

**Windcrest at Galleria Home Owners Assn.,  
Inc. v Smithtown Galleria II, LLC**

2007 NY Slip Op 33963(U)

December 5, 2007

Supreme Court, Suffolk County

Docket Number: 0034493/2006

Judge: Elizabeth H. Emerson

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT - STATE OF NEW YORK  
**COMMERCIAL DIVISION**  
**TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 2-16-07  
SUBMITTED: 7-18-07  
MOTION NO.: 001- MD

\_\_\_\_\_ x  
WINDCREST AT GALLERIA HOME OWNERS  
ASSOCIATION, INC., VIRGINIA BOLLA, JOAN  
SCARLATA, LEON SYGADLO, PETER ECKSTEIN,  
MARLENE ECKSTEIN and SCOTT A. MORGAN ON  
BEHALF OF THEMSELVES AND ALL OTHER  
SIMILARLY SITUATED,

RIVKIN RADLER LLP  
Attorneys for Plaintiffs  
926 Reckson Plaza  
Uniondale, New York 11556-0926

Plaintiffs,

-against-

SINNREICH SAFAR & KOSAKOFF LLP  
Attorneys for Defendant Nelson & Pope LLP  
320 Carlton Avenue, Suite 3200  
Central Islip, New York 11722

SMITHTOWN GALLERIA II, LLC, GREENVIEW  
CAPITAL PARTNERS I, LLC, DICANIO GALLERIA,  
LLC, GREENVIEW PROPERTIES, INC., AXELROD  
& CHERVENY, ARCHITECTS, P.C., NELSON & POPE,  
LLP., CHARLES GARGANO, VINCENT DICANIO,  
LARRY C. GARGANO, PATRICK MCCANN,  
KATHLEEN L. GARGANO, CARMEN GARGANO,  
BETTY G. BOSE, "JOHN DOE #1" through "JOHN DOE  
#10" and XYZ CORPORATION #1" through "XYZ  
CORPORATION #10", the last twenty (20) names being  
fictitious and unknown to the Plaintiffs,

CERTILMAN BALIN ADLER & HYMAN LLP  
Attorneys for Defendants  
Greenview Capital Partners I, Greenview Properties,  
Inc., Charles Gargano, Vincent Dicano, Larry C.  
Gargano, Patrick McCann, Kathleen L. Gargano,  
Carmen Gargano and Betty G. Bose  
90 Merrick Avenue  
East Meadow, New York 11554

Defendants.

FARBER BROCKS & ZANE, LLP  
Attorneys for Defendants  
Axelrod & Cherveney, Architects, P.C.  
1565 Franklin Ave.  
Mineola, New York 11501

LEWIS JOHS AVALLONE AVILLES, LLP  
Attorneys for Defendants  
Dicanio Galleria LLC and Smithtown Galleria II  
425 Broad Hollow Road, Suite 400  
Melville, New York 11747

Upon the following papers numbered 1 to 14 read on this motion for Dismissal of the complaint ; Notice of Motion and supporting papers 1-7 ; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 8-12 ; Replying Affidavits and supporting papers 13 ; and the Transcript on the Hearing dated May 16, 2007 14 it is,

**ORDERED** that this motion by defendant Nelson & Pope, LLP (“N&P”) for an Order dismissing the complaint as against it pursuant to CPLR 3211 (a)(5) or, in the alternative, for an Order dismissing the fifth, ninth, eleventh, twelfth and thirteenth causes of action as against it pursuant to CPLR 3211 (a) (7) or, in the alternative, dismissing the fifth and ninth causes of action pursuant to CPLR 3016 is decided as follows:

### Facts

The plaintiffs in this action are seeking, inter alia, to recover damages for fraud and misrepresentation, breach of fiduciary duties, breach of contract and false advertising in connection with an offering plan for a development of 187 single-family homes in Smithtown, New York (the “Project”). The claims and facts alleged to support such claims involve a variety of different aspects of the Project. For purposes of this decision, the Court will focus only on those facts necessary to determine this motion to dismiss.

In summary, the plaintiffs allege, among other things, that certain defendants made material misrepresentations respecting the construction of a storm water drainage system and/or abused their position as controlling members of the board of directors of the homeowners association by failing to disclose to the homeowners the nature of the defects in construction of such storm water drainage system. The plaintiffs further allege that certain defendants engaged in faulty construction practices in the planning, design and construction of the storm water drainage system, as well as the planning design and construction of the roofs of each of the homes in the Project. Finally, the plaintiffs claim that certain defendants entered into an agreement with the Town of Smithtown to allow the storm water runoff from town lands to be introduced into the storm water drainage system of the Project, which was a deviation from the standards of the Town of Smithtown Building Code and good and accepted construction practices. The plaintiffs contend that, as a result, the storm water drainage system consistently overflows, causing unhealthy and unsafe water conditions at the Project and repeated damage to the plaintiffs and their property.

With respect to the present motion to dismiss by N & P, N & P has moved to dismiss all eight causes of action asserted against it by the plaintiffs. N & P argues that the plaintiffs’ claims are predicated upon services provided by N & P pursuant to a contract between N & P and Smithtown Galleria II, LLC (“Galleria II”) in March, 1998 ( the “N & P Contract”). Pursuant to the N & P Contract, N & P was to provide professional engineering services in connection with the design and municipal permitting for the Project. **(Defendants Memorandum of Law in Further Support of Motion to Dismiss at p.2)**. N & P alleges that N&P had no responsibility for the construction of the Project and that “N & P’s engineering services were completed in May 1999 or, at the very latest, in August 1999.” (*Id.*) Finally, N & P alleges that following the completion of its work a new engineer was hired to supervise construction of the Project and that the new engineer redesigned the elements of the Project that are the subject of plaintiffs’ claims. Based on these allegations, N & P first seeks to dismiss the entire complaint against it as barred by the applicable statute of limitations. In the alternative, N & P seeks to dismiss causes Five, Nine, Eleven, Twelve and Thirteen pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. N & P also argues that cause of action Five, alleging negligent misrepresentation and cause of action Nine, alleging misrepresentation and fraudulent concealment,

(collectively the “Fraud Causes of Action”), should be dismissed as these causes of action are precluded by the Martin Act and/or are not plead with requisite particularity as required pursuant to CPLR 3016. Finally, N & P moves for dismissal of the Eleventh cause of action alleging breach of contract claiming that there is no privity of contract between plaintiffs and N & P.

In opposition to N&P’s motion to dismiss, the plaintiffs argue that the various causes of action asserted against N & P are not time barred and that the Fraud Causes of Action are available to plaintiffs on the facts presented and have been pled with the requisite particularity. Finally, plaintiffs challenge N & P’s right to dismissal, arguing that it is premature as it is in fact a motion for summary judgment.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the Court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see, Leon v Martinez*, 84 NY2d 83; *Guggenheimer v Ginzburg*, 43 NY2d 268; *Rovello v Orofino Realty Co.*, 40 NY2d 633). Furthermore, “the allegations of a complaint, supplemented by a plaintiff’s additional submissions, if any, must be given their most favorable intendment” (*see, Arrington v New York Times Co.*, 55 NY2d 433). However, “while the allegations in the complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration” (*see, Salvatore v Kumar*, \_\_AD3d\_\_, 2007 NY Slip Op 08435 [2<sup>nd</sup> Dept, Nov. 7, 2007]; *see also M.J. & K Co., Inc. v Matthew Bender and Company Inc.*, 220 AD2d 488). Under CPLR 3211 (a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see, Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326; *Leon v Martinez*, *supra* at 88). Furthermore, an action is subject to dismissal if said action is barred by the applicable statute of limitations. (*see, A. Morrison Trucking v. Bonfiglio*, 13 Misc 3d 1211[A]).

Turning first to the individual causes of action alleged against N & P. The first cause of action against N & P is in fact the fifth cause of action set forth in the complaint entitled “misrepresentation.” In this cause of action the plaintiffs contend that N & P was retained by the Sponsor to design and prepare the plans and specifications to construct the Project and to provide information and representations in the Offering Plan. Plaintiffs allege that N & P knew or should have known that certain areas of the Project were not “designed, built and constructed in compliance with the applicable rules, regulations, laws and other requirements.” Plaintiffs further allege that N & P made certain representations including, without limitation, those in the Offering Plan, knowing they would be relied on by purchasers and that these representations were false when made to induce purchasers to buy the properties within the Project.

In support of its motion to dismiss, N & P contends that although the plaintiffs have delineated their claims as misrepresentation such claims are in fact malpractice. N & P argues that even though plaintiffs call this cause of action “misrepresentation,” it is nothing more than an attempt to recast a malpractice claim into a fraud claim, in order to apply a longer statute of limitations period. Plaintiffs however, argue they have not plead a cause of action in malpractice or

negligence against N & P, but contend the Fifth cause of action is one for “simple common law fraud.” Plaintiffs further argue that no malpractice action could be asserted by plaintiffs against N & P, because plaintiffs are not and have never been in a professional relationship with N & P. In applying the appropriate standard to this motion to dismiss and giving the plaintiffs the benefit of every possible favorable inference to determine whether the alleged facts fit within any cognizable legal theory, the Court determines that the Fifth cause of action is in fact a claim for fraud and to the extent relevant will be discussed below with cause of action Nine, entitled misrepresentation and fraudulent concealment (the “Fraud Causes of Action”).

Plaintiffs allege in their Ninth cause of action, misrepresentation and fraudulent concealment based on “material misrepresentations respecting the construction of a storm water drainage system” in the Offering Plan. Plaintiffs contend that N & P’s statement that the drainage system was designed in accordance with the requirements and regulations of the Town of Smithtown was made in order to conceal the “breaches and failures” and to induce the sales of the homes in the Project. N & P argues that these claims are not plead with specificity as required by CPLR 3016 and are barred by the Martin Act, which gives the Attorney General the exclusive right to maintain a cause of action for fraud in cases such as this.

Turning first to the Martin Act, such Act is a set of laws designed to regulate the sale of securities including the sale of condominium units (*see, Kramer v Zeckendorf* 10 Misc3d 1056[A]). The Martin Act requires, among other things, that prospective buyers of condominium units receive offering plans disclosing certain information. (*Id.*) The Martin Act allows the Attorney General to bring an action regarding corporate use of fraud, deception, and concealment in promotion or sale of stock (*see, Kramer v W10Z/515 Real Estate Ltd.* 844 NYS2d 18). However, the right of the Attorney General to bring these actions, does not abolish the right of a purchaser of condominium and cooperative units to sue for common-law fraud, (*Id at 19*).

Turning now to plaintiffs claim of common-law fraud against N&P and applying the relevant standard for dismissal, the Court concludes that a valid cause of action for common-law fraud is stated. In order to state a cause of action for common-law fraud, it is sufficient for plaintiff to allege that “defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged,” (*see, CPC International Inc. V McKesson Corporation*, 70 NY2d 268). In reading the complaint in a light most favorable to the plaintiffs, the Court finds that plaintiffs sufficiently plead the Fraudulent Causes of Action to withstand dismissal. As previously discussed, since the right to sue for common-law fraud is not abolished by the Martin Act, the Court denies N&P’s motion as to the Fraudulent Causes of Action.

Plaintiffs, do not oppose dismissal of causes of action six and seven, alleging violations of General Business Law §§ 349, 350, and 350-a. Additionally, plaintiffs do not oppose the dismissal of the eighth cause of action for aiding and abetting a breach of fiduciary duty. Accordingly, N&P’s motion is granted without opposition insofar as it pertains to these causes of action.

Cause of action eleven is for breach of contract. N&P asserts that, in addition to being untimely, a breach of contract claim cannot be maintained as the plaintiffs are not in privity

with N&P. The record is clear that plaintiffs are not parties to the Contract. However, the plaintiffs claim that they are third party beneficiaries to the N & P Contract. The plaintiffs allege that N&P breached this contract in that it prepared engineering plans and issued reports that caused and exacerbated the drainage issues in the Project. They further allege that N&P did not prepare the plans for the Project in accordance with the representations that N&P made in the offering plan and, as such, breached the engineering contract and breached its duty of good faith and fair dealing.

To determine if the plaintiffs are third party beneficiaries to the N & P Contract, the court must examine the documents surrounding the relationship. Courts have found condominium unit owners are third party beneficiaries where these documents sufficiently show intent to make them such (*see*, **The Board of Managers of The Astor Terrace Condominium v Shuman, Lichtenstein, Claman & Efron**, 183 AD2d 488). Generally, it has been held that ordinary construction contracts do not give third parties a right to enforce such a contract. However, where the contract in question has explicit language as to the intended beneficiaries of the contract, courts have enforced those provisions (*see*, **Board of Managers of the Arches at Cobble Hill Condominium, v Hicks & Warren, LLC** 14 Misc 3d 1234A). The court is aware that discovery has not proceeded in this action pending the determination of this motion. The Court is unable to determine the relationship between the parties based on the record now before it. Therefore, dismissal of this cause of action is denied with leave to plead this affirmative defense in N&P's answer to the complaint.

Causes of action Twelve and Thirteen seek declaratory relief and injunctive relief, respectively. Plaintiffs seek a judgment declaring that the defendants are obligated to take all actions to ensure compliance with the representations made in the Offering Plan at their expense and to take all steps to ensure that the Town of Smithtown ceases and desists from utilizing the storm water drainage system located at the Project. Plaintiffs' claim for injunctive relief seeks an order of the court directing that the defendants immediately remedy all defects and problems with respect to the storm water drainage system. N&P argues that plaintiffs fail to state a cause of action for equitable relief. N&P further argues that these causes of action merely restate plaintiffs' breach of contract and fraud claims. In addition, N&P claims that the cause of action for injunctive relief fails to allege irreparable harm and the absence of an adequate legal remedy. N&P argues that they should, therefore, be dismissed.

Declaratory relief need not be sought alone and may be joined with demands for any other relief to which the plaintiff deems itself entitled (**Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B**, CPLR C3001:5). Furthermore, both legal and equitable relief may be demanded in the same complaint, (*see*, **Fine v Scheinhaus**, 109 NY2d 307) and the inclusion of a money demand will not necessarily preclude an injunction (*see* **Credit Agricole Indosuez v Rosslyskiy Kredit Bank** 94 NY2d 541). Even though the Court has declined to impose a preliminary injunction at this point, the Court finds that the plaintiffs have stated a cognizable legal theory in causes of action twelve and thirteen and denies N&P motion as to these causes of action.

Finally, the Court turns to the remaining causes of action and N & P's argument that they should be dismissed arguing the allegations are barred by the applicable statute of limitations. CPLR 213 sets forth various time limitations for commencing different causes of action. If a court

finds that the applicable statute of limitations has run, then the claims must be dismissed as a matter of law (*see*, **A. Morrison Trucking v. Bonfiglio**, 13 Misc 3d 1211[A]). The parties do not disagree that the complaint encompasses many different theories and allegations against the defendants. Each of these claims carry its own time limit in which the action must be commenced. However, to determine if an action is timely, the Court must determine the nature of the action and when the relevant period begins and ends.

N & P argues that its work on the Project ended at the latest in August 1999 when the plans were accepted and approved by the Town. N & P contends that is when the statute of limitations for all causes of action began to run against it. In opposition, the plaintiffs argue that the parties had a continuous ongoing relationship and that N & P performed work on the Project as late as October 2001. In support of this contention, Plaintiffs attach to their opposition a "Certificate of Correction" prepared by N & P dated October 18, 2001. However, N&P contends that this certification relates solely to surveying services performed, which was a separate and distinct professional service and cannot act to toll the statute of limitations on the original scope of work.

Applying the applicable standard for dismissal, the Court finds that the record currently before it does not warrant dismissal of the remaining causes of action based on a statute of limitations argument. The parties have not yet had the benefit of discovery, and have not presented sufficient evidence to the Court to establish when the accrual of this action began to run. Accordingly, the Court denies N & P's motion to dismiss based on the statute of limitations, but grants leave to plead it as an affirmative defense in its answer.

Accordingly it is,

**ORDERED** that N&P's motion to dismiss is granted as to causes of action six, seven, and eight; and it is further

**ORDERED** that N&P's motion to dismiss is denied as to the remaining causes of action against it.

**HON. ELIZABETH HAZLITT EMERSON**

DATED: December 5, 2007

\_\_\_\_\_  
J. S.C.