SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:	HON. VERNA L. SAUNDERS		PART	IAS MOTION 36
		Justice X	INDEX NO.	154600/2018
ARISA 5 FRA	NKLIN LLC, Plaintiff,		MOTION SEQ. NO.	001
	- v - IANAGERS OF FRANKLIN PLACE, NIUM and BROADWAY 371, LLC, Defendants.		DECISION + C MOTIO	

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 16, 18, 19, 20, 22, 25, 30, 33, 35, 38

were read on this motion to/for

DISMISS

Defendant, Broadway 371, LLC, moves for dismissal pursuant to CPLR §§ 3211(a)(1) and (a)(7) seeking an order dismissing the complaint as against it on the grounds that plaintiff's complaint fails to state a claim as against defendant Broadway 371, LLC and that the terms of the Purchase Agreement bar plaintiff from the relief sought. After a careful review of the papers submitted, the motion is granted.

Plaintiff alleges the following facts: Defendant Broadway 371, LLC (hereinafter "Sponsor") is the sponsor of a 20-story building constructed to be sold primarily as luxury residential condominium units. In 2013, the Sponsor filed an Offering Plan with the New York State Department of Law and began selling units. The units were not yet completed. One such unit, known as Unit C or the Commercial Unit, was designed to be the sole non-residential unit in the building and was located on the ground floor. The unit was designed for various commercial uses, including a restaurant, if equipped with a flue for exhausting odors and other emissions. Initially, the Sponsor held the Commercial Unit for itself but later amended the Offering Plan to include that the Commercial Unit would be available for sale to the public.¹ The Sponsor did not install a flue but, as outlined in the Offering Plan, purportedly reserved a right to install a flue, sized for a possible restaurant or commercial grade kitchen.² Plaintiff avers that this right could be exercised by any subsequent owner of the Commercial Unit. On or about December 3, 2013, the plaintiff and the Sponsor entered into a Purchase Agreement wherein the plaintiff agreed to purchase the yet completed Commercial Unit.³ After construction was completed and based on the flue provisions outlined in the relevant offering plan, plaintiff contacted the Board of Managers of the Condominium ("Board") to determine a location for the flue. In response, the Board asserted that no such location was designated by the Sponsor when the building was built, and that plaintiff could not install same.

¹ The plaintiff relies upon excerpts of terms purportedly taken from the Offering plan and/or Amended Offering Plan as outlined in the Summons and Complaint but fails to attach same for the court's consideration. ² See above.

See above.

³ See Purchase Agreement, annexed as Movant's *Exhibit D*.

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Here, defendant 371 Broadway, LLC moves to dismiss plaintiff's complaint on the various grounds, including that plaintiff fails to state a cause of action.

In opposition to the motion, plaintiff asserts that it entered into an agreement with the Sponsor based on the "flue provisions" contained in the Offering Plan/Amended Offering Plan. Additionally, plaintiff contends that the Sponsor knew that a future board would prohibit the installation of a flue thus, defrauding the plaintiff who entered into the Purchase Agreement with the intent to use the Commercial Unit as a restaurant.

In reply, the Sponsor argues that plaintiff cannot substantiate a fraud claim; that plaintiff failed to proffer any facts as to any misrepresentations or misstatements made by the Sponsor; and that the plaintiff's arguments rest solely on its information and belief that the Sponsor knew a future board would refuse to install the flue.

When considering a motion to dismiss plaintiff's complaint 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. (*Leon v Martinez*, 84 NY2d 83 [1994]).

Specifically, plaintiff relies on terms outlining its right to install a flue, purportedly contained within the Offering or Amended Plan,⁴ and Paragraph 38 of the Purchase Agreement which states that "[a]ny conflict between the Plan and this Purchase Agreement will be resolved in favor of the Plan." However, plaintiff fails to attach the referenced plan for the court's consideration. Assuming *arguendo*, that such provisions as to a flue do in fact exist, it is unclear why the plaintiff failed to have said provisions added or incorporated into the purchase agreement. Additionally, plaintiff avers that its sole intention was to operate a restaurant and that the commercial unit was not yet completed when purchased. This suggests that plaintiff could have sought the installation of said flue prior to the court finds this argument unavailing considering that the underlying transaction was worth approximately seven million dollars and plaintiff could or should have taken action to ensure its interests were protected given the extensive nature of its investment.

Further, as plaintiff concedes in its papers, the Sponsor does not control the Board. Indeed, a review of the record suggests that the Sponsor was not involved in the Board's formation or development. Thus, plaintiff's argument that the Sponsor somehow knew that a future Board would prohibit the installation of a flue is without merit. Moreover, while the commercial unit could have been used for a restaurant, it is undisputed that a restaurant was not the commercial unit's intended nor sole purpose. In fact, as plaintiff points out, the Sponsor initially reserved the commercial unit for itself with no indication that it would be used as a restaurant. Ultimately, the plaintiff seeks relief for the Board's decision to refuse the installation of a flue at the subject premises. This decision was not made by the Sponsor, who ceased any

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⁴ Instead of attaching the Offering Plan and/or Amended Offering Plan, the plaintiff quotes terms allegedly from said Plan(s) and cites to the summons and complaint which also purportedly quotes the Plan(s).

control of the premises upon the sale of the units and formation of the board. Thus, dismissal as against the Sponsor is warranted.⁵ Based on the foregoing, it is hereby

ORDERED that defendant Broadway 371, LLC 's motion to dismiss plaintiff's complaint as against it is granted and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that this action is severed and continued under this index number with respect to the remaining defendants; and it is further,

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the Court's records to the reflect the change in the caption herein; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied.

This constitutes the final decision and order of the court.

September 2, 2020		2
		HON. VERNA L. SAUNDERS, JSC
CHECK ONE:	CASE DISPOSED X GRANTED DENIED	x NON-FINAL DISPOSITION GRANFED IN PART OTHER
APPLICATION:	SETTLE ORDER	SUBMIT ORDER
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN	FIDUCIARY APPOINTMENT REFERENCE

⁵ See Movant's *Exhibit B*.

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