

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of July, 2012.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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THE BOARD OF MANAGERS OF THE 231 NORMAN AVENUE CONDOMINIUM, M. FERRARI, LLC, ZBIGNIEW SOLARZ, KATARZYNA SOLARZ, ARTAC.COM, LLC, STEVEN HOLL, TOMMY AGRIODIMAS, JOAN LEVINSON, DOROTHY VENEZIA, VINCENT VENEZIA, RAFFAELE VENEZIA, A/K/A RALPH VENZIA, ANTHONY E. CONTE, THE PICKLE JAR, LLC, AND STEPHEN CONTE,

Plaintiffs,

- against -

Index No. 4197/11

231 NORMAN AVENUE PROPERTY DEVELOPMENT, LLC, DAVID YERUSHALMI, AMIR YERUSHALMI, OREN YERUSHALMI A/K/A OREN YERUSHALMY, MBK ARCHITECT, MICHAEL KRIEGH, RAVIV TURNER, AND BEN FRIEDMAN,

Defendants.

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The following papers numbered 1 to 14 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-3 9-10
Opposing Affidavits (Affirmations)_____	4
Reply Affidavits (Affirmations)_____	5
_____Affidavit (Affirmation)_____	_____
Other Papers <u>Memoranda of Law</u> _____	6-7 11-13
<u>Architect defendants' February 24, 2010 letter</u> _____	8

This is an action by plaintiffs the Board of Managers of the 231 Norman Avenue Condominium (the Board), M. Ferrari, LLC, Zbigniew Solarz, Katarzyna Solarz, Artarc.com, LLC, Steven Holl, Tommy Agriodimas, Joan Levinson, Dorothy Venezia, Vincent Venezia, Raffaele Venezia, a/k/a Ralph Venezia, Anthony E. Conte, the Pickle Jar, LLC, and Stephen Conte (collectively, plaintiffs), a group of purchasers of certain commercial condominium units at the 231 Norman Avenue Condominium (the Condominium), also known as the Greenpoint Lofts, which is located at 231 Norman Avenue, in Brooklyn, New York , against defendants 231 Norman Avenue Property Development, LLC (the Sponsor), David Yerushalmi, Amir Yerushalmi (Yerushalmi), Oren Yerushalmi a/k/a Oren Yerushalmy, MBK Architect, Michael Kriegh (Kriegh), Raviv Turner, and Ben Friedman (collectively, defendants), to recover for alleged construction and design defects in the Condominium. MBK Architect and Kriegh (collectively, the Architect defendants) move for an order, pursuant to CPLR 3211 (a) (1), (5), and (7), dismissing plaintiffs’ verified complaint as directed as against them and all cross claims as against them. The Sponsor and Yerushalmi (collectively, the Sponsor defendants) move for an order, pursuant to CPLR 3211 (a) (1), (2), and (7), and 3016 (b), dismissing plaintiffs’ amended complaint as directed against them in its entirety, with prejudice.

BACKGROUND

The buildings at the Condominium were renovated, constructed, and converted into a commercial condominium, pursuant to a project by the Sponsor. The Condominium

consists of a pre-existing commercial building with an additional reconstructed annex. As developed, the Condominium has a total of 68 commercial units, which were offered for sale pursuant to a condominium Offering Plan (the Offering Plan) submitted by the Sponsor and accepted for filing by the Attorney General's office on or about April 26, 2006.

The Offering Plan contains representations by the Sponsor that it would construct the building in accordance with the descriptions and specifications as set forth in that plan. Each purchaser of a unit executed a form Purchase Agreement (Purchase Agreement), with the Sponsor, as seller, which expressly provided that "[t]he Offering Plan . . . including all documents set forth in Part II thereof and any amendments thereto, is incorporated herein by reference with the same effect as if set forth at length." Thus, all of the Sponsor's obligations under the Offering Plan were thereby incorporated into each individual plaintiff's Purchase Agreement. The Certification by the Sponsor and Yerushalmi was part of the Offering Plan that was incorporated by reference into each unit owner's Purchase Agreement.

In addition, under section 33 (A) of each unit purchaser's Purchase Agreement, the Sponsor expressly covenanted that "[t]he construction of the building and the Unit, including the materials, equipment and fixtures to be installed therein, shall be substantially in accordance with the Plan and the architectural 'plans and specifications' (defined in the Plan), subject to the right reserved by Sponsor to modify and amend the Plan and the 'plans and specifications' in order to substitute materials, equipment or fixtures of equal or better quality and design." The Sponsor further covenanted, in subdivision (B) of this section, that

“[t]he construction of the Building and the Unit and the correction of any defects in construction to the extent required under the Plan are the sole responsibility of the Sponsor.”

MBK Architect is the architect retained by the Sponsor in connection with the design of the Condominium buildings and the preparation of the Offering Plan, and Kriegh is the principal of MBK Architect. The Architect defendants were retained pursuant to a written agreement (the Agreement) with the Owner, identified as 231 Norman Avenue Property Development Corp. The Agreement, dated February 2, 2004, set forth the Architect defendants’ responsibilities and the scope of the work. The Agreement provided that the project was to renovate and convert pre-existing warehouse space to a 68-unit commercial condominium facility. The Agreement specified, at page 3, that “[n]othing contained in this agreement shall necessarily create a contractual relationship with or a cause of action in favor of a third party against either the Owner or the Architect.”

On or about August 25, 2005, as part of the services provided by MBK, the Architects defendants issued an Architect’s Report regarding both the then-current conditions of the pre-existing structures, as well as the planned modifications as part of the development and conversion to the commercial Condominium (the Architect’s Report). In order to allow the filing of the Offering Plan, the Sponsor was required to include, in its Offering Plan, a Certification of the Sponsor’s Architect pursuant to Part 20.4 of the Regulations issued pursuant to General Business Law article 23-A (the Certification). Kriegh executed, as required by statute, the Certification regarding the Architect’s Report. In the Certification,

Kriegh stated that he had “read the entire Architect’s Report and investigated the facts therein and the facts underlying it with due diligence in order to form a basis for this certification.”

Kriegh further stated that “[t]his certification [wa]s made for the benefit of all persons to whom this offer is made.” In addition, Kriegh certified that the Architect’s Report:

“(i) set forth in narrative form the description and/or physical condition of the entire property as it will exist upon completion of construction, *provided that construction is in accordance with the plans and specifications that [he] examined* [emphasis added];

“(ii) in our professional opinion afford potential investors, potential investors, purchasers and participants an adequate basis upon which to found their judgment concerning the description and/or physical condition of the property as it will exist upon completion of construction, *provided that construction is in accordance with the plans and specifications that [he] examined*” [emphasis added].

Kriegh also certified that the Architect’s Report did “not omit any material fact”; “contain any untrue statement of a material fact”; “contain any fraud, deception, concealment, or suppression”; “contain any promise or representation as to the future, which is beyond reasonable expectation or unwarranted by existing circumstances”; or “contain any representation or statement which [wa]s false where [he]: (a) knew the truth; (b) with reasonable effort could have known the truth; (c) made no reasonable effort to ascertain the truth; [or] (d) did not have knowledge concerning the representation or statement made.”

The Certification also explicitly provided that “[t]his statement [wa]s not intended as a guarantee [or] warranty of the physical condition of the property.”

On January 10, 2008, the certificate of occupancy was issued by the New York City Department of Buildings. Kriegh attests that MBK Architect had completed the scope of the work in December 2007, prior to the issuance of the certificate of occupancy. The Architect defendants issued their final bill for services on January 15, 2008.

The April 26, 2006 Offering Plan was amended eight times over the years, from the First Amendment dated October 25, 2006, through the Eighth Amendment dated September 3, 2010. The First Amendment and the Second Amendment described physical changes in the Condominium and contained an Addendum to the Architect's Report detailing those changes prepared by the Architects. The following six Amendments did not identify any physical changes to the Condominium, and specifically noted that: "[t]here are no other changes to the Offering Plan."

This action was commenced by the filing of a summons with notice on February 22, 2011, and a verified complaint was filed on September 1, 2011. Plaintiffs are the Board¹ of the Condominium and a group of individual unit owners who purchased condominium units in the Condominium. Defendants include the Sponsor, principals of the Sponsor, and the former Sponsor-appointed members of the Condominium's Board. Yerushalmi is one of the principals of the Sponsor who served as a member of the Board of the Condominium

¹At the time plaintiffs commenced this action, the Board elected by the Sponsor maintained control of the Condominium, and it was not until October 11, 2011 that the unit owners gained voting control of the Board. Subsequent to gaining such control, the Board, which was originally named as a defendant, was realigned as a plaintiff and an amended summons was filed on April 11, 2012.

pursuant to the terms of the Offering Plan. Also named as defendants are MBK Architect, who, as noted above, was the architect retained by the Sponsor in connection with the design of the Condominium buildings and the preparation of the Offering Plan, and Kriegh, who, as previously noted, is MBK Architect's principal who signed the Certification contained in the Offering Plan.

Plaintiffs allege that the design and construction of the Condominium were grossly deficient, with numerous problems and deviations from what was promised to unit owners. Plaintiffs claim that there are substantial defects that cause the Condominium and the individual units therein to leak. Plaintiffs maintain that these defects allow significant water infiltration into the building and the units and pose serious threats to their lives and safety.

Plaintiffs assert these defects in the design and construction of the Condominium were identified in a limited inspection conducted by the Sponsor's engineering consultant SW Engineering Co., PLLC (SW Engineering) on July 8, 2009, in response to numerous complaints by the unit owners. Plaintiffs point out that after this limited inspection, SW Engineering issued a letter report on July 13, 2009, which detailed specific defects relating to the roof, windows, and walls in the building as a whole and in individual units. Plaintiffs state that the Sponsor's insurance company denied coverage based on its investigation which found "faulty, inadequate and defective construction."

Plaintiffs further assert that these serious construction defects were also identified in a report prepared by Howard L. Zimmerman Architects, P.C. (Zimmerman), who they

retained, after gaining control of the Board, to investigate these numerous alleged defects. Zimmerman's report allegedly found serious construction defects, many of which he found to bear on the structural integrity of the buildings and to impact the lives and safety of the unit owners. Zimmerman is alleged to have identified numerous deviations from what had been promised to the unit owners in the Offering Plan, numerous Building Code violations, and numerous conditions which he found to be sub-industry standard.

Plaintiffs filed an amended complaint on February 27, 2012,² which was served by leave of court granted on December 14, 2011. Plaintiffs' amended complaint sets forth 12 causes of action, which consist of a first cause of action for breach of contract as against the Sponsor defendants and others; a second cause of action for breach of duty to build in a skillful and workmanlike manner as against the Sponsor defendants and others; a third cause of action for breach of contract as against the Architect defendants, the Sponsor defendants, and others; a fourth cause of action for negligence as against the Sponsor defendants, the Architect defendants, and others; a fifth cause of action for negligent supervision of construction as against the Sponsor defendants and others; a sixth cause of action for professional malpractice as against the Architect defendants; a seventh cause of action for

²While the Architect defendants' motion was originally directed as against plaintiffs' original complaint, since plaintiffs amended their complaint during the pendency of this motion, the court will address this motion as against the amended complaint (*see 49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243, 243 [1st Dept 2004]; *Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d Dept 2003]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1st Dept 1998]). The Architect defendants, in a February 24, 2012 letter by their attorney, assert that plaintiffs' amended complaint does not alter the legal arguments previously briefed by them.

fraud and/or negligent misrepresentation as against the Sponsor defendants and others; an eighth cause of action for fraud and/or negligent misrepresentation as against the Architect defendants; a ninth cause of action for violation of General Business Law § 349 (a) as against the Sponsor defendants and others; a tenth cause of action for violation of 15 USC § 1703 (a) (2) as against the Sponsor defendants and others; an eleventh cause of action for conversion as against Yerushalmi and others; and a twelfth cause of action for breach of fiduciary duty as against Yerushalmi and others.

DISCUSSION

The Architect defendants' motion seeks dismissal of the four causes of action in plaintiffs' amended complaint that are directed as against them, namely, plaintiffs' third cause of action for breach of contract, plaintiffs' fourth cause of action for negligence, plaintiffs' sixth³ cause of action for professional malpractice, and plaintiffs' eighth⁴ cause of action for fraud and/or negligent misrepresentation. The Architect defendants, in support of their motion, argue that plaintiffs' amended complaint as against them is preempted by the Martin Act (General Business Law art 23-A).

The Martin Act is a disclosure statute which is designed to protect the public from fraud in the sale of real estate securities, and the Attorney General is charged with enforcing

³The sixth cause of action in plaintiffs' amended complaint was the fifth cause of action in plaintiffs' original complaint.

⁴The eighth cause of action in plaintiffs' amended complaint was the seventh cause of action in plaintiffs' original complaint.

its provisions and implementing regulations (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243-244 [2009]; *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 276-277 [1987]). A private common-law cause of action for fraud or otherwise, though, may be brought by a plaintiff where its basis is distinct from the Martin Act and it “is not entirely dependent on the Martin Act for its viability”; the “[m]ere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies” (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]). A plaintiff’s claims are not preempted by the Martin Act where the plaintiff alleges “not that [the] defendant omitted to disclose information required under the Martin Act but that it affirmatively misrepresented, as part of the offering plan, a material fact about the condominium” (*Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 607 [1st Dept 2011]).

However, “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.*, 18 NY3d at 353). Thus, there is no private right of action where the fraud and misrepresentation claim or other common-law claims alleged by the plaintiffs rely entirely upon alleged omissions in filings required by the Martin Act (*Kerusa Co. LLC*, 12 NY3d at 247; *Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]).

Plaintiffs argue that their claims are based upon affirmative misrepresentations, rather than omissions, and, therefore, are not preempted by the Martin Act. Plaintiffs, however, fail to allege what affirmative misrepresentations were made by the Architect defendants. The Architect's Report and Certification merely used, verbatim, the statutory language mandated by the Martin Act. Moreover, as set forth above, the Architect defendants' statements in the Certification simply indicate that the Architect's Report describes the property, as it was to be constructed, pursuant to the requirements of the Martin Act, based upon the plans and specifications examined by the Architect defendants, if constructed in accordance with these plans and specifications. Since, when the Certification and Architect's Report were issued, no construction had yet taken place, the Architect defendants' statements could not have been false or negligent at the time that they were made.

Plaintiffs argue that their complaint states a fraud claim against the Architect defendants because they knew or should have known of the building defects and that they were relying upon them. Specifically, plaintiffs contend that the Architect defendants were not merely responsible for preparing the building plans and the Certification in the Offering Plan, but, rather, that they failed in their continuing responsibility to oversee construction of the Condominium in accordance with the building documents and all applicable codes.

In support of this contention, plaintiffs rely upon the later Amendments to the Offering Plan, arguing that the Architect defendants failed to disclose that the construction was not in conformance with the Offering Plan and the Architect's Report. Plaintiffs point

to the fact that the April 26, 2006 Offering Plan was amended eight times over the years, from the First Amendment dated October 25, 2006 through the Eighth Amendment dated September 3, 2010. Plaintiffs note that while the First Amendment and the Second Amendment described physical changes in the Condominium and contained an Addendum to the Architect's Report detailing those changes prepared by the Architects, the following six Amendments did not identify any physical changes to the Condominium, and specifically noted that: "[t]here are no other changes to the Offering Plan."

Plaintiffs argue that the Architect defendants, therefore, continued to stand by the Architect's Report and Certification when they knew, or should have known with the exercise of due professional care, that their representations were false. Plaintiffs contend that the Offering Plan Amendments effectively reaffirmed the Certification, but the Architect defendants never disclaimed or disputed the representations that they had made in the Architect's Report and Certification.

Such alleged failure, however, cannot render the Architect defendants' actions fraudulent or negligent. A claim for fraud and negligent misrepresentation cannot be maintained where it is based on the failure to disclose facts in amendments which are required only because of the Martin Act (*see Kerusa Co. LLC*, 12 NY3d at 245). Indeed, this same argument was made and rejected in *Kerusa Co. LLC* (12 NY3d at 245), where the plaintiff therein pleaded fraud based upon its allegation that the sponsor defendants did not disclose various construction and design defects in the offering plan amendments, and

represented therein that there were no “material changes of facts or circumstances affecting the property or the offering” (*see* 13 NYCRR 20.5 [a] [2]) when, in fact, problems arising during construction alerted them to the existence of major defects, which they either ignored or inadequately remedied. The Court of Appeals, in *Kerusa Co. LLC* (12 NY3d at 245), held that since “[b]ut for the Martin Act and the Attorney General's implementing regulations . . . the sponsor defendants did not have to make the disclosures in the amendments . . . to accept Kerusa's pleading as valid would invite a backdoor private cause of action to enforce the Martin Act in contradiction to [its prior] holding . . . that no private right to enforce that statute exists.”

Since plaintiffs attempt to premise their claims upon omissions in the Amendments to the Offering Plan, they improperly attempt to assert a private cause of action under the Martin Act, and are preempted. Consequently, inasmuch as plaintiffs’ eighth cause of action for fraud and/or misrepresentation relies entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations, such claim is preempted by the Martin Act (*see Kerusa Co. LLC*, 12 NY3d at 245; *Berenger*, 93 AD3d at 184).

Plaintiffs’ third cause of action for breach of contract, fourth cause of action for negligence, and sixth cause of action for professional malpractice, likewise must be dismissed as preempted by the Martin Act since the Certification was executed by the Architect defendants pursuant to the Attorney General's implementing regulations and, as

such, may not be the basis of these private causes of action against them (*see Kerusa Co. LLC*, 12 NY3d at 245; *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284, 1287-1288 [2d Dept 2009], *appeal dismissed* 15 NY3d 742 [2010]).

Moreover, with respect to plaintiffs' third cause of action for breach of contract as against the Architect defendants, it has long been held that a plaintiff who purchases a condominium unit is merely an incidental third-party beneficiary to the contracts between the 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 AD3d 408, 408-409 [1st Dept 2009]; *Kerusa Co., LLC v W10Z/515 Real Estate Ltd. Partnership*, 50 AD3d 503, 504 [1st Dept 2008]; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1st Dept 1993]). A plaintiff may only be held to be an intended third-party beneficiary to such a contract when the contract is expressly intended to benefit such plaintiff, and the plaintiff relied upon the contractor's obligations under the contract (*see Caprer v Nussbaum*, 36 AD3d 176, 201 [2d Dept 2006]; *Kidd v Havens*, 171 AD2d 336, 339 [4th Dept 1991]; *Bridge St. Homeowners Assn. v Brick Condominium Developers, LLC*, 18 Misc 3d 1128[A], *3, 2008 NY Slip Op. 50221[U] [Sup Ct, Kings County 2008]).

Here, plaintiffs do not dispute that they were not parties to the Agreement between the Architect defendants and the Owner. Furthermore, the architectural plans were merely incorporated into the larger Offering Plan amid the other numerous provisions. Neither the

plans, nor any other agreement between plaintiffs and the Architect defendants, reflect the intent to specifically benefit plaintiffs. Therefore, the Agreement between the Owner and the Architect defendants does not extend privity to plaintiffs as intended third-party beneficiaries, and plaintiffs have no standing to bring a breach of contract claim as against the Architect defendants (*see Leonard*, 68 AD3d at 408; *Kerusa*, 50 AD3d at 504; *Residential Bd. of Mgrs of Zeckendorf Towers*, 190 AD2d at 637). Consequently, dismissal of plaintiffs' third cause of action is also mandated based upon a lack of privity.

Similarly, in the absence of privity or a relationship approaching privity, plaintiffs' sixth cause of action as against the Architect defendants for professional malpractice cannot be maintained (*see 905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]). This claim would also be barred by the three-year Statute of Limitations since the final bill for services was issued by the Architect defendants on January 15, 2008, and there is no evidence that any services were performed by the Architect defendants after they completed their work in December 2007 (*see CPLR 214 [6]; Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009]).

Plaintiffs' fourth cause of action for negligence, which alleges that the Architect defendants negligently designed and/or oversaw construction of the units and the building of the Condominium in a manner resulting in the alleged numerous construction defects, must also be dismissed on the additional basis that it is merely duplicative of plaintiffs' breach of contract claim (which cannot be maintained), and does not allege any independent

cause of action for negligence (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Hamlet on Olde Oyster Bay Home Owners Assn., Inc.*, 65 AD3d at 1288).

Thus, the motion of MBK and Kriegh to dismiss the complaint against them is granted. However, as there is no evidence of any cross-claims having been interposed against them, their motion to dismiss “all cross claims” is denied.

The Sponsor defendants, in their motion, seek dismissal of plaintiffs’ first, second, third, fourth, fifth, seventh, ninth, tenth, eleventh, and twelfth causes of action as against them. The Sponsor defendants contend that these claims must be dismissed pursuant to CPLR 3211 (a) (7) due to their failure to state a claim upon which relief can be granted as based upon the face of the amended complaint, and pursuant to CPLR 3211 (a) (1) based upon the documentary evidence referenced in the amended complaint. The Sponsor defendants also contend that plaintiffs’ seventh cause of action for fraud must be dismissed pursuant to CPLR 3016 (b) based upon the failure to allege fraud with sufficient particularity, and that plaintiffs’ tenth cause of action must be dismissed pursuant to CPLR 3211 (a) (2) for lack of subject matter jurisdiction. The Sponsor defendants further contend that all of the causes of action are duplicative of the alleged construction defect claim.

Where a motion to dismiss is brought pursuant to CPLR 3211 (a) (1) on the grounds that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations,

conclusively establishing a defense as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Rubinstein v Salomon*, 46 AD3d 536, 539 [2d Dept 2007]).

“When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide [the] plaintiff . . . with ‘the benefit of every possible favorable inference’” (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon*, 84 NY2d at 87; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Whether a plaintiff can ultimately establish its allegations “is not part of the calculus to determine a motion to dismiss” (*EBC, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). “Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence” (*AG Capital Funding Partners, L.P.*, 5 NY3d at 591; *see also Rovello v Orogino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Such a motion, pursuant to CPLR 3211 (a) (7), must fail if the facts as alleged fit within any cognizable legal theory (*see Leon*, 84 NY2d at 87-88; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello*, 40 NY2d at 634).

With respect to plaintiffs’ first cause of action for breach of contract, plaintiffs allege that pursuant to the Purchase Agreements entered into between the Sponsor and each unit owner, the Sponsor represented, agreed, and promised to construct the buildings and the units, including the materials, equipment, and fixtures to be installed therein, substantially in accordance with the Offering Plan and the plans and specifications. Plaintiffs further

allege that the Sponsor failed to comply with the terms of the Purchase Agreement because it failed to construct the buildings and units substantially in accordance with the Offering Plan and the plans and specifications. In addition, plaintiffs allege that Yerushalmi may be held jointly and severally liable with the Sponsor for breach of contract.

In order to plead the requisite elements of a cause of action to recover damages for breach of contract, the plaintiff must allege “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]).

The Sponsor defendants argue that their liability for breach of contract is limited pursuant to the terms of the Offering Plan and the Purchase Agreements. Specifically, they contend that plaintiffs are precluded from asserting their claim for breach of contract regarding the alleged property defects because the terms of the Offering Plan, which were incorporated into the Purchase Agreements, required plaintiffs to accept the property “as is.” They argue that the theory of caveat emptor applies and extinguishes the implied warranty that the building and units therein will be free from material defects.

This argument must be rejected. The “as is” provision in plaintiffs’ purchase agreements (at page 2, paragraph 6) states that “[m]y signing of this Purchase Agreement shall constitute my acceptance of said apartment “As Is,” except for those matters which are the responsibility of the Sponsor as stated in the Plan.” The Offering Plan, in turn, identifies the responsibility of the Sponsor, specifically setting forth that “[t]he construction of the

Building and the Unit and the correction of any defects in construction to the extent required under the plan are the sole responsibility of the Sponsor.” As such, under the “as is” clause, as amplified by the Offering Plan section to which it refers, the Sponsor was responsible for “[t]he construction of the Building and the Unit and the correction of any defects in construction.” Moreover, contrary to the Sponsor defendants’ argument, plaintiffs could not have waived their right to sue for breach of contract for construction defects before the Sponsor defendants completed construction and before plaintiffs could have possibly conducted meaningful inspections of the premises.

The Sponsor defendants further argue that the building was constructed in conformance with contract specifications and codes because a certificate of occupancy was issued by the City of New York. This argument is unavailing. While the plaintiffs’ Purchase Agreements (at page 6, paragraph 33 [A]) state that “[t]he issuance of a certificate of occupancy for the building shall be deemed presumptive evidence that the Building and the Unit have been fully completed in accordance with the Plan and the ‘plans and specifications,’” they expressly limit that presumption by providing that “nothing herein contained shall excuse Sponsor from its obligations to correct any defects in construction in accordance with the conditions set forth in the Plan.”

The Sponsor defendants also argue that the terms of the Offering Plan (at page 47) preclude plaintiffs’ breach of contract claim because it provides that the members of the Board “shall not be liable to the Unit Owners for any mistake of judgment, negligence, or

otherwise, except for willful misconduct or bad faith.” The Sponsor defendants’ reliance upon this provision is misplaced since it explicitly applies to the Board, providing the Board with “business judgment rule” protection. It does not apply to the Sponsor defendants nor does it operate to shield the Sponsor defendants from liability for breach of contract.

The risk of loss provision in the Offering Plan (at page 37), cited by the Sponsor defendants, which provides that the Sponsor will not be liable for any risk of loss to the unit upon the purchaser’s acquiring the right of possession, is also wholly inapplicable to shield them from liability for breach of contract. This provision, by its express terms, merely pertains to risk of loss from fire or other casualty, and not to the construction defects alleged by plaintiffs.

Thus, the court finds that plaintiffs have adequately alleged the material elements of their breach of contract claim, which states a viable cause of action. Consequently, the Sponsor defendants’ motion, insofar as it seeks to dismiss plaintiffs’ first cause of action, must be denied.

The Sponsor defendants further argue that all claims against Yerushalmi, individually, should be dismissed for failure to state a claim upon which relief may be granted. They assert that there are insufficient allegations to justify piercing the limited liability company veil, and that Yersushalmi cannot be personally held liable for breach of contract or fraud.

The allegations regarding piercing the limited liability status of the Sponsor, which are contained in plaintiffs’ amended complaint, adequately assert that Yerushalmi controls

and dominates the Sponsor as a personal enterprise, and that it would be inequitable for him to be permitted to use the limited liability form of the Sponsor and its ownership structure to perpetrate the wrongs alleged, while transferring to himself the assets of the Sponsor that would otherwise be available for paying the damages suffered by plaintiffs. In any event, even without piercing the limited liability veil, it is well settled within the Second Department that a plaintiff may seek damages for a breach of contract against the individual principals of the sponsor, based upon certification of the offering plan and the incorporation of the terms of the offering plan in a specific provision of the purchase agreement (*see Board of Managers of Marke Gardens Condominium v 240/242 Franklin Ave. LLC*, 71 AD3d 935 [2d Dept 2010]; *Sternstein v Metropolitan Ave. Development LLC*, 32 Misc 3d 1207[A] [Sup Ct Kings County 2011]; *Board of Mgrs. of the Crest Condominium v City View Gardens Phase II, LLC*, 35 Misc 3d 1223[A], *4, 2012 NY Slip Op 50826[U], *4 [Sup Ct, Kings County 2012]; *Kikirov v 335 Realty Assoc. LLC*, 31 Misc 3d 1212 [A], 2011 NY Slip Op 50600[U] [Sup Ct, Kings County 2010]). Thus, since plaintiffs' amended complaint asserts that such certifications were contained in the Offering Plan, which was incorporated by reference into the Purchase Agreements, the Sponsor defendants' motion to dismiss plaintiffs' first cause of action for breach of contract as against Yerushalmi must be denied.

As to plaintiffs' other claims as against Yerushalmi, individually, including their claim for fraud (which is discussed below), the court finds that at this juncture, there are sufficient allegations in plaintiffs' amended complaint to sustain these claims (to the extent that they

are otherwise maintainable) as against Yerushalmi, individually (*see Birnbaum v Yonkers Contr. Co.*, 272 AD3d 355, 357 [2d Dept 2000]; *Zanani v Savad*, 228 AD2d 584, 585 [2d Dept 1996]; *Residential Bd. of Mgrs. of Zeckendorf Towers*, 190 AD2d at 637).

Plaintiffs' second cause of action for breach of duty to build in a skillful and workmanlike manner reiterates the allegations of their first cause of action, and additionally alleges that implied within plaintiffs' Purchase Agreements, which incorporated the Offering Plan, was a duty on the part of the Sponsor to perform the work described therein in a skillful and workmanlike manner. It further alleges that the Sponsor failed to perform the work in a skillful and workmanlike manner in that, among other things, the Sponsor failed to correct any defects in the construction of the buildings to the extent required under the Offering Plan. It alleges that plaintiffs suffered a substantial loss of value in their units.

This cause of action, however, is largely duplicative of plaintiffs' first cause of action for breach of contract. Plaintiffs, however, assert that this claim constitutes a claim for negligent performance of the work. As argued by the Sponsor defendants, this cause of action is, therefore, duplicative of plaintiffs' negligence claim. Thus, since plaintiffs' cannot properly assert a negligence claim based upon the Sponsor defendants' alleged breach of contract (as discussed below), plaintiffs' second cause of action must be dismissed (*see* CPLR 3211 [a] [7]).

Plaintiffs' third cause of action for breach of contract is asserted as against the Sponsor defendants, along with the Architect defendants. It alleges that the Sponsor had a

duty to know and/or confirm that the Architect defendants fulfilled their obligations under the Agreement to all prospective purchasers, and that the failure of the Sponsor to require the Architect defendants to fulfill their obligations to prepare proper building plans and specifications constitutes a separate breach of the Agreement that the Sponsor entered into for the benefit of all prospective purchasers of units of the Condominium, including plaintiffs. It further alleges that Yerushalmi may also be held liable for the Sponsor's conduct.

Since, as discussed above, plaintiffs are merely incidental third-party beneficiaries, and not intended beneficiaries of the Agreement between the Sponsor and Architect defendants, they lack standing to maintain this cause of action as against the Sponsor defendants on the basis of the Agreement (*see Leonard*, 68 AD3d at 408-409). Therefore, plaintiffs' third cause of action must be dismissed (*see CPLR 3211 [a] [7]*).

Plaintiffs' fourth cause of action for negligence alleges that the Sponsor, and the Architect defendants had a duty to exercise reasonable care and skill according to standard practices in their trades in the design and oversight of the construction of the units and the building of the Condominium. It alleges that both the Sponsor and the Architect defendants breached this duty by negligently designing and/or overseeing construction of the units and the buildings of the Condominium in a manner resulting in the numerous alleged construction defects. Plaintiffs assert that Yerushalmi is liable for the Sponsor's negligent conduct.

These allegations “for negligent construction of a [condominium] state a breach of contract cause of action and not a tort cause of action” (*Merritt v Hooshang Constr.*, 216 AD2d 542, 543 [2d Dept 1995]; *see also 431 Conklin Corp. v Rice*, 181 AD2d 716, 717-718 [2d Dept 1992]). “[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated,” and “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 Bros. Dev. Corp.*, 182 AD2d 664, 665-666 [2d Dept 1992], quoting *Clark-Fitzpatrick, Inc.*, 70 NY2d at 389).

Here, this negligence cause of action by plaintiffs fails to allege that the Sponsor defendants owed a legal duty to them outside the contract, and is nothing more than an allegation of a breach of contract against the Sponsor and its principals. Thus, it is duplicative of plaintiffs’ breach of contract claims and does not allege any independent cause of action for negligence (*see Hamlet on Olde Oyster Bay Home Owners Assn., Inc.*, 65 AD3d at 1288). Consequently, dismissal of plaintiffs’ fourth cause of action is warranted (*see Clark-Fitzpatrick, Inc.*, 70 NY2d at 389; *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2d Dept 2005]; *Board of Mgrs. of Riverview*, 182 AD2d at 665-666; *Merritt*, 216 AD2d at 543; *431 Conklin Corp.*, 181 AD2d at 717-718).

Plaintiffs’ fifth cause of action for negligent supervision of construction against the Sponsor defendants alleges that the Sponsor had a duty to exercise reasonable care and skill

according to standard practices in its trade in the oversight of the construction of the units and the buildings of the Condominium. It asserts that the Sponsor breached that duty in that it negligently supervised the construction of the units and the buildings of the Condominium in a manner resulting in the numerous construction defects. It alleges that Yerushalmi is jointly liable for such negligent supervision.

This cause of action similarly is duplicative of, and fails to allege a claim which is independent of plaintiffs' breach of contract cause of action. Therefore, dismissal of plaintiffs' fifth cause of action is mandated (*see Hamlet on Olde Oyster Bay Home Owners Assn., Inc.*, 65 AD3d at 1288; *Board of Mgrs. of Riverview*, 182 AD2d at 665-666; *Merritt*, 216 AD2d at 543; *431 Conklin Corp.*, 181 AD2d at 717-718; *Board of Mgrs. of the Crest Condominium*, 35 Misc 3d 1223 [A], *8).

The Sponsor defendants seek dismissal of plaintiffs' seventh cause of action for fraud and/or negligent misrepresentation, arguing (in their reply memorandum of law and at oral argument) that this claim is preempted by the Martin Act. It well established that the Martin Act does not create a private cause of action and provides that only the Attorney General can sue for violations of the act (*see CPC Intl.*, 70 NY2d at 275). However, ““there is nothing in the plain language of the Martin Act, its legislative history or appellate level decisions in this state that supports defendant's argument that the Act preempts otherwise validly pleaded common-law causes of action”” (*Assured Guar. [UK] Ltd.*, 18 NY3d at 349, quoting and *affg* 80 AD3d 293, 304 [1st Dept 2010]).

In *Kerusa Co. LLC* (12 NY3d at 239), the Court of Appeals held that “a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act . . . and the Attorney General's implementing regulations.” The Court of Appeals, in *Kerusa Co. LLC* (12 NY3d at 247 n 5), however, expressly declined to decide “whether the alleged misrepresentation of an item of information that the Martin Act or the Attorney General's implementing regulations require[d] to be disclosed would support a cause of action for fraud, so long as the elements of common-law fraud are pleaded” since the plaintiff's cause of action for fraud, in *Kerusa Co. LLC* (12 NY3d at 247), rested “entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations.”

In *Kerusa Co. LLC* (12 NY3d at 246), the Court of Appeals noted that the proposed second amended complaint therein at most alleged “only that the sponsor defendants tolerated shoddy construction,” and that Kerusa did “not contend, for example, that drywall was painted over or taped over to cover up or prevent discovery of water damage,” or “that walls or bricks were put up to hide or prevent it from finding leaking pipes or holes in the foundation.” The Court of Appeals, in *Kerusa Co. LLC* (12 NY3d at 246), suggested that such allegations supporting “active concealment unrelated to alleged omissions from Martin Act disclosures” would support a sustainable cause of action for fraud.

The Appellate Division, Second Department, has specifically held that a cause of action by a plaintiff to recover damages for common-law fraud based upon affirmative misrepresentations in an offering plan, incorporated by reference into contracts of sale of condominium units, are not preempted by the Martin Act (*see Caboara v Babylon Cove Dev., LLC*, 82 AD3d 1141, 1142 [2d Dept 2011]; *Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, 71 AD3d 935, 936 [2d Dept 2010]; *Caboara v Babylon Cove Dev., LLC*, 54 AD3d 79, 82-83 [2d Dept 2008]). Where a sponsor deceptively conceals the poor construction of the condominium and makes misrepresentations as to the habitability of the condominium unit, the plaintiff's fraud claim does not rely wholly on omissions from the filings required under the Martin Act, and such claim will not be subject to dismissal based on a Martin Act preemption theory (*see Bhandari*, 84 AD3d at 607; *Assured Guar. [UK] Ltd.*, 80 AD3d 293, 301 [2d Dept 2010], *aff'd* 18 NY3d 341 [2011]; *Labgold v Soma Hudson Blue, LLC*, 2011 NY Slip Op 32179[U], 2011 WL 3565823 [Sup Ct, NY County 2011]).

Here, plaintiffs' amended complaint alleges not that the Sponsor defendants omitted to disclose information required under the Martin Act, but that they affirmatively misrepresented, as part of the Offering Plan, material facts about the Condominium. Plaintiffs' amended complaint lists numerous examples of the alleged construction defects that form the basis of their claims. Plaintiffs allege that the Sponsor defendants were aware of the building leaks prior to the time when the Sponsor offered the units for sale pursuant

to the Offering Plan, but the Offering Plan contains no disclosure about the building leaks or problems with the roofing or windows. In addition, plaintiffs allege that the Sponsor and its agents repainted unsold units in between rainstorms in order to make the unsold units look presentable to prospective buyers and renters. At oral argument, plaintiffs specifically pointed to their allegation that the defects were “painted over” to conceal the defects in the Condominium.

Based upon these alleged affirmative misrepresentations, plaintiffs’ fraud claim is not preempted by the Martin Act (*see Assured Guar. [UK] Ltd.*, 18 NY3d at 353; *Kerusa Co. LLC*, 12 NY3d at 247; *Bhandari*, 84 AD3d at 607; *Board of Mgrs. of Marke Gardens Condominium*, 71 AD3d at 836). Thus, the Sponsor defendants are not entitled to dismissal of plaintiffs’ seventh cause of action for fraud as preempted by the Martin Act (*see Kerusa Co. LLC*, 12 NY3d at 239; *Board of Mgrs. of Marke Gardens Condominium*, 71 AD3d at 936).

The Sponsor defendants, however, further argue that plaintiffs’ seventh cause of action for fraud is duplicative of their breach of contract claim in that the only fraud charged relates to a breach of the alleged contract, and that the alleged fraudulent statements related only to future events. It is well established that “[a] fraud based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract’” (*Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008], quoting *First Bank of Ams. v Motor Car Funding*, 257

AD2d 287, 291 [1st Dept 1999]). “In order to establish a fraud claim in addition to a breach of contract claim, plaintiff must show misrepresentations that are misstatements of material fact or promises with a present, but undisclosed, intent not to perform, not merely promissory statements regarding future acts” (*Mora v RGB, Inc.*, 17 AD3d 849, 852 [3d Dept 2005]). “[A] misrepresentation of a material fact which is collateral to the contract and serves as an inducement for the contract is sufficient to allege fraud” (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; *see also First Bank of Ams.*, 257 AD2d at 291-292).

“A fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff’s breach of contract claim” (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]). “Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract . . . and therefore involves a separate breach of duty” (*id.*; *see also J & D Evans Constr. Corp. v Iannucci*, 84 AD3d 1171, 1172 [2d Dept 2011]).

Here, plaintiffs’ fraud claim is not duplicative of their breach of contract claim as it sets forth misrepresentations collateral to the contract, including material factual misstatements in the Offering Plan regarding the nature and size of the Condominium and the quality of its construction that do not merely relate to future performance, but alleges the Sponsor defendants’ present intent to deceive by their misrepresentations. Moreover, the Sponsor defendants’ argument that plaintiffs cannot establish justifiable reliance on the

alleged misrepresentations or omissions, citing the “as is” clause in the Purchase Agreement, must be rejected since this was an ongoing project involving renovation, demolition, and new construction that was not complete at the time such representations were made. Plaintiffs have sufficiently pleaded that they justifiably relied upon the Sponsor defendants’ false representations in deciding to enter into the Purchase Agreements for units at the Condominium, and that the Sponsor defendants’ misrepresentations regarding the condition of the Condominium were “the direct and proximate cause of the losses claimed” (*Laub v Faessel*, 297 AD2d 28, 30 [1st Dept 2002]).

The court also rejects the Sponsor defendants’ argument that plaintiffs have failed to plead their fraud claim with the requisite particularity pursuant to CPLR 3016 (b) (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). Plaintiffs have sufficiently detailed the allegedly fraudulent misrepresentations made by the Sponsor defendants in the Offering Plan and Purchase Agreements which were allegedly known to be false when made, and made with the intention of inducing them to purchase units at the Condominium, and which they allegedly justifiably relied upon, causing them to be injured (*see Lanzi v Brooks*, 54 AD3d 1057, 1058 [3d Dept 1976], *affd* 43 NY2d 778 [1977]). The motion to dismiss the seventh cause of action for fraud and/or negligent misrepresentation is denied.

Plaintiffs’ ninth cause of action alleges that the Sponsor defendants violated General Business Law § 349 (a) by making false, deceptive, and misleading representations to them

by stating, among other things, that the building and the units, including the materials, equipment, and fixtures to be installed therein, would be constructed substantially in accordance with the Offering Plan and the plans and specifications. Plaintiffs assert that the Sponsor defendants engaged in a deceptive “bait and switch,” making these misrepresentations to prospective purchasers, including them, to induce them to enter into Purchase Agreements, when, in fact, such representations were false when made and known to be so.

Under General Business Law § 349 (a), it is unlawful to engage in “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” Pursuant to General Business Law § 349 (h), in addition to the right granted to the Attorney General to bring an action under this statute, there is a private right of action for “any person who has been injured by reason of any violation of this section,” allowing injunctive relief and damages, as well as reasonable attorney's fees.

In order to plead a claim for deceptive practices under this statute, a plaintiff must allege (1) that the act, practice, or advertisement was consumer-oriented, (2) that the act, practice, or advertisement was misleading in a material respect, and (3) that the plaintiff was injured as a result of the deceptive practice, act, or advertisement (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). In order to demonstrate that the act was “consumer-oriented,” the plaintiff “need not show that the defendant committed the complained-of acts repeatedly--either to the same plaintiff or to other consumers--but instead

must demonstrate that the acts or practices have a broader impact on consumers at large” (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Walsh v Liberty Mut. Ins. Co.*, 289 AD2d 842, 844 [3d Dept 2001]).

General Business Law § 349 “was intended [as] a consumer protection statute” (*Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 145 [2d Dept 1995]), so “[p]rivate transactions without ramifications for the public at large are not the proper subject of [such] a claim” (*Canario v Gunn*, 300 AD2d 332, 333 [2d Dept 2002]). Contracts between parties, involving the purchase of condominium units have been held “unique to the parties” and “[do] not fall within the ambit of the statute” (*Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311-312 [1st Dept 2000]; *see also Waverly Properties, LLC v KMG Waverly, LLC*, 824 F Supp 2d 547, 566 [SD NY 2011]; *Devlin v 645 First Ave. Manhattan Co.*, 229 AD2d 343, 344 [1st Dept 1996]; *see generally Genesco Entertainment, Div. of Lymutt Industries, Inc. v Koch*, 593 F Supp 743, 752 [SD NY 1984] [holding “single shot transaction” outside purview of General Business Law § 349]; *Quail Ridge Assoc. v Chemical Bank*, 162 AD2d 917, 920 [3d Dept 1990], *lv dismissed* 76 NY2d 936 [1990] [dismissing cause of action pursuant to General Business Law § 349 as there was only a “single shot” commercial transaction at issue]).

Here, plaintiffs’ ninth cause of action must be dismissed “since it stem[s] from a private contractual dispute between the patties without ramification for the public at large”

*(Merin v Precinct Devs. LLC, 74 AD3d 688, 689 [1st Dept 2010] [internal citations omitted]; see also Thompson, 271 AD2d at 311-312; see also The 20 Pine Street Homeowners Association v 20 Pine Street LLC, 2012 NY Slip Op 31302[U], 2012 WL 1965623 [Sup Ct, NY County 2012]; Board of Mgrs. of the Crest Condominium, 35 Misc 3d 1223[A], *9).* Consequently, the Sponsor defendants' motion, insofar as it seeks dismissal of plaintiffs' ninth cause of action, must be granted (*see* CPLR 3211 [a] [7]).

Plaintiffs' tenth cause of action, which is brought by the individual unit owners (and not the Board), alleges that the Sponsor defendants violated 15 USC § 1703 (a) (2), the Interstate Land Sales Full Disclosure Act (ILSA). The Sponsor defendants contend that the federal courts have exclusive jurisdiction over this statute and, therefore, this court does not have subject matter jurisdiction over this claim, mandating its dismissal pursuant to CPLR 3211 (a) (2).

This contention is devoid of merit. ILSA expressly confers subject matter jurisdiction on state courts to hear ILSA fraud claims by providing that “[t]he district courts of the United States . . . shall have jurisdiction of offenses and violations under this chapter . . . and concurrent with State courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter” (15 USC § 1719). Thus, this court has jurisdiction over ILSA fraud claims.

The Sponsor defendants further argue that the Board does not have standing to bring ILSA claims on behalf of the individual unit owners. This argument is unavailing since the

amended complaint explicitly states that this cause of action is brought by the individual unit owners, and not the Board. Each of these plaintiffs are “purchasers” under 15 USC § 1701 (10) entitled to bring a cause of action under 15 USC § 1709 (a). (*See Board of Managers of the Crest Condominium v City View Gardens Phase II, LLC*, 35 Misc 3d 1223[A], *10 [Sup Ct, Kings County, 2012]; *Bd of Managers v 72 Berry St., LLC*, 801 F Supp 2d 30 [EDNY 2011]).

Plaintiffs specifically cite to 15 USC § 1703 (a) (2) (A), (B), and (C). 15 USC § 1703(a) (2) of ILSA provides that “[i]t shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails” with respect to the sale of property:

“(A) to employ any device, scheme, or artifice, to defraud;

“(B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;

“(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser. . .”

This section of ILSA cited by plaintiffs concerns misrepresentation and fraud with respect to the sale of land, including condominiums (*see Tencza v Tag Court Square, LLC*, 803 F Supp 2d 279, 283 [SD NY 2011]; *Cruz v Leviev Fulton Club, LLC*, 711 F Supp 2d

329, 331 [SD NY 2010] [“While the ILSA's text refers to the sale of ‘lots,’ . . . its protections apply to the sale of condominiums as well”]; *Pasquino v Lev Parkview Developers, LLC*, 2011 WL 4502205, *6 [SD NY 2011]). Thus, plaintiffs have sufficiently pleaded a claim under ILSA, and dismissal of their tenth cause of action must be denied.

The Sponsor defendants argue that plaintiffs’ eleventh cause of action for conversion as against Yerushalmi should be dismissed as duplicative of their breach of contract claim. This cause of action alleges, among other things, that Yerushalmi, previously acting as a Sponsor controlled member of the Board, used funds collected by the Board as common charges and special assessments, not for the purpose of operating the property and administration of the Condominium, but for expenditures on items and services related to the construction of the Condominium and promised to the unit owners, including plaintiffs, by the Sponsor in the Offering Plan.

Specifically, plaintiffs allege that the Sponsor controlled Board submitted an invoice for \$85,000 for the management of the buildings for the first 17 months of the Condominium’s existence, and that this was an exorbitant fee for a 68-unit building. Plaintiffs further allege that the Sponsor controlled Board voted to assess the unit owners \$200,000 to pay for repairs to the outer walls of the buildings, and that these repairs would not have been necessary if the original construction work had been properly performed. In addition, plaintiffs allege that the Sponsor controlled Board voted to use no less than \$29,000 of Condominium funds to pay for such construction related expenses as SW Engineering

reports, waterproofing work by SW Engineering, leak repairs by the firm Capital Construction, and the Department of Buildings' filing fees related to waterproofing work. Plaintiffs assert that the Sponsor had promised to provide these items and services to the unit owners in the Condominium's Offering Plan.

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). “[T]o establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized domain over the thing in question . . . to the exclusion of the plaintiff's rights” (*Estate of Giustino v Estate of DelPizzo*, 21 AD3d 523, 523 [2d Dept 2005], quoting *Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 [2d Dept 1975]; see also *Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 113 [2d Dept 2009], *lv dismissed* 13 NY3d 900 [2009]; *Zendler Constr. Co., Inc. v First Adj. Group, Inc.*, 59 AD3d 439, 440 [2d Dept 2009]).

Tangible personal property or a specific sum of money must be involved (see *Independence Discount Corp.*, 47 AD2d at 757). A claim of conversion cannot be predicated “on a mere breach of contract” (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]). Where there are no independent facts alleged that constitute a separate taking which

could give rise to tort liability, apart from an alleged breach of contract, a cause of action for conversion must be dismissed (*see Tornheim v Blue & White Food Prods. Corp.*, 56 AD3d 761, 761 [2d Dept 2008]; *Hochman v LaRea*, 14 AD3d 653, 655 [2d Dept 2005]; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]; *Wolf v National Council of Young Israel*, 264 AD2d 416, 417 [2d Dept 1999]; *Priolo Communications v MCI Telecom. Corp.*, 248 AD2d 453, 454 [2d Dept 1998]; *MBL Life Assur. Corp. v 555 Realty Co.*, 240 AD2d 375, 376 [2d Dept 1997]).

Here, plaintiffs do not allege that a “specific identifiable thing” was entrusted to Yerushalmi. Rather, plaintiffs allege that Yerushalmi wrongfully used funds to pay for items and services which should have been paid for by the Sponsor. Thus, plaintiffs' claim stems from the promises contained in the Offering Plan, and sounds in breach of contract. Consequently, plaintiffs' eleventh cause of action for conversion is solely predicated on an alleged breach of contract, and must be dismissed for failure to state a cause of action (*see* CPLR 3211 [a] [7]).

Plaintiffs' twelfth cause of action for breach of fiduciary duty alleges that Yerushalmi failed to act in the best interests of the unit owners in a variety of ways, including the failure to keep accurate books and records, and by causing the expenditure of Condominium funds and resources on items and services related to the construction of the Condominium. “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, 590 [2d Dept 2007]). As a member of the Board, Yerushalmi stood in a fiduciary relationship and was required to act in good faith (*see Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 [1st Dept 1993]). Plaintiffs allege misconduct by Yerushalmi, which directly caused them damages.

It is well established that “individual board members may be validly sued for breach of fiduciary duty if the complaint pleads independent tortious acts on the part of those individual directors” (*Weinreb v 37 Apartments Corp.*, 2012 NY Slip Op 03754, *3 [1st Dept 2012]; *see also Berenger*, 93 AD3d at 185; *Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448, 449 [1st Dept 2010]). Plaintiffs’ amended complaint has pleaded fraud claims as against Yerushalmi, and at this early pre-answer stage of the action, the Sponsor defendants have not shown, as a matter of law, that there is no basis for this breach of fiduciary duty claim against Yerushalmi.

The Sponsor defendants seek dismissal of this cause of action on the basis that it is merely duplicative of plaintiffs’ breach of contract claim. However, this cause of action is based on a breach of a duty which is separate and distinct from plaintiffs’ breach of contract claim. As such, dismissal of plaintiffs’ twelfth cause of action, at this juncture, must be denied.

CONCLUSION

Accordingly, the Architect defendants' motion to dismiss plaintiffs' amended complaint as against them is granted. Their motion to dismiss "all cross claims" is denied. The Sponsor defendants' motion to dismiss plaintiffs' amended complaint as against them is granted insofar as it seeks dismissal of plaintiffs' second, third, fourth, fifth, ninth, and eleventh causes of action, and is denied in all other respects. Defendants shall serve their answer within thirty days hereof. A preliminary conference is scheduled for October 17, 2012.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.