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

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CHRISTINA ROBILOTTO,

Plaintiff,

- against -

ABYSSINIAN DEVELOPMENT CORPORATION, HARLEM VILLAGE HOMES II HOUSING DEVELOPMENT FUND COMPANY, INC. and APEX BUILDING COMPANY,

Defendants.

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Index No. 653560/14
DECISION & ORDER
(Motion Seq. 001)

JENNIFER SCHECTER, J.:

Plaintiff commenced this action in November 2014, seeking damages allegedly suffered as a result of the defendants' alleged breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and negligent misrepresentations in connection with plaintiff's purchase and the rehabilitation of a brownstone townhouse located at 203 West 121st Street in Manhattan's Harlem community (the Premises).

Defendants Abyssinian Development Corporation (ADC) and Harlem Village Homes II Housing Development Fund Company, Inc. (HVH) move, pursuant to CPLR 3212, for summary judgment: (1) dismissing the complaint against ADC and HVH in its entirety; (2) declaring that ADC and/or HVH are entitled to complete indemnification against co-defendant Apex Building Company (Apex); and (3) declaring that, to the extent plaintiff is found to have suffered any damages for which ADC and HVH may be liable, any monetary award entered against them in plaintiff's favor is limited to the amount of the plaintiff's $48,036.75 down payment.

ADC and HVH argue that dismissal should be granted for three reasons. First, ADC contends that the claims asserted against ADC should be dismissed, because ADC is not a party to any of the contracts that form the basis of plaintiff's complaint. Second, HVH contends that it satisfied all of its contractual obligations. Third, HVH allegedly assigned the guarantee of any and all warranties with respect to the Premises; thus, plaintiff must look solely to Apex for the recovery of the damages she is claiming.

Background

ADC is a New York not-for-profit corporation. According to its certificate of incorporation, it was formed in 1989 under the sponsorship of Abyssinian Baptist Church to, among other things, raise housing standards in Harlem and the Upper West Side (Howard Aff., Ex. A). Allegedly in furtherance of this effort, on November 19, 2003, ADC formed a single-purpose, not-for-profit corporation, HVH, to develop a housing project for persons of low and moderate income in Manhattan (*id.*, Ex. B). In 2007, HVH, by corporate resolution, applied for and was ultimately awarded a building loan and grant from the United States Department of Housing and Urban Development (HUD) to purchase and rehabilitate 10 brownstones in Harlem for home ownership in connection with a state and city program known as the Neighborhood Homes Program through HUD's 203 (k) Program (*id.*, Ex. C). The 203 (k) Program refers to section 203(k) of the National Housing Act, 12 USC §§ 1709, *et seq.*

In connection with this project, HVH claims that it hired an architect, J&P Designs, Inc. (J&P), to develop drawings for the complete gut rehabilitation and redesign of each of the 10 brownstones, including the Premises (Howard Aff., ¶¶ 11-12 & Ex. D).[1] HVH also claims that it executed an agreement, dated May 24, 2007, with co-defendant Apex to execute the plans prepared by J&P and to complete the construction of the project (*id.*, ¶ 13 & Ex. E).

On or about September 19, 2011, plaintiff entered into a "Residential Contract of Sale" (the Contract of Sale) to purchase the Premises for the sum of $960,735, of which $48,036.75 was the down payment (Howard Aff., Ex. F). The seller is listed as:

> "**HARLEM VILLAGE HOMES II HOUSING DEVELOPMENT FUND COMPANY, INC.**
> Address: c/o Abyssinian Development Corp., 4-14 West 125th Street, New York, New York 10027
> Social Security Number/Fed. I.D. No(s): xx-xxxxxxx
> Hereinafter called 'Seller'"

(*id.* [bold in original]). In section 34, entitled "Construction," the Contract of Sale advised that the seller was rehabilitating the Premises by a third-party contractor, who would be warranting that the Premises would be free from defects in workmanship and materials for a period of one year from the date of the closing, or, in the case of the roof, for five years. This provision further provided that, after the closing, the purchaser shall look solely to the contractor (and subcontractors, suppliers and manufacturers) and not to the seller for any

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[1] The February 15, 2006 contract with J&P that is attached to the moving affidavit of James T. Howard, lists three buildings in a "Section 203K Program" and seven buildings in a "Section 203B Program," none of which is the Premises at 203 West 121st Street (*see* Howard aff., Ex. D).

matter or liability arising out of or relating to the construction and rehabilitation of the Premises or any defect, latent or otherwise. In section 30 of the Contract of Sale, it was agreed that if the Premises were not "fully completed" by the closing date, this would not constitute an objection to closing. Rather, plaintiff was required to inspect the Premises prior to the closing, and prepare a punch list of any defective or unfinished work and the seller would complete that work following the closing of title for the Premises.

On May 17, 2012, the day before the closing, plaintiff conducted a walk through of the property (Robilotto Aff., ¶ 15 & Ex. D). That same day, she sent to her attorney (Christine Bell, Esq. of Rheem Bell & Mermelstein LLP) a punch list of problems with the property (*id.*, Ex. D). This list identified the following five problems:

> "1. The 2d floor electricity wasn't working. . . .
> 2. The gutter on the roof in the back of the building is leaking. It's likely the cause of the leaks inside the building but it was fixed - though not completely.
> . . .
> 3. There is a tile in the entry way that is missing.
> 4. There is a burner cover missing from the stove on the first floor.
> 5. Several months ago when I was in the building the tile floor on the first floor was coming up. The ADC has since replaced it with bamboo but the reason it was coming up was because it was laid on plywood. There is tile in the kitchen areas on the other two floors. I just want them to confirm that that tile wasn't laid on plywood and that it's not going to start popping up in 2 months"

(*id.*). Title closed on May 18, 2012 (Howard Aff., Ex. G; Robilotto Aff., ¶ 3).

From May 18, 2012 through May 21, 2012, plaintiff was in contact with Gilbert Rosa of ADC and Lilian Henriquez and Robert Horsford of Apex regarding additional problems and repairs to the Premises, including a problem with the building alarm, a stove and the hot water heater (Robilotto Aff., Ex. E). On May 21, 2012, plaintiff emailed Gilbert Rosa

thanking him for taking care of the hot water tank over the weekend and advising of additional problems she discovered after moving relating to tile grout, nicks in the kitchen cabinets, a running toilet, a chipped bathtub, a missing window screen, a non-working intercom system, and missing light bulbs (Robilotto Aff., Ex. E). Gilbert Rosa responded that day stating that he was glad the general contractor was able to take care of the hot water problem, that he would notify the general contractor of these items and try to get answers, and then offered to come the next day to "check these items and see where I can be of assistance" (*id.*).

By email dated May 21, 2012, Patrick Callella, Esq. of Windels Marx Lane & Mittendorf, LLP emailed plaintiff and her attorney, advising that "Gil [referring to Gilbert Rosa of ADC] will take care of these punchlist items for you (Robilotto Aff., Ex. D). It was a bit of a fight to get him to turn over the drawings - it is ADC's policy not to because the as-built plans always have some minor discrepancies between what was actually constructed" (*id.*).

On May 23, 2012, Gilbert Rosa of ADC emailed Robert Horsford and Lilian Henriquez of Apex advising that he met with the plaintiff that morning and did a "quick walk through" and that he was given a "small list of items that need to be addressed" (Robilotto Aff., Ex. F). The problems were mostly minor, relating to the cellar floor drain covers, the roof fans' timer, the intercom system, the electrical panel, tile grout, kitchen cabinet handles, a stove door, the basement toilet running, and bathroom tub chips (*id.*). By early June of 2012, more serious problems arose including that the cellar front wall under the street leaked

when it rained (*id.*, Ex. H). On June 11, 2012, Lilian Henriquez of Apex advised that a schedule to take care of the "outstanding repairs," identified as the bamboo floor, chipped bathtub and cellar drains, would be sent in a couple of days (*id.*)

On August 14, 2012, Gilbert Rosa of ADC emailed plaintiff asking to schedule a site inspection for city tax purposes (Robilotto Aff., Ex. I). In this email, he stated: "I hope all is well, I have not heard from you in a while. I hope that Apex has been able to resolve any issues that may have come up" (*id.*). Plaintiff responded: "Things are great- thanks for asking!" (*id.*). However, things apparently were not so great. On October 2, 2012, plaintiff once again emailed Gilbert Rosa advising that the entire basement of the Premises had flooded the week before and that the front drain was completely clogged, possibly from a construction worker putting concrete or grout in the drain (*id.*, Ex. M). That month, plaintiff also experienced a heating problem on the second and third floors and leaks in the basement from the heating system (*id.*, Exs. N and I). Once again, plaintiff advised Gilbert Rosa of ADC and, on October 10, 2012, he responded:

> "I understand that you have been having some heat and leak related issues. I have spoken with APEX this morning and they informed me that they are getting the plumber there today. If there is anything that I can do to assist or if APEX does not address the issue, please let me know"

(*id.*, Ex. N). Although Apex apparently sent a plumber to fix the heating problems, the lack of heat to the second and third floors persisted into January 2013, leading plaintiff to advise Lilian Henriquez of Apex that she suspected a "larger issue with the boiler" (*id.*, Exs. P & Q).

Plaintiff alleges that, as problems at the Premises persisted, the defendants ceased their efforts to remediate the design and construction defects at the Premises (Robilotto Aff., ¶ 30). This action was commenced on November 17, 2014. The complaint alleges that the Premises suffer from "severe design and construction defects" that causes the Premises "to exist in an unsafe and hazardous condition" (complaint, ¶¶ 20-21). Among other problems detailed in paragraph 20 of the complaint, plaintiff contends that Apex poured mortar or other construction debris into a basement drain causing a back flow of the city water system in 2012 and major flooding in the basement resulting in water damage to the cellar foundation walls and mold in the sheet rock covering the cellar walls (*id.*, ¶ 20 [a - c]). Plaintiff also claims that the boiler was improperly installed, has no thermostat, is inadequate to heat the entire building, and an attempted repair by Apex caused additional damage to the radiator grills and surrounding walls (*id.*, ¶ 20 [d]). Thorocoat sealant was allegedly not properly applied to the front and back of the building, causing the stucco to peel and crack (*id.*, ¶ 20 [g]). The roof allegedly leaks in several places and the gutters do not pitch correctly, causing leaks and damage (*id.*, ¶ 20 [h -1]).

Apparently, the bamboo and tile flooring and sub-flooring were improperly installed causing cracks and uneven flooring (Robilotto Aff., ¶ 20 [n]). Two attempts to fix the floors were allegedly unsuccessful. According to the complaint, "[t]he first attempt failed because the new floor was installed over the subfloor. The second attempt failed because the new floor was infested with bugs" (complaint, ¶ 20 [o]). Plaintiff alleges that she repeatedly and

persistently contacted the defendants regarding these and the other problems listed in paragraph 20 of the complaint (*id.*, ¶ 23; Robilotto Aff., ¶ 29 & Exs. D - P).

Plaintiff also alleges that the Premises, as built, deviated from the architectural drawings in many material respects. She alleges that defendants failed to satisfy the following requirements in the architectural drawings:

> "a. The boiler room would be equipped with a new 20 square inch ventilation louver with a fire damper for fresh air intake;
> b. there would be insulation between the roof beams and top floor ceiling with nine inch R-30 fiberglass for energy efficiency;
> c. all windows and exterior door frames would be caulked;
> d. a 2 1/4 x 25/32 inch premium select oak flooring would be installed throughout the Premises;
> e. a new Bitumen roof system with base and counter flashing would be installed;
> f. new metal hangers, supports and tied rods would be installed for all piping;
> g. a new wooden front door would be installed;
> h. finish panels would be installed between the refrigerators and cabinets in each kitchen;
> i. the front yard and backyard would be finished with brick pavers in a herringbone pattern; and
> j. the backyard would have new topsoil, seed and planting and the front yard would have an installed planter"

(Complaint, ¶¶ 18, 19, 20 [l], [m], [n], [r]).

The complaint asserts the following four causes of action against each defendant: (1) breach of the Contract of Sale; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; and (4) negligent misrepresentation.

Analysis

ADC

Plaintiff alleges that she and her attorney, at all times, dealt solely with ADC and its employees regarding all matters affecting the Contract of Sale, both prior to and after the closing, because HVH has no known employees. She submits evidence showing that all three of HVH's initial three directors (Sheena Wright [Pres.], James T. Howard [V.P. and Sec.] and Larry Dais) are officers, employees and/or directors of ADC (*see* Howard Aff., Ex. B; Bauchner Affirmation, Exs. 2 & 3). She also contends that, at no time, did ADC or any of its employees or representatives advise her that it was not the seller and cites to certain email evidence that even HUD believed that "Abyssinian" was the seller (*see* Robilotto Aff., Ex. C at page 6 of 9). Thus, plaintiff contends that there are triable issues of fact as to whether ADC was a party to the Contract of Sale or whether ADC can be held liable for HVH's contractual and legal obligations pursuant to an alter ego theory.

The first page of the Contract of Sale expressly defines the "Seller" to be HVH and ADC is listed only as a "care of" address (Howard Aff., Ex. F at 1). In addition, there is no dispute that HVH purchased the Premises from HUD, that it was HVH that entered into the contracts with J&P and Apex to rehabilitate the 10 brownstones, and that the deed transferring the Premises to plaintiff identifies the seller as HVH (*see id.*, Exs. A - E, G). Thus, there can be no misconception as to identity of the seller by plaintiff or her legal counsel. Any understanding by plaintiff to the contrary is barred by the merger clauses in sections 28 (a), 53 and 57 of the Contract of Sale, which provide:

> "All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract"

(Howard Aff., Ex. F, ¶ 28 [a]).

> "No Oral Changes: This Contract, or any provision hereof, cannot be orally changed, terminated or waived. ANY CHANGES OR ADDITIONAL PROVISIONS MUST BE SET FORTH IN A RIDER ATTACHED HERETO OR IN A SEPARATE WRITTEN AGREEMENT SIGNED BY THE PARTIES AND WHICH REFERS TO THIS CONTRACT"

(*id.*, ¶ 53, Rider I at 6).

> "Other Agreements: This Contract supersedes any and all understandings and agreements between the parties and constitutes the entire agreement between the parties and no oral representations or statements shall be considered a part hereof"

(*id.*, ¶ 57, Rider I at 6).

"[T]o state a claim for alter-ego liability plaintiff is generally required to allege 'complete domination of the corporation . . . in respect to the transaction attacked' and 'that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "'While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required'" (*Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005], quoting *Matter of Morris v New York State Dept.*

of Taxation & Fin., 82 NY2d at 141-142). A party seeking to recover on a veil piercing or alter ego theory of liability has a "heavy burden" to show not only domination, but also "that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

Plaintiff fails to raise a triable issue of fact as to whether ADC is the alter ego of HVH. In *Board of Mgrs. of the Gansevoort Condominium v 325 W. 13th, LLC* (121 AD3d 554 [1st Dept 2014]), the First Department concluded that allegations that a condominium sponsor was a single-purpose entity, undercapitalized, dominated by its parent company, and intermingled assets with the parent were insufficient to hold the parent company liable on an alter ego theory for plaintiff's claims arising from alleged construction defects. In that case, as here, the plaintiff had alleged that the parent and the sponsor used common office space, the same telephone numbers and the same email account. The First Department held that this was insufficient to allege alter ego liability and that the plaintiff's "failure to allege that [the parent] operated through the sponsor as an instrument of wrongdoing is fatal to its alter ego claim," and the claim that the sponsor had transferred all of the unit sale proceeds to the parent was not sufficient for this purpose (121 AD3d at 555; *see also Sound Communications, Inc. v Rack and Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011] ["The complaint merely alleges that Rack and Roll functioned as the moving defendants' alter ego. It is not sufficiently alleged that Rack and Roll's status as a limited liability company was used to commit a fraud against plaintiff."]).

In the present case, there is no evidence or even allegation that HVH is or was undercapitalized. Plaintiff alleges only that HVH's creation was "in conformity with the schemes to defraud HUD that were running rampant at the time ADC sold the Property to Plaintiff" (Bauchner Affirmation, ¶ 16). The sole support for this statement is a *New York Post* article which makes no mention of ADC or HVH, and suggests that unnamed nonprofit groups scammed HUD of millions between 1997 and 1999 (*id.*, Ex. 4).

Accordingly, the motion to dismiss as to ADC is granted.

HVH's Post-closing Obligations

HVH argues that the Contract of Sale is clear that plaintiff must look to Apex, and only Apex, to address any matter of liability for damages arising out of and/or relating to the construction and rehabilitation of the Premises. HVH argues that its responsibilities to plaintiff were expressly limited and otherwise extinguished upon the closing of title on May 18, 2012. HVH allegedly satisfied all of its post-closing obligations, which were expressly limited to repairing or replacing only those five problems identified by plaintiff in her May 17, 2012 email and that HVH's post-closing obligations cannot be expanded to include repairs for problems that she subsequently discovered post-closing, latent or otherwise.

Several provisions of the Contract of Sale are relevant to this argument.

First, in section 29 (a), the seller agreed that:

> "at its own cost and expense, [it would] rehabilitate and convert, if necessary, the Premises in order to complete a **three (3) family** dwelling in substantial and material compliance with the architectural drawings for the Premises prepared by J - P Design Group, Inc. (the 'Plans') as previously delivered to Purchaser. The Premises shall be constructed substantially in accordance with

> the requirements of The City of New York Department of Buildings and other agencies having jurisdiction over the construction, . . . "

(*id.*, § 29 [a], Rider I at 1 [bold in original]). If the Premises were not "fully completed" by the closing date, section 30 provides that this would not constitute an objection to closing. Rather, plaintiff was required to inspect the Premises prior to the closing, and

> "prepare an Inspection Statement (in the form set forth in Schedule B to this Contract) acknowledging Purchaser's acceptance of the Premises in good condition and in accordance with the terms of this Contract subject to the 'punchlist' [sic] items set forth on the Inspection Statement. A completed Inspection Statement shall be delivered to Seller or Seller's agent at the conclusion of the Inspection. To the extent included on the Inspection Statement and as required under this Contract, Seller shall complete any unfinished or defective work following the closing of title for the Premises. Seller's obligation to complete such work will survive delivery of the deed to Purchaser"

(*id.*, § 30, Rider I at 1-2).

In section 34, entitled "Construction," the Contract of Sale advised that:

> "Seller is causing the improvements located at the Premises to be rehabilitated by a third party contractor. The agreement between the Seller and the contractor provides, in substance, that the contractor shall warrant to Purchaser that the Premises shall be free from defects in workmanship and materials for a period of one (1) year from the date of closing of title (or in the case of the roof, five (5) years . . .) and the contractor shall provide such warranties for the benefit of Purchaser. Seller's agreement with the contractor also requires that the contractor assign to Purchaser all guarantees and warranties given by its subcontractors, suppliers and manufacturers. *Except as otherwise expressly provided for in this Contract, upon and after Closing, Purchaser shall look solely to the contractor (and subcontractors, suppliers and manufacturers) and not to the Seller for any matter or liability arising out of or relating to the construction and rehabilitation of the Premises, any component thereof or any defect, latent or otherwise. The provisions contained in this Section shall survive closing of title*"

(*id.*, § 34, Rider I at 3 [emphasis added]). In the very next section, the seller gave the following "Limited Warranty":

> "(a) Seller makes no housing merchant implied warranty or any other warranties, express or implied, in connection with the Premises or this Contract; and
> (a) The quality of construction shall be comparable to local standards customary in the particular trade and substantially in accordance with the Plans"

(*id.*, § 35, Rider I at 3).[2]

Thus, while HVH relies on sections 29 and 34 of the Contract of Sale for its argument that it made no post-closing warranties, section 34 specifically provides that it is "[e]xcept as otherwise expressly provided for in this Contract," and thus it does not eliminate the limited warranty HVH provides in section 35 (b) that the quality of construction shall be comparable to local and customary standards and substantially in accordance with the architectural drawings. A similar promise regarding substantial and material compliance with the architectural drawings appears in section 29 (a) of the Contract of Sale. The failure of the seller to deliver those architectural drawings to plaintiff prior to the walk-through is not a waiver of plaintiff's rights, and does not absolve HVH of such contractual liability. If anything, it supports plaintiff's contention that HVH breached its implied covenant of good faith and fair dealing. There are issues of fact as to whether the quality of the construction was comparable to local building trades and also whether the architectural plans were substantially followed, which preclude dismissal of plaintiff's first and second causes of

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[2] Both subsections of section 35 are labeled "(a)." For ease of reference, the court will refer to the second subparagraph as 35 (b).

action against HVH. Moreover, in the punch list plaintiff submitted to the seller on the day before the closing, she specifically identified a problem with a leaking roof and improperly installed gutters and a problem with the interior flooring throughout the house, punch list problems which HVH admittedly is still responsible for and which plaintiff alleges have never been properly fixed.

The court, however, rejects plaintiff's argument that HVH made post-Contract of Sale and post-closing promises via email regarding fixing certain defects, promises which are legally enforceable and have allegedly been breached. Section 53 of the Contract of Sale, quoted above, provides in bold lettering that any changes or additional provisions must be set forth in an additional written agreement signed by both parties. The emails to which plaintiff refers do not satisfy this requirement, and cannot be used to enlarge the post-closing contractual warranties that HVH agreed to provide.

Plaintiff's Negligence Causes of Action

Where a complaint alleges that work required by a contract was performed negligently, it states a cause of action to recover damages for breach of contract, not negligence (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]; *Wildenstein v 5H&Co.*, 97 AD3d 488, 491-92 [1st Dept 2012]; *Albstein v Elany Contr. Corp.*, 30 AD3d 210, 210 [1st Dept 2006], *lv denied* 7 NY3d 712 [2006]). Accordingly, HVH is entitled to summary judgment dismissing the third and fourth causes of action.

Plaintiff's Damages are Limited to Her Down Payment

To the extent that plaintiff is found to have suffered any damages for which HVH may be liable, HVH maintains that it is entitled to a declaration that the maximum amount of any monetary award entered in favor of plaintiff shall be limited to $48,036.75, the amount of plaintiff's down payment. Section 58 of the Contract of Sale purportedly mandates this result as it provides the following:

> "Limitation of Seller's Liability: Notwithstanding anything to the contrary contained in this Contract, Seller's liability under this Contract for its default hereunder, failure to complete and/or deliver the Premises as required by this Contract or have delivered title as required by this Contract shall be limited to refunding the Downpayment [sic] to Purchaser. It is expressly agreed between the parties that Purchaser shall have no other rights or remedies against Seller under this Contract other than a right to demand the return of the Downpayment in the event of Seller default. Upon the return of the Downpayment [sic], this Contract shall be deemed terminated and the parties shall be released from any liability hereunder except those obligations that expressly survive termination. Seller shall not be required to bring any action or proceeding to render title to the Premises marketable or cure any objection to title or to cure such inability to complete and/or deliver the Premises as required hereunder. The provisions contained in this Section shall survive the closing of title or earlier termination of this Contract"

(Howard Aff., Ex. F, § 58, Rider 1 at 6). Plaintiff argues that section 58 was intended to apply only if HVH was unable to deliver title to the Premises or to complete construction, and that application of this provision to any post-closing Seller warranties contained in the Contract of Sale would render those warranties meaningless.

Courts must interpret a contract "'so as to give full meaning and effect to the material provisions'" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). "When a contract for the

sale of real property contains a clause specifically setting forth the remedies available to the buyer if the seller is unable to satisfy a stated condition, fundamental rules of contract construction and enforcement require that [a court] limit the buyer to the remedies for which it provided in the sale contract" (*101123 LLC v Solis Realty LLC*, 23 AD3d 107, 108 [1st Dept 2005]). The use of the conjunctive/disjunctive phrase "and/or" in the first sentence of section 58 can only mean that any default under the Contract of Sale by the seller, not just a failure to deliver title or complete the construction, limits the buyer to the return of its down payment. If the first sentence is not clear, then the second sentence, whereby the parties "expressly agreed . . . that Purchaser shall have no other rights or remedies against Seller under this Contract other than a right to demand the return of the Downpayment [sic] in the event of Seller default" makes the meaning perfectly clear. Finally, if section 59 were limited to situations in which the seller was unable to deliver marketable title and no closing occurred, then the final sentence providing that the limitation on the seller's liability for a default "shall survive the closing of title" would be rendered meaningless.

Moreover, a contractual provision limiting a real estate seller's liability is given effect unless the complaint alleges "sufficient allegations of fraudulent conduct on the part of the seller such that, if proved, that clause would be unenforceable" (*TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 86 [1st Dept 2015]; *see also Norgate Homes v Central State Bank*, 82 AD2d 849, 850 [2d Dept 1981] [exculpation clause in real estate contract limiting the buyer's remedy to a return of the down payment will not be enforced "where there is a 'willful default' on the part of the seller"]). The complaint alleges only contractual

breaches and negligence on the part of HVH. Accordingly, any recovery against HVH is limited to the amount of plaintiff's down payment.

Indemnification by Apex

HVH's request for a declaration that it is entitled to complete indemnification by Apex pursuant to the terms of the contract between them is denied. The agreement with Apex that is attached to the Howard moving affidavit, by its terms, covers only three of the 10 brownstones, none of which is the Premises at 203 West 121st Street (Howard Aff., Ex. E at 1).

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Abyssinian Development Corporation and Harlem Village Homes II Housing Development Fund Company, Inc., made pursuant to CPLR 3212, for summary judgment is granted to the following extent:

> (1) dismissing the complaint against defendant Abyssinian Development Corporation;
>
> (2) dismissing the third and fourth causes of action as asserted against defendant Harlem Village Homes II Housing Development Fund Company, Inc.; and
>
> (3) declaring that, to the extent the plaintiff is found to have suffered any damages for which defendant Harlem Village Homes II Housing Development Fund Company, Inc. may be liable, that any monetary award entered in plaintiff's favor is limited to the amount of the plaintiff's $48,036.75 down payment;

and the motion is denied in all other respects.

This constitutes the Decision and Order of the Court.

Dated: January 11, 2016

HON. JENNIFER G. SCHECTER