18 Misc.3d 1128(A), 856 N.Y.S.2d 496, 2008 WL 344136 (N.Y.Sup.), 2008 N.Y. Slip Op. 50221(U)
(Table, Text in WESTLAW), Unreported Disposition
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C
(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Kings County, New York.
BRIDGE STREET HOMEOWNERS ASSOCIATION, et al., Plaintiffs,
v.
BRICK CONDOMINIUM DEVELOPERS, LLC, et al., Defendants.

No. 26507/06.
Feb. 7, 2008.

Adam Leitman Bailey, PC, New York, for Plaintiffs.

Harry Shapiro, Esq., Smith & Shapiro, New York, for Defendant Weiss.

Israel Goldberg, Esq., Goldberg, Rimberg & Friedlander, New York, for Defendants Brick Condominium Developers, LLC & Ely Bakst.

Andrew Fisher, Esq., Fisher & Fisher, New York, for Defendants Joel Benedek & Channy Bakst, Water Street LLC and 223 Water Street LLC.

CAROLYN E. DEMAREST, J.

***1** Defendant Andrew Weiss, P.E. ("Weiss"), the architect who executed the Engineer's Certification contained within the Offering Plan pursuant to which plaintiff condominium owners purchased their respective units, moves this court to dismiss all remaining causes of action against him contending that, as plaintiffs are not in privity with Weiss, they are without standing, and may not pursue contractual claims interposed against him and, because the Attorney General is vested with exclusive authority to prosecute false or fraudulent statements contained in the Offering Plan, the remaining claims are not viable.

Plaintiffs cross-move pursuant to CPLR 2221(d) for leave to reargue this court's prior decision with respect to the plaintiffs' fourth, fifth, seventh and eleventh causes of action as to defendants Brick Condominium Developers, LLC ("Brick"), the sponsor, and Ely Bakst a/k/a Eli Bakst ("Bakst"), a principal of Brick and a member of the Condominium Board, and Weiss. Plaintiffs also cross-move pursuant to CPLR 2221(e) for leave to renew argument upon the plaintiffs' fourth cause of action based upon their discovery that no written contract governed the services provided by Weiss to Brick and Bakst.

By decision dated January 23, 2007, this court dismissed the fourth (breach of contract for architectural services provided by Weiss), fifth (negligence in failing to ensure compliance with Building Code standards), seventh (common law fraud and/or negligent misrepresentation) and eleventh (rescission based upon fraudulent and/or negligent misrepresentation) causes of action in their entirety as to all defendants.

As much of the legal discussion will be applicable to all of the relief sought on these motions, the court will address the motions in tandem.

The cross-motion to reargue is granted upon review of this court's prior decision.[FN1] A review of the complaint establishes that plaintiffs are not seeking to litigate a private cause of action based upon the Martin Act, which would be prohibited (*Vermeer Owners v. Guterman*, 78 N.Y.2d 1114, 1116 [1991]; *CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268, 276-277 [1987]; *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Assoc.*, 191 A.D.2d 621, 622 [2d Dept 1993]), but are alleging, in the claims under immediate consideration, common law causes of action for breach of contract, negligence, professional malpractice, and fraud against Weiss, and for breach of contract, negligence, fraud, and rescission based upon fraud and negligent misrepresentation as to surviving defendants Brick and Bakst.

FN1. The motion is timely in that a notice of appeal was served/filed within 30 days of service upon plaintiffs of a copy of the prior order. Though not in strict compliance with CPLR 2221(d)(3), requiring that a motion to reargue be made within 30 days of service of a copy of the order, it has been held that the court is "not bound to deny the [party's] motion to reargue merely because the motion to reargue was made beyond the 30-day limit defined in CPLR 2221(d)(3)" where the ap-

peal from the prior order was taken and still pending as of the time that the motion for reargument was made. (*Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636, 638 [2d Dept 2005].)

While the Martin Act (General Business Law, Article 23-A), vests in the Attorney General exclusive authority to investigate and prosecute false or fraudulent representations contained in publicly-disseminated offering plans for condominium conversion (*see CPC Intl.*, 70 N.Y.2d at 277), this authority does not pre-empt the prosecution of private common law claims for damages sustained by the purchasers of such units as a result of the failure to deliver under promises contained in a contract or for fraud, misrepresentation or negligence independent of the duty imposed under the Martin Act. Indeed, the Court of Appeals has recognized the viability of private causes of action for fraud, breach of contract, and negligence in co-operative and condominium offerings (*see CPC Intl.*, 70 N.Y.2d at 277; *Vermeer*, 78 N.Y.2d at 1116; *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]). To charge the Attorney General with exclusive responsibility to litigate the private claims of all aggrieved condominium purchasers within the State of New York would be to place an impossible burden upon a public official and was surely not the legislative intent. At the same time, there exists a clear tension between the authority vested exclusively in the Attorney General to ensure the integrity of representations made to the public in offering plans intended to induce purchases of apartments and the right of those purchasers to a private recovery for losses sustained as a result of their reliance upon the sponsors' fraudulent or negligent misrepresentations or negligent performance of a duty not subsumed in the contract. A review of the case law has not revealed exactly where the line should be drawn with respect to the Martin Act. However, treating the various allegations of the complaint under common law theories may assist in an appropriate resolution of this dilemma.

***2** As previously noted by this court in my January 23, 2007, decision, the same factual allegations of defective construction and failure to construct in compliance with "Plans and Specifications, the Zoning Resolution, the Building Code of the City of New York and all other applicable governmental requirements," as promised in the Offering Plan (which was expressly incorporated into the plaintiffs' Purchase Agreements) support virtually all of the causes of action. The complaint alleges that only after moving into their apartments did plaintiffs discover the numerous alleged defects in design and construction that are specified in a lengthy report of Rand Engineering and Architecture firm dated June 5, 2006, provided to defendants, which also itemizes the losses sustained by plaintiffs as a result of such defects, including costs of remediation in excess of eighteen million dollars. The complaint further alleges that defendants Brick, Bakst, and Weiss expressly certified "for the benefit of all persons to whom this offer is made," that upon due diligence and investigation of the facts, inspection of the property and review of the Offering Plan, the Offering Plan was complete and truthful and did "not contain any fraud, deception, concealment, suppression" or "contain any representation or statement which is false, where we: (a) know the truth; (b) with reasonable effort could have known the truth; (c) made no reasonable effort to ascertain the truth; or (d) did not have knowledge concerning the representations or statements made" (Complaint Paragraphs 56, 69-70).

Defendant Weiss was the architect of record and prepared a report dated February 1, 2004, entitled "Description of Property and Specifications" (Architect's Report) which was incorporated into the Offering Plan as Exhibit 4 and thus also forms part of the Purchase Agreements with plaintiffs (Complaint Paragraph 69). Based upon the representations contained in the Architect's Report of specific conditions and improvements to be made with respect to the windows, roof, bathroom ventilation, water pressure, sprinkler system and sidewalk (see Complaint Paragraph 71), plaintiffs contend that the architectural services rendered by defendant Weiss in conjunction with the renovation and conversion of the building, though rendered pursuant to a contract between Weiss and the sponsors, were expressly for their benefit, entitling them to recover against Weiss for his malpractice in performance or for breach of that contract as third party beneficiaries.

The complaint alleges four causes of action against defendant Weiss: the fourth cause of action for breach of the contract between himself and the sponsor/developer to prepare plans and supervise construction; the fifth cause of action for negligence in overseeing the construction which resulted in non-compliance with Building Code standards and the

description contained in the Offering Plan; the sixth cause of action for "professional malpractice" in continuing to negligently oversee construction which was defective and non-compliant with the New York City Building Code, all in violation of the standard of care exercised by professional architects and engineers; and the seventh cause of action for fraud or negligent misrepresentation in the "Offering Plan, Certifications, and related marketing materials." As noted, the fourth, fifth and seventh causes of action have been dismissed in their entirety by this court. Dismissal of the seventh and eleventh causes of action was based upon the Martin Act. The court found the fourth cause of action duplicative of the first three causes of action for breach of contract and warranty as against Brick and Bakst, and, as to Weiss, that plaintiffs lacked privity. The fifth cause of action for negligence was precluded by the contract causes seeking identical relief for the same alleged conduct.

***3** Plaintiffs' motion addressed to the fourth cause of action seeks reinstatement against Weiss as third party beneficiaries of the contract between himself and Brick. It has now been revealed that, although it is conceded that an agreement existed, it is not written. This "newly discovered evidence" is the basis of plaintiffs' motion to renew; however, this fact is of no moment and would have no impact upon this court's determination. *See* CPLR 2221(e)(2). The motion to renew is therefore denied.

However, a review of the complaint and Weiss' Engineer's Certification contained within the Offering Plan, which is expressly incorporated by reference into the Purchase Agreements, establishes that plaintiffs were intended third party beneficiaries of Weiss' services to the sponsor. Andrew Weiss, P.C. certified that it was retained to prepare a report, had "visually inspected" the work and "prepared the building plans and specifications", and represented:

> We have read the entire [Architect's] Report and investigated the facts set forth in the Report and the facts underlying it with due diligence in order to form a basis for this certification. *This certification is made for the benefit of all persons of [sic] whom this offer is made.* (emphasis added).

"It is settled that a third party may sue as a beneficiary on a contract made for his benefit," *Board of Managers of the Riverview at College Point Condominium III v. Schorr Bros. Dev. Corp .*, 182 A.D.2d 664, 665 [2d Dept 1992], citing *Lawrence v. Fox*, 20 N.Y. 268. Both *Board of Managers* and *Regatta Condominium Assoc. v. Village of Mamaroneck*, 303 A.D.2d 739 [2d Dept 2003], also relied upon by defendant Weiss, are distinguishable from the instant case as to the result reached by the courts therein by the fact that, in those cases, there was no contractually expressed intent to benefit third parties as there is in this case. There can be no doubt that in purchasing their apartments, plaintiffs were entitled to rely upon defendant Weiss' competent performance of his professional obligations which were certified to meet specified standards as described in their Purchase Agreements incorporating the Offering Plan. In the case at bar, plaintiffs have adequately pled a breach of contract cause of action against Weiss as third party beneficiaries of that contract. The fourth cause of action is therefore reinstated against Weiss.

It is not clear whether plaintiffs are seeking reinstatement of the fourth cause of action against defendants Brick and Bakst, however, that cause of action was dismissed against them because it is redundant of the first, second, third and tenth causes of action for breach of contract. The court adheres to its prior decision in dismissing the fourth cause of action as to Brick and Bakst.

The court also adheres to its prior determination dismissing the fifth cause of action for negligence against Brick, Bakst and Weiss in that the substance of that claim duplicates the allegations of the fourth cause of action for breach of contract against Weiss, as well as the allegations contained in the sixth cause of action for professional malpractice, and the breach of contract and warranty claims set forth in the first, second and third causes of action against Brick and Bakst. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 389 [1987]. The only actionable duty owed to plaintiffs by defendants Brick and Weiss, other than those obligations imposed under the Martin Act which are exclusively enforceable by the Attorney General, arose out of the contractual purchase of the condominium units. *See also, Regatta Condominium Assoc.*, 303 A.D.2d at 740 and 741; *Board of Managers*, 182 A.D.2d at 665-666.

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***4** With respect to the sixth cause of action for malpractice alleged solely against architect/engineer Weiss, however, the claim is not precluded by the claim for breach of contract contained in the fourth cause of action because "in claims against professionals, [a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals ... may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties....' " *17 Vista Fee Assoc. v. Teachers Ins. and Annuity Assoc.*, 259 A.D.2d 75, 83 [1st Dept 1999], quoting *Sommer v. Federal Signal Corp .*, 79 N.Y.2d 540, 551 [1992]. As explained by the Court of Appeals in *Sommer*, professional malpractice lies in the "borderland between tort and contract" in which tort liability for failure to exercise reasonable care arises out of an independent duty imposed as a matter of policy apart from contractual obligations. *See Sommer*, 79 N.Y.2d at 550-552. At this early stage of pleading, the motion to dismiss the sixth cause of action must be denied.

It has been observed that the certifications contained in the offering plan are required by regulations of the Attorney General pursuant to the Martin Act (General Business Law § 352-e(6), 13 NYCRR 20.1 *et seq.*) and may not serve as the predicate for a common law fraud cause of action (*see Hamlet on Olde Oyster Bay Home Owners Assoc., Inc. v. Holiday Org., Inc.*, 12 Misc.3d 1182A, 824 N.Y.S.2d 763 [Sup Ct, Nassau County 2006]). Misrepresentations contained in such certifications may only be prosecuted by the Attorney General. *Krolik v. 239 East 79th St. Corp.*, 5 NY3d 54, 59 [2005]. However, the right to maintain a cause of action for fraud has been recognized, notwithstanding the authority vested in the Attorney General by the Martin Act, where all elements of a common-law fraud cause of action, including representation of a material fact, falsity, scienter, reliance and injury (*see Kline v.. Taukpoint Realty Corp.*, 302 A.D.2d 433 [2d Dept 2003]), have been adequately pleaded. *Kramer v. W10Z/515 Real Estate Limited Partnership*, 44 AD3d 457 [1st Dept 2007]. Here, the certifications are expressly incorporated into plaintiffs' Purchase Agreements. The complaint alleges that the misrepresentations contained in the Offering Plan certifications and related marketing materials intended to deceive included, *inter alia*, detailed descriptions of a new roof, waterproofing, window replacement and water pressure, which were not provided in the actual construction, that such defects were not discovered until plaintiffs took occupancy of their units, and that plaintiffs relied upon the certifications in electing to purchase, to their detriment in that they have not received the full value of their investment and will incur substantial costs in remediation.

According the complaint the deference to which it is entitled upon a motion to dismiss pursuant to CPLR 3211 (*see Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]), the allegations, standing alone, do articulate all of the elements of common law fraud. However, "[a] cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract." *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 528 [2d Dept 2001]. An examination of the seventh cause of action reveals that plaintiffs' allegations of fraud substantially track their claims of breach of contract. The only claim that does not rely on affirmative representations contained in the Offering Plan is the alleged failure to disclose, in the Offering Plan, that the fire water main is purportedly "severely deteriorated and exceeded its useful life expectancy" (Complaint Paragraph 149). This contention clearly falls within the parameters of the Martin Act and is not privately actionable. Indeed the tenor of the entire fraud cause of action, which consistently relies upon the representations contained in the Offering Plan, many of which are mandated by the regulations promulgated by the Attorney General under the Martin Act, is a recapitulation of plaintiffs' grievances contained in the first, second, third, fourth and tenth causes of action. As such, it is duplicative of the breach of contract claims and is thereby precluded (*see First Bank of the Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 [1st Dept 1999]; *Board of Managers of the Chelsea Quarter Condominium v. 129 W. Residential Partners, LLC,* 14 Misc.3d 1212A [Sup Ct, N.Y. County 2007]) or is otherwise precluded by the Martin Act (*see Krolik*, 5 NY3d at 58-59; *Board of Managers*, 14 Misc.3d at 1212A).

***5** Accordingly, as to the dismissal of the seventh and eleventh causes of action, this court adheres to its original decision.

In conclusion, defendant Weiss' motion to dismiss all causes relating to him is granted only as to the fifth and seventh causes of action and is otherwise denied. The plaintiffs' motion for reargument is granted and, upon reargument, the fourth cause of action is reinstated only as to defendant Weiss and the court adheres to its prior determination as to the fifth, seventh

and eleventh causes of action and as to the fourth cause of action as to Defendants Brick and Bakst.

This constitutes the decision and order of the court.

N.Y.Sup.,2008.
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