

At an IAS Term, Part 63, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of August 2016

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

DAVID JOHN GENAT,

Plaintiff,
-against-

**614 7TH AVENUE REALTY LLC AND
PARK DEVELOPERS AND BUILDERS, INC.,**
Defendants.

Index No.: 511857/2015

DECISION/ORDER
Hon. Ellen M. Spodek
Justice, Supreme Court

Papers	Numbered
Notice of Motion.....	<u> 1 </u>
Memorandum of Law in Support of Motion.....	<u> 2 </u>
Affidavit in Opposition of Motion.....	<u> 3 </u>
Memorandum of Law in Opposition to Motion.....	<u> 4 </u>
Stipulations.....	<u> 5 </u>
Exhibits.....	<u> 6 </u>

Upon the foregoing papers, defendants 614 7TH AVENUE REALTY LLC, and PARK DEVELOPERS AND BUILDERS, INC move for an order pursuant to CPLR 3211(a)(7), granting summary judgment against plaintiff DAVID JOHN GENAT, dismissing the complaint. Plaintiff opposes the motion.

This matter arises out of a contract that was entered into on or about November, 2009 for the construction and sale of a townhouse located at 614 7th Avenue, Brooklyn, New York. Defendants were constructing several single family townhouses and plaintiff entered into a contract to purchase one of these residences from the Defendants. Plaintiff was shown a model home and the floor plans of the proposed townhouse.

Plaintiff alleges that the defendants made guarantees that the townhouse would be of high quality, sound construction, and would conform to the previously laid out plans. Construction was delayed due to issues with the Department of Buildings and the surrounding community objecting to the layout and structure of the project which had to be modified. Plaintiff alleges that Defendants sacrificed the quality of the townhouses to conform to these modifications. Plaintiff alleges that the home does not conform to the blueprints for the model home in that a tree should have been removed but wasn't, the roof leaked, the skylight was not properly installed, the walls sustained water damage or were not complete, the stairs and floorboards were cracked and the furnishings within the home were a cheaper substitute than the ones shown in the floor model. Plaintiff also alleges that once these issues were brought to the attention of the defendants, the defendants either negligently repaired or failed to repair or replace the defective or substandard conditions.

Defendants allege that the sale was completed and based on the "Merger Doctrine", plaintiff is prevented from enforcing warranties or representations in the contract after such time, as the contract was fulfilled. Defendants also allege that the claims of fraud occurred before the contract was entered into and as plaintiff was aware of the changes, the changes were accepted. Finally, defendants allege that any issue of

fraud arising out of this matter is duplicative of the contract causes of action and should be dismissed as insufficient under CPLR 3016(b).

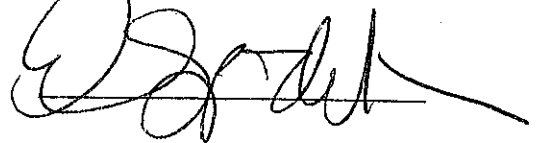
The warranties in the "Rider to the Contract 1", (Exhibit A in plaintiff's opposition to the motion) expressly states, " the promises contained within were to survive the contract and would be applicable, in some instances, up to 6 years from the delivery of the deed." The Merger Doctrine occurs when a seller's responsibilities under a contract for the sale of real property are merged in the deed upon the closing of title, "unless there is clear intent evidenced by the parties that a particular provision shall survive delivery of the deed..." *Davis V. Weg*, 104 A.D.2d 617, 479 N.Y.S.2d 553, 555 (2nd Dep't 1984); see also *Sherman Partners Assocs. v. 272 Sherman Assocs.*, 160 A.D.2d 992, 992, 554 N.Y.S.2d 936, 939 (2nd Dep't 1990). Here the Rider to the Contract has express language stating its applicability and effectiveness of the warranties post deed transfer. The effective starting date of these warranties was the delivery date of the deed. Additionally, the Second Department has previously held that the Merger Doctrine does not apply to latent defects as a matter of public policy. See *Milstein v. Incorporated Village of Port Jefferson*, 154 A.D.2d 442, 442, 546, N.Y.S.2d 13, 14-15 (2nd Dep't 1989) (citing *Caceci v. Di Canio Construction Corp.*, 72 N.Y.2d 52, 55, 530 N.Y.S.2d 771 (1988)). The Court finds that the Merger Doctrine does not preclude plaintiff's breach of contract claim or the breach of express warranty claim.

Additionally, the plaintiff's fraud claim is not duplicative of plaintiff's other claims. Claims of fraud that arise solely out of the facts of a breach of contract may be dismissed as duplicative. *34th-35th Corp. v. 1-10 Industry Associates, LLC*, 2 A.D.3d 711, 712 (2nd Dep't 2003). In the instant case, the plaintiff relied on the defendants'

representations of the model home as the home that would be built, conforming to all specifications and details. This information was discussed and relied upon before the dealings began and thus do not arise from the contract. Plaintiff alleges that he relied upon these misrepresentations "of present fact, not future intent, collateral to, but which was the inducement for[,] the contract" *Deerfield Commc'ns Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956, 502 N.E.2d 1003 (1986). In *Deerfield* the plaintiff had orally agreed to restrict the sale of the goods from the contract to outside of the United States. Upon receiving the inventory of goods, the plaintiff proceeded to claim that the restriction on the goods was not in the contract and therefore not enforceable. The Court of Appeals in *Deerfield* found that a claim for fraud did not arise out of the breach of contract claim and is thus not duplicative. As in *Deerfield*, plaintiff herein relied upon defendants' guarantee of a certain standard which either defendants had no intention of keeping or should have brought to the attention of plaintiff and subsequently obtained an acceptance from plaintiff if defendants wished to change it. The Court finds the fraud claim is not duplicative because it does not rise out of the breach of contract. Therefore, Defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

ENTER

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JSC