1018 E. Parkway LLC v Rikud Realty Inc.
2024 NY Slip Op 33902(U)
October 22, 2024
Supreme Court, Kings County
Docket Number: Index No. 515306/22
Judge: Larry D. Martin
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At an IAS Term, Part Comm-10 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of October, 2024.

PRESENT:

HON. LARRY D. MARTIN,

Justice.

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1018 EASTERN PARKWAY LLC, IRIS HOLDINGS NY LLC d/b/a IRIS HOLDINGS GROUP, MARC BLUMENFRUCHT and SHAY HART a/k/a SHAYA HIRTZ,

Plaintiffs,

- against -

Index No. 515306/22

RIKUD REALTY INC., THE ESTATE OF RUBIN DUKLER, LEAH MERENSTEIN, INDIVIDUALLY AND AS THE SOLE HEIR, EXECUTRIX OF THE ESTATE OF RUBIN DUKLER and THE "JOHN DOE" TRUST (whose identity is currently unknown but believed to be the entity into which Rubin Dukler's assets were transferred upon his passing),

Defendant(s).

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Nominal Defendant,

STEVEN LOWENTHAL, ESQ.,

Escrow Agent – Nominal Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	159-161, 163-176 180-183 185-232
Opposing Affidavits (Affirmations)	182-183, 241-293, 294-296, 299-300, 302, 304-307, 317-318

Upon the foregoing papers in this action in which plaintiffs seek recission and Defendants seek specific performance of a December 17, 2017 Stock Purchase Agreement (SPA), plaintiffs 1018 Eastern Parkway LLC (1018 Eastern Parkway or Purchaser), Iris Holdings NY LLC d/b/a Iris Holdings Group (Iris Holdings), Marc Blumenfrucht and Shay Hart a/k/a Shaya Hirtz (collectively, Plaintiffs) move (in motion sequence [mot. seq.] eight), for an order: (1) granting them summary judgment on their First, Second, Third, Fourth, Seventh, Eighth and Ninth causes of action in the complaint, pursuant to CPLR 3212; (2) relieving them from any obligation to manage or to fund any expenses relating to the residential apartment buildings at (i) 1018 Eastern Parkway in Brooklyn, (ii) 1074 Eastern Parkway in Brooklyn, and (iii) 1392 Sterling Place in Brooklyn (Properties); (3) compelling defendants to replace Plaintiffs as property manager of the Properties, and/or, in the interim, appointing defendant Leah Merenstein (Merenstein) as property manager, as she manages properties owned by Zohov Realty Corp., and owns 50% of the shares of defendant Rikud Realty Inc. (Rikud); (4) compelling defendants to submit a new and/or amended Multiple Dwelling Registration (MDR) naming a new property manager for the Properties, and removing the Plaintiffs' name therefrom, and/or, in the interim, appointing defendant Merenstein as property manager; (5) compelling Escrow Agent – Nominal Defendant, Steven Lowenthal, Esq. and/or Merenstein to return Plaintiffs' $3,000,000.00 down payment that Plaintiffs paid in connection with the SPA and which was released by Steven Lowenthal, Esq., as escrow agent; (6) compelling defendants Rikud, the Estate of Rubin Dukler (R. Dukler), Merenstein, individually and as sole heir and executrix of the

Estate of R. Dukler, to indemnify Plaintiffs for any liability asserted in the *Watson* Overcharge Action,[1] pursuant to §§ 4.1 and 4.5 of the SPA and to otherwise comply with any orders issued therein; (7) dismissing defendants' counterclaims, pursuant to CPLR 3211 (a) (1), CPLR 3211 (a) (7) and CPLR 3016 (b); and (8) conforming the pleadings to the evidence, pursuant to CPLR 3025 (c) (NYSCEF Doc No. 159).

The Escrow Agent – Nominal Defendant Steven Lowenthal, Esq., moves (in mot. seq. nine) for an order, pursuant to CPLR 3212, granting summary judgment dismissing this action as against him (NYSCEF Doc No. 180).

Defendants Rikud and Merenstein collectively move (in mot. seq. 10) for an order, pursuant to CPLR 3212 (a) and (e): (1) granting them summary judgment on their First, Second, Fourth, Fifth and Eighth counterclaims and directing an inquest on damages, and (2) granting them summary judgment dismissing the complaint.

Background

On May 25, 2022, Plaintiffs, the purchaser of 50% of the Properties under an SPA with defendant Rikud, commenced this action by filing a summons and a verified complaint seeking a declaration rescinding the SPA and compelling the return of their $3 million down-payment (NYSCEF Doc No. 2). The complaint alleges that defendant Rikud owns the Properties and Rikud's principals, as of December 19, 2017, were Rubin and Sara

[1] *Watson, et al. v Iris Holdings NY LLC et al.*, Kings County index No. 500614/20, was commenced by tenants of the Property at 1074 Eastern Parkway in Brooklyn asserting an overcharge in rent (Watson Overcharge Action).

Dukler (*id.* at ¶ 2). Allegedly, "Rubin Dukler, now deceased,[2] was a principal and the owner of fifty percent (50%) of the common stock shares of Defendant Rikud . . ." (NYSCEF Doc No. 2 at ¶ 10). Merenstein, R. Dukler's daughter, is sued both individually as a signatory to the SPA and as the sole heir and executrix of the Estate of R. Dukler (*id.* at ¶ 12).

The complaint alleges that "[o]n or about December 20, 2017, Rubin Dukler . . . entered into the written S[PA] with 1018 Eastern Parkway LLC ('Purchaser') wherein R. Dukler agreed to sell fifty percent (50%) of the common stock shares of Defendant Rikud . . ." with Sara Dukler continuing to own the other 50% interest in Rikud (*id.* at ¶ 33). "Pursuant to the SPA, the purchase price for the fifty percent (50%) of the common stock shares of Rikud was $6,209,875.00" and "*a deposit* of $3,000,000 was paid . . ." on December 20, 2017, and wired to the escrow agent, Seller's counsel and nominal defendant Steven Lowenthal, Esq., with the balance to be paid at a later Closing date (*id.* at ¶¶ 36-37 [emphasis added]). Rikud, contemporaneously with the execution of the SPA, entered into a Management Agreement with Iris Holdings for the latter to manage the Properties (*id.* at ¶ 34).

The complaint alleges that "Purchaser was fraudulently induced into entering into the S[PA] and its annexed Management Agreement, based upon the knowingly false and misleading statements and representations set forth therein" (*id.* at ¶ 3). Specifically, the complaint alleges that "§3.2 of the SPA contained representations by the Seller as to

[2] Rubin Dukler allegedly died in February 2021 (NYSCEF Doc No. 65 at ¶ 31).

various corporate documents of Rikud though no such documents were provided" (*id.* at ¶ 39). The complaint further alleges that:

> "§3.3 of the SPA contains a myriad of representations by the Seller which, as matters unfolded, revealed themselves false and it became clear that when Seller (R Dukler) made those representations, he knew them to be false and nonetheless made them with the intent for Purchaser to rely upon them. . . ." (*id.* at ¶ 40).

Those representations allegedly include: (1) "[t]here are no applications, orders, protests, complaints, or judgments regarding rents, services, equipment or any other matter affecting the Premises threatened or pending with any Government Entity . . ."; (2) "[i]t shall be a condition of Purchaser's obligation to consummate the transactions contemplated by this agreement that no organized rent strike or joint action by the tenants of any of the Premises shall occur at any time prior to the Closing Date"; and (3) "all DHCR required filings with respect to any of the Premises have been filed . . . and there are no tenant proceedings pending before the DHCR or any other Government Entity with respect to overcharge complaints, failure to provide essential services or other matter[s]" (*id.* at ¶ 41; *see also* NYSCEF Doc No. 167 [SPA] at § 3.3).

The complaint alleges that Article IV of the SPA required the Seller to indemnify Purchaser from any claims made against Rikud prior to the Closing, including proceedings by tenants for the reduction of rent (NYSCEF Doc No. 2 at ¶ 43). The complaint also alleges that "[t]he SPA was entered into by Purchaser in reliance upon a rent roll provided by Seller" which was inaccurate (*id.* at ¶ 42).

The complaint alleges that a 2002 Rent Reduction Order issued by the DHCR predates the 2017 SPA and evidences the Seller's false representation regarding Rikud's pre-Closing compliance with all applicable laws, including regulations, judgments or orders (*id.* at ¶¶ 44-45). The complaint alleges that "[t]he failure to disclose the existence of the 2002 Rent Reduction Order was, at best, an unintentional material misrepresentation with respect to the financial position of Rikud, or, at worst, an intentional and fraudulent material misrepresentation" by R. Dukler (*id.* at ¶ 49).

The complaint further alleges that under Section 3.3 (d) of the 2017 SPA, Purchaser is no longer obligated to consummate the sale under the SPA based on the pending Watson Overcharge Action by tenants of one of the Properties (*id.* at ¶ 50). The complaint also alleges that "[a]t the time of the entry of the SPA, in excess of 1,200 HPD Violations existed across the three Premises[,]" many of which have since been resolved "due to extensive violation remediation and repairs undertaken by Plaintiffs" and "Plaintiffs have spent substantial money, out of pocket, in advances towards funding repairs which have still not been reimbursed by Defendants" (*id.* at ¶¶ 51 and 52).

An alleged condition to proceeding with the Closing, under Section 5.2 (a) of the SPA, is that "[t]he representations and warranties of the Seller contained in this agreement shall be true and correct in all material respects . . ." and Section 5.4 (b) of the SPA provides that if the Closing fails to occur due to Seller's default, the Purchaser's sole remedies are to terminate the SPA and receive the return of its deposit or to seek specific performance (*id.* at ¶ 47). The complaint alleges that "[i]t remains Plaintiffs' position that the SPA and

Management Agreement are void ab initio, based upon the inability of the parties to consummate the Purchase Agreement, and the fraudulent representations made by Seller therein" (*id.* at ¶ 63).

The complaint asserts the following causes of action:[3] (1) a judgment declaring that the SPA was validly terminated (*id.* at ¶¶ 69-72); (2) a judgment declaring that the SPA's termination triggered the Seller's obligation to return the $3 million down-payment and directing nominal defendant Steven Lowenthal, Esq. to turn over said sum to Plaintiff 1018 Eastern Parkway (*id.* at ¶¶ 73-77); (3) a judgment declaring that Plaintiffs' obligations under the SPA and Management Agreement are terminated as of the date of their SPA termination on January 15, 2020 (*id.* at ¶¶ 78-81); (4) a judgment declaring that Defendants are liable to defend and indemnify Plaintiffs for their legal fees incurred in defending Rikud in the Watson Overcharge Action (*id.* at ¶¶ 82-90); (5) breach of the parties' Consent Order issued in the 2020 proceeding commenced by the Department of Housing Preservation and Development of the City of New York (HPD) (*id.* at ¶¶ 91-95); (6) an order requiring Rikud to specifically perform its obligations under the Consent Order issued in the 2020 HPD proceeding (*id.* at ¶¶ 96-102); (7) a judgment declaring that Defendants waived that provision of the SPA (¶ 6.12) requiring that the parties arbitrate any dispute before the Beth Din, a Rabbinical court, by refusing to proceed to arbitration (*id.* at ¶¶ 103-108); (8) damages resulting from R. Dukler's misrepresentations in the SPA and Management

[3] Plaintiffs advise, in their moving memorandum of law, that they have withdrawn their Fifth and Sixth causes of action regarding the Consent Order issued in a 2020 HPD Proceeding (NYSCEF Doc No. 162 at 20).

Agreement (*id.* at ¶¶ 109-124); and (9) rescission of the SPA based on fraudulent inducement (*id.* at 125-130).

On August 17, 2022, nominal defendant Steven Lowenthal, Esq. answered the complaint and asserted four affirmative defenses (NYSCEF Doc No. 47).

On August 22, 2022, Defendants Rikud and Merenstein answered the complaint, denied the material allegations therein and asserted affirmative defenses and counterclaims (NYSCEF Doc No. 51). On September 13, 2022, Defendants e-filed an amended answer which asserted affirmative defenses, including that "Defendants have not been served and have not received any alleged notice of violation(s) issued by any governmental agency and was, therefore, unaware of said violation(s)" and "since December 20, 2017, pursuant to the Management Agreement and in fact, the Agents [Iris Holdings] have taken full control of the Subject Premises, including but not limited to, collecting rent from the tenants . . . and assuming all obligations for the Subject Premises' maintenance, repairs, insurance, taxes, utility costs, liabilities, and other operations of Subject Premises" (NYSCEF Doc No. 65 at ¶¶ 138 and 147).

The answer also contains the following factual allegations in support of Defendants' counterclaims:

> "[s]ince December 20, 2017, Iris [Holdings] and its principals have completely taken over control and possession of the Subject Premises, including collecting all rents for their own account, performing any and all day-to-day operations for the Subject Premises and maintaining and repairing the Subject Premises as they see fit.

> "Neither Merenstein nor anyone associated with Rubin Dukler has had access to the Subject Premises since 2018.
>
> "Neither Merenstein nor anyone associated with Rubin Dukler has collected or received any rent or other income from the Subject Premises since in or around 2018.
>
> "To the contrary, since 2018, Iris [Holdings] has held itself out as sole owner of the Subject Premises. The equitable owner of the Subject Premises today is Iris [Holdings], along with Sara Dukler.
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> * * *
>
> "Upon information and belief, the actual reason Iris [Holdings] sought to rescind the SPA and Management Agreement was a change in New York state rent laws and regulations in 2019, which made it more difficult for the owners, including but not limited to Plaintiffs in this action, to effectuate luxury deregulation or other deregulation of rent-regulated apartments.
>
> "Since that time, Plaintiffs have simultaneously taken all benefits, income and profits from the Subject Premises (such as collecting rent), while seeking to renounce responsib[ility] for upkeep of the Subject Premises" (*id.* at ¶¶ 12-15 and 23-24).

Defendants' amended answer further alleges that "Plaintiffs have failed, in dereliction of their contractual and fiduciary responsibilities, to maintain required insurance for the Subject Premises" and "owe some $800,000 in property taxes and water charges . . ." (*id.* at ¶¶ 25 and 27).

Defendants' amended answer asserts nine counterclaims seeking and/or alleging: (1) a judgment declaring that: "(i) the SPA and Management Agreement are valid and enforceable; (ii) Rubin Dukler fully performed under the SPA and Management

Agreement; (iii) Plaintiffs must pay Defendants the balance of the consideration owed under the SPA; (iv) Plaintiffs are the owners and managers of the Subject Premises pursuant to the SPA and Management Agreement; (v) Merenstein is not an owner or in control of the Subject Premises; and (vi) Plaintiffs must take full responsibility as 'owner' and manager of the Subject Premises, including with respect to any housing enforcement actions and any orders issued thereunder" (*id.* at ¶ 50); (2) Plaintiffs breached the SPA and the Management Agreement "by refusing to close on the SPA and refusing to assume ownership over or in Rikud, by failing to take responsibility for ownership and maintenance of the Subject Premises, by failing to pay costs and expenses due on the Subject Premises, by failing to pay all consideration due for the subject shares in Rikud, and by serving notices of termination purporting to 'terminate' the SPA and Management Agreement only after the laws changed in 2019 . . ." (*id.* at ¶ 55); (3) fraud based on the false representation that "the Purchaser had the authority to enter and bind the SPA and the obligations thereunder are valid, binding and enforceable against Purchaser" (*id.* at ¶ 59); (4) promissory estoppel (*id.* at ¶¶ 66-69); (5) equitable estoppel (*id.* at ¶¶ 70-75); (6) conversion based on Plaintiffs' collection of rent and income from the Properties since 2018 (*id.* at ¶¶ 76-80); (7) money had and received based on Plaintiffs' collection of rental income from the Properties (*id.* at ¶¶ 81-85); (8) breach of fiduciary duty "by, among other things, absconding with 50% of rent arrears for the Subject Premises owed to Rikud under the Management Agreement; purporting to terminate the Management Agreement while still collecting its benefits such as rent from the Premises; refusing to identify in the MDRs

for the Subject Premises or anywhere else an actual place (address) of business from which Plaintiffs run their pertinent property management operations; refusing to use rents collected from tenants in the Subject Premises for the purpose of repair, maintenance and upkeep of the Subject Premises . . ." (*id.* at ¶ 89); and (9) an accounting.

Plaintiffs later served a reply to Defendants' counterclaims (NYSCEF Doc Nos. 59 and 66). After issue was joined, discovery ensued. On February 1, 2024, Plaintiffs filed a Note of Issue and Certificate of Readiness for Trial indicating that discovery has been completed (NYSCEF Doc No. 156).

Plaintiffs' Summary Judgment Motion

On February 29, 2024, Plaintiffs moved for summary judgment on their First, Second, Third, Fourth, Seventh, Eighth and Ninth causes of action in the complaint and for other related relief, including an order relieving Iris Holdings from any obligations regarding the management of the Properties and directing nominal defendant Steven Lowenthal, Esq., to turn over Plaintiffs' $3 million initial down-payment.

Plaintiffs submit an attorney affirmation together with various exhibits, including the pleadings, deposition transcripts and deposition exhibits, the SPA, the DHCR's 2002 Rent Reduction Order, evidence of the $3 million down-payment, emails between the parties and a January 13, 2023 affirmation from Defendant Merenstein regarding her unsuccessful search for documents responsive to Plaintiffs' discovery request (NYSCEF Doc No. 160).

Plaintiffs also submit a memorandum of law asserting that Plaintiffs terminated the SPA upon learning that R. Dukler's representations about the status of the Properties were false (NYSCEF Doc No. 162 at 3). Plaintiffs assert that while R. Dukler "represented that everything concerning the rent(s) and rental registration/filings with DHCR was 'satisfactory,'" Plaintiffs subsequently learned about the DHCR's 2002 Rent Reduction Order "that froze rents, did not permit rental increases, and mandated certain actions . . ." resulting in the commencement of the pending Watson Overcharge Action, in which tenants of 1074 Eastern Parkway seek $2 million in damages (*id.* at 3-4). Plaintiffs claim that "many tenants ceased paying rent and the rental income that Plaintiffs rely upon to make repairs, resolve violations, etc. has 'dried up' . . ." (*id.* at 4).

Plaintiffs assert in their brief that they learned that "at least one of the buildings (1018 Eastern Parkway) in the SPA did not have proper registration/filings of its petroleum bulk storage facilities . . ." triggering daily penalties of more than $37,500.00 (*id.*). Plaintiffs assert that when they terminated the SPA, Defendants also breached its terms by refusing to proceed to arbitration before the Beth Din, a Jewish rabbinical tribunal (*id.*).

Plaintiffs generally assert in their brief that "[m]uch of what Dukler told and represented to Plaintiffs about the tenants, leases, rents, etc. was not accurate" and they cite to allegations made by tenants of 1074 Eastern Parkway in the Rent Overcharge Action that Rikud and R. Dukler fraudulently registered fictitious tenants and leases and corresponding vacancy increases and improvements with the DHCR (*id.* at 8). Although they were admittedly represented by counsel during the SPA transaction, Plaintiffs assert

that R. Duckler's "wide" representations were in lieu of a "customary 'due diligence'" and that Plaintiffs justifiably relied on R. Dukler's representations due to a "compressed negotiation" (*id.* at 8-9).

Plaintiffs contend that defendants additionally breached Article III of the SPA because, to date, Rikud's corporate records have not been produced to Plaintiffs, although nominal defendant Steven Lowenthal, Esq., confirmed his receipt of Rikud's corporate documents in his November 20, 2018 email (*id.* at 9 and NYSCEF Doc No. 165 at 325-326 and 330).

Plaintiffs further assert that "[t]he SPA was entered into in reliance upon a rent roll provided by Seller . . ." and, although Section 3.2 of the SPA represents that there are no outstanding judgments or orders issued against Rikud regarding the rent or any other matter affecting the Properties, they later learned about the 2002 Rent Reduction Order issued by the DHCR (NYSCEF Doc No. 162 at 10). Plaintiffs asserts that "not only did Dukler breach the representations made in the SPA, [but] Dukler exposed Rikud Realty to a myriad of rent overcharge claims as well as liability in the Watson [Rent Overcharge] case . . ." by continuing to charge increased rents in violation of the DHCR's 2002 Rent Reduction Order (*id.* at 11-12). Plaintiffs assert that "[t]here is no question that Dukler continued to charge and collect rent more than what was permitted by the [2002] order" (*id.* at 12).

Notably, Merenstein previously submitted an affirmation affirming that "she did not find any documents regarding the 2002 DHCR Order in searching Dukler's office after he passed" and that she was not "aware" of the 2002 Rent Reduction Order when she executed

the SPA (*id.* and NYSCEF Doc No. 172 at ¶¶ 8-9; NYSCEF Doc No. 163 at 174:9-25-175:2). Plaintiffs confirmed that the DHCR's 2002 Rent Reduction Order is binding and was never set aside or vacated through their service of a subpoena upon DHCR, in response to which DHCR produced 1,033 pages of records (NYSCEF Doc No. 162 at 13).

Plaintiffs argue that "given the 2002 DHCR Order and the commencement of the Watson [Rent Overcharge] case, § 4.5[4] of the SPA was implicated which triggers Seller's [Defendants'] obligation to comply and/or pay for the disaster that was Dukler's handling of the rents and registration with DHCR" (*id.* at 16). Plaintiffs assert that § 5.2 of the SPA conditions Purchaser's obligations to close upon Seller's representations and warranties being true and correct in all material respects and that, under Section V of the SPA, they properly exercised their right to cancel the SPA due to R. Dukler's knowingly false representations in connection therewith (*id.*).

While Plaintiffs argue that R. Dukler misrepresented the status of the Properties, the existence of the 2002 Rent Reduction Order and Rikud's improper DHCR filings, Plaintiffs were admittedly aware in December 2017 that R. Dukler "was seconds from having a 7A Administrator appointed over 1018 Eastern Parkway and Plaintiffs saved him and the building by signing a contract to buy that building and take over management a few days later . . ." (*id.* at 21). Plaintiffs also claim that R. Dukler was "a known slumlord" whose

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[4] Section 4.5 of the SPA provides, "[i]f any complaints or proceedings are now pending for reduction of any rents or if any are filed prior to the Closing, then Seller shall prior to Closing comply with any orders made therein at the Seller's cost and expense; and if said complaints or proceedings are not dismissed by a court of final jurisdiction, then Seller shall at Closing give to Purchaser a credit for the cost of complying with such complaints or proceedings and the amount of any refund claimed under such complaints or proceedings." (NYSCEF Doc No. 167 at §4.51).

buildings had over 1,200 violations issued against them at the time he entered into the SPA (*id.*). Plaintiffs assert that Merenstein, who was a signatory to the SPA, admitted that she could not recall and did not know "if she or if her father [Dukler] undertook any investigation to ensure compliance with the representations made in the SPA" (*id.* at 23).

Defendants' Opposition

Defendants Rikud and Merenstein, in opposition to Plaintiffs' summary judgment motion, submit an affirmation from nominal defendant Steven Lowenthal, Esq. (Lowenthal), who affirms that the transaction "effectively closed" on December 20, 2017 (NYSCEF Doc No. 242 at ¶¶ 7-15). Defendants submit an opposing memorandum of law arguing that since the December 2017 execution of the SPA, Iris Holdings held itself out as owner of the Properties until the Watson Overcharge Action was commenced in 2020, at which time Plaintiffs sought to back out of the sales transaction (NYSCEF Doc No. 298). The remainder of Defendants' opposition mirrors their own summary judgment motion, described at length herein.

Nominal Defendant Steven Lowenthal, Esq.'s Summary Judgment Motion

On April 1, 2024, nominal defendant Lowenthal opposed Plaintiffs' motion (NYSCEF Doc No. 242) and moved for summary judgment dismissing the complaint as against him with prejudice (NYSCEF Doc No. 180). Lowenthal submits an affirmation asserting that "prior to December 20, 2017, Seller [R. Dukler] retained [him] to serve as transactional counsel for the sale of his fifty percent interest in Rikud . . ." to 1018 Eastern Parkway LLC (NYSCEF Doc No. 182 at ¶ 4). According to Lowenthal, "[t]he SPA was

negotiated and signed within a single day and in person at [his] offices on December 20, 2017" at which Plaintiffs were represented by counsel (*id.* at ¶ 6). Lowenthal affirms that $3 million (nearly half the purchase price) was paid upon the execution of the SPA and that "[t]he SPA established a closing date of June 20, 2018, to allow Purchaser additional time to come up with the Net Balance" (*id.* at ¶ 8).

Lowenthal affirms that he was not a signatory to the SPA and "[t]he SPA does not include any provisions designating [him], Lowenthal P.C. or any other person or entity to serve as escrow agent for the SPA Parties . . ." (*id.* at ¶¶ 9-10). Lowenthal notes that the SPA specifically provides that the first payment of $3 million was to be paid "*to Seller* on the date of the signing of this agreement . . ." (*id.* at ¶ 12 and NYSCEF Doc No. 167 at § 1.2 [a] [emphasis added]). Lowenthal affirms that on December 21, 2017, Purchaser paid the $3 million "to Seller by wiring [it] to Lowenthal P.C.'s IOLA account" at Seller's direction (NYSCEF Doc No. 182 at ¶¶ 13-14 and NYSCEF Doc No. 169 [wire transfer]). Lowenthal explains that he held onto the deposit for Seller's benefit "until Seller decided what it planned to do with the First Payment" (*id.* at ¶ 14). Lowenthal further affirms that:

> "It was always understood by the parties to the SPA and their counsel that the First Payment was to be released to Seller without any obligation on Seller or Lowenthal P.C. or me to retain the First Payment in escrow for the benefit of the SPA Parties" (*id.* at ¶ 15).

Lowenthal asserts that the complaint should be dismissed as against him since "[t]he First Payment has not been in [his] or Lowenthal P.C.'s possession, custody or control since [he] released the First Payment (less fees and costs) to Seller on March 12, 2020" (*id.* at ¶ 24).

Lowenthal also submits a moving memorandum of law asserting that dismissal is warranted because "the Complaint does not assert a single cause of action against Lowenthal, who served as transactional counsel to Seller in connection with the negotiation and execution of the SPA" (NYSCEF Doc No. 184 at 1). Lowenthal asserts that "it is undisputed that by the time Plaintiffs commenced this action on May 25, 2022, [he] had already notified Plaintiffs [that] the First Payment had been released to Seller . . ." (*id.*). Lowenthal further argues that "there exists no agreement pursuant to which [he] agreed to serve as Escrow Agent for the SPA Parties and, as a matter of law, nothing prohibited [him] from releasing the First Payment to Seller at any time after it was paid into [his] law firm's IOLA account" (*id.* at 2). Lowenthal seeks dismissal based on the fact that he previously advised Plaintiffs that he released their $3 million payment to Defendants more than two years before the commencement of this action (*id.* at 6).

Defendants Rikud's and Merenstein's Summary Judgment Motion

On April 1, 2024, Defendants Rikud and Merenstein moved for summary judgment on their counterclaims and to dismiss Plaintiffs' complaint (NYSCEF Doc No. 185). Merenstein submits an affirmation asserting that:

> "[a]s evidenced in the discovery in this action and annexed to this Motion, Plaintiffs were well aware in 2017, before entering the subject S[PA] that the Subject Premises were distressed and had incurred myriad New York Department of Building ('DOB') and Department of Preservation and Development ('HPD') violations, that required correction with government agencies.
>
> "To the best of my knowledge, Defendants turned over and/or made available to Plaintiffs all books, records, and other

> authorizations for Plaintiffs to vet the Subject Premises prior to their entry into the SPA on December 20, 2017" (NYSCEF Doc No. 186 at ¶¶ 10-11).

Merenstein further affirms that a *Heter Iska*,[5] which was purportedly incorporated by reference into the SPA, provided that the $3,256,909 balance owed by Plaintiffs under the SPA was actually a purchase money loan from R. Dukler "to be repaid at 4% and maturing in '6 months'" (*id.* at ¶ 20).

According to Merenstein, "[t]hroughout 2018, Plaintiffs represented to Defendants and their counsel that Plaintiffs were ready and even anxious to close the SPA transaction by making the final payment due under the SPA and *Heter Iska*" (*id.* at ¶ 27). After Lowenthal sent Plaintiffs a "time of the essence" letter demanding completion of the SPA transaction on December 31, 2018, Plaintiffs responded with their "vague and unspecified" claims that R. Dukler and Rikud breached the representations and warranties in the SPA (*id.* at ¶¶33-34). Merenstein asserts that "in January 2020, over one year after the December 2018 'time of the essence' closing was to occur, and over two years after entry of the SPA and Management Agreement, Plaintiffs applied a ruse to try to back out of the deal and attempted to 'terminate' both the SPA and Management Agreement" (*id.* at ¶ 36). Merenstein asserts that Plaintiffs admittedly attempted to rescind the SPA just after tenants of 1074 Eastern Parkway commenced the Watson Overcharge Action in 2020 (*id.* at ¶ 37).

[5] A *Heter Iska* is a Jewish religious document that allows Jewish borrowers and lenders to profit from loans while complying with the Torah's prohibition on interest.

Merenstein affirms that Plaintiffs have also breached the Management Agreement because they "have taken all benefits, income and profits from the Subject Premises (such as collecting rent), while seeking to renounce responsibility for upkeep of the Subject Premises . . ." and "Plaintiffs have never turned over any revenue, income or profits from the Subject Premises, to Rubin or me" (*id.* at ¶¶ 42-43). Merenstein affirms that "[s]ince taking over the Subject Premises, Plaintiffs have failed to timely and fully correct governmental violations thereon" resulting in "multiple open HPD actions and violations against Rikud in multiple pending proceedings in Brooklyn Housing Court and requiring me to hire counsel and defend those proceedings on behalf of Rikud" (*id.* at ¶¶ 44-45). Merenstein also affirms that Plaintiffs failed to pay property taxes, water charges, insurance premiums and water bills in breach of the Management Agreement (*id.* at ¶¶ 46-49).

Defendants additionally submit an affirmation from Steven Lowenthal, Esq., who affirms that he served as counsel to Rikud and Merenstein in connection with the SPA and Management Agreement and that "I personally witnessed and participated in the negotiation and signing of the SPA[,]" with Plaintiffs' counsel "within a single day and in person at my offices on December 20, 2017" (NYSCEF Doc No. 187 at ¶¶ 3 and 5). Lowenthal affirms that Plaintiffs negotiated a $2.3 million discount before agreeing on the purchase price of $6,209,875.00 for R. Dukler's 50% share of Rikud "on account of a $2,161,148.06 outstanding judgment against Rikud . . ." (*id.* at ¶ 6). Lowenthal affirms that prior to the execution of the SPA, "Plaintiffs had already conducted diligence on the Subject Premises by ordering title reports, appraisals, and beyond, and were eager to take

control and ownership over the Subject Premises which Plaintiffs knew were troubled" (NYSCEF Doc No. 187 at ¶ 9).

Lowenthal affirms that the $3 million paid by Plaintiffs toward the purchase price of R. Dukler's 50% interest in Rikud on December 20, 2017, was not a "deposit" to be held in escrow, but rather, was a direct payment made to his clients (*id.* at ¶ 8). Lowenthal affirms that the balance of the purchase price was "deferred" "as a type of 'loan' until a 'closing date' a handful of months later" (*id.* at ¶ 10). Lowenthal thus asserts that:

> "pursuant to Article I, Section 2 of the SPA, and its accompanying *Heter Iska*,[6] which was incorporated into the SPA by reference, the balance of the purchase price of $3,256,909 was temporarily loaned back to Plaintiffs to be repaid to Defendants on the 'closing date' of June 20, 2018. . . .
>
> "A *heter iska* is a method, approved under Jewish law, of structuring a loan or debt so that it becomes an investment instead of a loan and thus allows the payment of interest by the borrower to the lender, as provided for in the SPA.
>
> "The *Heter Iska* provides, in pertinent parts, that the 'Recipient [Rubin] has deferred a portion of the purchase price in the sum of $3,256,909' and 'in consideration of the monies advanced', Plaintiffs [1018 LLC] were to provide profits from the loan and other consideration.
>
> "Plaintiffs sought to secure that deferred payment under the *Heter Iska*, not to further vet the Subject Premises which they already knew to be troubled, but to work out tax and other implications for the subject transaction. I understand that those tax concerns included Plaintiffs (as an LLC) purchasing Rikud (a corporation) under the terms of the SPA, which could adversely affect Plaintiffs' tax status.

[6] *See* NYSCEF Doc No. 202.

> "Put another way, the SPA/Management Agreement transaction *effectively closed* on December 20, 2017, with Plaintiffs taking full control over the Subject Premises and directly paying half the price, and with [that] the parties utilized the SPA and its *Heter Iska*, to secure the balance of the purchase price on a later date" (*id.* at ¶¶ 11-15 [emphasis added]).

Lowenthal affirms that from December 20, 2017 through December 2018, Plaintiffs represented that they were prepared to "close" and make the final payment in satisfaction of the *Heter Iska* (*id.* at ¶ 17). Lowenthal recounts that "in spite of their representations, throughout 2018, Plaintiffs continued to stall settling on a 'closing date' to make the final payment due to Defendants under the SPA" and "on November 30, 2018, I sent Plaintiffs' counsel a 'time of the essence' letter,[7] which designating a 'time of the essence' Closing date of the SPA as December 31, 2018" (NYSCEF Doc No. 187 at ¶¶ 22 and 24). In response, Lowenthal received a letter from Plaintiffs' counsel,[8] in which Plaintiffs' counsel rejected the "time of the essence" closing date and claimed that the Seller breached representations contained in the SPA (*id.* at ¶ 26). Lowenthal recounts that "[b]y notices dated January 15, 2020 and February 24, 2020[9] . . . Plaintiffs claimed they could 'terminate' the SPA based on purported 'material misrepresentations' of Mr. Dukler arising from the Watson [Overcharge] Action . . ." (*id.* at ¶ 29). Lowenthal asserts that "the Management Agreement cannot be terminated because, pursuant to Article 10, it can only be terminated upon the 'consummation' of the SPA . . ." (*id.* at ¶ 30).

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[7] *See* NYSCEF Doc No. 216.
[8] *See* NYSCEF Doc No. 217.
[9] *See* NYSCEF Doc No. 218.

Defendants submit a memorandum of law arguing that on December 20, 2017, they transferred to Plaintiffs "[50%] ownership and management rights of three apartment buildings . . ." pursuant to the SPA and the Management Agreement, upon Iris Holdings' payment of "$3 million, half the purchase price . . ." (NYSCEF Doc No. 233 at 1). Defendants assert that:

> "Iris [Holdings], a sophisticated real estate investor, fundamentally breached the contracts by defaulting on its $3,256,909 repayment of Defendants' loan pursuant to the SPA and *Heter Iska*, and even repudiating Defendants' 'time of the essence' closing date to secure that repayment. Then, years later, Iris [Holdings] found a pretext to try to retroactively 'rescind' the transaction, claiming allegations from a 2020 lawsuit 'prove' that Defendants breached certain SPA representations and warranties" (*id.* at 1-2).

Defendants claim that it is Iris Holdings, and not them who materially breached the SPA by, among other things, repudiating the "time of the essence" closing and by "refusing to repay Dukler the $3,256,909 balance of the purchase price loaned by Defendants to Iris [Holdings] under the *Heter Iska*" (*id.* at 2 and 7). Defendants asserts that "[a] purchaser that fails to close a transaction when scheduled without an excuse, particularly where (as here) 'time is of the essence', materially breaches the contract" (*id.* at 8). Defendants also seek summary judgment on their counterclaim for specific performance on the ground that "Iris [Holdings] ratified the transaction and should be estopped from refusing to pay the balance of the SPA purchase price (deferred as a loan under an accompanying *Heter Iska*), now over six years into taking *de facto* total ownership and control of the Subject Premises, as well as all income derived from them" (*id.* at 3 and 11-12).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

Here, there is conflicting affirmation and deposition testimony by the parties regarding the nature of the subject transaction that took place on December 20, 2017, and whether a sale of R. Dukler's 50% interest in Rikud was actually consummated with Iris Holdings' payment of $3 million to Seller at the SPA's execution, at which time Iris

Holdings assumed management and control over the Properties and began collecting rent. It is unclear whether or not the parties intended that ownership of R. Dukler's 50% share of Rikud was transferred upon Plaintiffs' payment of the initial down-payment of $3 million (half the purchase price). There are also triable issues of fact that preclude summary judgment for either Plaintiffs or Defendants regarding the circumstances surrounding the *Heter Iska*, which Lowenthal and Merenstein affirm was incorporated by reference into the SPA, and purportedly established a purchase money loan for the balance of the purchase price in favor of Defendants.

While Plaintiffs seek rescission of the SPA based on alleged misrepresentations by R. Dukler regarding the status of the Properties in December 2017 and the pre-existence of the 2002 Rent Reduction Order, there are issues of fact as to whether or not their reliance on R. Dukler's representations about the status of the Properties in the SPA were reasonable under the circumstances presented in this record. Plaintiffs generally assert that much of what R. Dukler represented to them about the tenants, leases and rents "was not accurate," yet they do not elaborate on anything that R. Dukler (now deceased) purportedly said, other than the rent situation at the Properties was "satisfactory." Plaintiffs were admittedly aware that a 7A Administrator was due to be appointed over 1018 Eastern Parkway and that R. Dukler was a "known slumlord" whose apartment buildings had over 1,200 outstanding HPD and DOB violations, yet they agreed to limited "compressed" due diligence in a single day prior to executing the SPA on December 20, 2017. These admissions raise factual

issues regarding whether and to what extent Plaintiffs were aware that the Properties were in distress at the time they executed the SPA and Management Agreement.

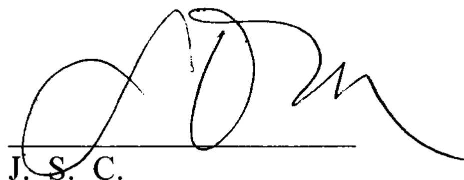
In contrast, nominal Defendant Lowenthal has established his right to summary judgment dismissing the complaint as against him because the complaint does not assert a single cognizable cause of action against him individually and Plaintiffs explicitly acknowledge that Lowenthal already released the $3 million down-payment to Sellers. There is no evidence in the record reflecting that Lowenthal, who merely served as transactional counsel to Sellers in connection with the parties' December 2017 negotiation and execution of the SPA, had any independent obligation to retain in escrow Seller's initial $3 million payment to Seller on December 20, 2017. Lowenthal is not a party to either the SPA or the Management Agreement which are the subject of this action for rescission/specific performance. Consequently, for the forgoing reasons, Lowenthal is entitled to summary judgment dismissing the complaint as against him with prejudice. Accordingly, it is hereby

ORDERED that Plaintiffs' summary judgment motion (mot. seq. eight) and Defendants' summary judgment motion (mot. seq. 10) are both denied; and it is further

ORDERED that nominal defendant Lowenthal's summary judgment motion (mot. seq. nine) is granted, and the complaint is hereby dismissed as against him with prejudice. The action is severed accordingly.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.