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SHORT FORM ORDER

INDEX No. 07-13673

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-20-07
ADJ. DATE 11-8-07
Mot. Seq. # 001 - MD

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DIANE FALKENBERG, HAROLD FALKENBERG, THOMAS F. STRENGER, KATHERYN M. STRENGER, JACK NAGLIERI, DOLORES NAGLIERI, DOROTHY THOMAS, URSULA WOODS, THOMAS BURKE, FRANCINE BURKE, MURIEL FOWLER, JEFFREY B. HOPKINS, JOHN F. BENNETT, ANTHONY SCHOBERL, VERONICA SCHOBERL, GEORGE OLDHAM, KAREN OLDHAM, THOMAS J. SNIPE, THOMAS J. SNIPE, JR., PATRICK COMMINS, LEON PEARCE, DORA MAY PEARCE, JOHN J. WALSH, RITA WALSH, BLUEMONT 1, FRANCIS S. HUMANICK, MARGARET HUMANICK, SCOTT M. WARNER, MONA WARNER, STEPHEN MASCIANGELO, ELIZABETH MASCIANGELO, FRANK RUGGIERO, NANCY RUGGIERO, EILEEN M. BROWNE, PETER GIOVANNIELLO, MARIA C. GIOVANNIELLO, VINCENT FEOLA, JOANNE FEOLA, ANTHONY MONACO, KAREN MONACO, DONALD McCREA, GIOVANNA McCREA, DONALD CARON, PATRICIA A. BURKE, ROSEANNE SCARPA, LINDA CARMICHAEL-FIELDS, JAMES R. GRONLUND, SANDRA N. GRONLUND, KURT MUELLER, LUCIA MUELLER, BRIGIDA DiMAIO, EUGENE PERINO, BARBARA PERINO, VINCENT CENNAMO, ROSEMARY DARCY, NANCY WENDROFF, JOHN KROHN, PAMELA KROHN, KURT HALLMAN, ANGELICA HALLMAN, EUGENE BUTTA, ANA BUTTA, STEPHEN BROWN, KAREN S. BENNETT-BRUMIN, JOSEPH J. CRISPINO, THOMAS FEZZA, JUDITH FEZZA, individually and on behalf of SILVER VILLAGE CONDOMINIUM,

Plaintiffs,

- against -

SILVER VILLAGE CONDOMINIUM, LLC, STEPHEN CODY, JEFFREY ROBINSON, JOSEPH BALZANO, STEVE SZAMBEL, FRANK WASHER and SILVER VILLAGE CONDOMINIUM,

Defendants.

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Upon the following papers numbered 1 to 28 read on this motion to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 12 - 24 ; Replying Affidavits and supporting papers 25 - 28 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that the motion to dismiss causes of action one through five is denied; and it is further

ORDERED that this motion to dismiss the sixth cause of action is granted.

This is an action for damages brought by plaintiffs, owners of homes in a development known as Silver Village Condominium located in Riverhead, New York. The complex consists of seventy-eight (78) homes and certain recreational facilities such as a clubhouse and pool. The plaintiffs purchased their homes from the sponsor (the developer) defendant Silver Village. The individual defendants are sponsor-designated members of the condominium's Board of Managers. Plaintiffs claim there are significant construction defects in the community that are not being addressed by the Board of Managers because the Board is controlled by the sponsor (which constructed the community). Plaintiffs seek to collect damages as a result of theses alleged defects.

Defendants Silver Village Condominium, LLC ("the sponsor") and Stephen Cody, Jeffrey Robinson, Josephine Balzano, Steve Szambel and Frank Washer ("the "Individual Defendants") have moved to dismiss the first six causes of action in the complaint pursuant to CPLR 3211 (a)(1) and (7). The first five causes of action are being brought derivatively on behalf of the condominium. The first cause of action against the sponsor sounds in breach of contract for failure to complete construction of the condominium and failure to remedy defects in the concrete, irrigation system, landscaping, the pond, roofing, and siding. The second cause of action alleges that the sponsor breached its express and implied warranties due and owing to plaintiffs. The third cause of action alleges that the sponsor negligently constructed the homes and common areas of the condominium complex. The fourth cause of action alleges a derivative claim against the individual defendants for breach of fiduciary duty in that they ignored and failed to investigate the condition of the homes. The fifth cause of action alleges a derivative claim against the individual defendants for gross negligence, willful misconduct and/or mismanagement of the condominium. The sixth cause of action requests that the Court remove defendants Cody, Robinson, and Balzano from the board and direct the election of replacements by the unit owners.

Defendants now move, prior to serving their answer, to dismiss the complaint in its entirety pursuant to CPLR 3211 (a)(1) based on the documentary evidence submitted on behalf of the motion and CPLR 3211 (a)(7) for failure to state a cause of action. Further, defendants claim the pleadings do not satisfy the heightened pleading standard of CPLR 3016 (b) for common law derivative actions which requires pleading facts of the claims with specificity, and pleading that demand was made upon the Board or detailed facts showing why such demand was futile.

Generally, derivative actions are brought by minority shareholders to vindicate the corporation's rights (***Marx v Akers***, 88 NY2d 189, 193, 644 NYS2d 121 [1996]). On the one hand, derivative actions are not favored in the law because they ask courts to second-guess the business judgment of the individuals charged with managing the company. On the other hand, derivative actions serve the important purpose of protecting corporations and minority shareholders against officers and directors who, in discharging their official responsibilities, place other interests ahead of those of the corporation (***Bansbach v Zinn***, 1 NY3d

1, 769 NYS2d 175 [2003]). A balance of these considerations is maintained by the requirement that a plaintiff shareholder set forth in the complaint--with particularity--an attempt to "secure the initiation of such action by the board or the reasons for not making such effort" (Business Corporation Law § 626 [c]).

Recently, in ***Carper, et al. v Nussbaum, et al.***, 36 AD3d 175; 825 NYS2d 55 (2006), the Second Department created the right for condominium unit owners to bring a derivative action against the sponsor and sponsor appointed board members. In ***Carper, supra*** at 36 AD3d at 190; 825 NYS2d at 68, the Court held:

> The same factors that caused the courts to fashion the derivative action procedure for shareholders and limited partners thus apply to condominium unit owners. All are owners of fractional interests in a common entity run by managers who owe them a fiduciary duty that requires protection. Condominium unit owners are, therefore, entitled to the same consideration by the courts as litigants in those situations in which the courts have historically allowed derivative actions to proceed, independent of any statutory authority.

The court, however, did not address the issue of whether the additional pleading requirements of CPLR 3016 (b) were applicable to condominium owner derivative actions.

In relevant part, Article III, Section 1 of the By-Laws of the Condominium provides that the Sponsor has the right to designate a majority of the Board of Managers as long as it owns at least one home in the condominium complex. The sponsor presently owns seven of the seventy-eight homes and rents those units. The sponsor has not offered those homes for sale. The Board of Managers is expressly authorized to take all actions not reserved to the homeowners either by statute or by the governing documents.

Plaintiffs maintain that the futility of a demand that the Board of Managers sue the sponsor for construction defects when a majority of the board are sponsor designees is set forth in paragraphs twenty-third through twenty-sixth of the complaint. As stated therein, the sponsor controls the Board of Managers, the homeowners had brought the construction defects to the attention of the Board and asked that they be remedied, the board failed to take any meaningful action to cure the defects and since a majority of the board members are representatives of the sponsor, the making of a demand would be futile.

Accordingly, the Court finds that plaintiffs have met their burden with respect to that prong of CPLR 3016 (b) governing common law derivative actions by pleading sufficiently detailed facts showing why such demand was futile, even if this additional pleading requirement is not required by ***Carper***.

Dismissal may be granted under CPLR 3211(a)(1) only if the documentary evidence "utterly refutes plaintiff's factual allegations" and conclusively establishes a defense to the asserted claims as a matter of law" (***Goshen v Mutual Life Ins. Co.***, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; ***Topel v Reliastar Life Ins. Co.***, 6 AD3d 608, 774 NYS2d 790 [2004]. Further, CPLR 3211(a)(7) provides that the court must afford the pleading a liberal construction, accept all the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]***; Hynes, et al., v Griebel,*** 2002 NY App Div Lexis 13418 [2002]; ***Glassman v Zoref, et al.,*** 291 Ad2d 430, 737 NYS2d 537 [2001]). The criterion is whether the plaintiff has a cause of action, not whether he or she has stated

one (***Vorel v NBA Properties, Inc.,*** 285 AD2d 641 [2001]). "Moreover, a court may freely consider evidentiary material submitted on the motion to remedy any defects in the complaint" (*id.*).

With respect to the first three causes of action, the court finds they have been pled with sufficient particularity. The first cause of action against the sponsor sounds in breach of contract for failure to complete construction of the condominium and failure to remedy defects in the concrete, irrigation system, landscaping, the pond, roofing, and siding. The second cause of action alleges that the sponsor breached its express and implied warranties due and owing to plaintiffs. The third cause of action alleges that the sponsor negligently constructed the homes and common areas of the condominium complex. The complaint states the categories of construction defects which exist at the condominium. Defendants are entitled to the specific details of each defect during discovery. Defendants' claims that certain categories of construction defects are "exclusions from responsibility under the Offering Plan" does not completely negate plaintiffs claims and in any event, is premature. It is too early in the action for the Court to make a specific finding with respect to the causes of the various construction defects. If the construction defects fall within the exclusions of the Offering Plan, then at that point, plaintiffs' recovery could be limited. On the other hand, provided the defects are of the kind and the cause alleged by plaintiffs, the language in the offering plan is not a bar to recovery. The Court notes it has not considered any evidence of the settlement discussions proffered by plaintiffs as proof that the Board of Managers were aware of the defective condition *(see*, ***Ex-Lax, Inc. v Goodman***, 21 AD2d 786, 205 NYS2d 572[1964]).

The fourth cause of action alleges a derivative claim against the individual defendants for breach of fiduciary duty in that they ignored and failed to investigate the condition of the homes. The fifth cause of action alleges a derivative claim against the individual defendants for gross negligence, willful misconduct and/or mismanagement of the condominium. The sixth cause of action requests that the Court remove defendants Cody, Robinson, and Balzano from the board and direct the election of replacements by the unit owners.

Defendants argue that the fourth cause of action is barred by documentary evidence in the form of an August 2, 2007 letter of Michael F. Cohen, Esq. In that letter, Cohen who is plaintiffs counsel, informs one of the Board members that he has "been named as a defendant not because you serve on the Board, but rather as a result of your connection with the Sponsor".

Defendants argument that this letter shields the Board members from a claim they breached a fiduciary duty to the homeowners is without merit. Rather, as stated in the letter, these defendants have liability because of their dual status as sponsor representatives and Board members. As Board members they owe a fiduciary duty to the homeowners to investigate and pursue all construction defects with the sponsor. As sponsor representatives, it is against their own personal financial interest to pursue a claim against the sponsor. It is that conflict of interest which underlies the plaintiffs' claim of breach of fiduciary duty.

Defendants also argue the fifth cause of action against the individual defendants for willful misconduct or gross negligence must be dismissed since there are no facts alleged demonstrating those claims. Further, the Condominium By-Laws contain an exculpation clause precluding personal liability for the Individual Defendants in the absence of intentional misconduct. The complaint at paragraph fifty-five through fifty-seven alleges that defendants ignored the defective manner in which the common elements and homes in the condominium were constructed because they are representatives of the sponsor. The

complaint provides enough information to support the fifth cause of action. Therefore, the motion to dismiss the fifth cause of action is denied.

The sixth cause of action seeks judicial removal of the individual defendants from the Board of Managers based on the alleged conflict of interest created by the fact they were designated to serve by the sponsor. While the condominium by-laws provide a procedure by which aggrieved unit owners may remove a member of the Board of Managers for cause, plaintiffs claim the procedure is meaningless because the sponsor has the right to appoint any replacement, and could re-appoint the same individuals plaintiffs seek to be removed.

Once a condominium is created, "the administration of the condominium's affairs is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements" (***Schoninger v Yardarm Beach Homeowners Ass'n, Inc.***, 134 AD2d 1,6, 523 NYS2d 523, 528 [1987]). "Where the by-laws are clear and explicit, their terms may not be ignored, but must be enforced as written" (***Blair v Local 100 Transport Workers Union of America***, 106 Misc. 2d 1018, 1021, 436 NYS2d 912, 914-915 [1980]). Here, plaintiffs have not alleged in their complaint any attempt to avail themselves of the remedy provided in the by-laws or a sufficient basis for the Court to interfere with the clear and explicit terms of the by-laws. Accordingly, the motion to dismiss the sixth cause of action is granted.

Dated: January 16, 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION