

**Hamlet on Olde Oyster Bay Home Owners  
Association, Inc. v Holiday Organization, Inc.**

2007 NY Slip Op 34253(U)

December 24, 2007

Supreme Court, New York County

Docket Number: 1647-04/

Judge: Leonard B. Austin

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INDEX  
NO. 11647-04

**SUPREME COURT - STATE OF NEW YORK**  
**IAS TERM PART 14 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**  
Justice

\_\_\_\_\_ x  
THE HAMLET ON OLDE OYSTER BAY HOME OWNERS ASSOCIATION, INC, THE HAMLET ON OLDE OYSTER BAY VILLA CONDOMINIUM, THE HAMLET ON OLDE OYSTER BAY CARRIAGE HOME CONDOMINIUM, and HARVEY SHERMAN, LOUIS LUFT and RITA LITVACK, on behalf of themselves and all other persons similarly situated,

**Plaintiffs,**

**- against -**

THE HOLIDAY ORGANIZATION, INC., THE HAMLET ON OLDE OYSTER BAY DEVELOPMENT CORP., THE HAMLET ON OLDE OYSTER BAY, LLC, THE HAMLET ON OLDE OYSTER BAY DEVELOPMENT CO., LLC, O.B. VENTURES CORP., GERALD MONTER, ELLIOT MONTER, MARILYN MONTER, RICHARD SPIRIO, JOSEPH MANCINO, JOHN BRANSFIELD, JR., JEFFREY WALL, R.PATRICK QUINN, MICHAEL PUORRO, RON BLOOMFIELD, HOLIDAY MANAGEMENT ASSOCIATES, INC., THE HAMLET OF OLDE OYSTER BAY FOOD AND BEVERAGE CORP., HOLCOM INCORPORATED, SCHIFFER MANAGEMENT GROUP, JOSEPH GILL SCHIFFER, SIDNEY B. BOWNE & SONS, LLP, DANE C. KENNY, ROBERT M. SWEDROE ARCHITECTS & PLANNERS, ROBERT M. SWEDROE, CHARLES A. DIGIOVANNA ARCHITECT and CHARLES A. DIGIOVANNA,

**Defendant,**

\_\_\_\_\_ x

**Motion R/D:**

- Motion Seq. 2 - 3-30-07**
- Motion Seq. 3 - 4-20-07**
- Motion Seq. 4 - 4-20-07**
- Motion Seq. 5 - 6-25-07**
- Motion Seq. 6 - 6-25-07**
- Submission Date: 6-25-07**
- Motion Sequence No.: 002, 003**
- 004, 005, 006/MOT D**

**COUNSEL FOR PLAINTIFF**

**Marc H. Schneider, P.C**  
666 Old Country Road  
Garden City, New York 11530

**COUNSEL FOR DEFENDANT**

**(for The Hamlet Defendants)**  
**Rosenberg, Calica & Birney, Esqs.**  
100 Garden City Plaza - Suite 408  
Garden City, New York 11530

**(for Charles A. DiGiovanna Architects and Charles A. DiGiovanna)**  
**Milber, Makis, Plousadis & Seiden, LLP**  
990 Stewart Avenue - Suite 600  
Garden City, New York 11530

**(for Sidney B. Bowne & Sons, LLP and Dane C. Kenny)**  
**Kreig Associates, P.C.**  
5 Heather Court  
Dix Hills, New York 11746

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**(for Robert M. Swedroe Architects  
and Planners and Robert W. Swedroe)  
McManus, Collura & Richter, P.C.  
48 Wall Street, 25<sup>th</sup> Floor  
New York, New York 10005**

The following papers were read on:

Motion Sequence 2

Notice of Motion dated March 15, 2007  
Affirmation of Robert M. Calica, Esq. dated March 15, 2007

Motion Sequence 3

Notice of Cross-Motion dated March 23, 2007  
Affirmation of Marc H. Schneider, Esq. dated April 13, 2007  
Affidavit of Robert Mayer sworn to April 13, 2007  
Affirmation of Michael C. Mule, Esq. dated April 11, 2005  
Affidavit of Lew Kroll sworn to January 24, 2005  
Affidavit of Louis Luft sworn to March 1, 2005  
Affidavit of Rita Litvack sworn to March 2, 2005  
Plaintiffs Memorandum of Law

Motion Sequence 4

Notice of Cross-Motion dated April 2, 2007  
Affirmation of Randi J. Krieg, Esq. dated April 12, 2007

Motion Sequence 5

Notice of Re-Cross-Motion dated May 21, 2007  
Affirmation of Ryan D. Mitola, Esq. Dated May 21, 2007

Motion Sequence 6

Notice of Cross-Motion dated May 9, 2007  
Affirmation of Braden H. Farber, Esq. Dated May 9, 2007

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Other Papers

Supplemental Affirmation of Marc H. Schneider, Esq. dated April 18, 2007  
Second Supplemental Affirmation of Marc H. Schneider, Esq. dated May 8, 2007  
Affirmation of Marc H. Schneider, Esq. dated May 21, 2007  
Reply Affirmation of Marc H. Schneider, Esq. dated May 21, 2007  
Reply Affirmation of Marc S. Krieg, Esq. dated June 12, 2007  
Affirmation of Braden H. Farber, Esq. dated June 22, 2007  
Reply Memorandum of Law of Holiday Defendants  
Plaintiffs' Reply Memorandum of Law.

Defendants, The Holiday Organization, Inc., The Hamlet on Olde Oyster Bay Development Corp., The Hamlet on Olde Oyster Bay, LLC, The Hamlet on Olde Oyster Bay Development Co., LLC, O.B. Ventures Corp., Gerald Monter, Elliot Monter, Marilyn Monter, Richard Spirio, Joseph Mancino, John Bransfield, Jr., Jeffrey Wall, R. Patrick Quinn, Michael Puorro, Ron Bloomfield, Holiday Management Associates, Inc., and The Hamlet on Olde Oyster Bay food and Beverage Corp. (collectively the "Hamlet Defendants"), move pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss certain portions of the amended complaint, for an order granting reargument of this Court's order dated July 7, 2006, and upon reargument, severing and dismissing certain portions of the breach of contract actions, for an order granting renewal and, upon renewal, dismissing certain causes of action, resettling and clarifying the Court's July 7, 2006 order and for sanctions pursuant to 22 NYCRR Part 130.

Plaintiffs cross-move to renew and reargue this Court's July 7, 2006 order and, upon renewal and reargument reinstating certain causes of action. Plaintiffs also cross-move to correct and substitute a page of the "Revised Class Action Complaint."

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Defendants, Sidney B. Bowne & Sons, LLP and Dane C. Kenny (collectively "Bowne Defendants), cross-move for an order pursuant to CPLR 3211(a)(1),(5) and (7) dismissing a portion of the amended complaint.

Defendants, Charles A. DiGiovanna Architect and Charles B. DiGiovanna, move for an order pursuant to CPLR 3211(a)(1),(3), (5) and 7 dismissing all causes of action in the amended complaint alleged against said Defendants.

### BACKGROUND

#### A. Prior Motion

The Hamlet on Olde Oyster Bay Cove ("Hamlet") is a planned, up-scale gated community in Plainview. Hamlet consists of three types of housing, "Sagamore" homes which are owned in fee, Hamlet Villa which consists of townhouse condominiums and Hamlet Carriage Homes which are also condominiums. Owners of all three types of homes are automatically members of Plaintiff, The Hamlet on Olde Oyster Bay Home Owners Association, Inc. ("HOA"). Owners of Villa units are also members of the Hamlet on Olde Oyster Bay Villa Condominium Owners Association. Owners of Carriage House units are also members of the Hamlet on Olde Oyster Bay Carriage Home Condominium Homeowners Association.

Plaintiff, Rita Litvack, is an owner of a Sagamore home. Plaintiff, Harvey Sherman, is an owner of a Villa condominium unit. Plaintiff Louis Luft is an owner of a Carriage Home condominium unit. They are alleged to represent the interests of each of member of their putative classes respectively. The HOA brings this action relating to

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the common areas of the development.

This action was commenced in October 2004. The complaint was 222 pages long and alleged 89 separate causes of action. Defendants Charles A. DiGiovanna, Charles A. Digiovanna Architect, Sidney B. Bowne & Sons, LLP, Dane C. Kenny, Robert M. Swedroe Architects & Planners and Robert M. Swedroe appeared by answering the complaint.

The Hamlet Defendants appeared by moving to dismiss many of the causes of action alleged in the complaint. By order dated July 7, 2006, this Court granted the Hamlet Defendants' motion to the extent of dismissing the second, fourth, fifth, eighth, tenth, twelfth, fourteenth, sixteenth, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, fifty-fourth, sixty-eight, sixty-ninth, seventieth, seventy-first, eighty-fifth, eighty-sixth, eighty-seventh, eighty-eighth and eighty-ninth causes of action in their entirety, dismissing all of the causes of action alleged against Defendants Joseph Mancino, John Bransfield, Jr., Jeffrey Wall, R. Patrick Quinn and Michael Puorro, dismissing the eleventh, thirteenth and fifteenth causes of action against Defendants Schiffer Management Group and Joseph Gill Schiffer. In addition, the Court granted Plaintiffs leave to serve an amended complaint regarding their breach of warranty causes of action within 30 days of the date of the order. The remainder of The Hamlet Defendants' motion was denied. The order set the matter down for a preliminary conference on September 20, 2006.

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2. Subsequent Proceedings

After the Court issued its July 7, 2006 order, Plaintiffs retained new counsel. The preliminary conference was adjourned several times to permit Plaintiffs' new counsel to obtain the file and become familiar with the issues involved in the action.

At a conference, the Court suggested that, in view of the July 7, 2006 order which dismissed many of the causes of action, Plaintiffs should serve a new complaint. The new complaint, as contemplated by the Court, would omit the dismissed causes of action and the general allegations contained in the complaint that related to the dismissed causes of action and the parties against whom the action had been dismissed. Additionally, the caption would be amended to omit, the Defendants against whom the action had been dismissed.

Plaintiffs' new counsel was to prepare a proposed amended complaint and provide a copy of it to the attorneys for the remaining Defendants. If all parties agreed to the new complaint, it would be deemed served and the Defendants would then interpose an answer.

While incoming counsel for Plaintiffs prepared a proposed amended complaint and provided a copy to the attorneys for the Defendants, the Defendants did not agree to accept it.

In March 2007, Plaintiffs served an "Amended Class Action Complaint" or "Revised Class Action Complaint" ("Amended Complaint"). The only difference between the two documents is their designation.

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The Amended Complaint is 235 pages and pleads 93 causes of action.

All of the Defendants except Robert M. Swedroe and Robert M. Swedroe Architects & Planners move to dismiss the Amended Complaint.

3. The Amended Complaint

This Court's July 7, 2006 order found that the breach of contract actions included factual allegations that should properly have been plead as causes of action for breach of warranty. The court gave the plaintiff 30 days from the date of the order to serve an Amended Complaint which would separately plead the breach of warranty causes of action. Plaintiffs' Amended Complaint does not comply with that order.

The Amended Complaint adds breach of warranty actions.<sup>1</sup> The remainder is virtually identical to the original complaint. The Amended Complaint alleges all 278 paragraphs of the complaint relating to the status of the parties, their relationship to the HOA, Sagamore, Villa and Carriage House units and the facts alleged to support the various causes of action. The fifth through ninety-third causes of action in the Amended Complaint simply reallege the very same causes of action alleged in the complaint, including those that were dismissed the by this Court's July 7, 2006 order.<sup>2</sup>

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<sup>1</sup>The first cause of action alleges a breach of warranty claim regarding the common area structures. The second cause of action alleges a breach of warranty relating to the Sagamore homes. The third cause of action alleges a breach of warranty relating to the Villa condominium units. The fourth cause of action alleges a breach of warranty action relating to the Carriage House condominium units.

<sup>2</sup>The fifth cause of action in the Amended Complaint alleges the first cause of action alleged in the complaint, *et seq.* and so on.

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## DISCUSSION

### A. Plaintiffs' Motion to Amend Designation of Complaint

In this motion, Plaintiffs seek to substitute and correct page 1 of their current pleading to change its designation from "Amended Class Action Complaint" to "Revised Class Action Complaint."

This motion must be denied. The CPLR does not provide for "revised" pleadings. CPLR 3011 defines pleadings to include complaint and an answer. CPLR 3025 permits the service of amended and supplemental pleadings. Any change to the original pleading is an amendment. Siegel, *New York Practice* 4<sup>th</sup> §237. Since the pleading served by Plaintiffs adds causes of action, it is properly designated an Amended Complaint.

### B. Timeliness of Service of the Amendment

The first issue the Court must resolve is whether Plaintiffs were permitted to serve the Amended Complaint since, when they did, it was without obtaining leave from Court or their adversaries.

This Court's July 7, 2006 order granted Plaintiffs leave to replead only the breach of warranty causes of action. Those cause of actions had to be replead within 30 days of the order. This was not done.

CPLR 3025(a) give a party leave to serve an amended pleading once as of right at any time before the time to respond expires or within 20 days after service of a responsive pleading.

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The Bowne Defendants served their answer to the complaint which was dated September 13, 2004.

Defendants Charles A. DiGiovanna and Charles A. DiGiovanna Architect served their answer on November 24, 2004.

More than 20 days have elapsed since these Defendants served their answer. Thus, Plaintiffs cannot serve an Amended Complaint upon these Defendants as of right.

This is not so as to the Hamlet Defendants. Rather than answer the complaint, the Hamlet Defendants moved pursuant to CPLR 3211(a) to dismiss several of the causes of action plead in the complaint in full or in part. After that motion was decided and the time for Plaintiffs to serve an Amended Complaint expired, the Hamlet Defendants did not serve an answer. Thus, the time for Plaintiffs to serve an Amended Complaint did not begin to run.

Additionally, if a court were to deny the motion on the grounds the Amended Complaint was not timely served, it would inevitably be faced with a motion by plaintiff seeking leave to serve an Amended Complaint. The issues raised in such a motion would be the same or similar to those to be addressed by the Court in this motion.

This action was commenced three years ago. Despite the age of this action, the Court is still deciding motions addressing the complaint. Judicial economy and the "prompt" resolution of the issues mandates that the Court rule on the sufficiency of the Amended Complaint.

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C. Holcom Incorporated

All causes of action against Defendant Holcom Incorporated had been voluntarily discontinued. See, Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v. The Holiday Organization, Inc., 12 Misc.3d 1182(A) (Sup.Ct. Nassau Co. 2006). Therefore, any allegations relating to Holcom should be stricken, and Holcom should be removed from the caption. See, Mandel v. Adler, 267 A.D.2d 150 (1<sup>st</sup> Dept. 1999); and 84 NY *Jur2d Pleadings* §26.

D. Previously Dismissed Causes of Action

The Hamlet Defendants move, in part, to dismiss those causes of action replead in the Amended Complaint which were dismissed by the Court's July 7, 2006 order and to delete from the caption the names of the Defendants against whom the case was dismissed.

Plaintiffs concede that the Court properly dismissed the unjust enrichment causes of action (the second, fourth, sixth, eighth, tenth, twelfth, fourteenth and sixteen causes of action in the complaint which were replead as the sixth, eighth, tenth, twelfth, fourteenth, sixteenth, eighteenth and twentieth cause of action in the Amended Complaint), the piercing the corporate veil cause of action (the eighty-fifth cause of action in the complaint which was replead as the eighty-ninth cause of action in the Amended Complaint), the joint and several liability cause of action (the eighty-sixth cause of action in the complaint which was replead as the ninetieth cause of action in the Amended Complaint), and the Donnelly Act causes of action (the eighty-seventh,

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eighty-eighth and eighty-ninth causes of action in the complaint which were replead as the ninety-first, ninety-second and ninety-third causes of action in the Amended Complaint). Since Plaintiffs concede that these causes of action were properly dismissed and since they do not seek through renewal or reargument to reinstate these causes of action, they should not have been plead in the Amended Complaint. They shall be dismissed.

Plaintiffs also concede that they are not seeking any relief against Defendants, O.B. Ventures Corp. and The Hamlet on Olde Oyster Bay Food and Beverage Corp. Therefore, these Defendants should be stricken from the caption of the action. See, Mandel v. Adler, *supra*.

E. Schiffer Management Group and Joseph Gill Schiffer

The eleventh, thirteenth and fifteenth causes of action in the complaint which were replead as the fifteenth, seventeenth and nineteenth causes of action in the Amended Complaint allege various theories of breach of contract against Defendants Schiffer Management Group and Joseph Gill Schiffer (collectively "Schiffer Defendants"). Schiffer Management Group was retained by the Sponsor to review the financial schedule in the Offering Plan containing the projections of first year income and expenses. Schiffer Management certified to the New York State Attorney General that the estimates contained in the Offering Plan were complete and accurate. This certification was signed by Joseph Gill Schiffer.

In its prior order, the Court dismissed these causes of action because the

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Plaintiffs were not in privity with the Schiffer Defendants. This Court held that one cannot maintain an action for breach of contract in the absence of privity. LaBarte v. Seneca Resources Corp., 285 A.D.2d 974 (2<sup>nd</sup> Dept. 2001); and M. Paladino, Inc. v. J. Luchese & Sons Contracting Corp., 247 A.D.2d 515 (2<sup>nd</sup> Dept. 1998).

The Court further found that the Plaintiffs were not the third-party beneficiaries of the contract between the Sponsor and the Schiffer Defendants. See, Port Chester Electric Construction Corp. v. Atlas, 40 N.Y.2d 652 (1976).

Plaintiffs assert that these causes of action should be reinstated because the Court misapprehended the applicable law, thus making reargument appropriate. Plaintiffs further assert that decisions of the Appellate Division issued subsequent to this Court's July 7, 2006 order change the law, making renewal appropriate.

In support of reargument, Plaintiffs specifically assert that the Court misconstrued Board of Managers of the Riverview at College Point Condominium III v. Schorr Brothers Development Corp., 182 A.D.2d 664 (2<sup>nd</sup> Dept. 1992). Plaintiffs assert that the Court cannot determine whether Plaintiffs were the intended beneficiaries of a contract between the Sponsor and the Schiffer Defendants without having read and reviewed the contract between those parties.

The Court did not misconstrue the relevant law. Plaintiffs are incidental beneficiaries of the contract between the Schiffer Defendants and the Sponsor. See, Regatta Condominium Assoc v. Village of Mamaroneck, 303 A.D.2d 739 (2<sup>nd</sup> Dept.

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2003); and Residential Board of Managers of Zeckendorf Towers v. Union Square-14th Street Assocs., 190 A.D.2d 636 (1<sup>st</sup> Dept. 1993).

Additionally, the contention that the Court should not dismiss the action for breach of contract without first reviewing the contract is raised for the first time on reargument. One may not assert new arguments or arguments not made in connection with the prior motion as a basis for reargument. Gellert & Rodner v Gem Community Mgt., Inc., 20 A.D.3d 388 (2<sup>nd</sup> Dept. 2005). Thus, reargument must be denied.

In support of their motion to renew, Plaintiffs assert that the Appellate Division, Second Department, in Caprer v. Nussbaum, 36 A.D.3d 176 (2<sup>nd</sup> Dept. 2006), changed the law thereby permitting them to maintain a breach of contract action against the Schiffer Defendants.

The cases upon which Plaintiffs rely do not provide for a cause of action for breach of contract. In Caprer, the Second Department permitted the condominium unit owners to bring an action against the accountants for negligence and aiding and abetting the breach of fiduciary duty, not breach of contract. Likewise, in CPC International Inc. v McKesson Corp., 70 N.Y.2d 268 (1987), the Court of Appeals sustained causes of action for common law fraud, not breach of contract.

Since Plaintiffs offer no new facts in this regard, renewal is also inappropriate. The breach of contract claims against the Schiffer Defendants (the fifteenth, seventeenth and nineteenth causes of action) were properly dismissed.

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F. Fraudulent Inducement

The thirty-third through the thirty-ninth causes of action in the complaint which were replead as the thirty-seventh through the forty-third causes of action in the Amended Complaint allege claims sounding in fraudulent inducement against the corporate Defendants and against the individual defendants for aiding and abetting fraudulent inducement.

In its prior order, this Court concluded that these causes of action were barred by the Martin Act (General Business Law §352-e) or because the claims were premised upon statements of opinion or commercial puffery. See, Siegel v. Bader, 238 A.D.2d 272 (1<sup>st</sup> Dept. 1997); and Sutton Assoc. v. LexisNexis, 196 Misc.2d 30 (Sup.Ct. Nassau Co. 2003).

Plaintiffs assert that the Court misapprehended the law in that it did not distinguish between an omission in the Offering Plan, which is not actionable, and an intentional misrepresentation of fact, which is. See, Kerusa Co., LLC v. W10Z/515 Real Estate, L.P., 10 Misc.2d 929 (Sup.Ct., NY Co. 2005). Plaintiff asserts that its causes of action are based upon intentional misrepresentations of fact.

Representations regarding the value of property are statements of opinion, not fact. 60A NY Jur2d *Fraud and Deceit* §76. Thus, to the extent that these causes of action were based upon statements of the value of the property, they are not actionable.

Plaintiffs assert that their causes of action are based upon the projected income from items such as club membership fees and rent from the restaurant, hair salon, ATM

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banking center, concierge service, which were contained in the Offering Plan, are actionable misstatements of fact. Projections of income or revenue are statements of opinion, not fact. 60A NY Jur 2d *Fraud and Deceit* §85.

Plaintiffs fail to distinguish between budgetary projections which the sponsor is required to place in an offering plan (13 NYCRR 22.3[g]) and knowingly misrepresenting a corporation's financial status to inflate its value. See, CPC International, Inc. v. McKesson Corp., *supra*. The Court did not misapprehend the law, reargument as to these causes of action must be denied.

Since the Court finds that dismissal of the causes of action alleging fraud in the inducement were proper, the causes of action against the members of sponsor who allegedly participated and aided and abetted in the activities that constituted the fraudulent inducement were also properly dismissed.

G. Negligent Misrepresentation

The Court previously dismissed the fifty-second, fifty third and fifty-fourth causes of action plead in the complaint which are the fifty-sixth, fifty-seventh and fifty-eighth causes of action in the Amended Complaint.

The Schiffer Defendants certified the income and expense statements contained in the Offering Plan. They certified that based upon their review and investigation of the schedules and their experience in the management of residential real estate, the income and expense statements appeared reasonable and accurate and that the projected income was sufficient to meet the first year operating expenses of the HOA

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and condominium associations.

Plaintiffs allege that the schedules contained in the Offering Plan certified by the Schiffer Defendants overstated the income that would be received from sources other than HOA common charges.

The Court dismissed these causes of action because the Plaintiffs were not in privity with the Schiffer Defendants and because the causes of action were barred by the Martin Act.

As with the fraudulent inducement causes of action, Plaintiffs have failed to distinguish between intentional misrepresentation of fact or of financial condition, which is actionable, and errors in projections which are not. The income and expense numbers which the Schiffer Defendants certified were only projections.

Hamlet was a new development, not a going concern. The Offering Plan contained projections of income based upon various assumptions. The figures were not based upon past or present performance.

Furthermore, the Martin Act and the regulations promulgated thereunder require an Offering Plan to contain projections of income and expenses. General Business Law §352-e(6); 13 NYCRR 20.1, *et seq.*; and 13 NYCRR 22.1, *et seq.* See, 13 NYCRR 20.2(c)(5)(i)(A-3); 13 NYCRR 20.3(2)(h)(3); 13 NYCRR 20.4(d)(4); 13 NYCRR 22.2(c)(6)(i)(c); 13 NYCRR 22.3(g)(6)(7); and 13 NYCRR 22.4(d). Any inaccuracies in the Offering Plan are violations of the Martin Act which can only be prosecuted by the

[\* 17 ]

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Attorney General. Board of Bayberry Greens Condominium v. Bayberry Green Assocs.,  
174 A.D.2d 595 (2<sup>nd</sup> Dept. 1991).

The Court did not misconstrue the law in this regard. Thus, reargument as to these causes of action must be denied.

Although Plaintiffs also seek to renew, they offer no new facts to demonstrate the basis for renewal. Thus, renewal is inappropriate.

H. Negligence

Plaintiffs allege that the developers negligently constructed the property. The sixty-eighth through seventy-first causes of action which are replead as the seventy-second through seventy-fifth causes of action in the Amended Complaint allege that the builders, The Hamlet on Olde Oyster Bay Development Corp. and The Hamlet on Olde Oyster Bay Development Co., LLC negligently constructed the buildings and structures in the common areas and negligently constructed the Sagamore, Carriage House and Villa units.

In its prior decision, the Court dismissed these causes of action holding that the relationship between the HOA and the purchasers of the units was contractual. The obligations between the parties was created by the Offering Plan. Since the complaint did not allege a breach of any duty separate and apart from those created by the contract, the complaint failed to state a cause of action. See, Clark-Fitzpatrick v. Long Island Rail Road, Co., 70 N.Y.2d 382 (1987).

The issue presented is whether Plaintiffs can maintain a cause of action against

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the Sponsor, developer and builders for negligence in constructing the buildings. They cannot. New York still adheres to the rule of *caveat emptor* in connection with the sale of real property, unless the conduct of the seller or the seller's agent amounts to active concealment. See, Matos v. Crimmins, 40 A.D.3d 1053 (2<sup>nd</sup> Dept. 2007).

Plaintiffs do not allege that Defendants actively concealed any conditions. The only rights the Plaintiffs have relating to the allegedly substandard, improper or defective construction are those arising out of their contractual relationship or those provided by the warranties substituted by the seller in place of those created by General Business Law Article 36-B. Thus, the Court properly dismissed the negligent causes of action. Renewal and reargument must be denied.

I. Breach of Fiduciary Duty/Aiding and Abetting

The Court did not dismiss or limit the breach of fiduciary duty/aiding and abetting causes of action except to the extent that the claims relating to actions occurring more than three years prior to commencement of the action were barred by the statute of limitations. Plaintiffs seek to renew and reargue to the extent that the Court concluded that these action were subject to a three year statute of limitations. Upon reconsideration, plaintiffs seek to have these claims subject to a six year limitations period.

Plaintiffs have plead in the alternative alleging the same conduct constitutes fraud, breach of contract and breach of fiduciary duty. Plaintiff's allege that since the breach of fiduciary duty causes of action are premised upon the same facts as the

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fraudulent concealment causes of action, the statute of limitations on the breach of fiduciary duty causes of action should be six years rather than the three years.

If a cause of action for breach of fiduciary duty is based upon fraud, then the claim is subject to a six year statute of limitations. Kaufman v. Cohen, 307 A.D.2d 113 (1<sup>st</sup> Dept. 2003). Plaintiffs assert that since the Court sustained the fraudulent concealment causes of action and the factual allegations underlying the fraudulent concealment cause of action are also plead as facts underlying the breach of fiduciary claim, the six year statute of limitations applies.

In determining whether to apply a three or six year limitations period, the Court must determine if the fraud allegation is an integral part of the breach of fiduciary duty claim or whether it is incidental thereto. *Id.*

In this case, the allegations relating to breach of fiduciary duty actions do not relate primarily to fraud. The breach of fiduciary duty causes of action are largely based upon allegations that the Sponsor-controlled Board of Managers failed to properly verify or pay expenses, to maintain the books, account for the money, failed to sub-meter the gas and electric service for restaurant in the clubhouse, failed to take appropriate action to remedy construction defects. These facts constitute mismanagement, not fraud. Thus, the Court properly found that these causes of action are subject to the three year statute of limitations. See, Dignelli v. Berman, 293 A.D.2d 565 (2<sup>nd</sup> Dept. 2002); and Yatter v. William Morris Agency, Inc., 256 A.D.2d 260 (1<sup>st</sup> Dept. 1998).

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The causes of action for breach of fiduciary duty and aiding and abetting the breach of fiduciary duty shall proceed subject to a three year statute of limitations.

J. Hamlet Defendants' Motion Strike Dismissed Causes of Action and Dismissed Parties

The Hamlet Defendants seek to strike from the Amended Complaint the dismissed causes of action dismissed by this Court's July 7, 2006 order and to strike from the caption the names of the defendants against whom the action has been dismissed.

This Court's July 7, 2006 order dismissed all of plaintiffs unjust enrichment, fraudulent inducement, negligent misrepresentation, negligence, joint and several liability, piercing the corporate veil all causes of action against Schiffer and Schiffer Management and all causes of action against the principals of O.B. Ventures, to wit: Joseph Mancino, John Branfield, Jr., Jeffrey Wall, R. Patrick Quinn and Michael Puorro.

This Court's July 7, 2006 order granted Plaintiffs leave to serve an Amended Complaint to replead its breach of warranty causes of action. The Amended Complaint should not have alleged causes of action, or named as defendants, parties against whom all of the claims asserted in the complaint had been dismissed by this Court's July 7, 2006 order. See, Mandel v. Adler, *supra*.

To compound this problem, Plaintiffs did not seek to reinstate the unjust enrichment, joint and several liability, piercing the corporate veil or Donnelly Act causes

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of action. Thus, these causes of action must again be dismissed and stricken from the Amended Complaint.

Plaintiffs move to renew and reargue from the Court's July 7, 2006 order to the extent it dismissed the eleventh, thirteenth, fifteenth, thirty-third through fortieth, fifty-second through fifty-fourth and sixty-eight through seventy-first causes of action. Plaintiffs seek, upon reconsideration, to have the Court reinstate these causes of action. Plaintiffs also seek to renew and reargue from to the July 7, 2006 order to the extent the Court held the seventy-ninth through eighty-first causes of action were subject to a three year statute of limitation and, on reconsideration, holding that these causes of action are subject to a six year statute of limitations. Plaintiffs' motion to renew and/or reargue the motion in its entirety has been denied. Thus, those causes of action must also be dismissed and stricken from the Amended Complaint.

In addition to striking those causes of action, the Court has dismissed and stricken from the caption those parties against whom the complaint has been dismissed, the Hamlet Defendants seek to strike from the Amended Complaint the general allegations alleged to support those causes of action. They assert that this material is scandalous and prejudicial material which was plead unnecessarily. CPLR 3024.

The problem with striking the "unnecessary" allegations is that the Amended Complaint contains 925 separately numbered "paragraphs" and alleges 93 causes of action. The Amended Complaint includes 278 separately numbered introductory factual paragraphs that set forth the status of the parties, their relationship to the action and the

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facts upon which the 93 causes of action are based. All of these introductory paragraphs are incorporated by reference into the 93 causes of action. When deciding a motion to dismiss, the Court must read the complaint as a whole to determine whether the challenged portion of the pleading states a cognizable cause of action. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976); Well v. Yeshiva Rambam, 300 A.D.2d 580 (2<sup>nd</sup> Dept. 2002); and Frank v. DaimlerChrysler Corp., 292 A.D.2d 118 (1<sup>st</sup> Dept. 2002). However, the Court cannot read each allegation made in the complaint to determine which allegations are necessary and which are unnecessary to each of the surviving causes of action.

CPLR 3024 does not provide a basis for striking unnecessary allegations. In order to strike portions of a pleading, the allegations must be scandalous or prejudicial and not merely unnecessary or irrelevant. Card v. Budini, 29 A.D.2d 35 (3<sup>rd</sup> Dept. 1967); Matter of Emberger, 24 A.D.2d 864 (2<sup>nd</sup> Dept 1965). See also, Siegel, *New York Practice 4<sup>th</sup> §230*.

Finally, the Hamlet Defendants do not indicate which of the factual allegations contained in the Amended Complaint are scandalous or prejudicial. A party seeking to strike allegations contained in a pleading that are scandalous or prejudicial must specifically indicate which allegations are unnecessarily prejudicial and why. See, JC Mfg., Inc. v. NPI Electric, Inc., 178 A.D.2d 505 (2<sup>nd</sup> Dept. 1991); and Wegman v. Dairy-Lea Co-op, Inc., 50 A.D.2d 108 (4<sup>th</sup> Dept. 1975).

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The Hamlet Defendants do not indicate which specific allegations contained in the complaint should be stricken. Thus, their application, in this regard, must be denied.

K. Restaurant Claims

One of the greatest disputes between HOA and the Hamlet Defendants relates to the operation of the restaurant and dining facilities in the Clubhouse. The restaurant was rented to a sponsor affiliated entity for a rent of \$12,000 per year plus a per chair fee for private functions. The members of the HOA were required to pay a monthly food and beverage fee even if they did not use the restaurant or bar.

Disputes arose between the HOA and the operator of the restaurant regarding, among other things, service, quality of food, operating hours and use of the facilities as a catering facility for parties for non-residents. As a result, the HOA withheld payment of the monthly minimums. This resulted in litigation between the operator of the restaurant and the HOA. See generally, Dinner Club Corp. v. Hamlet On Olde Oyster Bay Homeowners Assoc., Inc., 21 A.D.3d 777 (1<sup>st</sup> Dept. 2005). The Sponsor was a party to that litigation. As part of a global settlement of the *Dinner Club* action, the Sponsor paid money to the HOA and the parties exchanged general releases.

Thus, any causes of action brought by the HOA are barred by the settlement of the prior action. Since the claims asserted by the HOA could have been asserted in the prior litigation, they cannot be litigated herein, See, Board of Managers of Woodbridge Condominium One v. Horn, 234 A.D.2d 249 (2<sup>nd</sup> Dept. 1996).

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The HOA is a Type-A Not-For-Profit corporation. The members of the HOA are the owners of the Sagamore, Villa and Carriage House units. For practical purposes, members of a not-for-profit corporation are the "shareholders" in such a corporation. See, Not-For-Profit Corporation Law Articles 6, 7 and Business Corporation Law Articles 6, 7. The HOA by-laws provide for the members to elect the members of the HOA Board of Directors and that the business of the HOA will be managed by the Board of Directors. The members of the HOA are in privity with the HOA and are thus bound by its actions. See, Matter of Shea, 309 N.Y. 605 (1956). Thus, the settlement by the HOA of all claims involving the restaurant and the release it issued to the Sponsor in connection with that limitation permanently bars any claims by the members of the HOA against the Sponsor relating to the restaurant. See, Harris v. Hallberg, 36 A.D. 3d 857 (2<sup>nd</sup> Dept. 2007).

The individual classes of homeowners claims are also barred by the prior action. The HOA members are the owners of the Sagamore, Carriage House and Villa units. The members of the HOA cannot circumvent the authority given to the Board of Directors to manage the business of the HOA by bringing individual actions since it "was intended to cover the subject matter of this action. Friends of Avalon Preparatory School, Inc. v. Ehrenfeld, 6 A.D. 3d 658 (2<sup>nd</sup> Dept. 2004).

However, the prolixity of the Amended Complaint causes problems in striking allegations regarding the restaurant. Only ¶¶ 19, 20, 21 and 22 relate specifically to the restaurant. However, it is very clear to this Court that all claims relating to the restaurant

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have been fully, finally and completely settled by the prior action and will not be litigated in this action.

L. Breach of Warranty Causes of Action

One of the claims of these causes of action involves the alleged construction defects in the buildings and structures in the common areas as well as construction defects in the Sagamore, Villa and Carriage House units. The Amended Complaint makes numerous allegations regarding construction related defects in the buildings and structures in the common areas and the Sagamore, Villa and Carriage House units.

This Court's July 7, 2006 order gave Plaintiffs leave to replead the causes of action for breach of warranty. This Court found that a breach of warranty is a contract cause of action (see, Denny v. Ford Motor Co., 87 N.Y.2d 248 [1995]), and that the Sponsor had properly substituted contractual warranty provisions for those created by General Business Law §777-a.

Paragraph 7 of the warranty created by the Offering Plan and Purchase Agreements requiring the homeowner to provide the Sponsor with written notice of the alleged defect no later than ten days after the expiration of the warranty period. The notice must have been given by certified or express mail, return receipt requested. Upon receipt of notice of an alleged defect, the Sponsor was to inspect and test the alleged defect within a reasonable period of time. The homeowner making such a claim was required to give the Sponsor or the Sponsor's agent reasonable access to the home to test or inspect the premises during normal business hours, Monday to Friday. Upon

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completion of the inspection, the Sponsor would then notify the homeowner if the claim was accepted or rejected. If the claim was accepted, the Sponsor was given a reasonable time to take corrective action.

Paragraph 8 of the warranty states that no cause of action may be maintained by a homeowner against the Sponsor for breach of warranty unless homeowner properly and timely files a notice of warranty claim form. This paragraph further provides that a homeowner may not commence an action for breach of warranty (1) more than 30 days after the expiration date of the applicable warranty period; (2) more than 30 days after the Seller has given the homeowner written notice of rejection of the claim; or (3) more than 30 days after the builder has substantially completed remedial action with respect to a defect.

In pleading a cause of action for breach of contract, the complaint must allege the contract provisions allegedly breached. Peters v. Accurate Building Inspectors Div. of Ubell Ent. Inc., 29 A.D.3d 972 (2<sup>nd</sup> Dept. 2006); Sud v. Sud, 211 A.D.2d 423 (2<sup>nd</sup> Dept. 1995); and Atkinson v. Mobil Oil Corp., 205 A.D.2d 719 (2<sup>nd</sup> Dept. 1994). The original complaint did not allege that the HOA or the homeowners had complied with the any of the aforementioned provisions. Plaintiffs were granted leave to serve an Amended Complaint to plead compliance with the written provisions of the warranty.

The Amended Complaint does not make any allegations regarding compliance with warranty ¶¶ 7 and 8. Thus, the Amended Complaint does not comply with this Court's order. More importantly, the breach of warranty causes of action as plead in the

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Amended Complaint fail to comply with the requirement that Plaintiffs plead the provisions of the contract Defendants allegedly violated. *Id.*

Under such circumstance, the Court must now find that the complaint fails to state claim upon which relief can be granted. CPLR 3211(a)(7). However, the Amended Complaint contains allegations of construction defects that would be subject to a cause of action for breach of warranty had the cause of action been properly plead. Therefore, the Court will grant the Plaintiffs one last opportunity to properly plead the breach of warranty claims.

M. Hamlet Defendants' Motion for Reargument, Reconsideration And/or Clarification

The Hamlet Defendants moved in the prior motion to dismiss portions of the breach of contract, fraudulent inducement, negligence and negligent misrepresentation causes of actions on the grounds that the some of the allegations contained in those causes of action constitute violations of the Martin Act. General Business Law §352, *et seq.* Only the Attorney General can prosecute actions based upon violations of the Martin Act. Vermeer Owners, Inc. v. Guterman, 78 N.Y.2d 1114 (1991). The Court dismissed the fraudulent inducement, negligence and negligent misrepresentation actions. This Court now adheres to its decision to dismiss those causes of action.

The Hamlet Defendants assert the Court misconstrued the law in failing to dismiss those portions of the breach of contract actions which allege violations of the Martin Act. Based upon Lacks v. Lacks, 12 N.Y.2d 268 (1963); and Werfel v. Fitzgerald, 23 A.D.2d

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306 (2<sup>nd</sup> Dept. 1965), this Court found that it could not dismiss portions of causes of action.

The Hamlet Defendants assert that *Lacks* and *Werfel* are no longer good law. They cite to Professor Siegel's Commentaries in McKinney's (*McKinney's Practice Commentaries* C3211:9) and his treatise (Siegel, *New York Practice* 4<sup>th</sup> §258). The Hamlet Defendants assert that these commentaries provide that the court may dismiss "... dismiss but a part of a single cause of action if the part is severable without macerating the whole case." See, Siegel, *New York Practice* 4<sup>th</sup> §258. Professor Siegel cites to Forse v. Turner, 55 Misc.2d 810 (Sup. Ct. Broome Co. 1968) as the basis for his conclusion. See, Siegel, *New York Practice* 4<sup>th</sup> §258, fn. 3. The decision in *Forse* makes no mention of *Lacks*, even though the Court of Appeals in *Lacks* stated, "If any portion of a cause of action is sufficient, it should not be dismissed on motion (*Abrams v. Allen*, 297 N.Y. 52)." Lacks v. Lacks, *supra* at 271. See also, Werfel v. Fitzgerald, *supra* at 308, where the Appellate Division, Second Department, following *Lacks*, specifically held "...if a pleading in part states a cause of action, it cannot be dismissed. (citations omitted)."

The only case cited by the Hamlet Defendants in which a portion of a cause of action was dismissed pursuant to CPLR 3211(a)(7) is North Fork Preserve, Inc. v. Kaplan, 31 A.D.3d 403 (2<sup>nd</sup> Dept. 2006). However, in *North Fork Preserve*, plaintiffs alleged 14 specific categories of wrongdoing. The court found that two of those categories of alleged wrongdoing did not support the causes of action for fraud,

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corporate waste and breach of fiduciary duty. The court directed the causes of action premised upon those two categories of wrongdoing be dismissed. *North Fork Preserve* is factually distinguishable.

In *North Fork Preserve*, the defendant indicated which specific paragraphs or portions of the causes it action it sought to strike. That is not the situation in this case. The Amended Complaint herein contains 243 separately number factual allegations relating to the Defendants' purported wrongdoing, to wit: ¶¶ 50-293. Many, if not most, of these individually numbered paragraphs make multiple factual allegations or cite to or incorporate by reference the HOA Offering Plan and/or the Offering Plans relating to the Villa or Carriage House condominiums. All of these factual allegations are then incorporated by reference into the substantive causes of action. The Hamlet Defendants do not state which of these 243 factual allegations are unnecessary to the remaining causes of action.

This Court cannot, and will not, read through the 243 individual factual allegations to determine which are unnecessary to the surviving causes of action. If a defendant seeks to partially dismiss a cause of action, it must specifically state which allegations are unnecessary and why they are unnecessary. *Id.*

The Hamlet Defendants assert the decretal paragraph of this Court's July 7, 2006 order is inconsistent with its analysis. In this regard, these Defendants assert that all causes of action should be dismissed as against The Holiday Organizations, Inc, The

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Hamlet on Olde Oyster Bay Development Corp., The Hamlet on Olde Oyster Bay  
Development Co., LLC and O.B Ventures Corp.

The Sponsor is The Hamlet on Olde Oyster Bay, LLC. The Holiday Organization,  
Inc. is the parent organization of the Sponsor. The Hamlet on Olde Oyster Bay  
Development Corp. is an affiliate of the Sponsor. The Hamlet on Olde Oyster Bay  
Development Co., LLC and OB. Ventures Corp. are members of the sponsor.

This Court's prior order should have dismissed all causes of action against The  
Hamlet on Olde Oyster Bay Development Co., LLC and O.B. Ventures, Corp. for a more  
basic reason than that asserted by these Defendants. Limited Liability Company Law  
§609(a) specifically provides that members of limited liability companies are not liable for  
the debts, obligations or liabilities of the limited liability company in tort, contract or  
otherwise solely by being a member of the limited liability company. None of the  
exceptions contained in Limited Liability Company Law §609(b) are relevant to this  
action. The complaint and Amended Complaint do not allege any basis for holding these  
Defendants liable except for their being members of the Sponsor. Since they are  
statutorily exempted from liability, the action against these Defendants should have been  
dismissed.

The sole basis for holding The Holiday Organization, Inc. and The Hamlet on Olde  
Oyster Bay Development Corp. in this action was either a joint or several liability theory  
or on a piercing the corporate veil theory.. Since the Court dismissed these causes of  
action, the action should have properly been dismissed against these Defendants.

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To the extent this Court's prior order did not explicitly dismiss the action against these Defendants, it does so now.

N. Motion of Bowne Defendants

These Bowne Defendants join with the Hamlet Defendants in seeking to dismiss the causes of action alleged in the Amended Complaint that were dismissed by the prior order. They also seek to dismiss the twenty-first, twenty-third, twenty-fifth and twenty-seventh causes of action in the Amended Complaint which allege breach of contract, the twenty-second, twenty-fourth, twenty-sixth and twenty-eighth causes of action which allege unjust enrichment, the forty-fourth, forty-fifth, forty-sixth and forty-eighth causes of action which allege fraudulent inducement, the fifty-ninth, sixtieth, sixty-first and sixty-second causes of action which allege negligent misrepresentation and the seventy-sixth, seventy-seventh, seventy-eighth and seventy-ninth causes of action which allege negligence/architectural malpractice.

1. *Breach of Contract*

Sidney B. Bowne and Sons, LLP ("Bowne") prepared a report contained in the Offering Plan. That report describes the exterior common areas that will be controlled by the HOA (HOA Offering Plan, pp. 113-115). Bowne also prepared the site and drainage plans and specifications. Bowne certified that their report describes "...the entire property as it will exist upon completion of construction, provided that construction is in accordance with the plans and specifications that we examined" (HOA Offering Plan, p. 226). Bowne further acknowledged that a copy of its report will be incorporated

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into the Offering Plan "...so that prospective purchasers may rely on the Report" (HOA Offering Plan, p. 226). The Bowne certification was signed by Dane C. Kenny ("Kenny").

Plaintiffs concede they did not have a contract with Bowne.

Plaintiffs assert they are the third-party beneficiaries of the contract between the Sponsor and Bowne or Kenny.

The twenty-third cause of action is brought on behalf of the Sagamore owners group. The twenty-fifth cause of action is brought on behalf of the Villa owners group. The twenty-seventh cause of action is brought on behalf of the Carriage House owners group. Bowne had nothing to do with the construction of those units. Bowne's work involved the common areas. Therefore, the owners of these units cannot be the third-party beneficiaries of this contract.

With regard to the HOA common area, the allegations in the complaint demonstrate this cause of action is not viable. Bowne certified in its report that the exterior common areas would be as described, provided that the work was done in accordance with the plans and specifications it reviewed. Plaintiffs alleges that the exterior landscaping and other exterior work in the common areas was not done in accordance with the plan. (Amended Complaint, ¶194). Bowne cannot be held liable for breaching its contract when the breach does not arise from its contractual obligations.

Plaintiffs reliance upon Board of Managers of Astor Terrace Condominium v. Schuman, Lichtenstein, Claman & Efron, 183 A.D.2d 488 (1<sup>st</sup> Dept. 1992) is misplaced. While that court found that the purchasers of condominium units were the third-party

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beneficiaries of the design contracts, the complaint alleged violations of those contracts. In this case, the Amended Complaint does not allege violation of the design contracts. The allegations relate exclusively to construction flaws. The certification made Bowne indicates that it is contingent upon the work being performed in accordance with the plans Bowne prepared or reviewed. A thorough reading of the Amended Complaint establishes that Plaintiffs are not asserting that the plans were defective or inadequate. Plaintiffs' complaints involve allegations of improper, inadequate or incompetent construction or failure to construct the buildings in accordance with the plans and specifications or applicable building codes.

The only reason such information would have to be disclosed to prospective purchasers is the Martin Act and the regulations promulgated thereunder. Any allegation that the Offering Plan fails to comply with these requirements alleges a violation of the Martin Act. Only the Attorney General may bring action under the Martin Act. Veneer Owners, Inc. v. Gutterman, *supra*.

The certification made by Bowne specifically states that it is in accordance with General Business Law Article 23-A (the Martin Act) and Part 20 of the regulations promulgated by the Department of Law pursuant to the Martin Act (See, 13 NYCRR 20.1 *et seq.* and 13 NYCRR 22.1 *et seq.*).

For the foregoing reasons, the twenty-first, twenty-third, twenty-fifth and twenty-seventh causes of action must be dismissed.

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## 2. *Unjust Enrichment*

To establish a claim for unjust enrichment, a plaintiff must establish that it performed services for the defendant which resulted in the defendant being unjustly enriched. Clark v. Daby, 300 A.D.2d 732 (3<sup>rd</sup> Dept. 2002); and Kagan v. K-Tel Entertainment, Inc., 172 A.D.2d 375 (1<sup>st</sup> Dept. 1991). Plaintiff must establish that the services were performed at the request or behest of the defendant. Clark v. Daby, *supra.*; Prestige Caterers v. Kaufman, 290 A.D.2d 295 (1<sup>st</sup> Dept. 2002); and Lakeville Pace Mechanical, Inc. v. Elmar Realty Corp., 276 A.D.2d 673 (2<sup>nd</sup> Dept. 2000). The amended complaint does not allege that the Plaintiffs performed any services for or on behalf of the Defendants at the request of any of the Defendants for which the Plaintiffs anticipated being compensated.

To establish a cause of action for restitution, a plaintiff must establish that defendant received money from the plaintiff that, in good conscience and equity, defendant should not be permitted to retain. Wiener v. Lazard Freres & Co., 241 A.D.2d 114 (2<sup>nd</sup> Dept. 1998); and Bello v. New England Financial, 3 Misc.3d 1109(A) (Sup. Ct., Nassau Co. 2004). In this case, Plaintiffs did not pay any money to the Defendants. Bowne rendered services on behalf of the Sponsor, not the Plaintiffs.

For the foregoing reasons, the twenty-second, twenty fourth, twenty-sixth and twenty-eighth causes of action fail to state a cause of action and should be dismissed.

## 3. *Fraudulent Inducement*

The facts underlying these causes of action are the representations made by

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Bowne in the Offering Plan (Amended Complaint, ¶¶520, 530, 540, 550).

Bowne prepared the site and drainage plan specifications and prepared a report dated April 10, 2000 which described the landscaping and exterior portions of the common areas. Bowne acknowledges in its certification that a copy of its April 10, 2000 report is to be incorporated into the Offering Plan and that prospective purchasers may rely upon it. The certification states that the report describes the property "...as it will exist upon completion of construction, provided that construction is in accordance with the plans and specifications that we examined" (Offering Plan, pp. 226-227).

In order to avoid dismissal of a common law fraud action, plaintiff must plead "...a unique set of circumstances whose remedy is not already available to the Attorney General." Thompson v. Parkchester Apartments, Co., 249 A.D.2d 68, 69 (1<sup>st</sup> Dept. 1998). See also, Thompson v. Parkchester Apartments Co., 271 A.D.2d 311 (1<sup>st</sup> Dept. 2000); and 15 East 11<sup>th</sup> Apartment Corp. v. Elghanayan, 220 A.D.2d 295 (1<sup>st</sup> Dept. 1995), *lv. dismiss. part, den. in part*, 87 N.Y.2d 1050 (1996).

The "...elements of common-law fraud are a representation of a material fact, falsity, scienter, reliance and injury." Kline v. Taukpoint Realty Corp., 302 A.D.2d 422 (2<sup>nd</sup> Dept. 2003). See, Channel Master, Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403 (1958).

Plaintiffs' causes of action fail on both accounts. Insertion of a report or certification in an Offering Plan which are false would be a violation of the Martin Act. Prosecution of such an action would rest solely with the Attorney General.

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Furthermore, the report and certification are not false. The report describes the property based upon a review of the plans. The certification specifically states the property will be as described in the report if it is built in accordance with those plans. The complaint alleges the property was not constructed in accordance with the plans. The complaint specifically alleges the property was not constructed properly or in a workmanlike manner and/or materially deviated from the plans and specifications. (Amended Complaint, ¶¶521, 531, 541, 551). Thus, any differences between the representations contained in the Offering Plan and the property as built involved construction and not design issues. Simply stated, Plaintiffs have not alleged that Bowne misrepresented what was contained in the plans.

For the foregoing reasons, the fraudulent inducement causes of action (forty-fourth, forty-fifth, forty-sixth and forty-eighth) fail to state a claim and must be dismissed.

#### 4. *Negligent Misrepresentation*

“ A cause of action based upon negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information. (Citations omitted).” Fresh Direct, LLC v. Blue Martini Software, Inc., 7 A.D.3d 487, 489 (2<sup>nd</sup> Dept. 2004). Recovery for negligent misrepresentation may be had for “... pecuniary loss arising from negligent representations where there is actual privity of contract between the parties or a relationship so close as to approach that of privity.” Ossining Union Free School Dist. v.

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Anderson, LaRocca Anderson, 73 N.Y.2d 417, 424 (1989). See also, Parrott v. Coopers & Lybrand, L.L.P., 95 N.Y.2d 479 (2000).

Bowne and Kenny, on the one hand, and Plaintiffs, on the other, are not in privity, nor does their relationship approach privity. Even if it did, the Amended Complaint fails to state a cause of action for negligent misrepresentation. The report Bowne prepared is based upon a review of plans. Bowne certified the accuracy of the conditions based upon the work being performed in accordance with those plans. Since Plaintiffs allege that the work was not performed in accordance with the plans and specifications Bowne prepared or reviewed, the negligent misrepresentation causes of action (fifty-ninth, sixtieth, sixty-first and sixty-second) fail to state a cause of action and must be dismissed.

#### 5. *Negligence/Malpractice*

The seventy-seventh, seventy-eighth and seventy-ninth causes of action allege that Bowne departed from generally accepted practices and standards and failed to use reasonable care in the design and construction of the Sagamore, Villa and Carriage House units, respectively. However, the Offering Plan establishes that Bowne had no involvement in the engineering and construction of those units. The Offering Plan only indicates that Bowne prepared the plans and specifications for the landscaping and drainage. Its report relates exclusively to the common areas. Bowne cannot be held liable in negligence/malpractice for design or construction defects for which it had no responsibility. These causes of action must be dismissed.

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The seventy-sixth cause of action is different. Bowne prepared the plans and specifications for the landscaping and the non-structural common areas and the drainage. Plaintiffs do not allege that the plans were negligently prepared or that the plans failed to comply with good and accepted engineering standards in designing the site and drainage plans and specifications. The negligence alleged relates exclusively to defects in the actual construction of these systems or elements such as, uneven walkways, incomplete irrigation, dead grass, trees and other landscaping. Plaintiffs further allege that the systems that were not within the purview of Bowne's work was improperly designed or constructed.

The Bowne Defendants cannot be held liable in negligence for failing to perform work that was beyond the scope of its obligations. Thus, the seventy-sixth cause of action also fails to state a cause of action upon which relief can be granted and must be dismissed.

O. DiGiovanna's Motion to Dismiss

Due to the nature of the scope of the project, several Offering Plans were prepared and filed. There is an Offering Plan for the Home Owners Association. The only reference to Di Giovanna contained in the HOA Offering Plan is a letter to Ira Adler, Esq. of Certilman, Balin Adler & Hyman, LLP dated June 8, 2000 indicating that the plans for the Sagamore homes had been submitted to the Town of Oyster Bay Building Department (HOA Offering Plan, p. 126). The letter indicates approval of the plans is a ministerial act and that building permits should be issued shortly. This Offering Plan

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does not contain any architectural drawings or certifications prepared by Di Giovanna.

The Offering Plan does not indicate whether DiGiovanna prepared the architectural plans for the Sagamore homes. It states that Bowne and Robert M. Swedroe, Architects and Planners prepared the reports and certifications contained therein.

The owners of Villa units were buying condominium units. A separate Offering Plan was prepared for the Villa units ("Villa Plan"). The Villa Plan contains drawings of the floor plans for each of the units. However, the Villa Plan does not indicate who prepared those drawings.

The Villa consists of nine two story buildings each containing eight units. The units are classified as interior ground floor, interior upper, exterior ground floor and exterior upper. The Villa Plan contains a detailed narrative describing each type of unit. This description was prepared by DiGiovanna (Villa Plan, pp.126-132).

The Villa Plan also contains a letter from DiGiovanna to Ira Adler, Esq. of Certilman, Balin, Adler and Hyman, LLP dated June 8, 2000 with regard to the anticipated building permits for the Villa buildings from the Town of Oyster Bay Building Department.

DiGiovanna also prepared the certification required by the Martin Act and the regulations promulgated pursuant thereto. In the section of the certification relevant to this action, Di Giovanna certified that his narrative accurately describes the property as it will exist when built provided it is built in accordance with the plans and specifications he

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examined. He further states that his report provides potential investors or purchasers with "... an adequate basis upon which to found their judgment concerning ... the property as it will exist upon completion of construction, provided that construction is in accordance with the plans and specification examined" (Villa Plan, p. 205). The certification indicates that it is not meant to be a guarantee or warranty of the physical condition of the property (Villa Plan, pp. 205-206).

A separate plan was filed and issued for the Carriage House units. DiGiovanna had no involvement with these units.

#### 1. *Breach of Contract*

Plaintiffs concede they do not have a direct contractual relationship with Di Giovanna. However, they press the thirty-third, thirty-fifth and thirty seventh causes of action alleging the HOA, the Sagamore homeowners and the Villa condominium unit owners are the third-party beneficiaries of the contract between the Sponsor and DiGiovanna.

The causes of action must be read in connection with the factual allegation incorporated by reference into those causes of action.

The breach of contract causes of action are premised upon Amended Complaint ¶¶ 147-150, which relate to the certifications, ¶¶ 205-206 which relate to construction defects, ¶¶ 212-216 which allege DiGiovanna was aware of construction defects found by FSI Architects, an architect retained to inspect the premises by the HOA and the owners of the Sagamore, Villa and Carriage House units, and ¶¶ 246-247 which allege

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that the plan fails to contain meaningful descriptions of the units and floor plans of the Sagamore units.

The regulations promulgated pursuant to the Martin Act do not require Offering Plans to contain a description or floor plans of individual units. 22 NYCRR 22.2(c)(6)(iii). These regulations require that the plan contain a description and drawings of the property that is to be owned by the home owners association. *Id.*

To the extent that these causes of action are premised upon construction defects or construction, the complaint fails to state a cause of action against DiGiovanna and they must be dismissed.

The certifications were premised upon the property being constructed in accordance with the plans and specifications Di Giovanna reviewed. The certification specifically states that it is dependent upon the buildings and premises being constructed in accordance with the plans and specifications Di Giovanna reviewed. Plaintiffs do not allege the plans and specifications were defective or improper.

To the extent that these causes of action are premised upon construction defects, they fail to state a cause of action. Plaintiffs do not allege that DiGiovanna constructed these buildings.

The certifications cannot be a basis for a cause of action relating to construction defects. The certification in the Villa Plan was notarized on April 24, 2000. At that time, construction had not yet begun. Di Giovanna's letter to Ira Adler dated June 8, 2000 indicated that the building permit for construction of the Villa would be issued shortly.

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To the extent that this cause of action is premised upon the failure to include detailed plans, the cause of action fails because the failure to include such plans would be a violation of the Martin Act. The regulations promulgated by the Department of Law specifically require a condominium Offering Plan to contain a floor plan. 13 NYCRR 202.3(b).

The Sagamore units are not part of a condominium plan. The Sagamore units were sold to purchasers who took title in fee simple. The regulations regarding Offering Plans relating to Home Owners Association property requires a description and drawings of the common area buildings. 13 NYCRR 22.1, 22.3, 22.7. These regulations do not require the plan to contain a description or drawings of the individual units.

For the foregoing reasons, the breach of contract causes of actions must be dismissed as to DiGiovanna.

## 2. *Unjust Enrichment*

The thirty-fourth and thirty-fifth causes of action allege that DiGiovanna was unjustly enriched.

As discussed both in this Court's July 7, 2006 order and herein, such a cause of action is premised upon allegations that the plaintiff performed services for the defendant which resulted in the defendant being unjustly enriched. Clark v. Daby, *supra*; and Kagan v. K-Tel Entertainment, Inc., *supra*. Plaintiff must establish that the services were performed at the request or behest of the defendant. Prestige Caterers v. Kaufman, *supra*. DiGiovanna did not perform any services for or on behalf of either the owners of

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Sagamore or Villa units. The owners of these units concede that Di Giovanna performed its service on behalf of the Sponsor. Therefore, the causes of action for unjust enrichment fail to state a cause of action and must also be dismissed.

### 3. *Fraud/Aiding and Abetting*

The fiftieth cause of action alleges fraud or aiding and abetting the Sponsor in committing fraud. This cause of action is premised upon the allegations that the information contained in the report and certification contained in the Villa Plan was false.

This cause of action fails for two reasons. First, fraud must be plead with specificity. CPLR 3016(b). The report and certification are based upon a review of the plans and specification for the construction of the Villa condominium. The complaint is premised upon allegations that these units were not constructed in accordance with the plans and specification that DiGiovanna reviewed or that the construction was not performed in a proper or workmanlike manner. Plaintiffs do not allege with any specificity in what manner the report or certification was false and misleading.

Second, the Martin Act requires a condominium plan to contain a description of the property (13 NYCRR 20.7) and a certification from the Sponsor's architect. 13 NYCRR 20.4(c). Thus, providing a misleading or inaccurate description of the units or a false or fraudulent certification would be a violation of the Martin Act, which only the Attorney General may prosecute.

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#### 4. *Negligence/Malpractice*

The eighty-second cause of action alleges that DiGiovanna was negligent and committed malpractice in connection with services rendered.

To the extent that this cause of action is premised upon DiGiovanna's involvement with the Sagamore homes, the cause of action must be dismissed. From a reading of the entire record, the only mention of DiGiovanna in regard to the Sagamore homes is his letter indicating that the plans had been submitted to the Town of Oyster Bay Building Department and that the building permit was expected shortly.

DiGiovanna is an architect. Plaintiffs do not allege that DiGiovanna was negligent in preparing the plans for the Sagamore homes or that DiGiovanna negligently supervised the construction of these buildings. The Amended Complaint alleges construction defects in the Sagamore homes such as improperly installed HVAC systems, improperly installed heating and plumbing equipment and improperly installed roofing (Amended Complaint, ¶¶ 205-206). Plaintiffs do not allege nor do the papers indicate that DiGiovanna had any involvement with these issues.

Plaintiff makes similar allegations regarding the Villa condominiums (Amended Complaint ¶¶ 207-208).

Furthermore, these causes of action involve alleged violations of the Martin Act and the rules promulgated thereunder. The regulations promulgated pursuant to the Martin Act specifically require the narrative description and certification that Plaintiffs allege DiGiovanna negligently prepared. 13 NYCRR 20.3, 20.7. Plaintiffs may not

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circumvent the Martin Act and the Attorney General's jurisdiction by artfully alleging causes of action sounding in negligence. See, Whitehall Tenants Corp. v. Estate of Olnick, 213 A.D.2d 200 (1<sup>st</sup> Dept.), *lv. app. den.*, 86 N.Y.2d 704 (1995).

Therefore, the eighty-second cause of action fails to state a claim upon which relief can be granted and must be dismissed.

P. Sanctions

The Hamlet Defendants request sanctions pursuant to 22 NYCRR 130-1.1. Sanctions may be imposed for frivolous conduct. Frivolous conduct is defined as conduct that is without merit in law or fact, conduct that is undertaken primarily to delay or prolong the prosecution of an action or asserting material states of fact that are false. 22 NYCRR 130-1.1(c)(1)-(3).

Plaintiffs retained new counsel shortly after this Court issued its July 7, 2006 order. At a conference held shortly after Plaintiffs retained new counsel, the Court suggested that Plaintiffs' new counsel prepare a proposed Amended Complaint, in accordance with the July 7, 2006 order, and provide it to the attorneys for the Defendants. If the proposed Amended Complaint was satisfactory to the Defendants, they would serve an answer and the parties would then proceed with discovery.

The parties attempted, but were unable, to agree upon what could or should be alleged in the Amended Complaint. Given the parties' inability to agree upon an Amended Complaint, Plaintiffs served the document that was the subject of this motion.

Plaintiffs should not have alleged those causes of action that were previously

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dismissed which they were seeking to reinstate by way of renewal or reconsideration.

They also should have omitted the allegations relating to the restaurant.

However, the decision to impose sanctions is one left to the discretion of the court. Wagner v. Goldberg, 293 A.D.2d 527 (2<sup>nd</sup> Dept. 2005).

The Court believes that the Amended Complaint would have been subject to motion practice regardless of what allegations were made. Therefore, the Court believes the imposition of sanctions would be an abuse of discretion under these circumstances.

When Plaintiffs were last given the opportunity to amend their breach of warranty causes of action, they took such leave as license to plead various causes of action and theories of recovery which were previously dismissed. Plaintiffs are hereby warned that the only amendment to the Amended Complaint herein which will be tolerated are deletion of the dismissed causes of action and amendments consistent with this order. A longer, more prolix Amended Complaint was served after this Court's prior order. That should not happen again.

Therefore, the Hamlet Defendants motion for sanctions shall be denied.

Accordingly, it is,

**ORDERED**, that the motion of the Hamlet Defendants seeking dismissal of the sixth, eighth, tenth, twelfth, fourteenth, sixteenth, eighteenth, twentieth, ninetieth, ninety-first, ninety-scone and ninety-third causes of action in the Amended Complaint is **granted**; and it is further,

**ORDERED**, that the motion of the Hamlet Defendants dismissing all causes of

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action against The Hamlet on Olde Oyster Bay Development Co., LLC, O.B. Ventures Corp, The Holiday Organization, Inc., The Hamlet at Olde Oyster Bay Development Corp. is **granted**; and it is further,

**ORDERED**, that the motion of the Hamlet Defendants to dismiss the fifteenth, seventeenth, nineteenth, thirty seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, forty-second, forty-third, fifty-sixth, fifty-seventh, fifty-eighty, seventy-second, seventy-third, seventy-fourth, seventy-fifth and seventy-sixth causes of action in the Amended Complaint is **granted** and Plaintiffs' cross-motion to renew and reargue and upon reconsideration seeking reinstatement of the aforesaid causes of action is **denied** in its entirety; and it is further,

**ORDERED**, that the motion of the Hamlet Defendants to remove from the caption of the action to following parties: Joseph Mancino, John Branfield, Jr., Jeffrey Wall, R. Patrick Quinn, Michael Puorro, Schiffer Management Group, Joseph Gill Schiffer, The Hamlet on Olde Oyster Bay Food and Beverage Corp. and Holcom Incorporated against whom all the causes of action plead in the Amended Complaint have been dismissed or discontinued is **granted** and said parties are hereby stricken from the caption as defendants and the caption shall amended to so reflect. Plaintiffs shall settle an order amending the caption herein so as to remove all Defendants against whom all claims have been dismissed by January 31, 2008; and it is further,

**ORDERED**, that the motion of the Hamlet Defendants is in all other respects **denied**; and it is further,

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**ORDERED**, that Plaintiffs are hereby granted leave to replead the breach of warranty, and only the breach of warranty causes of action, to wit: the first, second, third and fourth causes of action, in accordance herewith by serving a second Amended Complaint not later than January 31, 2008; and it is further,

**ORDERED**, that Plaintiffs' motion to clarify or resettle the order of this Court dated July 7, 2006 is **denied**; and it is further,

**ORDERED**, that Plaintiffs' motion to renew and reargue from this Court's July 7, 2006, to the extent it held the breach of fiduciary duty causes of action are subject to a three year statute of limitations, is **denied**; and it is further,

**ORDERED**, that the motion of the Defendants Sidney B. Bowne & Sons, LLP and Dane C. Kenny for an order dismissing the amended complaint as to them is **granted**; and it is further,

**ORDERED**, that the motion of Defendant Charles A. DiGiovanna Architect and Charles A. DiGiovanna to dismiss the complaint as to them is **granted**; and it is further,

**ORDERED**, that Plaintiffs' motion to correct the papers to include the first page of a document designated "Revised Complaint" is **denied**; and it is further,

**ORDERED**, that the remaining Defendants shall serve their answer to the second amended complaint or move with regard to it not later than February 29, 2008; and it is further,


**ORDERED**, that the Hamlet Defendants' motion for sanctions is **denied**; and it is further,

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**ORDERED**, that counsel for the remaining parties to this action shall appear for a preliminary conference on March 6, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY  
December 24, 2007

  
\_\_\_\_\_  
Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**

JAN 03 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**