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

PRESENT: SHERRY KLEIN HEITLER PART 30
Justice

SYLVIA MENDEL,

Plaintiff,

- v -

HENRY PHIPPS PLAZA WEST, INC.,

Defendant.

INDEX NO. 107021/03

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN - 3 2004
COUNTY CLERK'S OFFICE
NEW YORK

THIS MOTION IS DECIDED PURSUANT TO THE ACCOMPANYING DECISION AND ORDER

DATED 5-25-04

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

Dated: 5-25-04

SHERRY KLEIN HEITLER J.S.C.

SHERRY KLEIN HEITLER

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DONOTPOST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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SYLVIA MENDEL,

Index No. 107021/03

Plaintiff,

DECISION & ORDER

-against-

HENRY PHPPS PLAZA WEST, INC. et al.,

Defendants.

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SHERRY KLEIN HEITLER, J.:

Motions 001 and 004 are consolidated for disposition.

Defendants Henry Phipps Plaza West (Housing Co.), Bellevue South Associates, L.P. (Bellevue), Bellwest Management Corp. (Bellwest) and Phipps Houses, Inc. (Phipps Houses), move, pursuant to CPLR 3211(a)(1), 3211(a)(5) and 3211(a)(7), for an order:

- dismissing the first through fourth and the eighth cause of action by reason of plaintiffs' lack of standing;
- dismissing the first through fifth, eighth and ninth causes of action on the basis of documentary evidence;
- dismissing the seventh cause of action for failure to state a cause of action;
- dismissing the sixth, seventh, tenth and eleventh causes, as against Bellwest and Phipps Houses, for failure to state a cause of action;
- dismissing, on the basis of the Statute of Limitations, the sixth, seventh and tenth causes of action to the extent that they allege personal injury or property damage occurring more than three years before the commencement of this action ;
- dismissing, on the basis of the Statute of Limitations, the sixth, seventh and tenth causes of action to the extent that they allege breaches of contract that occurred more than six years before the commencement of the action.

Plaintiffs are tenants' who assert eleven causes of action on behalf of a class of all tenants of the Housing Co., a limited-profit housing company that owns Henry Phipps Plaza West (Phipps Plaza West), an eight-building, 894-apartment Mitchell-Lama rental apartment complex located on Second Avenue, between East 26th Street and East 29th Street, in Manhattan. Bellevue is a limited partnership which is the beneficial owner of the property. Bellwest is the managing general partner of Bellevue. Phipps Houses is a corporation that is the sole shareholder of the Housing Co. and Bellwest.

The subject property has been a Mitchell-Lama housing development for the past 28 years. The Mitchell-Lama program is well-described in Columbus Park Corp. v. HPD, 80 N.Y.2d 19 [19921). Essentially, it is a government program that encourages the private development of low and middle income housing by offering state and municipal assistance to developers in the form of low-interest, long-term government mortgage loans and real estate tax exemptions. In return for those financial benefits, developers agree to regulations concerning rent, profit, distribution of property and tenant selection. In the absence of an agreement which provides to the contrary, a limited-profit housing may dissolve, i.e., withdraw from the Mitchell-lama program, pursuant to Private Housing Finance Law § 35(2), described below.

The central issue here is whether defendants have the right to dissolve the Housing Co. and transfer the subject property to Bellevue, which would then operate Phipps Plaza West free of the regulations applicable to Mitchell-Lama housing. The balance of the motion relates to plaintiffs' complaints regarding building conditions, primarily the alleged presence of mold in the buildings.

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[1] The original complaint was brought by four tenants; the amended complaint is brought by 65 tenants. No motion for class certification was ever made.

Certain historical aspects of urban renewal in Manhattan are relevant to the instant dispute. In September, 1965, the Board of Estimate approved an urban renewal plan (Plan) for the Bellevue South area of Manhattan. The area is bounded by First and Second Avenues, and by East 23rd and East 30" Streets. The Plan was amended several times. The third and final amendment was approved by the Board of Estimate on May 20, 1971. The Plan states that housing in the area will be "developed for occupancy by families of low and moderate income," but does not require that the housing be maintained for such occupancy for any particular period of time. Moreover, the Plan does not refer to the Mitchell-Lama program.

The Housing Co. was organized by Phipps Houses as a limited-profit housing company under the Mitchell-Lama Law, for the purpose of acquiring three parcels in the South Bellevue Urban Renewal Area. In early 1973, the City's Housing and Development Administration (HDA)[2] prepared a land disposition agreement (LDA), providing for the sale of the three parcels to the Housing Co. In April 1973, the Board of Estimate approved the LDA. The Housing Co. signed the LDA in December 1973. The City then conveyed title to the three parcels to the Housing Co., which thereafter constructed Phipps Plaza West. A mortgage loan was made by the State Housing Finance Administration (HFA) in accordance with the Mitchell-Lama Law. Tax abatements were granted by the City, and the project was completed in 1976. Since then, Phipps Plaza has been operated as a Mitchell-Lama rental complex, under the supervisory authority of the New York State Division of Housing and Community Renewal (DHCR).

The Mitchell-Lama Law (PHFL § 35[2]) provides that a limited-profit housing company "may voluntarily be dissolved without the consent of [DHCR], not less than twenty years after the occupancy date upon the payment in full of the remaining balance of the mortgage or mortgages and

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[2] Now the Department of Housing Preservation and Development, or HPD.

of any and all expenses incurred in effecting such voluntary dissolution.''

In January 2002, Bellevue submitted to DHCR the written notice of intention to withdraw fiom the Mitchell-Lama program, Plaintiffs' response was that under their interpretation of the Mitchell-Lama law and the LDA, defendants were obligated to keep **Phipps** Plaza West in the Mitchell-Lama program until at least May 2011. DHCR then asked HPD (HDA's successor) for a statement of its position. On September **13,2002,HPD** Assistant Commissioner Julie Walpert wrote to DHCR Assistant Commissioner McCurnin, stating that, according to HPD's interpretation of the Mitchell-Lama law and the relevant provisions of the **LDA** (described below), the Mitchell-Lama restrictions were effective until September **10,2004.** By letter dated December 23,2002, Assistant Commissioner McCurnin advised the parties that DHCR concurred with HPD's position, i.e., concurred that defendants were free to proceed with a voluntary dissolution.

Plaintiffs then commenced the instant action. Thereafter, defendants went ahead with the closing. After pre-paying **the** remaining mortgage balance, defendants effected **a** transfer of title from Housing Company to Bellevue. Moreover, defendants surrendered their federal subsidy and their New York City real estate tax abatement.

Defendants have offered to accept Section 8 benefits for all qualified tenants. According to defendants, nearly 80% of the tenants have incomes low enough to qualify for Section **8** benefits. Under the Section 8 program, tenants pay no more **than** 30% of their income in rent, and owners receive a federal subsidy which covers the rest of the rent. Plaintiffs contend that tenants receiving Section 8 benefits are unprotected from rent increases in that **an** owner can withdraw from the Section 8 program. Defendants contend that once a tenant has been accepted into the Section 8 program, such tenant is legally entitled to continued Section **8** status so long **as** the tenant remains eligible under the statutory criteria. Since the question is the right of the defendants to withdraw

Phipps Plaza West from the Mitchell-Lama program, rather than the rent to be charged to tenants after such withdrawal occurs, this court need not decide that issue.[3]

Defendants purportedly have offered "discounted" leases for certain tenants whose incomes are too high for Section 8. However, those leases are being offered only for a limited period of time. The obligation, if any, of the defendants to renew those discounted leases is also not at issue here.

Plaintiffs recognize the 20-year rule recited in PHFL § 35(2), but contend that the LDA extended defendants' commitment to retain Mitchell-Lama status for Phipps Houses, long after the end of the 20-year period.

Several sections of the LDA are material to the resolution of the instant dispute.

Section 407(B), which is entitled "Reservation of Rights After Completion of Project, provides:

> Nothing expressed in or to be implied from this Agreement is intended or shall be construed to prevent, foreclose or prohibit the holders of interest or the Housing Company or any Successor Housing Company,*** from exercising any and all rights*** [under] Article II of the Private Housing Finance Law ***including, without limitation, voluntarily dissolving the Housing Company pursuant to and subject to the provisions of said Article II, particularly subdivision 2 of Section 35 of said law***

Section 504(A) provides:

> The Housing Company***covenant[s] that the grantee, its successors and assigns of the land conveyed or any part thereof***will devote the Housing Site to and only to the uses specified in the ***Plan***Said covenant is to run for a period of forty (40) years from the date of approval of by the City of New York, of the***Plan***and shall expire on September 10,2004.

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[3] Although DHCR took the position that defendants had the right to withdraw the development fiom the Mitchell-Lama program as of September 2004, the agency took no position as to the rent lawfully chargeable to tenants.

Section 505 of the LDA states:

> [Nothing expressed in or to be implied from this Agreement is intended or shall be construed to give any person, firm or corporation other than the parties hereto and the holder or holders of any mortgage authorized under this Agreement any legal or equitable right, remedy, or claim under this Agreement, or under any provisions *** being for the sole and exclusive benefit of the parties hereto and the holder or holders of any mortgage authorized under this Agreement.

Section 505(B) states:

> Notwithstanding any provision to the contrary contained in Paragraph 505 hereof, and in amplification and not in restriction of the provisions thereof, it is intended and agreed that the City and its successors and assigns shall be deemed beneficiaries of the agreements and covenants provided in said subdivision (a), (b) and (c) of Paragraph 504 hereof, and the United States shall be deemed a beneficiary of the covenant provided in subdivision (c) of Paragraph 504 hereof, both for and in their or its own right and also for the purposes of protecting the interests of the community and other parties, public or private, in whose favor or for whose benefit such agreements and covenants have been provided. Such agreements and covenants shall*** run in favor of the City and the United States, for the entire period during which such agreements and covenants shall be in force and effect, without regard to whether the City or the United States has at any time been, remains, or is an owner of any land or interest therein to or in favor of which such agreements and covenants relate. The City shall have the right,*** in the event of any breach of the covenant provided in subdivision (c) of Paragraph 504 hereof, to exercise all the rights and remedies, and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breach of agreement or covenant, to which it or any other beneficiaries of such agreement or covenant may be entitled.

In deciding this motion, this court will address the amended complaint, which states (albeit in somewhat more detail) allegations similar to those of the original complaint.

The first cause of action alleges that Bellevue's notification to DHCR of the Housing Company's intention to withdraw Phipps Plaza West from the Mitchell-Lama program is a breach

of its obligations under the **LDA.** Plaintiffs seek specific performance of the Housing Company's obligation to keep Phipps Plaza West in the Mitchell-Lama program until at least May 20,2011, or compensatory damages.

The second cause **of** action alleges that the provision in ¶ 504(a) of the LDA, that the Housing Company covenants to devote its site to the Plan until September 10,2004, does not reflect the actual understanding between the City **and** the Housing Company that the covenant would remain in effect until May 20,2011. In effect, plaintiffs allege a unilateral mistake on the part of the City, **and** the Housing Company's knowledge of that mistake. Plaintiffs seek reformation of the **LDA** to reflect the later ending date of the covenant.

The third cause of action alleges that even if the covenant does expire on September 10, 2004, Bellevue's notification to DHCR that the Housing Company intends to withdraw fiom the Mitchell-Lama program is a breach of the **LDA.** Plaintiffs seek specific performance of the Housing Company's obligation to comply with the covenant until September 10, 2004, or compensatory damages.

The fourth cause of action alleges that, despite the defendants' offer to accept Section 8 vouchers, the attempt to withdraw Phipps Plaza West fiom the Mitchell-Lama program constitutes a breach of the **LDA** to develop and maintain Phipps Plaza West as housing for occupancy by families of low and moderate incomes.

The fifth cause of action alleges that defendants solicited tenants by misrepresenting to them that the apartments would continue to be for low and middle income people, and that in reliance on that misrepresentation, they gave up apartments elsewhere.

The sixth cause of action alleges that defendants have negligently permitted molds, fungi and other microbial life to develop **and** grow in the apartments. Plaintiffs claim that mold **has** entered

apartments through bathroom vents and in the location of water leaks into various apartments, and seek $450 million in compensatory damages, plus punitive damages.

The seventh cause of action alleges that the infiltration of water into plaintiffs' apartments, and the presence of mold and fungi in those apartments, constitute a nuisance. Plaintiffs seek damages plus injunctive relief.

The eighth cause of action refers to Article 2 of the PHFL, which limits the investors' return to 6% per year. It is alleged that defendants unlawfully evaded the 6 percent limit by using affiliated contractors and suppliers, and renting commercial space to its affiliates under leases highly favorable to the lessees.

The ninth cause of action alleges that if the Housing Co. withdraws Phipps Plaza West from the Mitchell-Lama program without compensating plaintiffs for the reserve funds, defendants would be unjustly enriched.

The tenth cause of action alleges that defendants have allowed building conditions to deteriorate, i.e. lack of clean and potable water, water leaks, faulty windows, molds, lack of ventilation in common areas and bathrooms, presence of pigeons and squirrels, overflowing toilets. Plaintiffs seek abatement of rents previously paid, plus punitive damages.

The eleventh cause of action seeks attorneys' fees and expenses arising from defendants' alleged breaches of the warranty of habitability.

Defendants maintain that, since DHCR and HPD issued opinions as to whether defendants could withdraw the project from the Mitchell-Lama program, plaintiffs' remedy, if any, would have been an Article 78 proceeding. Plaintiffs, however, contend that neither agency ever reached a "final" determination, and that an Article 78 proceeding was neither required nor appropriate. Since it is not clear whether the DHCR and HPD letters were intended as final determinations, this court

will assume, without deciding, that there were no formal agency determinations, and that plaintiffs were not required to proceed via Article 78.

In rendering a determination on a motion to dismiss a complaint for failure to state a cause of action, the allegations of the complaint are assumed to be true (Williams v. Aliano, 246 AD2d 592 [2d Dept 19981). Nevertheless, it is a well-settled principle of contract law that a third party has standing to enforce an agreement only where the agreement indicates an intent to benefit that party (Nepco Forged Products. Inc. v. Consolidated Edison Co. of New York. Inc., 99 A.D.2d 508 [2d Dept. 1984]; Port Chester Electrical Corp. v. Atlas, 40 NY2d 652 [19761). Thus, in order to enforce the LDA, plaintiffs need to establish that they are third-party beneficiaries of that agreement.

The particular language used in the agreement is the best evidence of the intent of the contracting parties (Binghamton Masonic Temple, Inc. v. City of Binghamton, 213 AD2d 742 [3d Dept 19951, lv to appeal denied, 85 NY2d 811 [19951). Where a provision exists in the agreement expressly negating any intent to permit enforcement by third parties, that provision is decisive (Schuler-Haas Elec. Corp. v. Wager Const. Corp., 57 AD2d 707 [4" Dept. 19771; Nepco Forged Products, Inc. v. Consolidated Edison Co. of New York, Inc., supra).

As defendants point out, ¶ 505 of the LDA containsjust such a provision expressly negating any intent to benefit non-contracting parties. Plaintiffs maintain that Section 505(B), which creates an exception to ¶ 504(A), grants them standing to seek enforcement if the LDA. However, ¶ 505(B) extends the right to enforce the contract only to the City of New York (or its successors or assigns) or to the federal govemment.

Federal courts have considered whether mortgage insurance regulatory agreements, entered into between the federal agency and the private developer pursuant to the provisions of the National Housing Act, give third-party beneficiary status to tenants. It has been held that those regulatory

agreements, which are analogous to the **LDA,** do not give tenants third-party beneficiary status (Falzarano v. United States, 607 F.2d 506 [1st Cir. 19791; Reiner v. West Village Assocs., 600 F.Supp. 233 **[SDNY** 1985], aff d, 768 F.2d 32 (2d Cir. 1985).

In Heller v. Middagh St. Assocs, **(Sup** Ct., Kings County, Index No. 20436/02), the court dismissed causes of action that were premised on a limited-profit housing company's alleged breaches of a land disposition agreement. The agreement in Heller, like the instant **LDA,** provided that nothing in the agreement was intended to provide benefits to anyone other than the government agency, the developer or the holder of the mortgage.

In Concerned Cooper Gramercy Tenants Assn. v New York City Educational Construction Fund **(304** AD2d 412 [1st Dept 2003]), the tenants of a Mitchell-Lama project located in a building that also contained a public school, challenged the legality of a ground lease amendment entered into between the Fund, which owned the building, and the **ground** lessee, who **was** the tenants' direct landlord. The challenged amendment provided that **the** withdrawal of the premises from the Mitchell-Lama program would not be deemed a violation of the lease requirement that residents of the demised premises be persons of low or moderate income. The court dismissed the case for lack of standing, noting that the tenants were not parties to the ground lease or the challenged amendment.

In an effort to establish standing, plaintiffs cite Bd. of Managers of Alfred Condominium v Carol Mgmt, Inc., 214 AD2d 380 [1st Dept 19951, lv to **appeal** dismissed, 87 NY2d 942 [1996]), in which a sponsor of a condominium entered into contracts with a construction manager and architect. After control was transferred to the board of managers, the board was able to maintain a suit against the construction manager architect, arising out of alleged construction defects. Alfred, however, must be distinguished from the instant case. In Alfred, the contract between the sponsor and the architect did not contain any disclaimer regarding third-party beneficiary status of non-contracting parties.

Moreover, although the contract between the sponsor and the construction manager did contain such a disclaimer, such disclaimer was negated by a contract rider that explicitly referred to the unit owners as beneficiaries. The instant **LDA** does not contain the rider present in Alfred.

In light of the above, this court holds that plaintiffs lack standing to enforce the LDA. This mandates dismissal of the first, second, third, fourth and eighth causes of action, all of which invoke the LDA as the legal basis for challenging defendants' withdrawal of Phipps Plaza West from the Mitchell-Lama program.

On the eighth cause of action, defendants correctly point out that the PHFL does not provide a private remedy for an owner's alleged violation of the 6% limit on investor return. In response, plaintiffs concede that the statute does not provide a private remedy, but contend that they are seeking to enforce the **LDA** rather than the statute. However, since this court holds that plaintiffs lack standing to enforce the **LDA,** there is no legal basis for the eighth cause of action.

For reasons explained below, even if plaintiffs had standing, the **LDA,** at best, would require defendants to retain Mitchell-Lama status for Phipps Houses until September 10, 2004.

It is true, as plaintiffs point out, that parties are free to enter into agreements extending Mitchell-Lama coverage for a term greater than the 20-year period recited in PHFL § 35(2) (Columbus Park Corp. v. HPD, 80 N.Y.2d 19 [1992]). The LDA appears to create such an extension. The real question, however, is the length of that extension.

In the first cause of action, plaintiffs assert that defendants are obligated to maintain Mitchell-Lama status for Phipps Plaza West at least until May 20, 2011. Plaintiffs contend that the LDA (specifically, ¶ 504(A)) requires defendants to retain such status for 40 years from the Board of Estimate's 1971 approval of the third and final amendment to the Plan. Defendants' position is that, even assuming that the **LDA** extends their obligation beyond the 20-year period provided by PHFL

§ 35(2), the plain language of f 504(A) ends that obligation as of September 10,2004.

The interpretation of an unambiguous contract is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the four comers of the document. (W.W.W. Associates v Giancontieri, 77 NY2d 157 [1990]). Absent a clear ambiguity, the meaning of a contract is to be determined from the language employed by the parties under accepted rules of contract law. (Croman v Wacholder, 2 AD3d 140 [1st Dept 2003]), citing Cowen Co. v Anderson, 76 NY2d 318 [1990]).

The LDA in effect, contains a restrictive covenant against removal of the development project from the Mitchell-Lama program. Restrictive covenants are narrowly construed against the party seeking enforcement. (Greek Peak, Inc. v Grodner, 155 AD2d 827 [3d Dept 1989], aff'd 75 NY2d 981 [1990]). If ¶ 504(A) of the LDA merely recited an expiration date of 40 years from approval of the "Plan," there arguably would be some ambiguity as to whether the 40-year period was to be measured from the 1964 Board of Estimate approval of the original urban renewal plan or the 1971 Board of Estimate approval of the third amendment.[4] In that event, the ambiguity would be construed against plaintiffs, who derive their rights from an agreement formulated by HDA, the drafting party.[5] However, the language stating that the LDA expires on September 10, 2004 eliminates any possible ambiguity as to the end date of the agreement. Contracts are construed so that no clause is rendered meaningless (Two Guys From Harrison, N.Y., Inc. v. S.F.R. Realty Assocs., 63 NY2d 396 [1984]). If plaintiffs' construction of the LDA were correct, there would be

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[4] Defendants state that the third amendment contains only relatively minor changes which do not affect this Mitchell-Lama project. This point, however, does not have to be decided here.

[5] Defendants state that the LDA was drafted unilaterally by HDA, and plaintiffs do not appear to claim otherwise.

no reason to recite the September 10, 2004 expiration date.

In light of the above, this court holds that the **LDA** requires defendants to retain Phipps Plaza West as Mitchell-Lama housing only until September 10, 2004. This court is not aware of any provision of the **LDA** or the **PHFL** that prohibited defendants from making an advance application to DHCR (prior to the **LDA** expiration date) for permission to withdraw from the Mitchell-Lama program. The only restriction, therefore, is that until September 10, 2004, Bellevue, as the new owner of Phipps Plaza West, cannot implement any rent increases beyond those which are permitted under the Mitchell-Lama program.

As the second cause of action is asserted upon "information and belief," plaintiffs' reformation claim appears to be based on pure speculation. Where a written agreement between sophisticated, counseled business persons is unambiguous on its face, one party cannot defeat summary judgment by a conclusory assertion that, owing to mutual mistake or fraud, the writing did not express his or her own understanding of the oral agreement reached during negotiations (Chimart Assocs. v. Paul, 66 NY2d 570 [1986]). It is significant, as defendants point out, that the LDA's stated expiration date is consistent with the subsequently executed deed, which conveyed title to Housing Co. Thus, it is highly unlikely that a mistake occurred. Moreover, even if witnesses or documents could be located regarding the drafting of the LDA, which occurred more than 30 years ago, plaintiffs would not have standing to seek reformation of the **LDA.**

The fifth cause of action is based upon misrepresentations allegedly made by defendants in a 1976 brochure prepared for and distributed to prospective tenants of Phipps Plaza West, including plaintiffs. The brochure recites, generally, that the Phipps Plaza West, along with similar previously completed developments known as Phipps Plaza North, Phipps Plaza South and Phipps Plaza East, was to "provide moderate cost***housing for moderate and low income families." Since the

brochure[6] said nothing about the length of time that Phipps Plaza West would remain a Mitchell-Lama development, plaintiffs' claim, if any, would have to be based upon a theory of fraudulent concealment. The elements of a fraudulent concealment case consist of (1) a false representation; (2) made with knowledge of falsity; (3) for the purpose of inducing the other party to rely upon it; (4) justifiable reliance on the part of plaintiffs; and (5) damages (Lama v. Smith Barney Inc., 88 NY2d 413 [1996]). Even if plaintiffs were to establish the first four of these elements, the fifth element would require a showing that, even though they have had the benefit of reduced Mitchell-Lama rents for the past 28 years, they are now worse off, in terms of rents, than they would have been if they had never moved to Phipps Plaza West from their previous residences.

Even assuming that the plaintiffs read the brochure before moving into their respective apartments, they would have to show that they reasonably relied upon the brochure as creating a perpetual right to reduced rents as Mitchell-Lama tenants. Unless the facts represented involve matters peculiarly within the knowledge of one party, the other party must make use of the means available to learn, by the exercise of ordinary intelligence, the truth of such matters, or he or she will not be heard to complain that he was induced to enter into the transaction by means of misrepresentations (Fiorella v County of Putnam, 1 AD3d 475 [2d Dept. 20031, citing Schumacher v. Mather, 133 NY 590 [1982] . A matter of public record cannot be deemed to be within the knowledge of one party (Mosca v Kiner, 277 AD2d 937 (4th Dept. 2000). For example, one court held that a party did not have an action for misrepresentation concerning a certificate of occupancy, where such certificate was a matter of public record (Jordache Enterprises, Inc. v Gettinger Assocs., 176 AD2d 616 [1st Dept. 19911, lv dismissed, 80 NY2d 925 [1992].

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[6] For purposes of this discussion, this court assumes that the plaintiffs read the brochure; this is not fully clear from the papers.

In the instant case, the tenants who read the brochure could have ascertained the true facts (regarding defendants' right to withdraw the development from the Mitchell-Lama program) by reading PHFL § 35(2) and the **LDA,** both of which were matters of public record. Paragraph 407(B) of the **LDA,** which refers specifically to voluntary dissolution under PHFL § 35(2), negates any possible inference that tenants were promised perpetual Mitchell-Lama status for **Phipps** Plaza West. Moreover, paragraph 504(A) put prospective tenants on notice Mitchell-Lama status could end as early as September 10, 2004. Thus, this court finds that there is no basis for a claim for misrepresentation or concealment, and the fifth cause of action must be dismissed.

As stated above, plaintiffs' contract claims assert that they are third-party beneficiaries of the **LDA.** Where, as here, there is a written contract that governs the subject of a dispute, no claim for unjust enrichment may be maintained (Clark-Fitzpatrick, Inc. v Long Island R.R., 70 NY2d 382 [19871). Thus, the ninth cause of action must be dismissed.

This court now turns to the causes of action relating to building conditions.

Bellwest and Phipps Houses contend, regardless of any liability on the part of Housing Co. and Bellevue, that they are not liable for any occurrences alleged in the **sixth,** seventh, tenth and eleventh causes of action. However, a partnership and its individual partners are jointly and severally liable for torts committed within the scope of the partnership (Pedersen v Manitowoc Co., 25 NY2d 412 (1969); Partnership Law § 24). Thus, Bellwest is liable for the alleged wrongful acts of Housing Co. and Bellevue. However, this court agrees with Phipps Houses that the sixth, seventh, tenth and eleventh causes of action must be dismissed as against it. There is no basis for piercing a corporate veil in the absence of any allegations in the complaint that the corporate form of Housing Co. has been used to perpetrate a fraud (Morris v Dept. of Taxation, 82 NY2d 135 (1993).

As to the seventh cause of action, defendants contend that the term "nuisance" is applicable only to conditions or activities which threaten injury to persons outside the defendants' premises (citing Miller v Morse, 9 AD2d 188 [4th Dept 1959]), and that tenants cannot maintain a nuisance cause of action against a landlord. However, in Kanlikidis v 235 Lincoln Plaza Housing Corp. (305 AD2d 546 [2d Dept 2003]), the court dismissed a nuisance action based on the facts, but stated, by implication, that a cooperative shareholder would have a cause of action in nuisance against a cooperative which engaged in a course of action which substantially and unreasonably interfered with the use and enjoyment of plaintiffs' property. If a cooperative shareholder can maintain such a cause of action, then a tenant logically would have the same right of action. This court therefore denies that portion of the motion which seeks dismissal of the seventh cause of action.

Defendants contend that the sixth cause of action (negligence) is barred by the three-year Statute of Limitations, CPLR 214, in that the alleged mold condition occurred more than three years prior to the commencement of this action. In response, plaintiffs seek the benefit of the discovery rule recited in CPLR 214-c(2):

> Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by plaintiff, whichever is earlier.

CPLR 214-c(4) states:

> Notwithstanding the provision of subdivision two*** of this section, where the discovery of the cause of the injury is alleged to have occurred less than five years after the discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury, provided, however, that if any such action is commenced or claim filed after the period in which it would otherwise have been authorized pursuant to subdivision two*** the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical

> knowledge and information sufficient to ascertain the cause of the injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized***

The sixth cause of action is insufficient in that it does not set forth any details regarding the individuals who allege that they have been injured by reason of the presence of mold in their apartments. In order to determine the timeliness of the sixth cause of action under CPLR 214-c, this court would need to know the date that each plaintiff was exposed to mold, the date that the injury or illness manifested itself with respect to each plaintiff and, if necessary, the manner in which each plaintiff discovered the cause of such injury. Said cause of action is dismissed with leave to replead.

On the seventh cause of action (nuisance), to the extent that plaintiffs seek prospective injunctive relief, there is no Statute of Limitations problem. The amended complaint, however, does not set forth sufficient facts for this court to ascertain the extent, if any, to which the claims for damages are barred by the Statute of Limitations. Said cause of action is dismissed with leave to replead.

As to the tenth cause of action, claims under the warranty of habitability sound in contract and are subject to the six-year Statute of Limitations of CPLR 213. There is no discovery rule with respect to warranty (contract) claims. Said cause of action is dismissed with leave to replead.

Accordingly, it is

ORDERED that the motion is granted to the extent that the first, second, third, fourth, fifth, eighth and ninth causes of action are dismissed, and it is further

ORDERED that the sixth, seventh and tenth causes of action are dismissed in their entirety, as against Phipps Houses, Inc., and it is further

ORDERED that the sixth, seventh and tenth causes of action are dismissed with leave to replead; and it is further

ORDERED that the temporary restraining order (Motion 004) is hereby vacated.

This shall constitute the decision and order of the court.

DATED: MAY 25, 2004

SHERRY KLEIN HEITLER
J.S.C.