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At an IAS Term, Part Comm. of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of January, 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

- -X

BRIDGE STREET HOMEOWNERS ASSOCIATION, et al.,

Plaintiffs,

- against -

Index No. 26507/06

BRICK CONDOMINIUM DEVELOPERS, LLC, et al.,

Defendants.

- -X

The following papers numbered 1 to11 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 6-8 9-11
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	
___________Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action by Bridge Street Homeowners Association (BSHA) and 37 individual residential unit owners of the Bridge No. 50 Condominium (Bridge Street Condominium) (collectively, plaintiffs) alleging 11 causes of action, 223 Water Street, LLC and Joshua Guttman a/k/a Joshua Gutman (Guttman) cross-move for an order: (1) pursuant to CPLR 3211 (a) (1), (3), and (7), and General Business Law § 352-e (1) (b), dismissing plaintiffs' complaint as against them, and (2) correcting plaintiffs' complaint by striking allegedly scandalous, prejudicial, and unnecessary allegations inserted into the complaint. 223 Water Street, LLC and Guttman, cross-move, in the alternative, for an order requiring plaintiffs to replead paragraphs 76, 77, 78, 82, 131, 157, 173, and 174 of their complaint based upon the alleged ground that the allegations of these paragraphs are so vague and ambiguous that they cannot reasonably be required to frame a response to them.

Brick Condominium Developers, LLC (Brick) and Ely Bakst a/k/a Eli Bakst (Bakst). cross-move, pursuant to CPLR 3211 (a) (1), (3), and (7), for an order dismissing plaintiffs' complaint as against them, and, pursuant to CPLR 3211 (c) for summary judgment in their favor. Channy Bakst and Joel Benedek (Benedek) cross-move for an order dismissing plaintiffs' complaint as against them.

Plaintiffs' motion for a preliminary injunction, requiring the resignation of the current sponsor-designated members of Bridge Street Condominium's Board of Managers, and directing that a special meeting be convened to amend the declaration and

by-laws of Bridge Street Condominium to provide for the immediate election of five additional members of the board composed entirely of condominium residential unit owners independent of the sponsor and Guttman, was denied by the court at the close of oral argument.

-FACTS-

In September 2003, 223 Water Street, LLC, the owner of a building located at 50 Bridge Street, in Brooklyn, New York, entered into a contract with Brick, pursuant to which Brick purchased the fourth, fifth, sixth, and penthouse floors of the building for conversion to condominium ownership. A residential certificate of occupancy for the building was obtained on March 29, 2004, permitting 58 residential units to be located on these floors. Brick, as the sponsor, developer and promoter of the Offering Plan of Bridge Street Condominium, filed on March 31, 2004, offered the 58 residential units for sale for a total of $26,695,400. The closing of the sale to Brick occurred on September 27, 2004, after which 223 Water Street, LLC retained the first (lobby), second, and third floors as commercial units.

Guttman is the president and principal of 223 Water Street, LLC. While 223 Water Street, LLC owned the subject building, the name, Water Street, LLC, rather than 223 Water Street, LLC, was set forth as being the contract vendor in the Offering Plan. Bakst is the principal and sole member of Brick. Ely Bakst, along with Channy Bakst (who is his wife), and Joel Benedek, are the members of the Board of Managers of

Bridge Street Condominium appointed by the sponsor, Brick. Andrew Weiss, P.E. (Weiss) was the architect for Bridge Street Condominium pursuant to an architectural/ engineering services agreement with Brick. Weiss is not a participant in the motions before the Court.

On September 5, 2006, plaintiffs commenced this action against Brick, Guttman, Bakst, Water Street, LLC, 223 Water Street, LLC, Weiss, Channy Bakst, and Benedek. Plaintiffs' complaint consists of 59 pages and sets forth 11 causes of action. The first, second, and third causes of action are asserted against Brick, Bakst, and Guttman, and seek damages for breach of contract, breach of express warranty, and breach of the common-law implied housing merchant warranty, respectively. The fourth and fifth causes of action are alleged against Brick, Bakst, Guttman, and Weiss. The fourth cause of action seeks damages for breach of the architectural/engineering service agreement. The fifth cause of action seeks damages for negligence in the performance of these defendants' obligations to construct and deliver condominium units completed in accordance with the New York City Building Code and the Offering Plan. The sixth cause of action is asserted against Weiss, and seeks damages for professional malpractice.

The seventh cause of action is alleged against Brick, Bakst, Guttman, and Weiss, and seeks damages for common-law fraud and/or negligent misrepresentation. The eighth cause of action is asserted against Bakst, Channy Bakst, and Benedek, and seeks damages for breach of fiduciary duty. The ninth cause of action is alleged against Brick, Bakst,

Guttman, Channy Bakst, Benedek, Water Street, LLC and 223 Water Street, LLC and seeks a permanent injunction mandating the resignation of all sponsor-designated members of Bridge Street Condominium's Board of Managers and the election of a board composed only of independent unit owners. The tenth and eleventh causes of action are asserted against Brick, Bakst, and Guttman. The tenth cause of action seeks rescission based upon willful breach of contract, and the eleventh cause of action seeks rescission based upon fraudulent and/or negligent misrepresentation.

-DISCUSSION-

In addressing the cross motion by Guttman and 223 Water Street, LLC, it is noted that Guttman is not a principal, officer, or owner of Brick. Guttman's sole relationship to Brick is the fact that 223 Water Street, LLC, of which he is a principal, sold the subject premises to Brick. Neither Guttman nor 223 Water Street, LLC ever entered into any contractual relationship with plaintiffs.

Despite this absence of any contractual privity between Guttman and plaintiffs, plaintiffs purport to assert numerous claims against him based upon their allegation that he is the alter ego of Brick. They allege that there should be a piercing of the corporate veil of Brick to hold Guttman liable. Specifically, plaintiffs' complaint alleges, in paragraph 87, that Brick "is a mere instrumentality and alter ego of defendant Guttman, which is operated and controlled by Guttman, through the instrumentality of his son-in-law Bakst, solely to advance his and their personal financial interests."

It is well settled, however, that "[i]n order to pierce a corporate veil, [the] plaintiff must prove [that] the owners of the corporation completely dominated the corporation in regard to the transaction involved and that the domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff being damaged" (*Hamlet on Olde Oyster Bay Home Owners Assn. v Holiday Organization,* 12 Misc 3d 1182 [A], *14-15, 2006 NY Slip Op. 51378 [U]; *see also Matter of Morris v New York State Dept. of Taxation & Finance,* 82 NY2d 135, 141-142 [1993]; *Old Republic Nat. Title Ins. Co. v Moskowitz*, 297 AD2d 724, 725 [2002]).

In making the determination of whether to pierce the corporate veil and hold a corporate officer or principal liable, the factors to be examined are "'(1) domination and control over [the] corporation by those held liable which is so complete that the corporation has no separate mind, will or existence of its own; (2) use of this domination and control to commit fraud or wrong or any other dishonest or unjust act; and (3) injury or unjust loss resulting to plaintiff from said control and wrong'" (*Bowles v Errico,* 163 AD2d 771, 773 [1990], quoting 13 NY Jur 2d, Business Relationships § 26; *see also Maggio v Becca Constr. Co.,* 229 AD2d 426, 427-428 [1996]).

As noted, Guttman was not an owner, principal, or officer of Brick, but only the principal of the vendor, who sold the premises to Brick. The mere fact of a familial relationship between Guttman and Bakst, who is the principal of Brick, does not provide a sufficient basis upon which to predicate liability under a piercing of the corporate veil

theory. There are no factual allegations to support plaintiffs' conclusory claims that the corporate form of Brick was disregarded to carry out a fraud and to suit Guttman's convenience (*see Walkovszky v Carlton,* 18 NY2d 414, 420-421 [1966]; *Austin Powder Co. v McCullough,* 216 AD2d 825, 826-827 [1995]). Indeed, the complaint is barren of any allegations of an overlap in ownership, officers, directors, and personnel between Brick and 223 Water Street, LLC, inadequate capitalization of Brick, or a commingling of assets between Brick and 223 Water Street, LLC (*see Island Seaford Co. v Golub Corp.,* 303 AD2d 892, 893-894 [2003]).

Plaintiffs' complaint simply alleges, in paragraph 88, that Guttman's control and domination of Brick is shown by page 3 of the Offering Plan, wherein Brick represented that it was a "contract vendee" that was to acquire title from the "contract vendor," Water Street, LLC, of which Guttman is the president. Plaintiffs argue that despite Brick's purported acquisition of title, Guttman, as president of 223 Water Street, LLC, has applied to the New York City Board of Standards and Appeals (the BSA) for permission to amend the zoning variance for the second and third floors of the premises from manufacturing to residential status, and that this shows Guttman's dominance over Brick.Such argument is of no moment. 223 Water Street, LLC's retention of ownership of the lower floors of the building and Guttman's application to the BSA with respect thereto is irrelevant to the other floors, which were converted to condominium ownership by a separate sponsor, and plaintiffs' claims based on defects in the condominium

residential units on the subject floors.

Plaintiffs further argue that since it was not until September 27, 2004 that the transfer from 223 Water Street, LLC to Brick was consummated and Guttman has admitted that the premises had already been built-out at the time of this conveyance, Guttman or 223 Water Street, LLC must have taken part in the alleged clearing up of outstanding Building Code violations. Plaintiffs assert that it may , therefore, be inferred that the defects alleged in the complaint are a direct result of activity undertaken while Guttman and his corporation still owned the premises.

Plaintiffs' argument is unavailing. Neither Guttman nor his corporation, 223 Water Street, LLC, were parties to the Offering Plan or purchase agreements. Thus, no privity existed between them and plaintiffs, and they owed no duty to plaintiffs (*see LaBarte v Seneca Resources Corp.,* 285 AD2d 974, 975 [2001]; *M. Paladino, Inc. v J. Lucchese & Son Contracting Corp.,* 247 AD2d 515, 515 [1998]; *Residential Bd. of Managers of Zeckendorf Towers v Union Square -14th Street Assocs.*, 190 AD2d 636, 637 [1993]). Consequently, dismissal of plaintiffs' complaint as against Guttman must be granted (*see* CPLR 3211 [a] [7]).

It is noted that plaintiffs also contend that the court cannot grant Guttman dismissal of the second, third, and fourth causes of action as against him because he has only cross-moved for dismissal with respect to six of the 11 causes of action, which do not include these three claims. Such contention, however, is belied by the notice of cross

motion, which requests an order "dismissing the complaint, and each of its causes of action."

With respect to 223 Water Street, LLC, only the ninth cause of action, which seeks injunctive relief regarding the resignation of the Board of Managers, is asserted as against it. Guttman, in his affirmation, points out that 223 Water Street, LLC has no interest in Brick, that it had no further interest in the floors transferred by it to Brick after the closing of sale, and that it cannot be shown to have participated in any way in the sales or management of the condominium units. Thus, since 223 Water Street, LLC cannot legally exert any control over the current board members and their tenure in office, it is not a proper party to this claim. Consequently, dismissal of the complaint as against 223 Water Street, LLC is similarly mandated (*see* CPLR 3211 [a] [7]).

As to Water Street, LLC, plaintiffs claim that Water Street, LLC is in default since it has failed to interpose an answer to the complaint. However, while "Water Street, LLC" was the name listed as the contract vendor in the Offering Plan, it is apparent that this was simply an inadvertent error and that the vendor to which it referred was actually intended to be 223 Water Street, LLC. It appears that only 223 Water Street, LLC is related to this case, and that this case has no connection to "Water Street, LLC." Thus, dismissal of this case as against this incorrectly named entity is warranted (*see* CPLR 3211 [a] [7]).

Insofar as the cross motion by Guttman and 223 Water Street, LLC seeks to strike

paragraph 3 of the complaint as scandalous, such cross motion is without merit and, in any event, it is rendered moot by the dismissal of plaintiffs' complaint as against Guttman. In addition, while the cross motion also seeks to require plaintiffs to replead, such request is meritless in the absence of any motion by plaintiffs for leave to amend their complaint or any evidentiary showing that they have good ground to support any cause of action as against Guttman or 223 Water Street, LLC (*see* CPLR 3025, 3211).

As to plaintiffs' complaint against Bakst and Brick, the court notes that Bakst, in his individual capacity and as the principal of Brick, executed the sponsor's certification and, jointly and severally with Brick, certified the Offering Plan. Thus, plaintiffs may properly assert a claim as against Bakst, individually, as well as a claim as against Brick (*see Birnbaum v Yonkers Contracting Co.*, 272 AD2d 355, 357 [2000]; *Zanani v Savad,* 228 AD2d 584, 585 [1996]; *Residential Bd. of Managers of Zeckendorf Towers,* 190 AD2d at 637). As discussed above, plaintiffs have only asserted claims as against Channy Bakst and Benedek in their seventh, eighth, and ninth causes of action predicated upon their alleged breach of the fiduciary duty, which, as members of the Board of Managers, they owe to plaintiffs (*see Board of Managers of Acorn Ponds at North Hills Condominium I v Long Island Investors,* 233 AD2d 472, 472-473 [1996]).

Defendants Bakst, Brick, Channy Bakst and Benedek argue that the Martin Act (General Business Law § 352-e [1] [b]) prohibits plaintiffs from maintaining these claims. Pursuant to the Martin Act, the Attorney General has sole and exclusive

jurisdiction to prosecute sponsors who make false statements in offering plans (*see Vermeer Owners v Guterman,* 78 NY2d 1114, 1116 [1991]; *CPC Intl. v McKesson Corp.,* 70 NY2d 268, 276 [1987]; *Keh Hsin Shen v Astoria Fed. Sav. & Loan,* 295 AD2d 319, 320 [2002]; *Thompson v Parkchester Apts. Co.,* 271 AD2d 311, 311 [2000]; *167 Housing Corp. v 167 Partnership,* 252 AD2d 397, 398 [1998]; *Thompson v Parkchester Apts. Co.,* 249 AD2d 68, 68 [1998]; *Whitehall Tenants Corp. v Estate of Olnick,* 213 AD2d 200, 200 [1995]; *Rego Park Garden Owners v Rego Park Gardens Assocs.,* 191 AD2d 621, 622 [1993]; *Board of Managers of Fairways at North Hills Condominium v Fairways at North Hills*, 150 AD2d 32, 38-39 [1989]; *Rubenstein v East River Tenants Corp.*, 139 AD2d 451, 454-455 [1988]; *Kramer v Zeckendorf,* 10 Misc 3d 1056 [A], *5, 2005 NY Slip Op. 51990 [U]). In opposition to the cross motions, plaintiffs point out that while there is no private right of action under the Martin Act, this does not foreclose a cause of action for common-law fraud. Plaintiffs' seventh and eleventh causes of action, seek damages and rescission based upon common-law fraud and negligent misrepresentation.

It is well settled, though, that "private plaintiffs will not be permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney-General under the Martin Act" (*Whitehall Tenants Corp.,* 213 AD2d at 200). To distinguish common-law fraud causes of action from Martin Act causes of action, a plaintiff must plead "a unique set of circumstances [wherein the] remedy is not already available to the Attorney General" (*Thompson,* 249 AD2d at 69; *see also Thompson,* 271

AD2d at 311). Plaintiffs' causes of action for common-law fraud and negligent misrepresentation, however, are solely premised on allegedly false and misleading statements contained in the Offering Plan and marketing materials, clearly the subject-matter of the Martin Act restriction (*see Hamlet on Olde Oyster Bay Home Owners Assn.*, 12 Misc 3d at *7-8).

Plaintiffs argue that they may nevertheless maintain their common-law fraud claims because their claims are based on false statements, as opposed to omissions, in the cooperative Offering Plan. They argue that in *Kramer v Zeckendorf* (10 Misc 3d 1156 [A], *6), the Supreme Court, New York County, drew a distinction between "fraud based on omissions of an offering plan, which is not actionable, and fraud based on affirmative misrepresentations of fact, which is not barred." Plaintiffs contend that the various construction defects alleged by them, a defective roof, the lack of wall insulation, improper ventilation, faulty sidewalks, and flawed water pressure and fire prevention systems, involve affirmative misrepresentations and defects which they were not able to ascertain prior to taking possession, but of which defendants knew or should have known. Plaintiffs argue that on this basis, they have sufficiently pleaded claims for common-law fraud and negligent misrepresentation.

This argument must be rejected. Decisions of the Appellate Division have not recognized such a distinction between omissions and affirmative misrepresentations (*see Thompson*, 271 AD2d at 311; *167 Housing Corp.*, 252 AD2d at 398). Indeed, plaintiffs

are endeavoring to pursue claims based upon information allegedly misrepresented by the sponsor, which is exactly what the Martin Act commits exclusively to the Attorney General (*see Thompson,* 271 AD2d at 311; *Whitehall Tenants Corp.,* 213 AD2d at 200). "[P]laintiffs are not permitted to disguise claims which rightfully belong to the Attorney General as their own" (*511 West 232nd Owners Corp. v Jennifer Realty Co.,* 285 AD2d 244, 248 [2001], *affd* 98 NY2d 144 [2002]). Thus, plaintiffs' seventh and eleventh causes of action must be dismissed as a matter of law (*see* CPLR 3211 [a] [3], [7]).

Plaintiffs' first and tenth causes of action assert breach of contract claims. Specifically, plaintiffs assert that the Offering Plan represented that the building would be constructed substantially in accordance with the plans and specifications filed with the DOB, and the file drawings indicate that a roof with a 20-year No Dollar Limit (NDL) warranty was to be installed. However, a 20-year NDL was not installed. Plaintiffs also employed Rand Engineering and Architecture, P.C. (Rand), an engineering firm, which investigated the existing conditions from January through March 2006, and prepared a report (the Rand Report). The Rand Report discloses that the existing roofing system is the same as that which was in place prior to the addition of the top floors to the building.

The Rand Report also discloses that the party/common walls terminate at the floor level, and do not extend through the concealed space below the floor, which is required by the Building Code of the City of New York as a fire stopping/segregation method. In addition, the Rand Report indicates that neither sprinklers nor compartments are installed

in compliance with the Building Code. Plaintiffs allege that due to these construction deficiencies, Brick further breached the terms of the Offering Plan insofar as they represented that the construction of the building had been completed in accordance with the New York City Building Code.

Plaintiffs additionally allege other breaches of the Offering Plan, including an unstable sidewalk vault located below the newly installed sidewalk along Bridge Street, a lack of exterior wall insulation in the fourth and fifth floor apartments which result in a loss of approximately 65% more heat or air-conditioning than the walls described in the Offering Plan, noncompliance with Building Code regulations regarding suppression of sound transmission in the interior walls, and a myriad of insufficiencies in the building's domestic water systems.

The aforesaid allegations, which are alleged to support virtually all of plaintiffs' causes of action, specifically set forth common-law breach of contract claims. The Martin Act does not bar common-law breach of contract claims or breach of warranty claims (*see Tiffany at Westbury Condominium v Morelli Dev. Corp.*, 34 AD3d 791 (2d Dep't,2006); *885 W.E. Residents Corp. v Coronet Properties Co.*, 220 AD2d 305, 306 [1st Dep't,1995]. Therefore, plaintiffs' first, second, third, and tenth (seeking rescission for willful breach of the contract) causes of action based on common-law breach of contract and warranty claims are not barred by the Martin Act, and dismissal of these causes of action cannot be granted on that basis (*see Tiffany v Morelli*, 34 AD3d 791; *885 W.E. Residents Corp.*, 220

AD2d at 306).

Plaintiffs' second cause of action for breach of express warranty alleges that plaintiffs were promised condominium units that would materially conform to the plans and specifications set forth in the Offering Plan, that they would be of no lesser quality than that set forth in the Offering Plan, and that the work, labor, services rendered, and materials used would be of sound workmanlike quality. Plaintiffs assert that immediately after moving into their respective condominium units, they discovered that the workmanship was improper and of a shoddy and inferior nature, and that the units did not materially conform to, and were of a lesser quality than that which was set out in the Offering Plan.

Where, as here, the plaintiffs' claim is that the contractor failed to comply with contractually created express warranties, it is not required that such claim be dismissed based upon the Martin Act (*see CBS Inc. v Ziff-Davis Publishing Co.,* 75 NY2d 496, 503-504 [1990]; *61 West 62 Owners Corp. v Harkness Apt. Owners Corp.,* 222 AD2d 358, 360 [1995]). Thus, dismissal of plaintiffs' second cause of action is not warranted.

Plaintiffs' third cause of action for breach of the common-law implied housing merchant warranty alleges that since the premises was to be a final height of seven stories, the respective purchase agreements are deemed to contain the common-law implied housing merchant warranty, which applies to purchasers of newly constructed homes of six stories or more (*see* General Business Law article 36-B). Plaintiffs allege

that the units suffered from a myriad of latent defects that were in breach of the common-law multiple housing merchant warranty. Inasmuch as such a claim is not barred by the Martin Act, plaintiffs may sustain this implied breach of warranty cause of action (*see Hamlet on Olde Oyster Bay Home Owners Assn.,* 12 Misc 3d at *20). Thus, dismissal of plaintiffs' third cause of action must be denied.

Brick asserts, as a basis for dismissal, that the certificate of occupancy for the subject building was issued after the physical inspection of the premises by the New York City Department of Buildings (the DOB), and that many of the complaints now presented by plaintiffs were the subject of prior complaints for which DOB found no violations. Brick also asserts that plaintiffs themselves have made material and structural modifications to their units at the cooperative building which impact on the structural integrity of the building. Brick contends, based upon these assertions, that plaintiffs cannot pursue their claims for common-law breach of contract.

Brick's contention is without merit. On a motion to dismiss for failure to state a cause of action, a court "must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide [the] plaintiff. . .'the benefit of every possible favorable inference'" (*AG Capital Funding Partners, L.P. v State Street Bank & Trust Co.,* 5 NY3d 582, 591 [2005], quoting *Leon v Martinez,* 84 NY2d 83, 87 [1994]; *see also Gothem v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). The mere issuance of a certificate of occupancy and the finding of no violations with respect to

some of plaintiffs' claims is not conclusive documentary proof as to the merits of plaintiffs' claims. Rather, triable issues of fact are raised which cannot be properly resolved on a motion to dismiss. Thus, dismissal of plaintiffs' causes of action for breach of contract and warranty must be denied.

While the first, second, third, and tenth causes of action may be maintained as against the sponsor Brick, it is well established that a member of a limited liability company is statutorily exempted from individual liability for the contractual obligations of a limited liability company (*see* Limited Liability Company Law § 609; *Retropolis, Inc. v 14th Street Development, LLC,* 17 AD3d 209, 210 [2005]; *Collins v E-Magine, LLC,* 291 AD2d 350, 351[2002]; *Hamlet on Olde Oyster Bay Home Owners Assn.*, 2006 WL 1982603 at *15). Thus, since Brick was a properly formed limited liability company, Bakst, as its member, cannot be held liable for Brick's contractual obligations unless the "corporate" veil is pierced upon a showing that Bakst completely dominated the LLC and in such capacity perpetrated a fraud or inequity upon plaintiffs as alleged. It is noted that Bakst personally certified the veracity of the Offering Plan which is a part of the plaintiffs' contracts. Giving the allegations of the complaint the deference due upon a motion to dismiss pursuant to CPLR 3211, the motion to dismiss the claims against Bakst under causes numbered one, two, three and ten is denied. *See Birnbaum v Yonkers Contracting Co., Inc.* , 272 AD2d 355,357.

Plaintiffs' fourth cause of action alleges a breach of contract claim against Brick,

Bakst, and Weiss for negligence in the preparation and supervision of the architectural/engineering services agreement. Plaintiffs allege that Brick and Bakst either knew or should have known that the building plans and specifications were negligently prepared by Weiss and/or that Weiss had negligently failed to properly supervise construction. Architect Weiss has not moved. However, insofar as this claim against Brick and Bakst is duplicative of the other claims for breach of contract, it must be dismissed.

Moreover, a condominium association, is not an intended beneficiary of a contract between an owner/developer and a construction contractor (*see Residential Board of Managers of Zeckendorf Towers*, 190 AD2d at 637; *Board of Managers of Riverview at College Point Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664, 665 [1992]). Plaintiffs were not a party to the architectural/engineering services contract and their claims thereunder against Brick and Bakst are based upon an alleged failure to enforce a contract to which plaintiffs were not in privity and have no standing. Consequently, plaintiffs' fourth cause of action must be dismissed (*see Hamlet on Olde Oyster Bay Home Owners Assn.,* 12 Misc 3d at *22).

Plaintiffs' fifth cause of action alleges negligence against Brick, Bakst, and Weiss for collective failures in the performance of their obligations to construct and deliver condominium units completed substantially in accordance with the Building Code of the City of New York. The relationship and the legal obligations between plaintiffs and

Brick and Bakst, however, are contractual. The obligations of Brick, as the sponsor, are established by the Offering Plan and the purchase agreements.

It is well established that "[a] breach of contract claim does not give rise to a separate cause of action in tort unless the [d]efendant breached a legal duty that is separate and apart from the [d]efendant's contractual obligations" (*Hamlet on Olde Oyster Bay Home Owners Assn.,* 12 Misc 3d at *12; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382, 389 [1987]; *Muldoon v Bluewater Pool Services,* 7 AD3d 496, 497 [2004]). Here, plaintiffs have not established the existence or breach of any legal duties other than those imposed by the Offering Plan and purchase agreements. Therefore, plaintiffs' fifth cause of action alleging negligence must be dismissed as a matter of law (*see* CPLR 3211 [a] [7]; *Hamlet on Olde Oyster Bay Home Owners Assn.,* 12 Misc 3d at *12).

Plaintiffs' eighth cause of action alleges a breach of fiduciary duty by Bakst, Channy Bakst, and Benedek, as sponsor-appointed Board members. Bakst, Channy Bakst, and Benedek, as the Board of Managers appointed by the sponsor, have a fiduciary duty to the unit owners and the BSHA (*see Board of Managers of Acorn Ponds at North Hills Condominium I v Long Pond Investors,* 233 AD2d 472, 472-473 [1996]; *Board of Managers of Fairways at North Hills Condominium v Fairways at North Hills,* 193 AD2d 322, 324-325 [1993]; *Hamlet on Olde Oyster Bay Home Owners Assn.,* 12 Misc 3d at *13).

Benedek asserts that he found no violations registered with the DOB, and that, therefore, there can be no breach of fiduciary duty by the board members. Benedek's assertion regarding the DOB's findings with regard to some of the claims made by plaintiffs, however, is not dispositive of all of plaintiffs' claims at this juncture.

Bakst, Channy Bakst, and Benedek also rely upon the business judgment rule in support of their contention that plaintiffs do not have an actionable claim against them. "The business judgment rule 'bars judicial inquiry into actions of corporate directors taken in good faith in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'" (*S.H. & Helen R. Scheuer Family Found. v 61 Assocs.,* 179 AD2d 65, 69 [1992], quoting *Auerbach v Bennett,* 47 NY2d 619, 629 [1979]). It does not, however, cover situations where condominium board members engage in self-dealing or otherwise shirk their fiduciary duties (*see Caprer v Nussbaum,* 825 NYS 2d 55 (2d Dep't, 2006) (nor).

The business judgment rule "shields the deliberations and conclusions of the chosen representatives of the board only if they possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment" (*Auerbach,* 47 NY2d at 631). When "the complaint alleges that the corporate decisions of the directors lacked a legitimate business principle or were tainted by a conflict of interest, bad faith or fraud, the business judgment rule may not be invoked to insulate the directors" (*Amfesco Industries v Greenblatt,* 172 AD2d 261, 264 [1991]; *see also Wolf v*

Rand, 258 AD2d 401, 404 [1999]; *S.H. & Helen Scheuer Family Found.*, 179 AD2d at 69).

Here, plaintiffs, in their complaint, have alleged conflicts of interest and bad faith by Bakst, Channy Bakst, and Benedek. Plaintiffs allege that these defendants are loyal to Guttman, rather than to them, and that they have breached their fiduciary duty to them by failing to take good faith actions on their behalf. At this stage of the action, plaintiffs' eighth cause of action, which seeks damages for an alleged breach of fiduciary duty by Bakst, Channy Bakst, and Benedek, sets forth a legally cognizable cause of action. Consequently, dismissal of this cause of action must be denied (*see Caprer,* 825 NYS 2d 55).

Plaintiffs' ninth cause of action against Brick, Bakst, Channy Bakst, and Benedek seeks a permanent injunction, mandating the resignation of all sponsor-designated members of the condominium board and the election of a board composed only of independent owners. Since there are factual issues raised as to plaintiffs' breach of fiduciary claim, dismissal of this cause of action should not be granted at this juncture.

-CONCLUSION-

Accordingly, the cross motion by 223 Water Street, LLC and Guttman is granted insofar as it seeks dismissal of the complaint as against them. The complaint is also dismissed as against Water Street, LLC. The cross motion by Brick and Bakst is granted to the extent that the fourth, fifth, seventh, and eleventh causes of action as against them

are dismissed. Said cross motion is denied insofar as it seeks dismissal of the first, second, third, and tenth causes of action as against Brick and Bakst, the eighth cause of action as against Bakst, and the ninth cause of action as against Brick and Bakst. The cross motion by Channy Bakst and Benedek to dismiss the eighth and ninth causes of action as against them is denied.

Thus, the fifth, seventh and eleventh causes of action are dismissed in their entirety. The fourth cause of action is also dismissed in its entirety as a matter of law nothwithstanding the absence of a motion to dismiss on behalf of defendant Weiss. The Court declines to address the sixth cause of action against Weiss in the absence of a motion.

The remaining parties shall appear for conference in Commercial Division I, Room 756 at 360 Adams Street, Brooklyn at 11 a.m. on February 28, 2007.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST