SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02M

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SCOTT LYONS,

Plaintiff,

- v -

PAUL A. BOSKIND, T. D'AGOSTINO HOME INSPECTION USA, CORP. D/B/A LONG ISLAND HOME INSPECTION ASSOCIATES, WILLIAM F. SCOFIELD

Defendant.

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INDEX NO. 653003/2022

MOTION DATE 04/19/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for DISMISS.

In this breach of contract action, defendant Paul A. Boskind ("Boskind") moves to dismiss the Complaint as against him pursuant to CPLR 3211(a)(7). The motion is opposed by plaintiff Scott Lyons ("Lyons"), who cross-moves for an order compelling Boskind's deposition pursuant to CPLR 3124. The action arises out of a sale of a residence on Fire Island. Lyons was the purchaser and Boskind the seller. After closing, Lyons inspected the home and discovered damage including ruptured pipes, inoperable appliances and electrical systems, a leaking swimming pool, and an inoperable pool heater (*id*. ¶¶ 26-32). He commenced this action to recover damages claiming a breach of contract.

Boskind contends the Complaint does not identify "any contractual representation, warranty, promise, or obligation that was breached" and that it addresses conditions that existed prior to sale that do not form the basis of a cause of action for breach of contract (NYSCEF Doc. No. 37, affirmation of Boskind's counsel in support of motion ¶¶ 3,5). He asserts that the claims are barred by the express terms of the contract and that Lyons agreed to purchase the house with

these conditions present by electing to close on the contract. He further points to a merger clause in the contract, which includes a disclaimer on the reliance of representations and warranties made outside the contract.

The initial contract was executed on October 28, 2021 (NYSCEF Doc. No. 40, "Contract"). In it, Lyons agreed to accept the home "as is" subject to his own inspection (Contract ¶ 12). The Contract further provided that the plumbing, electrical systems, and appliances would be in working order as of the closing as a condition precedent to closing (*id.* ¶ 16). The Second Rider to the Contract supplemented these provisions by representing that "the pool filter and heater shall be in working order and the roof, house and pool free of leaks at Closing" (Contract, Second Rider ¶ 2).

The Second Rider also contained a provision related to winterization of the Premises:

> If Seller plans to have the house winterized prior to Closing, Seller shall give Purchaser reasonable advanced notice so that Purchaser shall have an opportunity to conduct a pre-closing inspection. If Seller shall fail to provide such notice and Purchaser is not afforded the opportunity to confirm that the appliances, the water, plumbing and electrical systems are in working order, then it is agreed that at the Closing, the Escrowee will hold $10,000.00 in escrow to assure that the appliances and the items listed in Paragraph 16(e) shall be in working order.

(*id*. at ¶ 3[b]). Under this provision, Lyons had until May 1, 2022 to inspect the house and confirm that the above referenced items were in working order. If there were problems with these items, the Contract provided a mechanism to address those issues. This provision concluded by stating "The provisions of this paragraph shall survive the closing."

Lyons alleges that a pre-sale inspection in September 2021 found that the pool heater pump, water, plumbing, and electrical systems were in working order (NYSCEF Doc. No. 38, Complaint ¶ 13). The sale closed in January 2022. Lyons was only able to arrive to inspect post-closing at the end of April, at which time he allegedly discovered the damage. Lyons

attributes this damage to Boskind's improper winterization. He contacted the escrowee, Defendant William F. Scofield ("Scofield"), pursuant to the Second Rider seeking release of the $10,000 in escrow funds but Scofield allegedly failed to do so (*id.* ¶¶ 33-47).

Lyons alleges that Boskind breached the Contract by failing to provide notice of his intent to winterize, failing to deliver the utilities and swimming pool in working condition, and failing to reimburse him for the costs he incurred in repairing the damage caused by the defective winterization. The Verified Complaint also seeks a declaratory judgment against Scofield that Lyons is entitled to the escrow funds, and an injunction against Boskind and Scofield preventing distribution of the escrow funds to anyone other than Lyons.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory" (*M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). A plaintiff states a cause of action for breach of contract where it alleges that a contract exists, that it performed in accordance with the contract, that the defendant breached its contractual obligations, and that the breach resulted in damages (*34-06, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]). Where a written contract "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting dismissal of the complaint pursuant to CPLR 3211(a)(1)" (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]).

The merger doctrine relating to real estate sales provides that "once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out

of the contract" (*TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 85 [1st Dept 2015]). "The only exception to this rule is where the parties clearly intended that the particular provision of the contract supporting the claim would survive the delivery of the deed" (*id.*).

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent," (*Greenfield v Philles Recs., Inc.*, 98 NY2d 562, 569 [2002]). "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations," (*112 West 34th St. Assoc., LLC v 112-1400 Trade Properties LLC*, 95 AD3d 529, 531 [1st Dept 2012], quoting *Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2d Dept 2007]).

The Court finds that the Complaint states a cause of action for breach of contract. Paragraph 3(b) of the Second Rider clearly states that its provisions are to survive the closing, therefore the merger doctrine does not bar Lyons' breach of contract claims arising under this provision (*see TIAA Global Invs., LLC*, 127 AD3d at 85-86). The Complaint alleges that Boskind did not perform under it and that the escrow funds were not released to pay for repairs after Lyons' notice to Scofield (Complaint ¶¶ 25-34; 48-50). The language of the Contract itself does not unambiguously contradict Lyons' allegations, as Paragraph 3(b) of the Second Rider plainly expresses Boskind's obligation to either notify Lyons of his intent to winterize the house prior to the closing or, failing that, to place funds in escrow that would be used to pay for any repairs to specified utility items and appliances and for the release of such funds upon Lyons' notice to the escrowee. Accordingly, this branch of Boskind's motion is denied.

Boskind further seeks dismissal of the third cause of action purportedly seeking an injunction preventing Scofield from releasing the escrow funds. Insofar as this cause of action

seeks distribution of the escrow account and this relief is also requested in the second cause of action, it is duplicative. Duplicative causes of action "should be dismissed as duplicative" where "they arise out of the same facts and seek the same damages" (*Courtney v McDonald*, 176 AD3d 645, 646 [1st Dept 2019]). Accordingly, this cause of action is dismissed; however, the Court directs that there shall be no distribution of the escrowed funds during this litigation absent court order or agreement of the parties.

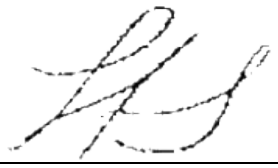
It is accordingly:

ORDERED that Boskind's motion to dismiss the Complaint against him is denied with respect to the first cause of action for breach of contract; and it is further

ORDERED that Boskind's motion is granted with respect to the third cause of action, and said cause of action is dismissed as against him; and it is further

ORDERED that Lyons' cross-motion is granted to the extent of setting this matter down for a Compliance Conference on February 25, 2025 at 9:30 a.m. at 60 Centre Street, Room 212.

This constitutes the Decision and Order of the Court.



11/25/2024
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

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