

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 completion of construction and prior to taking possession of the premises. While plaintiff intimates that the Sponsor was a more sophisticated party who took advantage of the plaintiff, 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

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

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE

⁵ See Movant's Exhibit B.