence and on res judicata or collateral estoppel, C.P.L.R. § 3211(a)(1) and (5), claiming the Attorney General's ruling dated January 15, 2010, bars plaintiffs' action. The Attorney General determined that the Sponsor's nondisclosure of more than $23,000,000 in mortgages encumbering the hotel property did not constitute an omission materially adverse to plaintiffs, entitling them to rescind their contract. For the reasons explained below, the court denies defendants' motion.

II. DOCUMENTARY EVIDENCE

Upon defendants' motion to dismiss plaintiffs' claims pursuant to C.P.L.R.§ 3211(a)(1), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence is

in admissible documentary form, demonstrates the absence of any significant dispute regarding those facts, and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012). Defendants rely primarily on the Attorney General's January 2010 ruling. The uncertified copy of the Attorney General's determination is inadmissible. C.P.L.R. §§ 4520, 4540(a) and (b); Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 283 A.D.2d 322, 323 (1st Dep't 2001), aff'd, 98 N.Y.2d 208 (2002); People v. Sikorski, 280 A.D.2d 414 (1st Dep't 2001); People v. James, 4 A.D.3d 774, 775 (4th Dep't 2004); People v. Smith, 258 A.D.2d 245, 249-50 (4th Dep't 1999). See People v. Casey, 95 N.Y.2d 354, 362 (2000); People v. Brown, 221 A.D.2d 270, 271 (1st Dep't 1995); People v. Dockery, 98 A.D.3d 1308, 1309 (4th Dep't 2012); Fiorentino v. TEC Holdings, LLC, 78 A.D.3d 766, 767 (2d Dep't 2010).

Defendants also present the offering plan and purchase agreement in support of the motion, but these documents also are unauthenticated and thus inadmissible. The offering plan, insofar as it may have been filed with the Attorney General, for example, is uncertified by that office. Nor does any witness authenticate the offering plan or, assuming defendants present it for the truth of its contents, lay a foundation for its admissibility as an exception to the rule against hearsay.

Insofar as defendants offer the purchase agreement to bind plaintiffs, no witness attests to plaintiffs' signature or to circumstantial authentication. Colbourn v. ISS Intl. Serv. Sys., 304 A.D.2d 369, 370 (1st Dep't 2003); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003); Bank of New York v. Dell-Webster, 23 Misc. 3d 1107 (Sup. Ct. Bronx Co. 2008). See Yonkers Ave. Dodge, Inc. v. BZ Results, LLC, 95 A.D.3d 774 (1st Dep't 2012); 225 Fifth Ave. Retail LLC v. 225 5th, LLC, 78 A.D.3d 440, 441-42 (1st Dep't 2010); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Bell Atl. Yellow Pages Co. v. Padded Wagon, 292 A.D.2d 317, 318 (1st Dep't 2002).

Since defendants fail to support their motion with evidence in admissible form, the court denies dismissal on the grounds of documentary evidence. Greenapple v. Capital One, N.A., 92 A.D.3d at 550; Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc., 44 A.D.3d 317, 318 (1st Dep't 2007); 1911 Richmond Ave. Assoc., LLC v. G.L.G. Capital, LLC, 60 A.D.3d 1021, 1022 (2d Dep't 2009). See Muhlhahn v. Goldman, 93 A.D.3d 418, 419 (1st Dep't 2012). Even considering the document on which defendants primarily rely, the Attorney General's ruling, it does not negate plaintiffs' claims, as discussed below.

III. RES JUDICATA AND COLLATERAL ESTOPPEL

A. Applicable Standards

Under the doctrine of res judicata or claim preclusion, a final judgment on a claim bars future actions between the same

parties based on the same claim or other claims arising from the same transactions between the parties. Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 12 (2008); Josey v. Goord, 9 N.Y.3d 386, 389-90 (2007); Matter of Hunter, 4 N.Y.3d 260, 269 (2005); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 347 (1999). The judgment must be on the merits to give it preclusive effect. Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d at 13; Kalisch v. Maple Trade Fin. Corp., 35 A.D.3d 291 (1st Dep't 2006); Espinoza v. Concordia Intl. Forwarding Corp., 32 A.D.3d 326, 328 (1st Dep't 2006). Under New York's transactional approach, the final judgment on the merits also bars all other claims arising from the transaction, even if based on different theories or seeking different relief. Josey v. Goord, 9 N.Y.3d at 389-90; Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d at 347; U.S. Bank N.A. v. GreenPoint Mtge. Funding, Inc., 105 A.D.3d 639, 640 (1st Dep't 2013); Grezinsky v. Mount Hebron Cemetery, 52 A.D.3d 202 (1st Dep't 2008). Res judicata also bars claims against a nonparty to a prior proceeding whose liability depends on the liability of a party found not liable in that proceeding, Simmons v. New York City Health & Hosps. Corp., 71 A.D.3d 410 (1st Dep't 2010); Marinelli Assoc. v. Helmsley-Noyes Co., 265 A.D.2d 1, 7 (1st Dep't 2000); Fuentes v. Brookhaven Mem. Hosp., 10 A.D.3d 384, 385-86 (2d Dep't 2004), or whose interests otherwise were represented by the party in the prior proceeding, such the nonparty was in privity with the party. Green v. Santa Fe Indus., 70 N.Y.2d 244, 253 (1987); Fabiano v. Philip Morris Inc.,

54 A.D.3d 146, 149 (1st Dep't 2008).

Collateral estoppel bars a party from pursuing a claim necessarily decided in a previous action where there was a full and fair opportunity to litigate the issue, and the party pursuing the claim is the same. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 199 (2008); City of New York v. Welsbach Elec. Corp., 9 N.Y.3d 124, 128 (2007); Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001); Martin v. Safeco Ins. Co. of Am., 19 A.D.3d 221 (1st Dep't 2005). For res judicata or collateral estoppel to apply, the claim or issue must have been resolved against the party now seeking to raise the issue or against another party in privity with the current claimant. Buechel v. Bain, 97 N.Y.2d at 303; BDO Seidman LLP v. Strategic Resources Corp., 70 A.D.3d 556, 560 (1st Dep't 2010); Green v. Santa Fe Indus., 70 N.Y.2d at 253; Kinberg v. Kinberg, 59 A.D.3d 236, 237 (1st Dep't 2009).

Res judicata and collateral estoppel apply to prior administrative agency determinations, as long as the agency employed "procedures substantially similar to those used in a court of law." ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 226 (2011); Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d 147, 153 (1988); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499 (1984); Metro-North Commuter R.R. Co. v. New York State Exec. Dept. Div. of Human Rights, 271 A.D.2d 256, 257 (1st Dep't 2000). The preclusive effect of an administrative decision depends on four criteria. (1) The agency's adjudication was within its

authority. (2) The agency's procedures ensured adequate testing of evidence, finding of facts, and consideration of issues. (3) The parties expected to be finally bound by the adjudication. (4) Preclusive effect is consistent with the agency's administrative need for flexibility in modifying prior decisions to adapt policy to changing conditions. Allied Chem. v. Niagara Mohawk Power Corp., 72 N.Y.2d 271, 276-77 (1988).

B. Application of These Standards to the Attorney General's Procedures

New York General Business Law § 352-e and its implementing regulations authorize the Attorney General to determine disputes regarding downpayments toward purchases of cooperative units that have required the filing of an offering plan with the Attorney General. 13 N.Y.C.R.R. § 21.3(l)(3)(viii)(a). See Madison Park Owner LLC v. Schneiderman, 93 A.D.3d 555 (1st Dep't 2012); Dunlop Dev. Corp. v. Spitzer, 26 A.D.3d 180 (1st Dep't 2006). The Attorney General's procedures in making that determination, however, are not sufficiently judicial to apply the preclusion doctrine. ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Jason B. V. Novello, 12 N.Y.3d 107, 114 (2009). See Alamo v. McDaniel, 44 A.D.3d 149, 154 (1st Dep't 2007). The parties do not dispute that plaintiffs' application to the Attorney General and defendant Sponsor's response involved only the submission of documents. While plaintiffs may have been free to present a vast array of documents, no mechanism allowed plaintiffs to present non-documentary evidence, test the veracity of defendant Sponsor's documents, or cross-examine their authors or

signatories or other witnesses involved with the parties' transaction. Jason B. v. Novello, 12 N.Y.3d at 114; Allied Chem. v. Niagara Mohawk Power Corp., 72 N.Y.2d at 276-77. See Auqui v. Seven Thirty One Ltd. Partnership, 20 N.Y.3d 1035, 1037 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 226; Jeffreys v. Griffin, 1 N.Y.3d 34, 40-41 (2003); Alamo v. McDaniel, 44 A.D.3d at 154.

Preclusive effect attaches only to dispute resolutions rather than to all administrative determinations. Jason B. v. Novello, 12 N.Y.3d at 113; Venes v. Community School Bd. of Dist. 26, 43 N.Y.2d 520, 523 (1978). The Attorney General's regulation, 13 N.Y.C.R.R. § 21.3(l)(3)(viii)(a), refers to the procedure for a determination of entitlement to a downpayment as an "application." A party may seek release of the downpayment by filling out a form and sending copies of the application to the other parties to the contract of sale. Id. The Attorney General acts on the application by deciding it in 30 days or notifying the parties of an extension of time. 13 N.Y.C.R.R. § 21.3(l)(3)(viii)(d); Dunlop Dev. Corp. v. Spitzer, 26 A.D.3d at 181. The procedures do not provide for holding a hearing, even when parties submit controverting documents or otherwise oppose the application. See Jason B. v. Novello, 12 N.Y.3d at 114.

The Attorney General's faithful adherence to regulatory procedures does not render the preclusion doctrine any more applicable where, as here, the procedures fall far short of resembling court proceedings. ABN AMRO Bank, N.V. v. MBIA Inc.,

17 N.Y.3d at 227. Concomitantly, since the Attorney General did not conduct a quasi-judicial adjudication, plaintiffs were not limited to seeking review pursuant to C.P.L.R. Article 78. ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 225; Abiele Contr. v. New York City School Constr. Auth., 91 N.Y.2d 1, 12 (1997).

C. Application of These Standards to the Attorney General's Substantive Determination

Even if the Attorney General's procedures were sufficient to apply res judicata or collateral estoppel, defendants bore the burden to demonstrate that the Attorney General decisively resolved the issues he was authorized to decide and that they were identical to the issues plaintiffs raise in this action. See Jeffreys v. Griffin, 1 N.Y.3d at 39; Ryan v. New York Tel. Co., 62 N.Y.2d at 501; Gomez v. Brill Sec., Inc., 95 A.D.3d 32, 35-36 (1st Dep't 2012); Alamo v. McDaniel, 44 A.D.3d at 154. The Attorney General decided that defendant Sponsor was entitled to the downpayment based on the absence of material nondisclosures by the Sponsor of information adverse to plaintiffs' interests that would support rescission of the purchase agreement. He did not decide the merits of any of the other legal bases on which plaintiffs now seek equitable relief and damages. People v. Applied Card Sys., 11 N.Y.3d 105, 125 (2008); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d at 348-49; Gomez v. Brill Sec., Inc., 95 A.D.3d at 35; Ginezra Assoc. LLC v. Ifantopoulus, 70 A.D.3d 427, 429-30 (1st Dep't 2010). Defendants thus fail to demonstrate that these legal claims were resolved decisively in their favor and against plaintiffs.

Although defendants urge that the transactional approach to res judicata bars plaintiffs' claims because plaintiffs previously failed to raise these claims, neither the record nor the applicable regulations demonstrate that plaintiffs were permitted to raise these claims in the limited application before the Attorney General. The regulations governing the application do not authorize the Attorney General to determine the return of a downpayment on grounds beyond the extent of the offering plan's nondisclosures and their materially adverse effect on plaintiffs' interests reflected in the purchase agreement. 13 N.Y.C.R.R. § 21.3(l)(3)(viii). Nor do the regulations authorize him to determine the grounds for any other equitable relief or damages. See Abiele Contr. v. New York City School Constr. Auth., 91 N.Y.2d 9.

In any event, res judicata and its transactional approach would not bar plaintiffs' additional claims against defendant owner Mark Hotel Owners Corp. or defendant developer Alexico Group LLC, as neither was a party to the Attorney General's proceeding, and no procedure permitted plaintiffs to join these defendants. City of New York v. Welsbach Elec. Corp., 9 N.Y.3d at 127-28. See Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d at 154-55; Liss v. Trans Auto Sys., 68 N.Y.2d 15, 23 (1986); Tounkara v. Fernicola, 63 A.D.3d 648, 650 (1st Dep't 2009). The procedure for disposition of the downpayment specifies only that a sponsor, purchaser, subscriber, or escrow agent may apply, 13 N.Y.C.R.R. § 21.3(l)(3)(vii)(a), and nowhere

mentions an owner or a developer.

As set forth above, parties in privity with a party in a prior proceeding, such as defendant Sponsor here, also may invoke res judicata. Since nothing indicates the potential liability of the other defendants, the owner and developer, for the alleged nondisclosures or for repayment of the downpayment, however, these other defendants do not demonstrate the same interest as the Sponsor in the disposition of the downpayment to establish privity with the Sponsor and justify preclusion. Green v. Santa Fe Indus., 70 N.Y.2d at 253-54; Fuentes v. Brookhaven Mem. Hosp., 10 A.D.3d at 385-86. See Buechel v. Bain, 97 N.Y.2d at 305; Juan C. v. Cortines, 89 N.Y.2d 659, 668-69 (1997); Simmons v. New York City Health & Hosps. Corp., 71 A.D.3d 410. In fact, when the Attorney General ruled against plaintiffs, he released the downpayment to the Sponsor. See N.Y. Gen. Bus. Law §§ 352-e(2-b), 352-h; 13 N.Y.C.R.R. § 21.3(l)(3).

IV. PREEMPTION OF PLAINTIFFS' CLAIMS BY THE MARTIN ACT

Neither the Attorney General's regulations nor the authorizing statute under the Martin Act, N.Y. Gen. Bus. Law art. 23-A, necessarily extinguishes plaintiffs' non-statutory claims. N.Y. Gen. Bus. Law § 352-e; 13 N.Y.C.R.R. § 21.3; Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 18 N.Y.3d 341, 351 (2011); Meadowbrook Farms Homeowners Assn., Inc. v. JZG Resources, Inc., 105 A.D.3d 820, 821 (2d Dep't 2013). See Roni LLC v. Arfa, 18 N.Y.3d 846, 849 (2011); Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 12 N.Y.3d 236, 247 (2009).

The regulations require the offering plan to make disclosures. They include: the terms of security approved as an alternate to an escrow account, 13 N.Y.C.R.R. § 21.3(l)(4)(iv); the terms of a surety agreement approved as alternate security, 13 N.Y.C.R.R. § 21.3(l)(5)(iv); details of financing if a purchaser's obligation to purchase depends on obtaining financing or a commitment to financing, 13 N.Y.C.R.R. § 21.3(l)(16); the terms of mortgages encumbering the property on the closing date, 13 N.Y.C.R.R. § 21.3(q); and the organizational structure of the apartment corporation. 13 N.Y.C.R.R. § 21.3(s)(1). If the developer or seller has obtained construction financing, the regulations require the Sponsor to make disclosures including the terms of a construction loan, 13 N.Y.C.R.R. § 21.3(x)(1); the terms of a loan applicable to the Sponsor's obligation to market units, 13 N.Y.C.R.R. § 21.3(x)(2); and whether any bond other than required by the regulations secures the Sponsor's obligations. 13 N.Y.C.R.R. § 21.3(x)(12).

Although plaintiffs' claims based on failures to make these disclosures would be precluded, Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 12 N.Y.3d at 245-46, defendants have moved to dismiss the complaint on the grounds that res judicata or collateral estoppel bars plaintiffs' claims, C.P.L.R. § 3211(a)(5), not on the grounds that they fail to state a claim. C.P.L.R. § 3211(a)(7). Nor have the parties addressed the claims' insufficiency as grounds for dismissal. The Attorney General did not determine whether the required disclosures were

made, but only determined that the allegedly undisclosed information would not be a material amendment allowing plaintiffs to rescind the purchase agreement and claim their downpayment. His determination that his regulations did not require a refund did not even necessitate a determination whether any party defaulted on the purchase agreement. Nor did he determine whether defendants affirmatively misrepresented information that may constitute fraud even if the truthful information was not required to be disclosed under General Business Law § 352-e or 13 N.Y.C.R.R. § 21.3.

V. CONCLUSION

Consequently, on each of the grounds raised, the court denies defendants' motion to dismiss the amended complaint. C.P.L.R. § 3211(a)(1) and (5). This decision constitutes the court's order.

DATED: June 19, 2013

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.