ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

HARBOUR POINTE AT ARVERNE BY THE SEA HOME OWNERS ASSOCIATION II, INC., on its own behalf on behalf of its members, all the residential home owners of Harbour point at Averne by the Sea II,

Index No.: 703118/12

Motion Date: 1/31/13

Motion Seq.: 1

Plaintiffs,

- against -

BEJAMIN-BEECHWOOD LLC, BENJAMIN AVERNE LLC, BEECHWOOD AVERNE BUILDING CORP., ALVIN BENJAMIN, LESLIE A. LERNER, MICHAEL DUBB, FAKLER, ELIASON AND PORCELLI A.I.A. ARCHITECTS AND ASSOCIATES LLP, LEO D. FAKLER, A.I.A.,

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendants Fakler, Eliason and Porcelli A.I.A., Architects and Associates LLP, and Leo D. Fakler, A.I.A. (collectively FEP) pursuant to CPLR 3211(a)(1) & (7) dismissing the plaintiff's complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8
Reply Affidavits.....	9-10
Additional Papers.....	11-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

In this action, the plaintiff, an association of condominium

owners at Harbour Pointe At Arverne By The Sea II development (Harbour Pointe II) is suing the developers and builders of the condominium for alleged construction defects. The defendant Benjamin-Beechwood LLC, the sponsor and developer, offered and marketed the homes at Harbour Pointe II for sale to public pursuant to an offering plan. It is a mandatory requirement of home ownership at Harbour Pointe II that each homeowner is required to become a member of the plaintiff association upon purchase of a home within the development.

The developer entered into a contract with defendants FEP to provide architectural services which consisted of the design and preparation of drawings for this development of 121 two-family homes and to file those drawings with the Department of Buildings. The complaint alleges that FEP prepared plans and specifications for the construction of the development and homes. The complaint further alleges that FEP was the architect of record for the sponsor and prepared a description of the property as well as an addendum to the architect's report which were included in the offering plan. Additionally, the offering plan contained a report and certification prepared by the FEP.

In order to be successful on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of the claim (*see Held v Kaufman*, 91 NY2d 425 [1998]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]). On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court must accept as true all the allegations in the complaint (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561 [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]). In support of its motion to dismiss, the defendants FEP submitted the subject contract for architectural services. The contract does not contain any mention of the plaintiff home owners.

The elements for a cause of action for breach of contract are (1) the existence of a contract, (2) the performance by plaintiff, (3) the defendants' breach of their contractual obligations and (4) damages resulting from the breach (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2d Dept 2010]). Here, the defendants have established that the plaintiff was not in privity of contract with them. In the alternative, the plaintiff alleges that it is a third-party beneficiary of the contract. A third-party beneficiary may sue as a beneficiary on a valid contract when there is a an intent to benefit the third party and the benefit

is not merely incidental (*see Kotchina v Luna Park Hous. Corp.*, 27 AD3d 696 [2d Dept 2006]); *Mutual Ticket Agents, Local 23293 v Roosevelt Raceway Assoc.*, 172 AD2d 595 [2d Dept 1991]). The plaintiff claims that it has standing to assert a breach of contract cause of action as a third-party beneficiary of the contract. Here, the contract between the sponsor and FEP contains no provision expressly stating an intention to benefit plaintiff, and the plaintiff did not otherwise plead any facts or circumstances that would support a finding that it as more than a mere incidental beneficiary of the contract, therefore the plaintiff is not a third-party beneficiary (*Regatta Condominium Assn. v Village of Mamaroneck*, 303 AD2d 739 [2d Dept 2003]). In *Regatta*, the Second Department dismissed a breach of contract cause of action against an "Owner's Representative" who had contracted with the sponsor because the contract did not expressly state an intention to benefit any third-party (*Id.*). The Second Department then applied this principle in a companion decision concerning the same condominium development, dismissing a breach of contract cause of action against the architect for the alleged negligent design and construction of a condominium complex (*Regatta Condominium Assn. v Village of Mamaroneck*, 303 AD2d 740 [2d Dept 2003]). Therefore, the breach of contract cause of action must be dismissed.

Additionally, the cause of action for negligent misrepresentation must be dismissed. To establish a cause of action for negligent misrepresentation the plaintiff must show either privity of contract or a relationship so close as to approach that of privity (*Parrot v Coopers & Lybrand*, 95 NY2d 479 [2000]. In *Parrot*, the Court of Appeals rejected the finding of privity to any foreseeable plaintiff. The Court found that the plaintiff was not a known party because the facts were insufficient to establish a relationship so close as to approach privity. (*Id.* At 484.) Similarly, the plaintiff, here, has not sufficiently alleged that when the defendants made any representation for which it is being sued, the defendants knew the plaintiff would be among them, or in fact, that the defendants knew or even had the means of knowing of plaintiff's existence (*Skyes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370 [2010]). Here, the plaintiff was merely a member of a potential class of purchasers rather than a known party. Thus, the plaintiff was not in so close a relationship to have the functional equivalency of privity necessary to support a cause of action for negligent misrepresentation.

The cause of action for professional malpractice must be dismissed as well. A cause of action for architectural malpractice requires proof of a duty owed to the plaintiff.

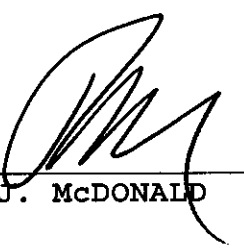
Here, the plaintiff failed to plead any facts sufficient to establish that FEP owed a duty to the plaintiff as there was no contractual privity nor the functional equivalent of contractual privity necessary to support such a cause of action (*Melnick v Parlato*, 296 AD2d 443 [2d Dept 2002]).

The plaintiff's reliance on two First Department cases, *Board of Mgrs. of Alfred Condominium v Carol Mgt.* (214 AD2d 380 [1st Dept 1995]) and *Board of Mgrs. of Astor Terrace Condominium v Schuman, Lictenstein, Claman & Efron* (183 AD2d 488 [1st Dept 1992]) to oppose the motion in its entirety is misplaced. Those cases involved contracts and facts, which unlike here, contained sufficient intention that the eventual purchasers were beneficiaries of the agreement. To the extent that the plaintiff uses those cases to support a finding here of a relationship approaching that of privity, those cases were expressly limited by the First Department following the Court of Appeals decision in *Parrot* (*Skyes v RFD Third Avenue 1 Assoc., LLC*, 67 AD3d 162 [1st Dept 2009]) and further rejected by the Court of Appeals which stated that *Astor* is "inconsistent with *Credit Alliance* and our cases applying it" (*Skyes*, 15 NY3d at 374).

Finally, though the plaintiff submitted papers after the motion was fully submitted, this Court will consider these papers as the defendant had a chance to put in a reply (*see Gastaldi v Chen*, 56 AD3d 420 [2008]). In those papers, the plaintiff points to *Newswalk Condominium v Shaya B. Pac. LLC*, (102 AD3d 932 [2d Dept 2013]), which it feels has a direct bearing on this case and supports its position that the motion to dismiss should be denied. The Court in *Newswalk* cites to *Board of Mgrs. of Astor Terrace Condominium* (*183 AD2d at 488*) in denying a summary judgment motion by an architect. The citation to *Astor*, however, is for the principle that privity or its functional equivalent is a requirement to recovery. It does not stand for the analysis undertaken in *Astor* as such analysis has been rejected by the Court of Appeals. Inasmuch as the facts in the complaint were insufficient to support any such privity or functional equivalency, *Newswalk* does not support denial of the motion to dismiss this complaint against FEP.

Accordingly, the motion by defendants FEP to dismiss the complaint is granted and the complaint is dismissed against those defendants.

Dated: Long Island City, NY
May 30, 2013



ROBERT J. McDONALD
J.S.C.