

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 3

Index Number : 603231/2008

Justice

SILVERMAN, BLAKE

INDEX NO. 603231/08

vs

SHAOUL, BENJAMIN

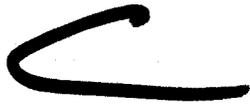
MOTION DATE 7/16/09

Sequence Number : 005

MOTION SEQ. NO. 005

DISMISS

MOTION CAL. NO. _____



in this motion to/for Dismiss/Amend

PAPERS NUMBERED

1
2
3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

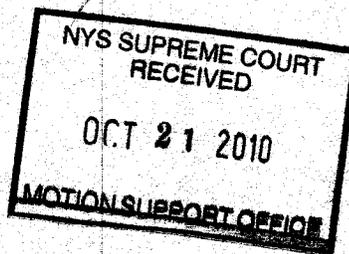
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION



Dated: 10-20-10

Eileen Bransten

HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
BLAKE SLIVERMAN AND TRACY SILVERMAN,

Plaintiffs,

-against-

Index No. 603231/08
Motion Seq. Nos: 05-07
Motion Date: 7/16/09;
12/17/09

BENJAMIN SHAOUL, MARK RAVNER, LEMADRE
DEVELOPMENT, LLC, LEMADRE MEZZ, LLC, M&B
REALTY DEVELOPMENT, LLC, MAGNUM
MANAGEMENT, LLC, CANTOR AND PECORELLA,
INC., ISAAC & STERN ARCHITECTS, P.C., ISMAEL
LEYVA ARCHITECT, P.C., MG ENGINEERING, P.C.,
MGJ ASSOCIATES, ROBERT SILMAN ASSOCIATES,
P.C., and PAV-LAK CONTRACTING, INC.,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.:

Plaintiffs, the purchasers of a condominium unit which has allegedly suffered water and mold damage, bring this action seeking recovery against the condominium building's sponsor, developer, design professionals and contractors. Defendants MG Engineering, P.C. ("MG"), MGJ Associates ("MGJ", and, with MG, the "MG Defendants"), Ismael Leyva Architect, P.C. ("Leyva"), Robert Silman Associates ("Silman") and Pav-Lak Contracting, Inc. ("Pav-Lak") have made various motions and cross-motions to dismiss and/or for summary judgment (CPLR 3211 [a] [1] and [7], CPLR 3212). Plaintiffs cross-move to serve a Second Amended Verified Complaint adding a claim that they are intended third-party beneficiaries to each of the contracts between the various moving and non-moving defendants.

Background

Defendant Lemadre Development, LCC (“Lemadre”) is the sponsor, owner, and/or developer of the Yves Condominium at 166 West 18th Street, New York, New York (the “Building”), a residential apartment building with 38 condominium units (Amended Verified Complaint [“AC”] ¶¶ 1, 3). Defendant Magnum Management, LLC (“Magnum”) is the Building’s property manager was responsible for the construction and/or maintenance of the Building (AC ¶ 7). Lemadre and Magnum are ultimately controlled by defendants Benjamin Shaoul (“Shaoul”) and Mark Ravner (“Ravner”). Specifically, Shaoul and Ravner are the members of M&B Realty Development LLC (“M&B Realty”), which is the sole member of M&B Mezz, LLC (“M&B Mezz”). M&B Mezz is the sole member of Lemadre Mezz, LLC (“Lemadre Mezz”), which, in turn, is the sole member of Lemadre (AC ¶¶ 4-6). Shaoul and Ravner allegedly have an undisclosed ownership and/or managerial interest in Magnum (AC ¶¶ 8-9).¹

Pav-Lak was the general contractor for the Building (AC ¶ 16). Defendants Isaac & Stern Architects, P.C. (“Isaac & Stern”) and Leyva were architects responsible for the Building’s design (AC ¶¶ 11-12). The MG Defendants were responsible for designing, engineering, planning and overseeing the mechanical aspects of the Building’s construction, including the exterior window system (AC ¶¶ 13-14).

¹ The Lemadre entities, Magnum, and the individual defendants will be collectively referred to as the “Shaoul/Ravner Defendants.”

Silman was responsible for designing, engineering, planning and overseeing the structural aspects of the Building's construction (AC ¶ 15).

On October 25, 2007, plaintiffs Blake and Tracy Silverman (the "Silvermans") entered into a contract of sale with Lemadre to purchase unit 7B (the "Unit") in the Building for \$2.1 million (AC ¶¶ 1, 24; Plaintiffs' Statement of Material Facts ["Plaintiffs' Fact Statement"] ¶ 1). Between August 26, 2008 and September 16, 2008 (the date of closing of the sale of the Unit), the Silvermans and an agent of the Shaoul/Ravner Defendants conducted walk-through inspections of the Unit. On each occasion, water leaks were observed and the Shaoul/Ravner Defendants promised to remedy the defects (AC ¶¶ 28-36; Plaintiffs' Fact Statement ¶ 1).

The Silvermans closed on the Unit on September 16, 2008. Plaintiff's allegedly relied on the Shaoul/Ravner Defendants' assurances that the water infiltration problems would be repaired no later than September 22, 2008 (AC ¶¶ 37, Plaintiffs' Fact Statement ¶ 3).

Beginning on October 1, 2008, the Silvermans advised the Shaoul/Ravner Defendants that the water leak problem and various punch-list issues had not been resolved. After a meeting at the Unit on October 3, 2008, the Silvermans were again assured that the defects would be remedied. On October 9, 2008, the Silvermans were advised that the problems had all been corrected and that they could move in (AC ¶¶ 39-43; Plaintiffs' Fact Statement ¶ 4).

On October 21, 2008, however, the parties agreed to another punch-list which included the water leak issue. Following a period of heavy rain and high winds in New York City between October 25th through the 28th, Plaintiffs allege that the living room and bedrooms in the Unit suffered severe water damage which destroyed the floor, dry-wall, paint, ceiling and the Silvermans' personal belongings. The flooding also allegedly created a health-threatening mold condition and rendered the Unit uninhabitable. Plaintiffs contend that the water infiltration was caused, *inter alia*, by various defendants' defective and negligent design, construction, engineering and installation of the floor-to-ceiling window systems (AC ¶¶ 44-49, 115, Plaintiffs' Fact Statement ¶ 5-6).

The Motions to Dismiss

Each moving defendants alleges that it was not responsible for the work that caused the water leakage. Additionally, defendants Leyva, Silman and Pav-Lak contend that they were not in privity with plaintiffs, and Leyva and Pav-Lak attack the sufficiency of the punitive damages claims. For the following reasons, each defendants' motions are denied except to the extent that plaintiff's claim for punitive damages against them is dismissed.

The MG Defendants' Motion to Dismiss

The MG Defendants contend that their work was limited to mechanical engineering services which did not involve the design or construction of the floor-to-

ceiling window system. In support of this contention, they submit a copy of their April 5, 2006 contract with Magnum, which indicates that the scope of their work was “the preparation of complete Mechanical, Electrical, Fire Alarm, Plumber and Sprinkler (“MEP”) engineering documents” for the construction of the Building (Affidavit of Michael Gerazounis, P.E. [“Gerazounis Aff.”] ¶ 8; Ex. B, Article 1). The MG Defendants also submit eight additional agreements for mechanical engineering services at the Building, which they contend were not related to the window system (Gerazounis Aff. ¶ 10; Exs. C through J). Defendants claim that the mechanical systems they designed were to be installed after the Building’s construction, and, thus, after the construction of the allegedly defective window system.

Plaintiffs counter that the complaint’s allegations of negligence were not limited to the window system, but extended to the design of the entire Building (AC ¶¶ 114, 115). Furthermore, plaintiffs have submitted the affidavit of a registered architect, Don Erwin, who concludes that the MG Defendants’ work may have been a “substantial contributing cause” to the water leakage problem. Erwin avers that upon inspecting the Unit he observed water in the area of the HVAC system designed by the MG Defendants. Erwin states that the examination of the actual design drawings for that system together with the MEP design drawings, memoranda, change orders, approvals and other documents would be required to properly assess the MG Defendants’ possible liability (Affidavit of Don

Erwin, R.A. [“Erwin Aff.”] ¶¶ 2, 3). Erwin also asserts that one of the documents submitted by the MG Defendants indicates that they re-evaluated the design of a cooling system which may have had an impact on the water infiltration problem, and that another document reveals modifications to the plumbing and sprinkler systems, which each involve water distribution to the Building’s units (Erwin Aff. ¶ 4).

The court concurs with plaintiffs that the complaint implicates the defective design of the entire Building as well as the individual Unit, notwithstanding the complaint’s particular focus on the floor-to-ceiling window system. Furthermore, assuming *arguendo* that the MG Defendants’ conclusory averments that their work could not have contributed to the water problem establish a prima facie case, summary judgment must be denied in view of the factual issues raised by plaintiffs’ expert’s affidavit (*see Kung v Zheng*, 73 AD3d 862, 863 [2d Dept 2010]). The MG Defendants’ additional arguments based upon their contention that the mechanical system was an internal system, and upon the fact that certain repairs were made to the Building, cannot be considered as they were raised solely on reply (*see Batista v Santiago*, 25 AD3d 326, 326 [1st Dept 2006]).

Insofar as the complaint seeks punitive damages against the MG Defendants, those claims are dismissed for the reasons set forth below in the discussion of defendant Leyva’s motion.

Defendant Leyva's Motion to Dismiss

Defendant Leyva asserts that as the design architect, it performed services which were unrelated to the functionality of the curtainwall or the watertight integrity of the Building's construction (Defendant Ismael Leyva's Statement of Facts ["Leyva's Fact Statement"] ¶ 10). Leyva relies on the affidavit of one of its registered architects, Manish Chadha, who was a senior associate with administrative involvement in the Building's design. Chadha, in turn, relies on Leyva's May 1, 2006, and October 16, 2006, agreements with Magnum (Affidavit of Manish Chadha in Support of Defendant Ismael Leyva's Motion for Summary Judgment ["Chadha Aff."], Exs. A, B). Chadha contends that, pursuant to those agreements, Leyva reviewed construction documents for design intent only and that its review did not involve the assembly of specific items or inspections of any construction work done in the field (Chadha Aff., ¶ 10). Additionally, Chadha states that Leyva consulted on the aesthetic considerations for the Building, including the appearance of the curtainwall (Chadha Aff., ¶ 15). Leyva also argues that, as a matter of law, it cannot be held liable to plaintiffs in the absence of privity of contract with the plaintiffs, and that plaintiff's punitive damages claim is insufficiently pled.

Plaintiffs argue that Leyva's admitted involvement with the design of the curtainwall and review of contractor documents to ensure conformance with design intent is sufficient to raise a question of fact as to liability. Furthermore, plaintiffs contend that

purchasers of a condominium unit can recover in negligence for non-economic losses resulting from dangerous conditions due to construction defects.

Leyva's motion is denied except to the extent of dismissing the punitive damages claim. First, given Leyva's conceded design work on the curtainwall, it is impossible at this point to find as a matter of law that Leyva's input was not a contributing cause of the water infiltration problem. The Chadha affidavit is neither conclusive, nor particularly probative, on that issue. The affidavit is vague the affidavit does not supply a proper foundation for its conclusions. Chadha appears to merely parrot the language of the two agreements, which were both proposals created before any work was actually completed. Specifically, the May 1, 2006, agreement stated that it was intended to "outline the basis by which [Leyva was to] propose to provide architectural services" (Chadha Aff., Ex. A), and the October 16, 2006, agreement announced Leyva's future intent to "work with the curtainwall manufacturer to further develop details and oversee the Curtainwall Construction Administration" (Chadha Aff., Ex. B).

Although Chadha contends that the affidavit's statements are based on "communications, papers, reports, investigations and other materials contained in Leyva's file," only the preliminary agreements are provided by and discussed. According, Chadha's conclusion that Leyva's subsequent work was merely aesthetic and unrelated to the functionality of the curtainwall cannot be given conclusive weight at this stage of the

proceedings (see *Fredericks v North General Hosp.*, 289 AD2d 126, 126 [1st Dept 2001]). Plaintiffs' failure to submit a countering expert affidavit is of no moment, as the failure of Leyva's affidavit to establish a prima facie requiring dismissal mandates denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Diaz v Nunez*, 5 AD3d 302, 302-03 [1st Dept 2004]).

Leyva's argument that it is not in privity of contract with the Silvermans presents a more difficult question. In general, a plaintiff "cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship" (*Residential Bd. of Managers of Zeckendorf Towers v Union Square-14th St. Assocs.*, 190 AD2d 636, 637 [1st Dept 1993]; *Lake Placid Club Attached Lodges v Elizabethtown Builders, Inc.*, 131 AD2d 159 [3d Dept 1987]). However, plaintiffs argue that in view of their allegations regarding the mold hazard, under *Bd of Managers of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488 [1st Dept 1992]), "recovery in negligence is available for non-economic losses resulting from allegations of dangerous conditions in the building due to alleged construction defects" (*id.* at 490). Plaintiffs further urge that the privity problem can be cured by permitting them to amend the complaint to plead that they were third-party beneficiaries of the various contracts (*id.* at 489; *Bd. of Managers of Estates at Hillcrest Condominium IV v Hillcrest Estates Dev. Co.*, 205 AD2d 487 [2d Dept 1994]).

The issue is affected by the First Department's decision in *Sykes v RFD Third Ave. 1 Assocs, LLC*, 67 AD3d 162 [1st Dept 2009]). *Sykes*, which was issued while motions herein were being briefed, calls into question some aspects of the Appellate Division's prior ruling in *Astor Terrace*. Specifically, *Sykes* found that it was "questionable" whether *Astor Terrace* was good law with respect to its resolution of the negligent misrepresentation claim (*Sykes*, 67 AD3d at 169). *Sykes* found that *Astor Terrace* was in "direct conflict" with a line of Court of Appeals cases (*Credit Alliance Corp. v Andersen & Co.*, 65 NY2d 536 [1985]; *Parrott v Coopers & Lybrand*, 95 NY2d 479 [2000]) which set a stringent standard for privity, including the need for evidence that the plaintiff was a "known party" to the defendant and had either direct contact or dealings "linking" it to the plaintiff (*Sykes*, 67 AD3d at 167). *Sykes* also found *Astor Terrace* "inapposite" because in that case the court found that the plaintiff unit owners were intended third party beneficiaries of the contract between the sponsor and the engineers or design professionals (*Sykes*, 67 AD3d at 168).

The court does not find *Sykes* dispositive of the issues raised by this action. *Sykes* addressed only a negligent misrepresentation claim, not one for negligence as is alleged here. Although a negligence claim (pled as professional malpractice) in *Sykes* was also dismissed, the grounds for dismissal was the statute of limitations, rather than facial deficiency (*Sykes*, 67 AD3d at 165). Furthermore, *Sykes* did not disturb the holding in

Astor Terrace allowing for recovery in negligence where a hazardous condition is alleged. Accordingly, Leyva's motion to dismiss the negligence claim is denied.

Plaintiffs' claim for punitive damages is dismissed. The complaint "falls short of showing the high degree of moral turpitude, 'wanton dishonesty and utter malice necessary to an award of punitive damages'" (*Bd. of Managers of Waterford Ass'n, Inc. v Samii*, 68 AD3d 585, 586 [1st Dept 2009] [internal quotations and citation omitted]).

Defendant Silman's Motion to Dismiss

Silman's motion to dismiss suffers from the same defects as Leyva's. It is supported by the affidavit of a professional engineer, Joseph F. Tortorella, who recites the terms of an April 4, 2006 unsigned agreement between Silman and Lemadre (Affidavit of Joseph [sic] Tortorella, P.E. in Opposition to Plaintiff's Motion for Leave to Amend Their Verified Complaint and in Support of Robert Silman Associates, P.C.'s Cross-Motion for Summary Judgment Dismissing Plaintiff's Amended Verified Complaint and all Cross-Claims ["Tortorella Aff."], Ex. A). Tortorella avers that Silman was retained for structural engineering services limited to the performance of calculations, the preparation of structural design drawings, assisting contractors with questions concerning the drawings and reviewing structural shop drawings. Tortorella states that Silman was not involved in the design or construction of the floor-to-ceiling window system or waterproofing work on the Building.

Although plaintiffs have not countered with an expert's affidavit, the court finds that Silman has established a prima facie case that it is free from liability. Like Leyva's expert, Silman's expert relies exclusively on an executory contract which is not necessarily probative of the work actually performed. Moreover, the contract merely indicates that the design services were in connection with a "concrete residential structure," so it is impossible to determine at this juncture as a matter of law that the work did not affect the floor-to-ceiling window system or otherwise contribute to the water infiltration problem.

For the reasons discussed above in connection with Leyva's motion, Silman's argument for dismissal based upon lack of privity is rejected, but the plaintiffs' claim for punitive damages against Silman is dismissed.

Defendant Pav-Lak's Application to Dismiss

Defendant Pav-Lak has not served a formal motion to dismiss. Instead, in its opposition to plaintiffs' motion to amend, it adopted the arguments made by Leyva and Silman and requested summary judgment. For the reasons set forth above, the application is denied except to the extent that Plaintiff's claim for punitive damages against Pav-Lak is dismissed.

Plaintiffs' Motion to Amend

Plaintiffs' motion for leave to amend the complaint to include a third-party beneficiary claim is granted except as noted below.

Silman does not specifically address the motion, and Leyva's opposition is based upon the conclusory claim that plaintiffs will never be able to prove more than that they were incidental, rather than intended, beneficiaries of the relevant contracts. However, this is not an issue that can be resolved in the absence of discovery. "[T]he best evidence of whether contracting parties intended their contract to benefit third parties remains the language of the contract itself" (*Nepco Forged Prods., Inc. v Con. Edison Co.*, 99 AD2d 508, 508 [2d Dept 1984]). As indicated above, some condominium unit owners are granted third-party status by the agreements procured by the sponsor. Although "[w]here a provision exists in an agreement expressly negating an intent to permit enforcement by third parties . . . that provision is decisive," (*Nepco Forged Prods., Inc.*, 99 AD2d at 508; see *Mendel v Henry Phipps Plaza West, Inc.*, 6 NY3d 783 [2006]; *Bd. of Managers of Alexandria Condo. v Broadway/72nd Assocs.*, 285 AD2d 422 [1st Dept 2001]; *Edward B. Fitzpatrick, Jr. Const. Corp. v Suffolk Co.*, 138 AD2d 446 [2d Dept 1988]), it is not clear whether the record before the court contains all contracts and other documents necessary to make the relevant determination (*compare, Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009]).

Defendant Pav-Lak, however, has identified language in its Construction Management Agreement with Lemadre which defeats plaintiffs' claim to third-party beneficiary status. Paragraph 19.23 of that contract provides that "[t]his Agreement is not intended to confer any benefit or rights upon persons other than the parties hereto and the permitted assignees hereof." Accordingly, plaintiff's motion to amend is denied insofar as it seeks to assert a new third-party beneficiary claim against defendant Pav-Lak.

Accordingly, it is hereby

ORDERED that each defendants' respective motion to dismiss and/or for summary judgment are denied, except to the extent that plaintiffs' claim for punitive damages against each moving defendant is dismissed; and it is further

ORDERED that plaintiffs' motion/cross-motion for leave to serve a Second Amended Verified Complaint is granted, except as to defendant Pav-Lak Contracting, Inc., and it further

ORDERED that plaintiff is directed to serve a Second Amended Verified Complaint conforming with this decision with thirty days of notice of entry of entry of this order.

Dated: New York, New York
October 20, 2010

ENTER:



Hon. Eileen Bransten, J.S.C.