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Board of Mgrs. of the 125 N. 10th Condominium v 125 N. 10, LLC
2014 NY Slip Op 50035(U)
Decided on January 6, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on January 6, 2014

Supreme Court, Kings County

Board of Managers of the 125 North 10th Condominium, Plaintiff,

against

125 North 10, LLC d/b/a 125 North 10 LLC, 125N 10 d/b/a 125 North10 LLC 125 N 10 d/b/a 125 North10 MM, LLC, Savanna Services L.L.C. d/b/a Savanna Partners d/b/a Savanna Fund, Christopher Schlank, Nicholas Bienstock a/k/a Nicholas C. Bienstock a/k/a Nicholas Cburnham Bienstock, Peter Petron, John Fraser a/k/a John R. Fraser, Investcorp International Holdings Inc. d/b/a Investcorp, Ryder Construction, Inc., Carl Jaccarino, Robert M. Reich, LLC, Robert M. Reich, Anthony Cucich Architects d/b/a A. Cucich Architects, Anthony Cucich a/k/a Anthony A. Cucich, Scarano Architect, PLLC, d/b/a Scarano & Associates Architects, Robert M. Scarano, Jr. a/k/a Robert Scarano, AE Design Incorporated d/b/a Andres Escobar & Associates, Sharon Engineering P.C., Ronan Sharon, Penmark Realty Corporation. d/b/a Penmark Realty Corp., d/b/a Penmark, Core Group Marketing LLC d/b/a Core Group Marketing, LLC, S. Schwartz Engineering, PLLC d/b/a Schwartz S d/b/a S. Schwartz Associates Consulting Engineers, Simon Schwartz, Frank Seta & Associates, LLC, Saied S. Seta a/k/a Frank Seta, "John Doe #1 through John Doe No.10," inclusive, the last ten names being fictitious and unknown to Plaintiff, the persons or parties intended being the persons or corporations or entities who provided constructions services and/or design and fabrication services at the Premises described herein, Defendants.

14982/2012

Attorney for Plaintiff: The Law Firm of Elias Schwartz, PLLC, Jennifer Block, Esq.

Attorney for Defendants Ryder Construction and Carl Jaccarino: Hannum Feretic Prendergast & Merlino, LLC, John E. Hannum, Esq.

Attorney for Defendants 125North10, LLC, 125 N 10, 125N 10, Savanna Services L.L.C., Christopher Schlank, Bienstock, Petron, Fraser, Investcorp International Holdings Inc., Core Group Marketing: Starr Associates LLP, Andrea Roschelle, Esq.

Attorney for Defendants Anthony Cucich Architect, Anthony Cucich Architects, Anthony Cucich: Sinnreich Kosakoff & Messina LLP, James M. Boyce, Esq.

Attorney for Defendants Robert M. Reich, LLC and Robert M. Reich: Singer & Robinson, Ilana Deutsch Robinson, Esq.

Attorney for Sharon Engineering P.C., Ronan Sharon: Traub Lieberman Straus & Schrewsbery LLP, Jamie Keubler, Esq.

Attorney for Defendants Frank Seta & Associates, LLC, Saied S. Seta: Lewis Brisbois Bisgaard & Smith LLP, Mark K. Anesh, Esq., Garo Artinoff, Esq.

Attorney for AE Design Incorporated, Andres Escobar: Hoey, King, Epstein, Prezioso & Marquez

Attorney for Scarano Architect, PLLC d/b/a Scarano & Associates Architects and Robert M. Scarano, Jr., a/k/a Robert Scarano: Zetlin & DeChiara LLP

Attorney for Penmark Realty Corporation. d/b/a Penmark

Realty Corp., d/b/a Penmark: Kaufman Borgeest & Ryan LLP, Jonathan B. Bruno, Esq.

Simon Schwartz, Appearing Pro Se

Carolyn E. Demarest, J.

The following papers read on this motion:Papers Numbered:

Penmark's Notice of Motion, Memo of Law in Support, Affs in Support;

Plaintiff's Memo of Law in Opposition; Affirmation in Opp;

Penmark's Memo of Law in Reply

1-7

Scarano's Notice of Motion, Memo of Law in Support; [*2]

Plaintiff's Memo of Law in Opposition; Affirmation in Opp;

Scarano's Memo of Law in Reply

8-12

Cucich's Notice of Motion, Memo of Law in Support;

Plaintiff's Memo of Law in Opposition; Affirmation in Opp

13-16

Seta's Notice of Motion, Memo of Law in Support;

Plaintiff's Memo of Law in Opposition; Affirmation in Opp;

Seta's Aff and Memo of Law in Reply

17-22

Schwartz's Notice of Motion, Memo of Law in Support;

Plaintiff's Memo of Law in Opposition; Affirmation in Opp;

Schwartz's Aff in Reply

23-27

Jaccarino's Notice of Motion, Memo of Law in Support;

Plaintiff's Memo of Law in Opposition; Affirmation in Opp;

Jaccarino's Aff in Reply

28-32

Sharon's Notice of Motion, Exhibit 3, Memo of Law in Support;

Plaintiff's Memo of Law in Opposition; Affirmation in Opp;

Ryder/Jaccarino Affidavit in Opp

33-37, 45

AE Design's Notice of Motion;

Plaintiff's Memo of Law in Opposition; Affirmation in Opp

38-40

Sponsors' Affs and Memo of Law in Opp to Motions to Dismiss Cross-claims; Documentary Supplement [*3]

41-44

BACKGROUND

This action arises out of the design and construction of 125 North 10th Street, Brooklyn, New York, an 86-unit luxury condominium (the "Project").

On June 27, 2006, the Sponsor defendants [FN1] acquired the property for the purposes of constructing a residential building, consisting of two connected towers and a cellar-level parking garage (the "Building"). Sponsors disseminated an Offering Plan, effective January 28, 2008, that set forth specific descriptions of the Building and improvements to be accomplished by the Project, stated that all warranties extended to the Sponsor would be assigned by the Sponsor to the board of managers, and named a number of individuals who were involved with the Project.

According to plaintiff, Sponsors, however, did not deliver a Building in accordance with the Plans and Specifications set forth in the Offering Plan, but, instead, the building was "rife with construction problems," including improperly designed and constructed walls, roofs, and foundation, which have resulted in water infiltration and significant property damage, as well as non-compliance with New York City Department of Building ("DOB") Codes. Other issues complained of include scalding hot water that flows through the residential fixtures, the persistent break down of the building's heating and cooling systems, severe drafts from the windows, extensive leaking from ceilings, flooding in the cellar garage, noxious odors permeating the units, and a dangerous condition created by terrace railings at the top of the ten-story building, which are designed so that it is possible for children to climb over them.

When the defects were discovered, the Sponsor-controlled board requested that all defendants return to the Building to inspect their designs, plans, and work, to determine how to rectify the problems. However, despite numerous inspections, plaintiff claims that the defects remained unresolved. Accordingly, in 2011, the Board, which was no longer Sponsor-controlled,[FN2] retained a non-party firm, RAND Engineering & Architecture, P.C. (" Rand") to perform a visual survey of the building to determine the cost of making repairs, which were estimated to cost at least $2 million. Plaintiff claims to have performed essential repairs to the roof, in addition to other repairs, which have cost much more than estimated by Rand. Despite these expenditures, plaintiff contends, numerous defects still require repair. Finally, plaintiff refers to a case recently filed in Kings County wherein an individual named Tirpak names the Board as defendant, alleging that by reason of a dangerous and defective condition existing on the roof in violation of DOB code, he fell from the roof and was paralyzed from the waist down.

Plaintiff Board of Managers of the 125 North 10th Condominium ("Board") commenced this action on July 23, 2012, on its own behalf and on behalf of the residential unit owners of the condominium, against, in addition to the Sponsor defendants, project managers, architects, [*4]managing agent, consultants, engineers, providers of interior design services, and the general contractor involved with the Project. The defendants had the following roles in the Project: Robert M. Reich, LLC and Robert M. Reich (the "Reich Defendants") were the project managers for the

Project, Anthony Cucich Architects d/b/a A. Cucich Architects and Anthony Cucich a/k/a Anthony A. Cucich (the "Cucich Defendants") and Scarano Architect, PLLC d/b/a Scarano & Associates Architects and Robert M. Scarano, Jr., a/k/a Robert Scarano (the "Scarano Defendants") were architects, Core Group Marketing LLC d/b/a Core Group Marketing, LLC ("Core") is the selling agent for the Building, Penmark Realty Corporation. d/b/a Penmark Realty Corp., d/b/a Penmark ("Penmark") is the managing agent for the Building, Frank Seta & Associates, LLC, Saied S. Seta a/k/a Frank Seta (the "Seta Defendants") were consultants, S. Schwartz Engineering, PLLC d/b/a S. Schwartz Associates LLC d/b/a Schwartz S d/b/a S. Schwartz Associates Consulting Engineers and Simon Schwartz (the "Schwartz Defendants") and Sharon Engineering P.C. d/b/a Sharon Engineering, P.C. and Ronan Sharon (the "Sharon Defendants") were engineers, AE Design Incorporated d/b/a Andres Escobar & Associates ("AE Design") provided interior design services, and Ryder Construction, Inc. was the general contractor.

In its 400 paragraph complaint, verified only by counsel, plaintiff alleges ten causes of action as follows:

Breach of Contract - First Cause of Action

Plaintiff alleges that Sponsors are in breach of the Purchase Agreements by failing to construct the Building in accordance with the Offering Plan, which was incorporated into the Purchase Agreements. Plaintiff alleges that the various problems and defects in the Building "are all due to improper design, fabrication, workmanship or construction practices by the Sponsor's Architects, Engineers, Consultants and Contractors or the use of materials that are substantially and materially at variance with the Plans and Specifications and are in violation of the Building Code of the City of New York" (Paragraph 265). Although the majority of plaintiff's complaints are levied against the Sponsors, paragraphs 272 through 278 complain of the other defendants and alleges that "[d]efendants in this cause of action breached their express and implied covenants to deliver a building free of known construction problems and defects . . .".

Breach of Express Warranties - Second Cause of Action

Plaintiff's second cause of action asserts claims for breach of express warranties against all defendants, alleging that defendants expressly warranted that the quality of their services or work would be first-class and performed in a professional manner, in accordance with the Plans and Specifications, and building codes, free of deficiencies and defects. According to plaintiff, these express warranties were extended by the Sponsors to plaintiff, the intended beneficiary of the warranties.

Negligence - Third Cause of Action

Plaintiff's third cause of action alleges that Sponsors breached their duty of care owed to plaintiff by failing to ensure that the work performed was consistent with local standards and in accordance

with the Plans and Specifications, including failing to properly inquire into the background of the other defendants and failing to supervise and monitor them. According to plaintiff, Sponsors became aware of the deficient quality of the work yet continued to allow other defendants to work, concealed the fact that the Building was not built in accordance with the Offering Plan, and recklessly disseminated the marketing materials, Sponsor Certification, [*5]Architect's Report, and Architect's Certification without amending the documents to reflect defects so as to notify prospective purchasers. Plaintiff also asserts this cause of action against Reich, Penmark, and Core, stating that they retained the engineers, architects, consultants and general contractor on behalf of Sponsors and that Penmark and Core "negligently and recklessly verbally ratified the representations found in the Offering Plan and the marketing materials to prospective purchasers and real estate agents" (Complaint ¶ 312).

Negligence - Fourth Cause of Action

Plaintiff asserts an additional claim of negligence against all defendants, alleging that Sponsor and all remaining defendants who were involved in the construction of the Building, had a duty to plaintiff to ensure that work was performed in accordance with the Plans and Specifications and in accordance with local standards, and breached that duty by constructing a Building with various defects so that plaintiff has to make "substantial expenditures" to cure the defects and perform the repairs.

Strict Liability - Fifth Cause of Action

Plaintiff's fifth cause of action is for strict liability against Sponsors, Cucich defendants, Scarano defendants, Penmark, Core, Ryder, Jaccarino, Seta defendants, and Reich defendants. Plaintiff complains that the Building fails to comply with various NYC building codes, including fire, ADA accessibility, electric, and exhaust, which present a hazard to health and safety to Building occupants.

Fraud - Sixth Cause of Action

Plaintiff claims in its sixth cause of action, for fraud, that the Offering Plan, marketing materials, and Sponsor Certification misrepresented the quality of the Building yet Sponsors disseminated these documents, and verbally ratified the representations in them, to prospective purchasers to induce them into purchasing residential units. Although plaintiff asserts this cause of action against, in addition to Sponsor defendants, Penmark, Core, and the Reich defendants, plaintiff does not plead any actions taken by those defendants and only generally states that "[d]efendants have actively misrepresented and concealed the conditions at the Building."

Professional Malpractice - Seventh Cause of Action

Plaintiff's seventh cause of action asserts claims for professional malpractice against Cucich defendants, Scarano Defendants, AE Design, Sharon Defendants, Schwartz Defendants, and Seta Defendants, alleging that they breached duties of care owed to unit owners to ensure that the Building was designed and constructed in accordance with the Plans and Specifications and in accordance with normal industry standards, resulting in a Building with dangerous conditions that will "invariably result in claims for damages and/or injuries."

Negligent Misrepresentation - Eighth Cause of Action

In its eighth cause of action, plaintiff claims that Cucich, Scarano, AE Design, Sharon, Scwartz, and Seta Defendants made representations and drew up plans and specifications to be used in the Offering Plan, yet failed to disclose the deficiencies in construction, which was " a gross departure from good and accepted practice."

Deceptive Trade Practices Under GLB § 349 - Ninth Cause of Action

Plaintiff's ninth cause of action asserts claims for deceptive trade practices under GBL § [*6]349, alleging that Sponsors disseminated the Offering Plan to prospective purchasers that contained misrepresentations about the quality of the Building, did not correct the misrepresentations, but instead verbally ratified them to induce purchasers. Although defendants Penmark, Core, and Reich Defendants are named in the caption, plaintiff's allegations describe no actions taken by them.

False Advertising Under GBL § 350- Tenth Cause of Action

Finally, plaintiff asserts claims for false advertising within the meaning of GBL § 350, claiming that Sponsors' omissions and statements in various marketing materials constitute false advertising. Although defendants Penmark, Core, and Reich Defendants are named in the caption, plaintiff's allegations describe no actions taken by them.

A number of defendants have moved to dismiss the complaint and various cross-claims [FN3] against them. The following defendants move to dismiss pursuant to CPLR 3211(a)(1) or (a)(7): Penmark, Scarano, Seta, and Ryder. Defendants Cucich and AE Design move to dismiss pursuant to

CLR 3212. Although Schwartz and the Sharon defendants characterize their motions as brought pursuant to 3211, the Court notes that they have answered and issue is joined, so the motions are regarded as brought under CPLR 3212. At oral argument on June 12, 2013, the defendants adopted the arguments made by all other defendants. Their motions will be addressed in turn.

APPLICABLE STANDARDS OF REVIEW

Upon a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-04 [2d Dept 2008]). However, the court must base its judgment on factual allegations rather than legal conclusions and can afford no deference to assertions that are "inherently incredible or flatly contradicted by documentary evidence" (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]). Pursuant to CPLR 3211(a)(1), a party " may move for judgment dismissing one or more causes of action against him on the ground that . . . a defense is founded upon documentary evidence." "A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim" (*Fontanetta v John Doe 1*, 73 AD3d 78, 83 [2d Dept 2010], *quoting Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

Upon motion for summary judgment, pursuant to CPLR 3212, the moving party bears the initial burden to produce affidavits and documentary evidence sufficient to "warrant the court as a matter of law in directing judgment in [its] favor" (CPLR 3212(b); *see Friend of Animals, Inc. v Assoc. Fur Mfrs., Inc.*, 46 NY2d 1065, 1078 [1979]). Once the movant establishes prima facie entitlement to judgment, the burden shifts to the opposing parties to "demonstrate by admissible [*7]evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). While "all facts must be viewed in the light most favorable to the non-moving party'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012*], quoting Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]), mere conclusory allegations or defense are insufficient to preclude summary judgment (*see Zuckerman*, 49 NY2d at 562).

DISCUSSION

Motion Sequence 1 - Penmark

Penmark Realty Corporation d/b/a Penmark Realty Corp., d/b/a Penmark ("Penmark") is plaintiff's managing agent. On March 25, 2009, Penmark and the Sponsor-controlled board entered into an agreement whereby Penmark was to be the managing agent for the Building. Pursuant to the terms of the Offering Plan, plaintiff assumed Sponsor's rights in the Managing Agreement with Penmark at the closing of the first unit. The terms of the Managing Agreement indicate that Penmark was responsible to "[c]ause the building to be maintained in good condition, in keeping with a first class luxury residential Building, ... and cause repairs and alterations of the building to be made, including but not limited to, electrical, plumbing, steam fitting, carpentry, masonry . . .," to hire, pay and supervise personnel necessary to maintain the Building, and to market units for sale upon the owners's request. At some unspecified time, subsequent to execution of the Management Agreement with Sponsor, plaintiff assumed control of the Board and acquired Sponsor's rights under the Management Agreement.

Plaintiff asserts claims against Penmark for breach of contract, breach of express warranty, negligence (third and fourth causes of action), strict liability, fraud, and deceptive trade and advertising practices under NY GBL §§ 349 and 350. Penmark moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the Complaint and all cross-claims against it.

Breach of Contract, Breach of Express Warranty, Negligence, & Strict Liability

Penmark moves to dismiss plaintiff's first, second, fourth, and fifth causes of action on the grounds that they arise from the defective construction of the Building, in which, it is undisputed, Penmark had no role. The complaint, at paragraph 98, identifies Penmark as the managing agent of the Building "in connection with the sale and management of the condominiums developed during the Project." Penmark argues that the documentary evidence, specifically the Offering Plan and Management Agreement, demonstrates that Penmark was not involved in the construction of the Building.

In opposition to the motion, plaintiff does not argue that Penmark was involved in the construction of the Building but, instead, attempts to plead, for the first time, that Penmark breached its contract and an express warranty by failing to maintain the Building and arrange for repairs as it was obligated to do under the Managing Agreement.

Plaintiff's first, second, fourth, and fifth causes of action are dismissed against Penmark as it is undisputed that Penmark was not involved in the construction of the Building. While plaintiff may have cognizable claims against Penmark based on a purported breach of the Management Agreement, plaintiff raises allegations based on the Managing Agreement for the first time in its opposition papers, and the pleadings do not give Penmark sufficient notice of the transactions or occurrences about which plaintiff complains (*see* CPLR 3013). Penmark's motion to dismiss is granted with respect to the first, second, fourth, and fifth causes of action, and plaintiff is granted leave to replead against Penmark any claims stemming from the Management Agreement within 30

days.

*[*8]Negligence, Fraud and General Business Law §§ 349 & 350*

Penmark also moves to dismiss plaintiff's third, sixth, ninth, and tenth causes of action. Plaintiff's ninth and tenth causes of action for violations of GBL§§ 349 and 350 are dismissed against Penmark for failure to state a cause of action, as the only actions complained of are those purportedly taken by Sponsors. Moreover, plaintiffs complaint only describes a private dispute among parties and does not involve actions affecting "the public at large" (*Sutton Apartments Corp. v Bradhurst 100 Development LLC*, 107 AD3d 646, 648 [1st Dept 2013] citing *Merin v Precinct Devs. LLC*, 74 AD3d 688, 689 [1st Dept 2010]).

Furthermore, plaintiff's sixth cause of action for fraud is dismissed against Penmark as plaintiff's allegation that "[d]efendants have actively misrepresented and concealed the conditions at the Building" does not meet the level of specificity required in pleading fraud claims (*see Quinones v Schaap*, 91 AD3d 739, 741 [2d Dept 2012])(claim for fraud should have been dismissed as plaintiff failed to allege or provide details of any misrepresentations made by defendants).

In its third cause of action for negligence, Plaintiff alleges that Penmark, acting as Sponsor's selling agent, negligently verbally ratified the misrepresentations made in the Offering Plan and marketing materials to prospective purchasers, who detrimentally relied upon such misrepresentations.

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144 [2007]).

In the absence of contractual privity, a plaintiff states a cause of action for negligent misrepresentation if

three conditions [are] satisfied: the defendant must have been aware that its representations were to be used for a particular purpose or purposes; the defendant must have intended that the other party rely on the representations for such purpose or purposes; and there must have been some conduct on the part of the defendant linking it to the other party which evinces the defendant's understanding of that party's reliance.(*Beck v Studio Kenji*, 90 AD3d 462 [1st Dept 2011]).

Penmark denies that it was involved in the marketing or sale of the Building and argues that the Offering Plan clearly identifies the Core defendants as Sponsors' selling agent, not Penmark. A provision in the Managing Agreement gives Penmark the responsibility, upon the Board's request, to list units for sale and lease. While Penmark denies that it was ever tasked with the sale of any unit, for purposes of this motion, the Court must accept plaintiff's allegations as true. However, plaintiff has alleged that Penmark acted exclusively as an agent for a disclosed principal, Sponsor,

and Penmark cannot therefore be held liable for the alleged misrepresentations (*see Brasseur v Speranza*, 21 AD3d 297, 299 [2005] (managing agent cannot be liable for alleged failure to supervise renovations when it was acting as agent for disclosed principal condominium). Accordingly, plaintiff's third cause of action is dismissed as to Penmark.

Motion Sequence 2 - Scarano[*9]In June 2004, Scarano Architect, PLLC ("Scarano")[FN4] entered into an agreement with Kay Organization, LLC ("Kay"), the predecessor of Sponsors, to perform architectural services for the Project, including, among other services, the "preparation, filing and approval of applications and construction documents required by the N.Y.C. Department of Buildings," "preparation of preliminary design sketches in accordance with the Owner's *written* program and Architect's input," (emphasis in original) and "controlled inspection for firestopping and structural stability." Defendant Sponsors took over the Project at some time in 2006, and Scarano entered into an agreement with Sponsors, which incorporated the prior agreement with Kay. Scarano claims that, at this point, the Sponsors retained the Cucich defendants to supersede Scarano as Architect of Record with the Department of Buildings, while Scarano provided only limited architectural services for the Project, such as drafting. Plaintiff denies that Cucich superseded Scarano and claims that Scarano submitted applications to the Department of Buildings as late as 2008 and 2011.[FN5] Scarano submits printouts from the DOB database, indicating that Cucich is the applicant of record for the Project, and references Cucich's affidavit admitting that it superseded Scarano. Cucich is listed as the architect of record in the Offering Plan, while Scarano is not mentioned.

Plaintiff asserts claims against Scarano for breach of contract, breach of express warranty, negligence, strict liability, professional malpractice, and negligent misrepresentation. The Scarano defendants move, pursuant to CPLR 3211 (a)(1) and (7), to dismiss the complaint and all cross-claims against them.

Breach of Contract

In its complaint, plaintiff complains generally that " [d]efendants in this cause of action breached their express and implied covenants to deliver a building free of known construction problems and defects." Scarano moves to dismiss the breach of contract on the grounds that it was not a party to an agreement with, or otherwise in privity with, plaintiff.

It is well established that if a party is not in privity with a defendant, a viable cause of action for breach of contract exists only if the party was an intended third-party beneficiary of the contract (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd.*, 50 AD3d 503, 504 [1st Dept 2008]*; Lake Placid Club Attached Lodges v Elizabethtown Builders, Inc.*, 131 AD2d 159, 161 [3d Dept 1987])(because no contractual relationship between plaintiff and architect defendants, recovery was "dependent upon a showing that plaintiff's members were third-party beneficiaries of the developer's contracts with defendants"). "Nonparty enforcement of a contractual promise is limited

to an intended' as contrasted with an incidental' beneficiary" (*Lake Placid*,131 AD2d at 161). "One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties' to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'"(*id).*

Absent evidence of an express intent to benefit a plaintiff, a plaintiff who purchases a condominium unit is merely an incidental third-party beneficiary to the contracts between the [*10]sponsor and service providers which participated in the development of the condominium and, thus, has no standing to bring a breach of contract claim against such contractors (*see Leonard v Gateway II, LLC*, 68 AD 408, 408-09 [1st Dept 2009]); *Kerusa*, 50 AD3d at 504; *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 656 [1976]). As articulated in *Lake Placid*, that a developer had in mind "the normal business motive to obtain a construction product of sufficient quality for ready marketability of the condominium units to potential customers . . . is clearly not a basis from which to infer the requisite intent of the developer to bestow performance benefits upon the purchasers of the condominium units . . ."*(Lake Placid*, 131 AD2d at 162; *see also Bd of Mgrs. of Riverview at Coll. Point. Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664, 665 [2d Dept 1992] (breach of contract claim properly dismissed against defendants who designed, planned, inspected and constructed condominium because plaintiff owner was not third party beneficiary of contract between defendants and sponsor of project); *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]; *Kerusa*, 50 AD3d at 504; *cf. Key Intl. Mfg. v Morse/Diesel, Inc*., 142 AD2d 448, 456 [2d Dept 1988] (motion to dismiss plaintiff's breach of contract claim denied when plaintiff alleged that promisee explicitly stated that its contracts would benefit plaintiff).

Here, it is undisputed that Scarano did not enter into a contract with plaintiff but with Sponsors and Sponsors' predecessors. Moreover, plaintiff does not argue, nor can this Court find, anything in the 2004 Agreement that could be construed as expressing an intent by the parties to benefit plaintiff. However, plaintiff, relying on a previous decision rendered by this Court in *Kikirov v 355 Realty Assocs, LLC*, (31 Misc 3d 1212(A) [Sup Ct, Kings County 2011]), argues that a provision in the Offering Plan, providing that warranties extended to Sponsor by various contractors would be assigned to the board on behalf of the unit owners, indicates an intent to benefit the plaintiff, thus rendering plaintiff a third-party beneficiary.

Paragraph (g) of the Offering Plan reads, in part:

At the First Closing, Sponsor will deliver, assign or otherwise grant to the Condominium board, on behalf of all Unit Owners, the right to proceed under any assignable warranties and other undertakings received by Sponsor from contractors, suppliers, or others in connection with the construction and equipping of the Building . . .

Paragraph (p) of the Plan further references the assignment of warranties, in stating:

Except for those warranties or guarantees provided to Sponsor by contractors, manufacturers or suppliers, which Sponsor will assign to the Condominium Board and/or Unit Owners, as necessary, Sponsor does not make any warranty of any kind, express or implied . . . In *Kikirov*, this Court declined to dismiss claims for breach of contract against the general contractors of a project because a provision in the Offering Plan stated that the sponsor "will deliver . . . on behalf of Unit Owners an assignment of all assignable warranties and other undertakings received by the Sponsor from contractors, materialmen or others in connection with the construction and equipping of the Building" (*Kikirov*, at *11). Although the plaintiff had not explicitly alleged that such assignments had occurred, this Court determined that further discovery was required to determine whether any such assignments existed.

While the language in the Offering Plan is similar to the provision in *Kikirov*, the documentary evidence precludes a finding that Scarano and Sponsors intended to benefit plaintiff. Sponsors, in opposition to Scarano's motion to dismiss all cross-claims against it, submits a complete copy of its agreement with Scarano. At section 1.3.7.5, the agreement [*11]expressly states that "[n]othing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect." Thus, the documentary evidence conclusively shows that plaintiff was not an intended third party beneficiary, as the contract explicitly states that the parties did not intend to create a benefit for third parties (*see Edward B. Fitzpatrick, Jr. Contr. Corp. v County of Suffolk*, 138 AD2d 446, 450 [2d Dept 1988])("Where a provision in the contract expressly negates enforcement by third parties, that provision is controlling."). Accordingly, plaintiff's first cause of action against Scarano is dismissed.

Breach of Express Warranty

Plaintiff brings a separate cause of action for breach of express warranty, alleging that Scarano and all other defendants expressly warranted that "the quality of their services and/or work would be first-class and performed in a professional manner consistent with the local prevailing standards of architecture . . . and would be in compliance with the Plans and Specifications and applicable Building Codes of the City of New York . . . and their services would be free of deficiencies and defects." Plaintiffs claim that these warranties were extended to the Sponsor and then assigned to plaintiff, the intended beneficiary of the warranties.

It is well established that "[n]o warranty attaches to the performance of a service. If the service is performed negligently, the cause of action accruing is for that of negligence. Likewise, if it constitutes a breach of contract, the action is for that breach" (*Town of Poughkeepsie v Espie*, 41 AD3d 701, 706 [2d Dept 2007] citing *Aegis Prods. v Arriflex Corp. of Am.*, 25 AD2d 639, 639 [3d Dept 1966]; *see also Milau Assoc. v North Ave. Dev. Corp.*, 42 NY2d 482, 488 [1977]; *Mallards Dairy, LLC v E & M Engineers & Surveyors, P.C.*, 71 AD3d 1415, 1417 [4th Dept 2010] (because contract was for services, cause of action for breach of warranty could not lie). Here, the warranty plaintiff claims was breached is a contractual promise to perform services in a certain manner, which forms the basis for plaintiff's first cause of action for breach of contract. Accordingly, plaintiff's second cause of action is dismissed as to Scarano.

Negligence

Plaintiff also asserts a claim for negligence against all defendants. Plaintiff claims that defendants, including Scarano, had a duty to the Building owners to perform work consistent with local standards and in accordance with the Plans and Specifications, which it breached when it negligently designed the Building. As a result, plaintiff contends, it must spend large sums of money to cure the defects caused by defendant's negligence.

The essence of plaintiff's claim is for breach of contract, not tort, as plaintiff fails to allege that defendants breached a duty other than to build the Building in the manner they promised (*see Merritt v Hooshang Constr.*, 216 AD2d 542, 543 [2d Dept 1995](allegations that builder negligently constructed house sounded in contract, not tort). "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected therewith and dependent upon the contract" *(Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Brothers Development Corp.*, 182 A2d 664, 666 [2d Dept 1992] citing *Clarke-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). No independent legal duty to plaintiff has been alleged.

Moreover, the harm plaintiff complains of —the cost of repair— is economic loss, for which there is no recovery in negligence (*see Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, [*12]450-52 [2d Dept 1988] (Supreme Court properly dismissed construction project owner's claim for economic loss caused by negligence of an architect or engineer with whom it was not in privity of contract);

Lake Placid Club Attached Lodges v Elizabethtown Bldrs., 131 AD2d 159, 162 [3d Dept 1987]).

As the complaint fails to state a cause of action for negligence, plaintiff's fourth cause of action is dismissed as to Scarano.

Strict Liability

Plaintiff alleges that, because the building defects have resulted in violations of various NYC building codes, specifically Building Code § 27-334, which is violated by the design of the terrace railings, defendants, including Scarano, should be held strictly liable.

A cause of action for strict liability seeks to provide a remedy for an individual injured because of another's violation of an obligation imposed, not by contract, but by law. "It does not attempt to afford the injured party the benefit of any bargain but rather endeavors to place him in the position he occupied prior to the injury" (*Steckmar Nat. Realty and Inv. Corp., Ltd., v J.I. Case Co.*, 99 Misc 2d 212, 214 [Sup Ct, NY County 1979]). The crux of plaintiff's complaint is that Scarano's plans caused the building to be defectively constructed so as to violate various codes, requiring plaintiff to expend large sums to rectify. Plaintiff has not alleged that it has suffered any physical injury resulting from the alleged violations. The economic loss plaintiff complains of is "not the character of harm contemplated by the rule which renders a manufacturer liable for negligence or strict products liability'" (*Hole v General Motors Corp.*, 83 AD2d 715, 717 [3d Dept 1981] *quoting Steckmar*, 99 Misc 2d at 214; *see also Key Intl.*, 142 AD2d at 450-52).

Moreover, plaintiff fails to allege that the building codes are the types of statutes that establish a specific standard of care and that plaintiff falls within the class of people intended to be benefited by such statutes (*see Zupnick v Certified Lbr Corp*., 17 Misc 3d 1122(A) [Sup Ct, Kings County 2007]). Accordingly, plaintiffs' cause of action for strict liability against Scarano is dismissed.

Professional Malpractice

Plaintiff also asserts a cause of action for professional malpractice, alleging that Scarano breached its duty to design the building "in a competent and workmanlike manner in accordance with the Plans and Specifications and in accordance with normal industry standards for construction, architecture, and engineering" (Compl. ¶ 362). In claims against professionals, "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties'

relationship"(*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 83 [1st Dept 1999]). Here, however, the documentary evidence establishes that plaintiff had no contractual relationship with Scarano, nor any relationship approaching privity. Accordingly, plaintiff's malpractice claim is dismissed (*see 905 5th Associates, Inc. v Weintraub*, 85 AD3d 667, 668 (1st Dept 2011])(malpractice claim dismissed when plaintiff had not established a relationship approaching privity with architect who provided services for neighbor's construction).

*[*13]Negligent Misrepresentation*

Plaintiff also asserts a claim for negligent misrepresentation against Scarano, alleging that Scarano made representations about the quality of the construction that it should have known were false, when it knew the representations would be incorporated into the Offering Plan and relied upon by prospective purchasers.

"[A] private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute" (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*,18 NY3d 341, 353 [2011]). However, an independent common-law claim is not preempted by the Martin Act when it is not entirely dependent on the Martin Act for its viability (*see id.*; *see also Caboara v Babylon Cove Dev., LLC*, 82 AD3d 1141, 1142 [2d Dept 2011])(defendants not entitled to judgment as a matter of law dismissing the complaint because they failed to establish that plaintiffs' claims rested "entirely on alleged omissions from filings required by the Martin Act and the [AG's] implementing regulations").

Here, plaintiff complains of omissions and misrepresentations made by Scarano in the Offering Plan. As these documents were filed in accordance with the Martin Act, claims of misrepresentations based upon such documents are preempted by the Martin Act. Accordingly, plaintiff's eighth cause of action against Scarano for negligent misrepresentation is dismissed.

Motion Sequence 3 - Cucich

The Cucich Defendants entered into an agreement with Sponsors on July 12, 2006, to provide architectural services in connection with the Project. In its complaint, plaintiff claims that Sponsors retained Cucich to be the architect of record for the project, to prepare floor plans for the New York Real Property Assessment Department, and to provide architectural services. According to Cucich,

these services included superseding the original architect of record, making necessary corrections to the design documents, and participating in meetings with the building commissioner and former commissioner to "shepherd" the project through the DOB in an expeditious manner. Cucich admits that it filed a certification with the Offering Plan but contends that the Cucich Defendants had no site supervision, inspection, or construction administration responsibilities, nor any communication or relationship with the plaintiff.

Plaintiff asserts claims for breach of contract, breach of express warranty, negligence, strict liability, professional malpractice, and negligent misrepresentation against the Cucich defendants. The Cucich Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against the Cucich Defendants.

Breach of contract

Cucich argues that the breach of contract claim must be dismissed against it, as it was not in privity with plaintiff and assigned no warranties to plaintiff. In support of its motion for summary judgment Cucich provides an affidavit from Anthony Cucich, stating that Cucich entered into an agreement with Sponsors and did not have any contact with plaintiff at any time, and a copy of the agreement with Sponsors, which contains no warranty nor any indication that the agreement was intended to benefit plaintiff.

The documentary evidence establishes that Cucich was not in privity with plaintiff. Despite plaintiff's argument, in opposition, that Cucich knew and intended plaintiff to benefit from its contract with Sponsors, as evidenced by the provision assigning warranties in the Offering Plan, plaintiff produces no evidence in support of its position and identifies no warranties made by Cucich. As plaintiff has not submitted evidence demonstrating the existence [*14]of a factual issue requiring trial of this claim, Cucich's motion for summary judgment is granted with respect to the breach of contract claim *(see Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Brothers Development Corp.*, 182 Ad2d 664, 665 [2d Dept 1992])(summary judgment properly granted when plaintiff board failed to demonstrate triable issues of fact as to whether it was a third-party beneficiary of contract between project owner and contractor).[FN6]

Breach of express warranty, negligence, and strict liability

For the reasons discussed above with respect to the Scarano motion, plaintiff's claims for breach of express warranty, negligence, and strict liability are dismissed as to Cucich.

Professional Malpractice

Plaintiff cause of action for professional malpractice alleges that Cucich breached its duty of care to ensure that the Building was designed and constructed in accordance with the Plans and Specifications and normal industry standards.

"An action for professional malpractice may lie in the context of a contractual relationship if the professional negligently discharged the duties arising from that relationship" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 83 [1st Dept 1999]). Here, however, the evidence establishes that plaintiff had no contractual relationship with Cucich, nor any relationship approaching privity. Accordingly, plaintiff's malpractice claim is dismissed (*see 905 5th Associates, Inc. v Weintraub*, 85 AD3d 667, 668 (1st Dept 2011])(malpractice claim dismissed when plaintiff had not established a relationship approaching privity with architect who provided services for neighbor's construction).

Negligent Misrepresentation

In its complaint, plaintiff alleges that Cucich negligently misrepresented in the architect's certification and in the various amendments to the Offering Plan that the Building was built in accordance with the Offering Plan and in compliance with relevant city codes. The Cucich Defendants argue that the Martin Act preempts plaintiff's claims, as they arise solely out of the certification Cucich submitted pursuant to the Martin Act.

"[A] private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute" (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*,18 NY3d 341, 353 [2011]). However, an independent common-law claim is not preempted by the Martin Act when it is not entirely dependent on the Martin Act for its viability (*see id.*; *see also Caboara v Babylon Cove Dev., LLC*, 82 AD3d 1141, 1142 [2d Dept 2011])(defendants not entitled to judgment as a matter of law dismissing the complaint because they failed to establish that plaintiffs' claims rested "entirely on alleged omissions from filings required by the Martin Act and the [AG's] implementing regulations").

In opposition, plaintiff argues that because the alleged misrepresentations stemmed, not [*15]only from the certificate in the Offering Plan, but from subsequent amendments of the Offering Plan, such claims have an independent basis and are not preempted by the Martin Act. Plaintiff argues that the Cucich Defendants made material misrepresentations by stating in each of the eleven

amendments to the Offering Plan that there were "no material changes," thus misrepresenting that the Building was built in accordance with the Offering Plan.

Plaintiff's argument is unavailing. The disclosure regulations adopted by the AG specify, at 13 NYCRR 20.5[a][2], that "[a]n amendment must include a representation that all material changes of facts of circumstances affecting the property or the offering are included unless the changes were described in prior amendment(s) submitted to but not yet filed with the Department of Law." In *Kerusa Co. LLC v W10Z/515 Real Estate Limited Partnership* (12 NY3d 236 [2009]), a case involving similar facts, the plaintiff's allegations that defendants did not disclose various construction and design defects in the offering plan amendments but instead represented that there were no material changes when there were, in fact, problems arising during construction, were deemed preempted by the Martin Act. The Court of Appeals reasoned that "[b]ut for the Martin Act and the [AG's] implementing regulations . . . the sponsor defendants did not have to make the disclosures in the amendments. Thus, to accept [plaintiff's] pleading as valid would invite a backdoor private cause of action to enforce the Martin Act . . ." (*id*. at 245).

Here, plaintiff complains of omissions in the Offering Plans and subsequent amendments. As these documents were filed in accordance with the Martin Act, claims of misrepresentations based upon such omissions are preempted by the Martin Act and dismissed.

In its opposition, plaintiff also raises, for the first time, allegations that Cucich made material misrepresentations in filings with the DOB, upon which plaintiff relied to its detriment. In support of its position, plaintiff includes an affidavit from Chad Gessin, president of the Board, reciting the various defects with the Building and stating that, prior to purchasing a unit in the Building, he and other resident owners researched the Offering Plan, marketing materials, and Building Department records to decide whether to purchase in the Building and concluding that Cucich was responsible for filing an architect certificate and plans with the Department of Buildings.

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144 [2007]). "A relationship approaching privity requires that (1) defendant have an awareness that his or her statement is for a particular purpose; (2) a known party relies on the statement in furtherance of that purpose; and (3) there is some conduct linking defendant to the relying party and evincing its understanding of that reliance"

(*Sykes v RFD Third Avenue 1 Associates, LLC*, 67 AD3d 162, 167 [1st Dept 2009] aff'd 15 NY3d 370, 373 [2010]).

Here, plaintiff fails to support, or even allege, facts that would establish that Cucich was aware or intended that filings with the DOB would be relied upon by plaintiff, or that Cucich evinced an understanding of plaintiff's purported reliance. Plaintiff's contention that plaintiff was a "known" party to Cucich because 37% of the Building had been sold when Cucich continued to make filings with the DOB is unavailing (*see Ford v Sivilli*, 2 AD3d 773, 774 [2d Dept 2003](future purchaser of building who brought claim of negligent misrepresentation against architect based on filings with town building department not a known party but, rather, "[a]t best [*16]. . . part of an indeterminate class of persons who, presently or in the future' may rely upon [the] alleged misrepresentations")(citations omitted).

For the foregoing reasons, Cucich's motion to dismiss is granted with respect to plaintiff's negligent misrepresentation claim.

Motion Sequence 4 - Seta

The Seta Defendants were retained by Sponsors [FN7] to provide consulting services for the Project pertaining to the design of the exterior walls, roofing and waterproofing. A copy of the Seta Defendants' retainer agreement indicates that, among other responsibilities, the Seta defendants were to "[r]eview architectural drawings and details as they pertain to roof and waterproofing, membrane materials," "[a]ssist architect with performance criteria for air, water and structural test," and "[c]onduct observation of work in progress (2-3 days a week), take photographs and prepare weekly reports concerning the contractor's conformance to plans and specifications."

Plaintiff asserts claims of breach of contract, breach of express warranty, negligence, strict liability, professional malpractice, and negligent misrepresentation against the Seta Defendants. Seta Defendants move, pursuant to 3211(a)(1) and (7), and 3016(b), to dismiss plaintiff's complaint.

Breach of contract

Seta Defendants move to dismiss plaintiff's breach of contract claim on the grounds that plaintiff was never in privity with Seta Defendants. Plaintiff claims that it was in privity with Seta because it was an intended third party beneficiary of its agreement with Sponsors, as evidenced by the purported assignment of warranties. However, the documentary evidence establishes that Seta and Sponsors did not intend to benefit plaintiff.

As Seta notes, and plaintiff does not dispute, the retainer letter references standard conditions that were attached and made part of the agreement. The first paragraph of those standard conditions states, in part: "[n]othing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or FSA." The agreement defeats plaintiff's contention as it explicitly states that the parties do not intend to create a benefit to third parties (*see Edward B. Fitzpatrick, Jr. Contr. Corp. v County of Suffolk*, 138 AD2d 446, 450 [2d Dept 1988])("Where a provision in the contract expressly negates enforcement by third parties, that provision is controlling."). Accordingly, the breach of contract claim is dismissed.

Breach of express warranty, negligence, and strict liability

For the reasons previously discussed, plaintiff's claims for breach of express warranty, negligence, and strict liability are dismissed as to Seta Defendants.

Professional malpractice

In the absence of allegations showing a relationship approaching privity, plaintiff's malpractice claim is dismissed (*see 905 5th Associates, Inc.*, 85 AD3d at 668).

Negligent misrepresentation

For the reasons set forth in the Scarano motion discussion, plaintiff's claim for negligent [*17]misrepresentation is dismissed as to Seta.

Motion sequence 5 - Schwartz

On June 9, 2004, S. Schwartz Engineer, PLLC was retained to perform mechanical engineering services in connection with the Project. In its complaint, plaintiff alleges that S. Schwartz Engineer, PLLC and Schwartz, individually, contracted with Sponsors and breached duties of care owed pursuant to that contract. In its opposition papers, however, plaintiff states that the Schwartz Defendants contracted with Defendant *Scarano*, and produces an agreement dated June 9, 2004, between S. Schwartz Engineer, PLLC and Defendant Scarano.

Plaintiff asserts claims for breach of contract, breach of express warranty, negligence, professional malpractice, and negligent misrepresentation against Schwartz PLLC and Schwartz, individually (the "Schwartz Defendants"). Simon Schwartz, appearing pro se, moves to dismiss the complaint and any cross claims asserted against him. Schwartz characterizes his motion as one brought

pursuant to CPLR 3211, but because he has answered and issue has been joined, it will be treated as one brought pursuant to CPLR 3212. Although Schwartz attempts to move on behalf of both Schwartz Defendants, as noted at oral argument, Schwartz cannot represent Schwartz PLLC, as PLLCs, like corporations, must be represented by counsel. Accordingly, the Court will only consider the motion to dismiss with respect to claims against Schwartz individually.

While "corporate officers may be held personally liable for personal torts committed in the performance of their duties for their corporation, . . . corporate officers may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts"(*Westminster Constr. Co. v Sherman*, 160 AD2d 867, 868 [2d Dept 1990]; *see Merritt v Hooshang Constr.*, 216 AD2d 542, 543-44 [2d Dept 1995](officer not personally liable merely because while acting for builder corporation he made decisions that resulted in corporation's breach of contract). The agreement, addressed to Scarano and Associates, is printed on S. Schwartz Engineer, PLLC letterhead and makes references to the PLLC with no indication that Schwartz, individually, intended to bind himself. Moreover, the Offering Plan identifies the PLLC as the mechanical engineer hired in connection with the project and makes no mention of Schwartz individually. At oral argument, plaintiff contended that Schwartz should be personally liable because he submitted a projected cost budget plan that was made part of the Offering Plan. However, a review of the Offering Plan shows that he submitted the plan on behalf of S. Schwartz Engineer, PLLC. As there is no evidence that Schwartz intended to bind himself personally under the contract, the claims asserted against Schwartz individually are dismissed.

Motion Sequence 6 - Ryder & Jaccarino

In 2007, Ryder entered into an agreement with Sponsors to act as the construction manager of the Project. The agreement was signed by John Fraser for Sponsors and by Frank Mosomillio, as president, for Ryder. At the time of construction, Jaccarino was employed by Ryder. Later, on June 1, 2012, Jaccarino, along with two partners, purchased Ryder.

Plaintiff asserts claims for breach of contract, breach of express warranty and strict liability against Ryder and Jaccarino. Defendants Ryder Construction, Inc. and Carl Jaccarino move pursuant to CPLR 3211(a)(7) to dismiss plaintiff's complaint and any cross-claims against Jaccarino individually.

Jaccarino argues that, at the time of the Project, he was merely an employee, the senior project manager and director of construction, so he should not have been named as a defendant [*18]absent allegations that he acted outside the scope of his employment, which he contends that he did not. There are no allegations that Jaccarino acted outside the scope of his employment during the Project. Plaintiff argues that at the time of the Project, Jaccarino was Vice President of Ryder and thus should be liable as an officer.

While "corporate officers may be held personally liable for personal torts committed in the performance of their duties for their corporation, . . . corporate officers may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts"(*Westminster Constr. Co. v Sherman*, 160 AD2d 867, 868 [2d Dept 1990]). Even assuming, for the purposes of this motion, that Jaccarino was an officer at the time of the alleged defective work, the gravamen of plaintiff's complaint is that Ryder failed to perform its contractual duties. As this claim sounds in breach of a contract, to which Jaccarino individually was not a party, according to the clear documentary evidence, the Complaint must be dismissed as to Jaccarino (*see Merritt v Hooshang Constr.*, 216 AD2d 542, 543-44 [2d Dept 1995](officer not personally liable merely because while acting for builder corporation he made decisions that resulted in corporation's breach of contract).

Motion Sequence 7 - Sharon Defendants

On March 18, 2004, Sharon entered into an agreement with Scarano to provide structural and mechanical engineering services for the Project, whereby it was to, among other responsibilities, inspect the site and observe conditions, review architectural plans, perform structural analysis and determine the basic framing system, prepare plumbing and sprinkler plans, and assist in obtaining DOB approval. Then, on April 19, 2010, Sharon entered into an agreement with Savanna Partners, one of the Sponsors, to provide structural engineering services, including "[e]ngineering design of Structural systems for the wall repairs, temporary shoring and excavation protection." Sharon also entered into an agreement directly with plaintiff, but not until March 8, 2012, months after the alleged construction defects were discovered.

Plaintiff asserts claims for breach of contract, breach of express warranty, negligence, professional malpractice, and negligent misrepresentation against the Sharon defendants, alleging that Sharon agreed to provide services in a first-class manner, but failed to do so, which resulted in the alleged defects in the Building. Sharon Defendants move to dismiss the Complaint. Although Sharon Defendants characterize their motion as brought pursuant to 3211, the Court notes that they have answered and issue is joined, so the motion is treated as brought pursuant to CPLR 3212.

Breach of contract

Sharon argues that the breach of contract claim must be dismissed against it, as it was not in privity with plaintiff and assigned no warranties to plaintiff. In support of its motion, Sharon submits an affidavit from its president, Ronen Sharon, stating that its agreements were only with Scarano and Sponsors, respectively, and Sharon did not intend to benefit any third parties, such as

plaintiff. Plaintiff claims that it was in privity with Sharon because it was an intended third party beneficiary of its agreement with Sponsors, as evidenced by the purported assignment of warranties. However, the documentary evidence, the two agreements submitted by both plaintiff and Sharon, reveals no warranties made by Sharon, and plaintiff has not identified any such warranties or produced evidence that they were assigned to it. As it fails to raise an issue of fact requiring resolution at trial, plaintiff's breach of contract claim is dismissed with respect to Sharon (*see Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Brothers Development Corp.*, 182 Ad2d 664, 665 [2d Dept 1992]). [*19]

Breach of express warranty & negligence

For the reasons discussed above with respect to the Scarano motion, the claims for breach of express warranty and negligence are dismissed as to Sharon.

Professional malpractice

In the absence of evidence suggesting a relationship approaching privity, plaintiff's malpractice claim is dismissed (*see 905 5th Associates, Inc.*, 85 AD3d at 668).

Negligent misrepresentation

Plaintiff's claim that Sharon made negligent misrepresentations in the plans and drawings it drew up to be used in the Offering Plan is dismissed for the reasons discussed in the Scarano motion above.

Motion Sequence 8 - AE Design

On June 4, 2004, AE Design was retained by Sponsors' predecessor to provide concept drawings for the Project. Subsequently, on March 8, 2007, AE Design entered into an amended agreement with Sponsors. Pursuant to the agreement with Sponsor, AE Design was to provide interior design drawings, with "all drawings prepared by [AE Design] [to] be reviewed and approved by the Project's architect and/or expeditor to ensure code compliance and public safety issues including but not limited to ADA compliance." The Offering Plan refers to AE Design as a "Design Architect."

Plaintiff asserts claims for breach of contract, breach of express warranty, negligence, professional malpractice, and negligent misrepresentation against AE Design. AE Design moves

pursuant to 3212 for summary judgment dismissing the complaint and any cross-claims against it.

Breach of contract

AE Design argues that the breach of contract claim must be dismissed against it, as it was not in privity with plaintiff and assigned no warranties to plaintiff. In support of its motion, AE Design provides an affidavit from AE Design's principal, Andreas Escobar, stating that it entered into an agreement with Kay, Sponsor's predecessor, then it entered into an amended agreement with Sponsors when they took over the Project. A review of the agreements, provided by both plaintiff and AE Design, reveals that they contain no warranties made by AE Design. Plaintiff fails to produce any evidence suggesting that AE Design made warranties to Sponsors and that such warranties were subsequently assigned to plaintiff. As plaintiff has failed to demonstrate the existence of a factual dispute requiring resolution at trial, AE Design's motion for summary judgment is granted with respect to the breach of contract claim *(see Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Brothers Development Corp.*, 182 Ad2d 664, 665 [2d Dept 1992])(summary judgment properly granted when plaintiff board failed to demonstrate triable issues of fact as to whether it was a third-party beneficiary of contract between project owner and contractor).

Breach of express warranty & negligence

For the reasons discussed above with respect to the Scarano motion, plaintiff's claim for breach of express warranty and negligence are dismissed

Professional malpractice

In the absence of evidence suggesting a relationship approaching privity, plaintiff's malpractice claim is dismissed (*see 905 5th Associates, Inc.*, 85 AD3d at 668).

Negligent misrepresentation

Plaintiff argues that AE Design created drawings to be reviewed by the Project's [*20]architects, which it knew would be relied upon by plaintiff, the ultimate consumer. For the reasons set forth in the Cucich motion discussion, plaintiff's claim for negligent misrepresentation is dismissed as to AE Design as plaintiff fails to produce evidence or even allege facts establishing that AE Design knew and intended plaintiff to reply upon the purported misrepresentations.

Counterclaims and cross claims

Plaintiff complains of various defects, ranging from problems with the Building's foundation, leaking from ceilings, noxious odors, and improperly designed terrace railings. All moving defendants were involved in the construction or design of the Building, except for Penmark and AE Design, which have established through documentary evidence that they were merely the managing agent and interior design consultant, respectively. Many issues of fact have been raised by the moving defendants as to the cause of the alleged defects and the potential liability of co-defendants to each other under theories of indemnification or contribution. A determination of the merits of these claims requires further factual development. Accordingly, all cross claims against moving defendants which have been dismissed from this case as a result of this decision, are dismissed without prejudice to the right of an aggrieved co-defendant to commence a third party action within 30 days.

CONCLUSION

As all of plaintiff's claims are dismissed as to Penmark, the complaint against Penmark is dismissed with leave to plaintiff to replead with respect to any viable contract causes of action related to the Management Agreement.

As all of plaintiff's claims against Scarano Defendants are dismissed, the complaint is dismissed as to Scarano Defendants.

As all of plaintiff's claims against Cucich Defendants are dismissed, the complaint is dismissed as to Cucich Defendants.

As all of plaintiff's claims against Seta Defendants are dismissed, the complaint is dismissed as to Seta Defendants.

As all of plaintiff's claims are dismissed as to Simon Schwartz, individually, the complaint is dismissed only as to Simon Schwartz, individually, without prejudice to his litigating his cross and counterclaims against the remaining parties.

As all of plaintiff's claims are dismissed as to Jaccarino, the complaint is dismissed as to Jaccarino, individually.

As all of plaintiff's claims against Sharon Defendants are dismissed, the complaint is dismissed

as to Sharon Defendants.

As all of plaintiff's claims against AE Design are dismissed, the complaint is dismissed as to AE Design.

All cross claims against the moving defendants are dismissed without prejudice to an aggrieved defendant bringing a third party action against a co-defendant who has been dismissed from this case as a result of this decision.

This constitutes the decision and order of the Court.

E N T E R:

_____

HON. CAROLYN E. DEMAREST, J.S.C.

Footnotes

Footnote 1: The "Sponsor Defendants" comprise 125NORTH10, LLC d/b/a 125 North 10 LLC, 125N 10 d/b/a 125NORTHLO LLC, 125 N 10 d/b/a 125NORTH10 MM, LLC, Savanna Services L.L.C. d/b/a Savanna Partners d/b/a Savanna Fund, Christopher Schlank, Nicholas Bienstock, Peter Petron, John Fraser a/k/a John R. Fraser, Investcorp International Holdings Inc. d/b/a Investcorp, and Core Group Marketing, LLC d/b/a Core Group Marketing.

Footnote 2: Based on the pleadings, the Court cannot determine when Sponsors ceased controlling the Board.

Footnote 3: The following defendants answered and asserted cross-claims against various co-defendants: the Sponsor Defendants, the Reich Defendants, the Cucich Defendants, the Sharon Defendants, and the Schwartz Defendants.

The Cucich Defendants attach what are purportedly answers with cross-claims by the AE Defendants and by Ryder and Jaccarino, but a review of the County Clerk's records indicates that no such answers appear to have been filed.

Footnote 4: Both Scarano Architect, PLLC and Robert Scarano, Jr., individually, are named as defendants.

Footnote 5: Notably, despite this position, in paragraph 127 of the Complaint, plaintiff states that

Cucich was retained as Architect of Record.

Footnote 6:

Plaintiff urges the Court to deny Scarano's motion as premature because discovery has not yet taken place. However, plaintiff does not identify any evidence in defendants possession that, if produced, would raise a triable issue of fact (*see* CPLR 3212(f); *cf. Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 715 [2d Dept 2005]).

Footnote 7: Plaintiff, in its complaint, states that this relationship began in 2005 but both plaintiff and Seta attach an agreement signed by Sponsors and Seta that was drafted June 20, 2007, and signed August 8, 2007.

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