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Docket: **1984CV02666-BLS1**
Date: **June 26, 2020**
Parties: **BRETT HERSHEY, individually and as beneficiary of the BCG NOMINEE TRUST VS. MOUNT VERNON PARTNERS, LLC, MARCEL D. SAFAR, CHEVRON PARTNERS, LLC, AND CHEVRON BUILDERS, LLC**
Judge: **/s/ Karen F. Green Superior Court Justice**

DECISION AND ORDER ON MOTIONS TO DISMISS

The plaintiff, Brett Hershey, individually and as beneficiary of the BCG Nominee Trust ("Hershey"), sued: Mount Vernon Partners, LLC ("Mount Vernon") for breach of contract (Count I) and breach of the covenant of good faith and fair dealing (Count II); Mount Vernon, Marcel D. Safar ("Safar"), Chevron Partners, LLC ("Chevron Partners"), and Chevron Builders, LLC ("Chevron Builders") (collectively, "Defendants") for promissory estoppel (Count III), negligence (Count IV), and misrepresentation (Count V); and Safar, Mount Vernon and Chevron Partners for unfair and deceptive practices in violation of G.L. c. 93A (Count VI). The Defendants responded with a Counterclaim alleging, among other things, breach of the implied covenant of good faith and fair dealing (Count IV), violation of G.L. c. 272, § 99 (Count V), and interference with business relations (Count VI).

Hershey moved to dismiss Counts IV, V and VI of the Counterclaim. In response, the Defendants moved to dismiss all of the claims against Safar in the First Amended Complaint ("Complaint") and for the entry of a final and separate judgment as to Safar. After a hearing, Hershey's motion is allowed as to Counts V and VI, and denied as to Count IV,of the Counterclaim. Defendants' motion is allowed as to Count III, and denied as to Counts IV, V and VI, of the Complaint.

A. The Complaint's Allegations[1]

In late 2016, Hershey became interested in Maison Vernon, a new condominium development in Boston's Beacon Hill. Complaint, ¶23. Mount Vernon, the single purpose

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[1]This section and Section B summarize the factual allegations relevant to the Defendants' motion and to Hershey's motion, respectively. Some allegations are reserved for the discussion.

-1-

entity that developed Maison Vernon, was selling the units. Id. at ¶¶3, 17. Maison Vernon's website marketed them as ultra-luxury residences. Id. at ¶¶ 2, 24. It also described Chevron Partners as the condominium's developer, Chevron Builders as the general contractor, and both companies as affiliates. Id. at ¶ 25. Safar is the managing member of Mount Vernon, Chevron Partners, and Chevron Builders (collectively, the "Entity Defendants"). Id. at ¶ ¶ 18, 29-31. The Entity Defendants share the same principal place of business. Id. at ¶ ¶ 17, 19, 20.

In January 2017, Hershey made an offer to purchase Residence II ("Unit") at Maison Vernon. Id. at ¶ 26. In response, he received an email from Safar, at his Chevron Partners address, containing a counteroffer and explaining why the Unit was worth more than similar properties. Id. at ¶¶ 27, 28, Ex. A. Safar's representations concerning "the superior level of luxury, quality, and attention to detail," made on behalf of himself and the Entity Defendants, induced Hershey to purchase the Unit. Id. at ¶ 28. Thereafter, Safar "consistently" communicated with Hershey using his Chevron Partners email address. Id. at ¶ 30. Because he "rarely clarified" the entity on behalf of which he was speaking and presented himself as an agent of all of the Entity Defendants at varying times,"the Hersheys understood Safar to be

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communicating to them on behalf of himself and all of [the Entity Defendants] any time he communicated with them, unless [Safar] specified otherwise." Id. at ¶ 32.[2]

In February 2017, Hershey executed a Purchase and Sale Agreement ("P&S") with Mount Vernon in which he agreed to purchase the Unit for $5,412,500. Id. at ¶ 33, Ex. B. At the time, the Unit was not complete and required significant work before Hershey could move into it. Id. at ¶ 34.

Under the P&S, Mount Vernon was to deliver the deed to Hershey within 15 days of notifying him in writing that the Unit was "Substantially Completed, by August 31, 2017 unless otherwise agreed upon in writing, ...or for Excused Delays or delays caused by changes to the standard finishes requested by [Hershey], except that [Mount Vernon] ...ha[d] the right to extend the closing date one time...for any reason by an additional 60 days." Complaint, Ex. B, ¶ 8. After the P&S's execution, however, the Defendants engaged in a pattern of repeatedly promising that the Unit would be Substantially Complete[3] by a certain date and then failing to meet that deadline. Id. at ¶ 44. "On information and belief, each time the Defendants promised that the Unit would be completed by a certain date, they knew that the Unit would not be completed by that date and knew the Hersheys would make arrangements in reliance on their false statements." Id. The Defendants never "Substantially Completed" the Unit and "coerced the Hersheys into closing anyway by misleading them about the status of the project." Id. at ¶¶35, 41.

As construction progressed and the Defendants repeatedly delayed Substantial Completion, the Hersheys were forced to incur substantial expense for alternative housing

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[2] As used in the Complaint, "the Hersheys" appears to refer to Hershey and his spouse, Sarah. Based on the Complaint's allegations, it appears that Hershey engaged in most, if not all, communications with Safar.

[3] The P&S defines "Substantially Completed" to "mean once an unconditional and permanent Certificate of Occupancy has been issued for the Unit and the total value of the Punch List is less than $50,000, not including any changes to finishes that may be requested by [Hershey]." Complaint, Ex. B, ¶ 8.

-2-

arrangements. Id. at ¶ 52. "Safar repeatedly acknowledged the Defendants were to blame for the delays" and offered, on their behalf, "to cover the Hersheys' living expenses while they waited for the Unit to be ready." Id. at ¶ 53. See also id. at ¶91. On February 28, 2018, Safar sent an email stating, "since some delay comes from us, I would be happy to compensate you for this." Id. at Ex.C; see also id. at ¶ 53. Later, after the Defendants missed a March 2018 deadline, "Safar agreed on behalf of [the Defendants], to pay for the Hersheys' housing...." Id. at ¶ 49. On May 12, 2018, in response to an email in which Hershey informed Safar that he had incurred rent in the amount of $37,000 between January and March 2018 and $34,924.46 in April 2018, Safar wrote "[he] would be happy" to provide Hershey with a check. Id. at ¶¶54, 55, Ex. D & E.

Because the Defendants told Hershey the Unit was very close to being completed, Hershey, Mount Vernon and Chevron Builders entered into an Escrow Holdback and Indemnification Agreement ("Escrow Agreement") on April 6, 2018 that "modified the terms on which the closing would take place and the Project would be completed." See Complaint, ¶ 59. See also id. at Ex. F. Mount Vernon transferred title to the Unit to the BCG Nominee Trust and Hershey paid the remainder of the purchase price due under the P&S for the Unit. Id. at ¶ 60, Ex. F. Among other things, the Escrow Agreement provided:

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"Prior to the issuance of a Temporary Certificate of Occupancy, [Mount Vernon] agrees to contribute a certain monetary amount to [Hershey's] existing monthly rent payment, which amounts will be the subject of a separate agreement between the parties." Id. at Ex. F, § 7. Thereafter, the Defendants continued to push back the date for completion of the Unit. Id. at ¶ 51.

On August 8, 2018, after repeated broken promises, which were knowingly false, Hershey notified the Defendants under the Escrow Agreement that they were terminated for cause and that Hershey would take over completion of the Unit. Id. at ¶¶67, 70. Hershey retained a new owners' representative and a new contractor to complete the project. Id. at ¶ 71. Prior to doing so, the Hersheys and their representatives pointed out instances of the Defendants' substandard, incomplete, and shoddy work and the Defendants dismissed their concerns as trivial or nonexistent. Id. at ¶ 68. The Defendants did so even though they had made numerous admissions relating to the substandard work about which the Hersheys complained in audiovisual recordings made within the Unit during construction. Id. at ¶ 69.[4]

Once the Hersheys' own professionals inspected the Unit, they discovered numerous, additional latent defects in its construction and electrical and mechanical systems. Id. at ¶¶9. 68. See also id. at ¶¶71-75. The Defendants actively concealed these defects. Id. at ¶ 78. They also misrepresented "the level of quality of the materials, finishes, and craftsmanship" marketed and installed in the Unit. Id.

B. The Counterclaim's Allegations

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[4]The Defendants had actual knowledge that, as a security measure, the Hersheys installed Nest brand audiovisual cameras within the Unit during construction. Id. at ¶ 69. The audiovisual recordings containing such admissions include verbal acknowledgment by the Defendants and their representatives that they understood that the cameraswere audiovisually recording them at the time. Id.

-3-

On February 24, 2017, Hershey entered into the P&S with Mount Vernon to purchase Residence II at Maison Vernon. Counterclaim, ¶ 7. On June 1, 2017, Hershey requested that the Defendants perform additional work on the Unit ("Initial Additional Work") and agreed to pay $212,360.88 for that work. Id. at ¶ 10. The Defendants agreed to perform the Initial Additional Work at cost in exchange for Hershey agreeing to allow them to photograph the finished Unit. Id. at ¶11.

Through three subsequent change orders, Hershey requested that the Defendants perform significant additional work within the Unit and agreed to remit payment to the Defendants for that additional work. Id. at ¶¶12-18. The Defendants completed all of the Initial Additional Work and the additional work contained in Hershey's subsequent, three change orders (together, "Authorized Additional Work"). Id. at ¶ 43. Hershey failed to pay the Defendants for the Authorized Additional Work and has out allowed the Defendants to photograph the Unit. Id. at ¶¶44-45.

Hershey's numerous requests for changes to the Unit delayed its completion and the issuance of a Temporary Certificate of Use and Occupancy ("TOC"), which did not occur until June 25, 2018. Id. at ¶¶14, 24, Ex. A. They also resulted in Hershey agreeing to close on the Unit in an unfinished condition under the P&S. Id. at ¶19. On April 6, 2018, the closing occurred and Mount Vernon transferred ownership of the Unit to the BCG Nominee Trust after Hershey, Mount Vernon and Chevron Builders executed the Escrow Agreement. Id. at ¶ ¶ 1920, Ex. Q.

Hershey moved his furniture into the unfinished Unit on or about May 14, 2018. Id. at ¶22. At some point, he also installed Nest brand audiovisual

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cameras and made audio recordings of the Defendants' communications without providing notice or warning that audio would be recorded by the audiovisual cameras or obtaining their prior consent. Id. at ¶¶72-79.

Under the Escrow Agreement, Hershey was to remit payment of $100,000 upon completion of the items on a Final Punch List, to which the parties eventually agreed on June 17, 2018. Id. at ¶¶ 21, 23, Ex. Q, §1(c). Meanwhile, the Defendants agreed to pay "a certain monetary amount" to Hershey for his then-existing, monthly rent payments until the City of Boston issued a TOC for the Unit. Id.

As a result of Hershey's August 8, 2018 termination, the Defendants were no longer authorized to access the Unit or to perform work in it, although they had completed most of the Final Punch List items and were ready, willing and able to complete all of them. Id. at ¶ 32. All construction work and Additional Authorized Work was otherwise completed. Id. at ¶33. Hershey failed to pay $45,776.57 owed for Authorized Additional Work and $100,000 due under the Escrow Agreement. Id. at ¶ 44.

After he took over completion, Hershey "demolished and destroyed the Unit after completion of the agreed upon construction specifications to make certain upgrades and betterments not included in the [P&S]." Id. at ¶ 34. On June 16, 2019, he sent an email to Safar stating:

> I don't know if you had an obligation to disclose to the other unit owners that we have threatened litigation against you, but this behavior is going to cause them to find out sooner rather than later. We have already heard from other unit owners that your team has been making false statements about us and about the reason we are performing work. Do you really want to push us into court over this now?

Counterclaim, Ex. R.

Discussion

I. Standard of Review

In deciding each Rule 12(b)(6) motion, I accept as true the allegations stated in each party's complaint and attached exhibits, draw all reasonable inferences in the complaining party's favor, and determine whether the factual allegations "plausibly suggest[ ]... an entitlement to relief " on each claim. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)); see also Buffalo-Water 1, LLC v. Fid. Real Estate Co., LLC, 481 Mass. 13, 17 (2018). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Nor do "legal conclusions cast in the form of factual allegations." Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

A. Hershey's Motion

1. Count IV

Every contract in Massachusetts is subject to an implied covenant of good faith and fair dealing. See Chokel v. Genzyme Corp., 449 Mass. 272, 276 (2007); Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 (1991). The covenant "provides that 'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Anthony's Pier Four, Inc., 411 Mass. at 471-472 (quoting Drucker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 385 (1976)). Its breach usually "requires more than a simple breach" of contract and "involves bad faith conduct." Targus Grp. Intl, Inc. v. Sherman, 76 Mass. App. Ct. 421, 435 (2010) (internal quotes omitted). The question of the covenant's breach is one of degree. See Christensen v. Kingston Sch. Comm., 360 F. Supp. 2d 212, 226 (D. Mass. 2005).

Hershey contends that Count IV fails to state a claim for breach of the implied covenant because it alleges nothing more than a mere breach of contract. Assuming the truth of the allegations in the Counterclaim, as supplemented by its exhibits, however, I am not persuaded. Hershey's motion

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to dismiss Count IV, therefore, is denied.

2. Count V

Hershey argues that Count V fails to state a claim for violation of the Massachusetts Wiretap Act, G.L. c. 272, § 99 ("Wiretap Act") because the defendants have failed to allege that he secretly recorded any oral communications. The Wiretap Act prohibits the willful

-5-

interception of oral communications. G.L. c. 272 § 99 (C)(1). Subsection Q provides a civil remedy for statutory violations:

> Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interested or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest....

G.L. c. 272, § 99 Q. 'Interception" under the Wiretap Act "means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication. . . " G. L. c. 272 § 99 (B)(4) (emphasis added). The legislature intended the statute to prohibit all secret recordings, both audio and visual. Commonwealth v. Hyde 434 Mass. 594, 599 (2001).

A recording is "secret" unless the subject has "actual knowledge" of the fact of recording. Commonwealth v. Jackson, 370 Mass. 502, 507 (1976). "[A]ctual knowledge" can be proven "where there are clear and unequivocal objective manifestations of knowledge for such indicia are sufficiently probative of a person's state of mind to allow an inference of knowledge...." Id. at 507. The presence of a recording device commonly known to record audio in plain view "is, on its own, sufficient evidence from which to infer the subjects' actual knowledge of the recording." Glik v. Cunniffe, 655 F.3d 78, 88 (1st Cir. 2011) (citing Commonwealth v. Hyde, 434 Mass. at 605 and Commonwealth v. Rivera, 445 Mass. 119, 134 (2005)).[5]

Here, the Defendants do not allege that they were unaware of the Nest audiovisual camera; they allege only that Hershey did not provide prior notice or warning "that audio would be recorded by his audiovisual camera" and that they never consented to audio recording. See Counterclaim, ¶ ¶ 74-77. Because the Defendants have failed to allege facts plausibly suggesting that the audio recordings were "secret," they have failed to allege an "interception" under the Wiretap Act. See Commonwealth v. Hyde, 434 Mass. at 605 (stating defendant charged with violating Wiretap Statute during traffic stop could have avoided violation if he "held the tape recorder in plain sight"); Glik, 655 F.3d at 88 (rejecting argument that appellant "secretly" recorded audio statements of police officer with cell phone in plain view); Project Veritas Action Fund v. Conley, 244 F. Supp.3d 256, 265 (D. Mass. 2017) (Wiretap Statute "permits open recording in plain sight by cameras or cell phones with an audio component."). Thus, Count V fails to state a claim.

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[5] In Glik, the First Circuit noted that "although [Commonwealth v. Rivera] was resolved on other grounds, four of the seven justices of the Supreme Judicial Court concurred to note that the defendant's unawareness of the audio recording capabilities of the security cameras did not render the recordings 'secret' under the [W]iretap [S]tatute where the cameras were in plain sight." Glik, 655 F.3d at 87. See also Commonwealth v. Rivera, 445 Mass. at 134 (Cowin, J., concurring in part) ("That the defendant did not know the camera also included an audio component does not convert this otherwise open recording into the type

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of 'secret' interception prohibited by the Massachusetts wiretap statute."); id. at 142 (Cordy, J., concurring) ("Just because a robber with a gun may not realize that the surveillance camera pointed directly at him is recording both his image and his voice does not, in my view, make the recording a 'secret' one within the meaning and intent of the statute.")

-6-

3. Count VI

To state a claim for interference with business relations, the Defendants must allege: (1) they had an advantageous relationship with a third party; (2) Hershey knowingly induced a breaking of the relationship; (3) Hershey's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the Defendants were harmed by Hershey's actions. See Blackstone v. Cashman, 448 Mass. 255, 260 (2007). The "essence of the tort is damage to a business relationship or contemplated contract of economic benefit." Ratner v. Noble, 35 Mass. App. Ct. 137, 138 (1993). The damages must not be speculative or conjectural. Chemawa Country Golf, Inc. v. Wnuk, 9 Mass. App. Ct. 506, 510 (1980).

Count VI does not allege facts plausibly suggesting that Hershey knowingly interfered with any business relationship between the Defendants and any other existing or prospective unit owner.[6] Nor does it allege any facts suggesting that the Defendants suffered any harm as a result of any actual or threatened interference. Thus, it fails to state a claim upon which relief may be granted.

B. Safar's Motion

The Complaint seeks to hold Safar individually liable for promissory estoppel (Count III), negligence (Count IV), misrepresentation (Count V), and violation of c. 93A (Count VI). Defendants contend that Hershey has failed to allege sufficient facts to state these claims against Safar under a corporate veil piercing theory. Hershey responds that he has alleged sufficient facts to state such claims based on Safar's personal conduct. Alternatively, he argues that he has alleged enough to proceed on a veil piercing theory.

1. Count III

In the absence of a contract in fact, the promissory estoppel doctrine "implies a contract in law where there is proof of an unambiguous promise coupled with detrimental reliance by the promisee." Malden Police Patrolman's Ass 'n v. Malden, 92 Mass. App. Ct. 53, 61 (2017); see also Sonoiki v. Harvard Univ., 2020 WL 3416516, at *15 (D. Mass. June 22, 2020) (if written contract exists, claim of promissory estoppel is not permitted under Massachusetts law).

Hershey alleges in Count III that the Defendants, including Safar individually, promised to pay for the Hersheys' housing costs while the Hersheys waited for the Project to be completed." Complaint, ¶ 91; see also id. at ¶ 53. However, Hershey also alleges that he entered into an Escrow Agreement with Mount Vernon and Chevron Builders on April 6, 2018 concerning the same alleged promise. See id. at ¶ 57 (alleging that "as part of [the Escrow Agreement]..., Defendants again expressly agreed to pay the Hersheys' living expenses"). The Escrow Agreement, which Safar executed only on behalf of Mount Vernon and Chevron Builders, reflects that only Mount Vernon agreed "to contribute a certain monetary amount to [Hershey's] existing monthly rent payment, which amount will be the subject of a separate agreement between the Parties." Id. at Ex. F, § 7.

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[6] At most, it alleges only that Hershey "threatened" to do so.

-7-

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Because the party that promised to pay Hershey's housing costs was Mount Vernon, and there can be no promissory estoppel claim when there exists a written contract, Count III fails to state a claim against Safar for promissory estoppel. This is particularly so given that the Defendants have acknowledged that the Escrow Agreement is an enforceable contract. Counterclaim, ¶ 48. See Malden Police Patrolman's Ass 'n, 92 Mass. App. Ct. at 61 ("Where an enforceable contract exists...a claim for promissory estoppel is not permitted.").

2. Counts IV, V, and VI

"A corporate officer is personally liable for a tort committed by the corporation that employs him, if he personally participated in the tort by, for example, directing, controlling, approving, or ratifying the act that injured the aggrieved party." Townsends, Inc. v. Beaupre, 47 Mass. App. Ct. 747, 751-752 (1999). See also LaClair v. Silberline Manufacturing Co., Inc., 379 Mass. 21, 29 (1979) ("A corporate officer is liable for torts in which he personally participated whether or not he was acting in the scope of his authority."). This principle also applies in the context of G.L. c. 93A. See Community Builders, Inc. v. Indian Motorcycle Assocs., Inc., 44 Mass. App. Ct. 537, 560 (1998) ("It is settled that corporate officers may be held liable under c. 93A for their personal participation in conduct invoking its sanctions").

Hershey alleges that Safar knowingly made false statements, including about the quality of the Unit's construction and materials and the timing of its readiness for occupancy, on which he reasonably relied, and that, as a result, he was damaged. See Complaint at ¶ ¶ 35, 44-52, 64-66, 77, 100-109. These allegations are sufficient to state claims in Counts V and VI against Safar for misrepresentation and violation of c. 93A, respectively, based on his personal conduct. See Danca v. Taunton Say. Bank, 385 Mass. 1, 8 (1982) ("In a deceit action, the plaintiff must prove that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage.") (internal quotes omitted); McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 714 (1990) ("Common law fraud can be the basis for a claim of unfair or deceptive practices" under c. 93A).

In Count IV, Hershey does not specifically allege that Safar personally performed any of the allegedly shoddy and defective construction work. Further, the Complaint's exhibits reflect that Safar, individually, was not a party to either the P&S or the Escrow Agreement. Nevertheless, the Complaint's allegations are sufficient to infer, at least at the motion to dismiss stage, that he participated in the management or supervision of the construction. Cf., Thornhill v. Assocs. in Const. Mgmt., Inc., 53 Mass. App. Ct. 1117, 2002 WL 243444, at *1 (2002) (Rule 1:28) (affirming decision, on motion for summary judgment, that principal and shareholder of general contractor could not be held individually liable because "the record [did] not show that he individually entered into a contract with the plaintiffs or that he did any of the work that was later found to be defective."). Thus, the claim against Safar individually in Counts IV also survives the Defendants' motion.

Order

-8-

Counts V and VI of the Counterclaim, and the claim against Safar in Count III of the Complaint, are dismissed. Defendants' further request for the entry of separate and final judgment as to Safar is denied.

/s/ Karen F. Green Superior Court Justice

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