

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: Hon. Emily Pines
J. S. C.

Original Motion Dates: 05-08-2012; 05-22-2012 &
Motion Submit Date: 06-08-2012
Motion Sequence No.: 06-26-2012
007, 008, 009 & 010

[] FINAL
[X] NON-FINAL

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**SHERBROOKE SMITHTOWN OWNERS
CORP.,**

Plaintiff,

-against-

**JOHANNA MERSON, VERONICA DOWNES,
ELLIOTT UTRECHT, RUMAPLE, LLC., PAUL
J. HESSEL, JOHN FERRANTE, J. MERSON
MANAGEMENT CORP. a/k/a MERSON
PROPERTIES; MERSON PROPERTIES and
"JOHN DOE #1" through " JOHN DOE #5", the
last five (5) names being fictitious and unknown to
the Plaintiff,**

Defendants.

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This case arises out of alleged defects in the condition of premises which were converted into 48 cooperative apartments owned by the Plaintiff, Sherbrooke Smithtown Owners Corp, assertedly caused by Johanna Merson, the Sponsor Developer of the cooperative project, its management company, various engineers retained by the sponsor, the original Board of Directors of the corporation, who acted on behalf of the Sponsor, and the entity that transferred ownership of the subject premises to the sponsor Defendant. In fifteen causes of action contained in the Second Amended Complaint, the Plaintiff asserts causes of action against the various named Defendants for breach of

contract, breach of the rights of third party beneficiaries of contracts with the Sponsor, fraud, breach of fiduciary duties, aiding and abetting the breach of fiduciary duties, violations of the General Business Law, and Declaratory Judgment. In the four pending motions before the Court, certain Defendants seek Summary Judgment, dismissing certain of these causes of action and Plaintiff seeks Summary Judgment on its Declaratory Judgment cause of action against the Sponsor and Defendants Robert Chicco and CKC Equities LLC.

The first Summary Judgment motion is made on behalf of Defendants Johanna Merson (“Merson”), J. Merson Management Corp a/k/a Merson Properties, Merson Properties (“Property Manager”), Veronica Downes (“Downes”), Elliott Utrecht (“Utrecht”), and Robert Chicco (“Chicco”). More specifically, (1) Defendant Sponsor, Merson, seeks dismissal of the First Cause of Action against her based essentially upon breach of contract; (2) Defendant Property Manager seeks to dismiss the Second Cause of Action based upon breach of contract alleged against it; (3) Defendants Merson, Downes, Utrecht and Chicco seek to dismiss the Sixth Cause of Action alleged against them based upon alleged conspiracy to misrepresent and conceal the premises’ poor condition from prospective purchasers; (4) Merson, the Property Manager, Downes, Utrecht and Chicco all seek to dismiss the Tenth Cause of Action asserted against them, alleging participation in a fraudulent scheme to misrepresent and conceal the condition of the subject property; (5) Defendant Property Manager seeks to dismiss the Twelfth Cause of Action against it for wilful misconduct; (6) Defendants Merson, Downes, Utrecht and Chicco seek to dismiss the Eleventh Cause of Action against them alleging breach of their fiduciary duties to the Plaintiff; (7) Defendants Merson, Property Manager, Downes, Utrecht and Chicco seek to dismiss the Twelfth Cause of Action asserted against them for aiding and abetting each other in the breach of their fiduciary duties; (8) Defendant Merson seeks to dismiss the Fourteenth Cause of Action alleged against her asserting that she engaged in fraudulent concealment of the premises’ conditions and needs in violation of General Business Law § 349 and (9) Defendants Merson and Chicco seek to dismiss the Fifteenth Cause of Action asserted against them for Declaratory Judgment that Defendant CKC is not a holder of “Unsold Shares”, in a number entitling it to select a member of Plaintiff’s Board of Directors.

Defendant RuMaple cross moves for Summary Judgment and is seeking to dismiss the Third Cause of Action against it for breach of contract and/or breach of agreement for which Plaintiff was an intended third party beneficiary; and to dismiss the Thirteenth Cause of Action alleged against it for aiding and abetting the Sponsor in her breach of her fiduciary duty to Plaintiff.

Defendant CKC cross moves for Summary Judgment and is seeking to dismiss the Fifteenth Cause of Action alleged against it seeking a Declaratory Judgment that it is not the holder of three “Unsold Shares”; and, upon dismissal, a declaration entitling it to select a member of the Plaintiff’s Board of Directors.

Plaintiff Sherbrooke Smithtown Owners Corp (“Sherbrooke”) cross moves for Summary Judgment against Defendants Merson, Chicco and CKC on its Fifteenth Cause of Action seeking a Declaratory Judgment that CKC is not a Holder of “Unsold Shares” and is not entitled to designate a seat on the Plaintiff’s Board of Directors.

Plaintiff opposes the various Summary Judgment motions made by the Defendants as set forth and Defendants Merson, Chicco and CKC oppose Plaintiff’s motion for Summary Judgment.

The Court notes that Defendants Paul J. Hessel and John Ferrante, who are both appearing pro se in this action, have not made motions with regard to the causes of action asserted against them.

With regard to the First Cause of Action against the Sponsor, that Defendant argues that no private cause of action arises out of alleged omissions and misrepresentations in an Offering Plan and that such are within the realm of the Attorney General under the Martin Act, citing *Hamlet on Olde Oyster Bay Home Owners Ass’n v Holiday Organization, Inc*, 65 AD3d 1284 (2d Dep’t 2009). However, even assuming that a private right of action exists, Defendant Sponsor asserts that the record developed

during the discovery process is devoid of any evidence of breach of contract, fraud, falsity, scienter or reliance on the Plaintiff's part. Accordingly, the Sponsor asserts that the record lacks any indication whatsoever that the proposed budget for the premises was inadequate, that the premises were not in good condition, and/or that any of the Defendants had knowledge that such was the case. In this regard, Defendant Sponsor's counsel relies on the testimony of Defendant and civil engineer Defendant Ferrante that the budget was adequate and accurate; and the Defendant engineer Hessel's testimony that the Premises were in good condition at the time of his inspections, which included walking the grounds, observing sidewalks, patios stairs, parking lot, exterior walls, electrical panels and service boxes, heating systems, gas systems, plumbing systems, boilers, crawl spaces, roofs and apartment interiors. Similar conclusions were contained in an Appraisal and Building Condition Report dated November 10, 2006, according to the Defendant Sponsor, setting forth that the premises were in good condition produced through independent assessments conducted as a result of applications for loans through NCB. Defendant Sponsor further relies on an Engineering report produced by Velocity for NCB. The Sponsor also asserts that in response to inquiries by Velocity, the Town of Smithown set forth in 2006 that there were no outstanding building violations for the subject site.

The Sponsor herself avers that she diligently kept the Premises in good condition since her ownership began in 1977; that she updated and repaired the same in 2001 in preparation for the conversion; and that she retained the Property Manager to maintain the Premises after the conversion to oversee necessary repairs and maintenance. The Sponsor further alleges that at no time did she as Sponsor rush unit owners to closing, that they were free to bring their own architects or engineers to the premises and each had its own attorney at the various closings for purchase.

With regard to the Second Cause of Action, Defendant Property Manager again asserts, for all the same reasons, including the numerous inspections and reports as well as its own proper performance of its maintenance responsibilities, that the record obtained during discovery is devoid of any evidence that such party breached its

maintenance contract.

Defendants again assert that no evidence has been set forth with regard to the Sixth Cause of Action against Merson, Downes, Utrecht and Chicco for fraud in the inducement, based upon the alleged misrepresentations set forth above, as no misrepresentations were assertedly made. With regard to the Tenth Cause of Action against the same Defendants for participation in such fraud, and with regard to the Sponsor, Property Manager, Downes, Utrecht and Chicco for aiding and abetting the breach of their fiduciary duties (Thirteenth Cause of Action), in connection with the allegations that they acted in concert to conceal and misrepresent the existence of substantial defects in the Premises as well as the budget, such Defendants again set forth the testimony of their engineers, Board members and Sponsor as proof of all of the work performed on the premises before, during and following the sale of the premises. In addition, in support of the motion with regard to these allegations, Defendant Chicco sets forth that there was no concealment with regard to the Offering Plan; Defendant Downes testified that in many years of fielding telephone calls regarding premises complaints, there was nothing serious brought to her attention; and Defendant Utrecht sets forth that Merson assured the initial Board that the premises were always maintained, that she made repairs prior to the conversion and that many of the alleged defects asserted are clearly false. For all the same reasons as set forth above, Defendant Property Manager seeks to dismiss the Twelfth Cause of Action against him, which accuses it of wilful misconduct in its duties. With further regard to the Tenth Cause of Action asserted against Defendants Merson, Property Manager, Downes, Utrecht and Chico, those Defendants argue that the fraud claim is not pled with the specificity required under CPLR 3016. With regard to the Tenth Cause of Action asserted against Defendants Merson, Property Manager, Downes, Utrecht and Chico, those Defendants argue that the fraud claim is not pled with the specificity required under CPLR 3016.

Defendants Downes, Utrecht and Chicco move to dismiss the Eleventh Cause of Action asserted against them for breach of their fiduciary duties, first on the grounds that the three-year statute of limitations applies and those three Defendants were not Board Members for over three years before this lawsuit was commenced. In addition, the

Sponsor and the former Board Members argue for the same factual reasons as set forth above with regard to budgetary improprieties and the condition of premises issues, that there is no evidence to support the Eleventh Cause of action against them.

Again for the same reasons, i.e., there have been no factual bases set forth by the Plaintiff, the Defendant Sponsor moves to dismiss the Fourteenth Cause of Action, which essentially accuses the Sponsor of fraudulent statements made in mailings and advertisements with regard to the premises under GBL § 349.

Finally, Defendants Sponsor and Chicco move to dismiss the Fifteenth Cause of Action as they assert that Article III Section 2 of the By-Laws sets forth that the owner of “Unsold Shares” of three units or more is entitled to designate at least one member of the Board of Directors and such purchaser, CKC, had so designated Defendant Chicco.

Defendant RuMaple’s cross motion seeks Summary Judgment dismissing the Third Cause of Action asserted against it for breach of the Contract of Exchange dated June 12, 2003, as well as the Thirteenth Cause of Action alleging that such Defendant aided and abetted the Sponsor and Board members in breach of their fiduciary duties to the Plaintiff. RuMaple asserts that the documentary evidence demonstrates that it did not execute the Contract of Exchange as a party; but, rather, is merely mentioned in such document as the owner of the premises prior to the cooperative conversion. RuMaple sets forth that such Contract of Exchange establishes it solely that as a prior owner, and states that it transferred title to the subject premises in “As Is” Condition. With regard to the Thirteenth Cause of Action for aiding and abetting breach of its fiduciary duties, RuMaple asserts that as established by the transfer deed, its involvement with the transaction concluded on June 4, 2004; and it, therefore, simply could not have participated in any breach of the Sponsor’s or Board’s fiduciary duties. Nowhere in any agreements between the Sponsor and Plaintiff, according to RuMaple, did that Defendant make any representations or warranties. According RuMaple, the Plaintiff has not come forth during disclosure with any evidence that the Contract of Exchange gave RuMaple any duties with regard to the condition of the Premises. In addition, RuMaple essentially supports the arguments made by the Sponsor and former Board Members that there is no

evidence of any misrepresentations concerning the conditions of the subject premises and that the allegations made are not subject to a private right of action under the Martin Act.

Defendant CKC Holdings LLC (“CKC”) also cross moves for Summary Judgment, seeking to dismiss the Fifteenth Cause of Action asserted against it, which seeks a Declaration that it is not the holder of three “Unsold Shares” and, therefore, is not entitled to select a member of the current Board of Directors. According to Robert Chicco, he and a partner formed CKC to acquire three units as “Unsold Shares” and that such was necessary to provide the LLC with the flexibility necessary to provide that investor with the opportunity to rent and then sell the units maintaining representation on the cooperative Board of Directors in the interim. He sets forth that the Sponsor designated CKC as the Holder of “Unsold Shares”, in accordance with the provisions of the Offering Plan, the Proprietary Lease and other documents. Under paragraph 41 of the Proprietary lease under which each particular apartment is occupied, the leases state that “(U)nsold Shares retain their character as such . . . until an individual purchases the same for use and occupancy by himself or a member of his family”. Mr Chicco represents that no member of the LLC nor their immediate families have ever occupied the subject units and that when the units were sold by the Sponsor to CKC as “Unsold Shares”, such was acknowledged without objection by the Plaintiff which signed the Recognition Agreements. To the extent that Plaintiff argues that such units were sold to the LLC for value, Chicco, as drafter of the Offering Plan (as attorney), states that such means that the “Unsold Shares” would cease to be so designated when transferred by the Holder of “Unsold Shares” to a purchaser for value, as opposed to a nominee of the Holder who has not been designated as a Holder of Unsold Shares by the Sponsor.

Plaintiff opposes the various Summary Judgment motions. With regard to the general claim that its causes of action are barred because no private right of action is permitted for claims arising solely under the Martin Act, Plaintiff cites the Court of Appeals decision in *Assured Guar (UK) Ltd v J P Morgan Inv Management Inc*, 18 NY3d 341 (2011), which states that an injured investor may bring a common law claim (for fraud or otherwise) that is not predicated solely on the Martin Act and that the overlap between the two will not extinguish the common law remedies.

With regard to the various causes of action, it is the Plaintiff's assertion that it has set forth claims that the Sponsor, with the aid of the co-defendants, made affirmative misrepresentations in the Offering Plan and the Subscription Agreements, which incorporated the terms of the Offering Plan. Specifically, Plaintiff points to alleged misrepresentations by the Sponsor including the following: the premises were in good condition, the budgeted amount of \$6000 per year for maintenance was adequate; the \$9,729 reserve amount in the proposed budget was adequate; the buildings were structurally sound; the exterior walls were in good condition (with the exception of a few bricks); the windows checked were in good condition; each apartment was provided with a steel fireproof self-closing entrance door; thermostatically controlled zone valves regulate each apartment's temperature; any serious defects that were visually determinable have been noted; the basement, crawl space walls and floors were in good condition with no signs of moisture penetration; the windows were in good condition, with no signs of loose glazing or moisture penetration; the property was well maintained and no major replacements will be required in the near future.

Plaintiff further avers that it has demonstrated during discovery that the Sponsor utilized its dominion over RuMaple and the Property Manager (both owned by the Sponsor) in order to conceal these issues and retained professionals who failed to perform their duties. In this regard, Plaintiff refers to statements by Hessel that he failed to inspect crawl spaces and could not state what would lead him to determine that a building was not structurally sound. Plaintiff refers, in addition, to an action by the Sponsor, with the aid of her hand-picked "puppet" Board of Directors and the Property Manager, to deal with a destructive termite and carpenter ant infestation beneath Building #1, by merely placing an automobile type jack under the premises to support the building and shore up some of the rotten and deteriorated wood with inadequate 2 x 4s. Once the Premises were converted and the problem was discovered portions of the building had to be vacated and major repairs conducted.

Plaintiff states that while the Sponsor Defendant controlled the Board Defendants, consisting of her attorney, secretary and husband, as well as her wholly owned Property Manager, she suppressed expenses and artificially lowered the budget by refusing to

maintain the premises. Only once the Sponsor Defendant was no longer in control of the Board, according to Plaintiff, did Plaintiff discover serious problems with the buildings' roofing, chimneys, exterior brick masonry and vinyl facades, walkways, steps and grades, windows, crawl spaces, apartment entrance doors, and heating controls.

Plaintiff avers, moreover, that the Sponsor Defendant discouraged purchasers from having independent inspections and that Defendants Merson and Chicco informed purchasers that they were at risk of losing the opportunity to purchase their units if they did not close when the Sponsor demanded.

With regard to the Second Cause of Action against the Property Manager, Plaintiff asserts that such entity's failure to inspect, schedule repairs, engage contractors and/or maintenance personnel to repair and maintain the premises, constituted a breach of its contract, clearly intended for the benefit of the Plaintiff. In particular, Plaintiff blames such Defendant for failing to maintain the premises during the infestation and causing the unsafe attempted remediation of the condition described above. Plaintiff avers that the Property Manager also failed to act upon the complaints of residents during the period of the Sponsor's control of the "puppet" Board.

Plaintiff opposes dismissal of its Third Cause of Action against RuMaple on the ground that the Contract of Exchange was signed by that party, permitting the property to be transferred from RuMaple to the Sponsor followed by a transfer from the Sponsor to Sherbrooke. Defendant Chicco, who was a member of the "puppet" Board testified, according to Plaintiff, that the Contract of Exchange was a "contract of adhesion" between parties "with the same interest". In addition, during discovery, Plaintiff found that Defendant Hessel's inspection, which contained serious misrepresentations, and at least one amendment to the Offering Plan were paid for by RuMaple. Thus, Plaintiff argues, that Merson exercised complete dominion and control over RuMaple and it was essentially one and the same with the Sponsor.

With regard to the Sixth Cause of Action, which alleges a claim essentially for fraud in the inducement by the Sponsor, Downes, Chicco and Utrecht, through the

numerous misrepresentations in the Offering Plan, Proprietary leases and Subscription Agreements, the inadequate budgeting, as well as their acts in rushing the purchasers (assignees of Plaintiff) to close without adequate information, Plaintiff refers to the allegations made above. In addition, Plaintiff adds that Defendant Chicco was the person who drafted the Offering Plan and its amendments, which contain the numerous misrepresentations set forth above and that he concealed his membership on the Sponsor's Board and testified that this Board held no meetings despite the requirements of the co-op By-Laws which he drafted. Plaintiff further asserts that Defendant Downes was on the "puppet" Board and had worked as a secretary for the Sponsor for 28 years. According to Plaintiff, Defendant Downes was told by the Sponsor she would not have any duties as a member of the Board, she did not know what the duties of such Board were, and she made no inquiry to so determine. Defendant Utrecht was and is the Sponsor's husband and, according to Plaintiff, acted with Merson to defraud the Plaintiff's assignees as set forth above.

Plaintiff argues that the above allegations set forth the basis for its cause of action against the Defendant Sponsor, Property Manager, and Defendant Board members for fraud (Tenth Cause of Action)¹, against the Property Manager for Breach of its asserted fiduciary duties to the Plaintiff (Twelfth Cause of Action) and against the Sponsor, Downes, Chicco Utrecht, the Property Manager and RuMaple for knowingly participating in the breach of each others' fiduciary duties to the Plaintiff (Thirteenth Cause of Action).

Plaintiff sets forth that the Eleventh Cause of Action against the Sponsor, and Defendants Downes, Utrecht and Chicco for breach of their fiduciary duties is clearly set forth for all the reasons set forth above, dealing with the numerous misrepresentations and concealment. In addition, Plaintiff alleges that the failure of the Board to hold meetings or make any inquiries regarding significant matters was clearly a breach of the duties of this group of Defendants. Moreover, with regard to Defendants Downes,

¹ This cause of action was dismissed against Defendant RuMaple in a prior decision of the Court.

Chicco and Utrecht, Plaintiff asserts that the 6 year rather than 3 year statute of limitations applies, as such is the law with regard to wrongdoing by a member of a co-op board.

With regard to the Fourteenth Cause of Action alleged against the Sponsor for misstatements to the public at large through false mailings and advertisements in violation of General Business Law § 349, Plaintiff asserts that a private right of action under § 349 is not preempted by the Martin Act and that the alleged deceptive practices were aimed at the consuming public.

Plaintiff Sherbrooke cross moves for Summary Judgment in its favor on its Fifteenth Cause of Action against the Sponsor, Chicco and CKC, declaring that CKC is not the Holder of Unsold Shares and is not entitled to designate a seat on the Board of Directors. In support of its motion, Plaintiff refers to Section P of the Offering Plan which provides that “(u)nsold shares shall cease to be unsold shares when purchased by a purchaser for value” According to Plaintiff, Chicco admitted at his deposition that CKC did, in fact, purchase these three unsold shares from the Sponsor for value. Plaintiff further points to the section of the Offering Plan titled “Purchasers for Investment or Resale” which accurately describes CKC’s transaction.

In addition, Plaintiff asserts that a clear reading of the Offering Plan demonstrates that the “designation” by the Sponsor of a holder of “Unsold Shares” refers to such designation at the time of the initial offering and clearly not to a subsequent sale by the Sponsor of such shares at a later point in time for value.

SUMMARY JUDGMENT

A party moving for Summary Judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issue of fact (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party

opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept 1996]). “(I)n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant” (*Pearson v Dex McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking Inc.*, 203 AD2d 352 [2d Dept 1994]).

MARTIN ACT

The Martin Act, which is codified in Article 23-A of the General Business Law, prohibits fraudulent conduct, inter alia, in the advertisement, transfer, sale distribution, and purchase of securities, including those representing “participation interests” in condominiums and cooperative apartments (*see Kralik v 239 East 79th Street Owners Corp.*, 5 NY3d 54 [2005]; *Caboara v Babylon Cove Dev., LLC*, 54 AD3d 79 [2d Dept 2008]). The Act, which is enforced by the Attorney General, does not, in and of itself, give rise to a private right of action (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]; *Kralik v 239 East 79th Street Owners Corp*, *supra*). However, the Court of Appeals has most recently ruled that a plaintiff may maintain a valid common law claim in connection with the sale of securities despite the fact that such conduct could also give rise to an action by the Attorney General under the Martin Act (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341 [2011]). The test to be applied in such situations is whether the private party’s claim is predicated solely upon alleged omissions from documents filed pursuant to the Martin Act and the Attorney General’s implementing regulations (*Kerusa*, *supra*). Thus, in *Assured Guarantee, Ltd*, *supra*, the Court of Appeals explicitly rejected the view that, with limited exceptions, the Martin Act forecloses all private causes of action, such as breach of contract and/or breach of fiduciary duty.

Based upon a review of the significant allegations raised by the Plaintiff in this action, the Court finds that, to the extent they are found to raise substantial issues of fact under common law principles, they are not precluded by virtue of the fact that they may likewise state permissible claims by the Attorney General under the Martin Act.

BREACH OF CONTRACT/THIRD PARTY BENEFICIARY CLAIMS

To sustain a cause of action for breach of contract, a claimant must demonstrate as follows: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage (*Furia v Furia*, 116 AD2d 694 [2d Dept 1986]). The requirements for the formation of a contract require that there exist: (1) at least two parties with legal capacity to contract, (2) mutual assent to the terms of the contract, and (3) consideration (*see generally*, Restatement, Second, Contracts §§ 9, 12, 17; 1 Williston, Contracts (4th Ed) 200-09, § 3:2, 22 NY Jur2d, Contracts §§ 11, 13; and see UCC 1-201, subds (3) and (11) defining "agreement" and "contract" for the purposes of the Code: *see also Kowalchuk v Stroup*, 61 AD3d 118 [1st Dept. 2009]).

One who seeks to maintain an action for breach of contract as a third party beneficiary must establish that: 1) there is an existing valid and binding contract between the signatories, 2) the contract was intended for the third party's benefit, and 3) the benefit to the third party is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate that party if the benefit is lost (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783 [2006]). Purchasers of condominiums are third party beneficiaries of a contract between the sponsor and various professionals where documentation including selling documents and the Offering Plan manifest the Sponsor's intent to make the unit owners the intended beneficiaries (*see Board of Mgrs. of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488 [1st Dept. 1992]).

While the Sponsor does make a prima facie showing in favor of dismissal of the First Cause of Action for breach of contract, upon the shifting of the burden, the Plaintiff clearly raises substantial issues of material fact, concerning the budget and condition of the subject premises as set forth in its Offering Plan, Subscription Agreements and Proprietary Leases. The statements of the Sponsor to the effect that the Property Manager was retained by her specifically to maintain the premises following conversion, when coupled with the numerous issues raised concerning the condition of such premises, are sufficient to permit the inference that the Plaintiff is one of the intended beneficiaries of the subject contract and issues of fact exist with regard to that Defendant's adherence to its management agreement.

On the other hand, following Defendant RuMaple's assertions in support of its motion for summary judgment dismissing the cause of action against it for breach of the Contract of Exchange, and review of the wording of such agreement, the Plaintiff has failed to raise an issue of fact. Clearly, RuMaple signed such agreement solely as the prior owner of the premises, specifying that such sale to the Sponsor was in "As Is" condition. No promises or representations are made to the Plaintiff corporation nor its future resident Assignees in that document. Accordingly, the Third Cause of Action, asserted for breach of the Contract of Exchange against Defendant RuMaple, is dismissed.

BREACH OF FIDUCIARY DUTY AIDING AND ABETTING BREACH

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (*Kurtzman v Bergstol*, 40 AD3d 588 [2d Dept 2007]).

Officers and directors of a corporation stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty to the corporation (*Yu Han*

Young v Chiu, 49 AD3d 535 [2d Dept 2008]; *Adirondack Capitol Mgt., Inc. v Ruberti, Girvin and Ferlazzo, PC.*, 43 AD3d 1211 [3rd Dept 2007]). Thus, directors and majority shareholders have an obligation to all shareholders to adhere to fiduciary standards of conduct and to exercise their responsibilities in good faith when undertaking any corporate, including a merger (*Alpert v 28 Williams St. Corp.*, 63 NY2d 557 [1984]; *Collins v Telcoa Intl. Corp.*, 283 AD2d 128 [2d Dept 2001]). Furthermore, a shareholder in a closely held corporation owes a fiduciary duty to other shareholders in the corporation (*Littman v Magee*, 54 AD3d 14 [1st Dept 2008]; *Global Minerals and Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006]).

A claim for aiding and abetting a breach of fiduciary duty requires that: 1) the claimant demonstrate a breach of fiduciary obligations to another; 2) the defendant knowingly induced or participated in the breach, and 3) the plaintiff suffered damages as a result thereof (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461 [1st Dept 2007]; *Global Minerals and Metals Corp. v Holme*, supra; *Kaufman v Cohen*, 307 AD2d 113 [1st dept 2003]).

In most cases, the statute of limitations for a breach of fiduciary duty depends on the substantive remedy that plaintiff seeks (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]). It has always appeared to this Court that such a claim falls in the realm somewhere between breach of contract and fraud. Where the claim seeks equitable relief, it is governed by the six year statute of limitations of CPLR 213(1) (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, supra). On the other hand, where the claim seeks legal relief, it is governed by a three year statute of limitations (*id.*). Where a cause of action for breach of fiduciary duty is based on allegations of fraud, whether or not the six year statute of limitations governing fraud actions applies, will often depend upon whether the fraud allegation is merely incidental to the claim asserted (*Kaufman v Cohen*, supra; see *IDT Corp. v Morgan Stanley Dean Witter & Co.*, supra; *Powers Mercantile Corp. v Feinberg*, 109 AD2d 117 [1st Dept 1985], aff'd 67 NY2d 981 [1986]).

Based upon the papers submitted, the Court finds that Plaintiff has established the existence of a fiduciary duty owed by the Sponsor, the members of the initial Board of Directors and the Property Manager to the Plaintiff corporation as well as its Assignees. The allegations brought out both in the pleadings and in discovery concerning the failure to hold meetings; the failure to provide a sufficient budget for operation of the cooperative, as well as the allegations of fraudulent misrepresentations in the Offering Plan and Subscription Agreements, are sufficient to require the breach of fiduciary duty claims (Eleventh and Twelfth Causes of Action), as well as the aiding and abetting of such conduct (Thirteenth Cause of Action) against those same parties, to proceed to trial. The inclusion of numerous allegations of fraudulent conduct are also sufficient to sustain the 6 year as opposed to 3 year statute of limitations.

While this Court did not find that Plaintiff was able to raise an issue of fact concerning the breach of the Contract of Exchange vis a vis RuMaple, the same is not true of the Cause of Action against that party (Thirteenth) for aiding and abetting the Sponsor and initial Board members in breach of their fiduciary duties. As set forth in its papers in opposition to Summary Judgment, Plaintiff has alleged that RuMaple acted as the alter ego of the Defendant Sponsor, its sole owner, and not only signed one of the amendments to the Offering Plan, containing numerous misrepresentations, but also made payment to the Defendant engineer, Hessel, whose inspection and report both assertedly concealed and misrepresented the condition of the subject premises.

FRAUD IN THE INDUCEMENT/AIDING AND ABETTING FRAUD

In an action to recover for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, and justifiable reliance of the other party on the misrepresentation or material omission (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478 [2007]).

The elements of a claim for aiding and abetting fraud require showing 1) the existence of an underlying fraud, 2) knowledge of the fraud on the part of the aiding and abetting party, and 3) substantial assistance by the aiding and abetting party in achieving this fraud (*Standfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472 [1st Dept 2009]).

Claims for fraud, breach of fiduciary duty and breach of contract, when all raised by a party in the same lawsuit, are subject to scrutiny. A breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated, and the legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract (*Clark-Fitzpatrick, Inc., v Long Island R.R. Co.*, 70 NY2d 382 [1987]; *D'Ambrosio v Engel*, 292 AD2d 564 [2d Dept 2002]).

Conversely, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud (*WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]; *First Bank of Ams. v Motor Car Funding, Inc.*, 257 AD2d 287 [1st Dept 1999]; see *Daub v Future Tech Enter., Inc.*, 65 AD3d 1004 [2d Dept 2009]; *Shlang v Bear's Estates Dev. of Smallwood, N.Y., Inc.*, 194 AD2d 914 [3rd Dept 1993]; *RKB Enterprises Inc v Ernst & Young*, 182 AD2d 971 [3rd Dept. 1992]). It has been held that a fraud claim may be based on a breach of contract claim (*First Bank of Ams. v Motor Car Funding, Inc. supra*). While a party who is fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract, it may do so only if the misrepresentations alleged consist of more than mere promissory statements about what is to be done in the future; they must be misstatements of material fact or promises made with a present, albeit undisclosed, intent not to perform them (*McGovern v T.J. Best Bldg. and Remodeling Inc.*, 245 AD2d 925 [3rd Dept. 1997]; *Edelman v Buchanan*, 234 AD2d 675 [3rd Dept 1996]).

In the case at bar, Plaintiff has set forth in its Sixth Cause of Action against

Defendants Sponsor, Downes, Chicco and Utrecht a cause of action for fraud in the inducement. Although hotly contested by the Defendants, Plaintiff's assertions are sufficient to permit such claim to proceed to trial. In addition to the above stated claims of significant misrepresentations in the Offering Plan and Subscription Agreements, these include the alleged acts of rushing purchasers into closings without an opportunity to inspect them; the concealment of Defendant Chicco's membership on the initial Board of Directors; the knowledge of the other Board members that they were to perform no actions either on the Board nor to inquire concerning the same. The allegations of significant misrepresentations in the Offering Plan and Subscription Agreements, in addition, are sustainable under the law as set forth, as they do not relate solely to future performance; but, rather, to the intent to deceive the Plaintiff and its Assignees.

However, the Tenth Cause of action appears to this Court merely to reiterate a claim of fraud against the same parties, and is duplicative and unnecessary in the Court's view.

GENERAL BUSINESS LAW § 349

Although General Business Law § 349 was originally enacted to give the Attorney General sole enforcement power to curtail deceptive acts and practices directed at the consuming public, the statute was amended in 1980 to provide a private cause of action for "any person who has been injured by reason of any violation of this section," allowing injunctive relief, damages, and reasonable attorney's fees (General Business Law § 349[h]). The purpose of this amendment was to expand enforcement authority beyond the Attorney General and thereby ensure more optimal protection of the public (*City of New York v Smokes-Spirits.Com., Inc.*, 12 NY3d 616 [2009]).

A GBL§ 349 claim must be predicted on a deceptive act or practice that is consumer oriented (*Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]), as distinguished from

merely a private contractual dispute (*Elacqua v Physicians' Reciprocal Insurers*, 52 AD3d 886 [3rd Dept 2008]). Recurring conduct is not required (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20 [1995]).

In this case, Plaintiff's claim under the subject statute clearly stems from a dispute among the parties herein without ramifications to the consuming public at large. Based upon the law as set forth above, no issues of fact have been raised and the Fourteenth Cause of Action should be dismissed.

CONTRACT INTERPRETATION

Whether a contract is ambiguous is determined by examining the entire agreement and considering the relation of the parties and the circumstances under which the contract was executed with the wording to be considered in light of the obligation as a whole and the intention of the parties as manifested thereby (*Brad H. v City of New York*, 17 NY3d 180 [2011]). Based upon this Court's reading of the Offering Plan, also contained within the Subscription Agreements, "Unsold Shares" cease to hold such designation once they are purchased for value. There is no question that Defendant CKC's purchase fits within that sphere. While Chicco and the Sponsor may argue that the above reference in Section P of the Offering Plan only refers to a sale subsequent to one where the Sponsor initially transfers what it specifies as "Unsold Shares", that is not the language utilized and will not be adopted by the Court. Accordingly, Plaintiff is granted Summary Judgment on the Fifteenth Cause of Action and it is hereby declared that CKC has no right under the subject by laws to designate a member of Plaintiff's Board of Directors. For the same reasons, the motion and cross motion by Defendants Sponsor, Chicco and CKC for Summary Judgment dismissing the Fifteenth Cause of Action are denied.

Based on the above, it is **ORDERED** that:

1. The Defendants' motions and cross motions for Summary Judgment, dismissing the First, Second, Sixth, Eleventh, and Twelfth, Causes of Action are denied;
2. The motion on behalf of Defendants Sponsor, Property Manager, Downes, Utrecht, and Chicco to dismiss the Thirteenth Cause of Action is denied.
3. The cross motion by Defendant RuMaple to dismiss the Third Cause of Action against it is granted;
4. The motion and cross motions by all Defendants to dismiss the Tenth Cause of Action are granted;
5. The motion to dismiss the Fourteenth Cause of Action against Defendant Sponsor is granted; and
6. The cross motion granting Summary Judgment in favor of the Plaintiff on the Fifteenth Cause of Action is granted; and
7. The motion and cross motion by Defendants sponsor, chicco and CKC to dismiss the fifteenth Cause of Action are denied.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: September 24, 2012
Riverhead, New York

Emily Pines
J. S. C.