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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 602769/2007

LORNE, SIMON

VS.

50 MADISON AVENUE, LLC

SEQUENCE NUMBER : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached decision and order of even date 001

FILED
DEC 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/11/08

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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SIMON LORNE and LUDMILA LORNE,

Plaintiffs,

–against- Index No. 602769/07

50 MADISON AVENUE, LLC; GOLDSTEIN PROPERTIES, LLC; SAMSON MANAGEMENT, LLC; THE BOARD OF MANAGERS, member BRENT JOHNSTON, KENNETH RAISLER, DAVID MOFFITT, GREGORY HAYE; and JOHN DOES 1 through 10, intended to be persons presently unknown to the Plaintiffs but who may be necessary to afford the Plaintiffs complete relief herein,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

This is a dispute between the purchasers of a luxury condominium unit against the developers and sponsors, the manager of the condominium and its board of managers over alleged construction defects in the plaintiffs' unit. The plaintiffs allege that their unit, particularly the concrete substrate supporting the wood flooring, was designed and constructed in a careless, incompetent and unworkmanlike manner, such as to render it uninhabitable, with substantial design and construction defects, substantially below the appropriate standards for any residential unit, much less the luxury condo project promised in the Offering Plan and spec-ed in the Construction Plans. For their part, defendants contend that the plaintiffs have been unreasonable in their demands, but that if the concrete substrate is defective, it is the responsibility of the general contractor who has already been sued in a related action.

In motion sequence 001, defendant Board of Managers of 50 Madison Avenue

Condominium s/h/a The Board of Managers, and defendants Brent Johnston, Kenneth Raisler and David Moffitt move, pursuant to CPLR 3212, for summary judgment dismissing the fifth and only cause of action in plaintiffs' Verified Complaint that is asserted against them which is based on an alleged breach of fiduciary duty.

In motion sequence number 003, defendants 50 Madison Avenue LLC, Goldstein Properties LLC, Samson Management, LLC and Gregory Haye move for an order, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action. In the alternative, these defendants seek consolidation or joinder for purposes of discovery and trial, pursuant to CPLR 602, with a related action captioned *RC Dolner LLC v Samson Mgt., LLC and 50 Madison Ave., LLC*, pending in the Supreme Court of the State of New York, County of New York, Index No. 100694/07 (Goodman, J.) (the *Dolner* action).

Plaintiffs cross-move to amend their complaint to add a claim for declaratory relief, to assert damage claims under General Business Law §§ 349 and 350, and to add the condominium association as a necessary party to the action.

FACTUAL ALLEGATIONS

The plaintiffs are purchasers of a unit in a brand-new luxury condominium building located at 50 Madison Avenue, New York, New York. Defendants 50 Madison Avenue, LLC (50 Madison) and Goldstein Properties, LLC are alleged to be the developers and sponsors of the condominium (collectively, the Sponsors). Defendant Samson Management, LLC (Samson) is the manager of the condominium. Individual defendants Brent Johnston, Kenneth Raisler, and David Moffitt are members of the Board of Managers of 50 Madison Avenue Condominium (collectively, the Board of Managers). Defendant Gregory Haye is also a member of the Board of

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Managers, but he is a commercial board member who is employed by Samson, and is represented by counsel for the Sponsors and Samson. Non-party RC Dolner LLC (Dolner) was retained as the construction manager and general contractor on the project.

Plaintiffs signed a contract with 50 Madison to purchase the seventh floor unit in the condominium on or about January 24, 2005 for the agreed upon sum of $3,075,000 (the Contract of Sale). The Contract of Sale incorporates the condominium's Offering Plan, which includes the condominium's Declaration and its By-Laws.

The Verified Complaint dated August 14, 2007 alleges that, in anticipation of the closing, the Lornes attended a pre-closing inspection of their unit with Sampson. The Lornes provided to Samson a detailed list of certain construction issues that needed to be corrected and/or completed in accordance with the Construction Plans (the Punch List). Based on alleged assurances that the items on the Punch List were cosmetic and that there were no issues or defects that would affect the habitability of the unit, the Lornes closed on their unit on September 28, 2005.

However, after the closing, the Lornes were not able to move into their unit because the sprinkler pipes began to leak badly making it necessary to remove portions of the ceiling. This work took approximately two months to complete. The Lornes finally moved into the unit in November 2005. However, they contend that they soon discovered certain additional and latent construction defects. In December 2005 and January 2006, they allegedly notified Sampson and the Sponsors that, in addition to problems with the bedroom heating systems and windows in their unit, the floors were defective, in that there was vertical movement readily discernible in numerous planks of the floors, some planks had started to pop out of their proper location and other portions of the floors appeared warped.

With respect to the flooring, plaintiffs allege that it "was designed as a 'floating floor,' i.e., a floor that lies flat on the concrete substrate like a carpet, unattached to the concrete substrate, being held down by its own weight." Verified Complaint ¶ 31. The flooring consists of the (1) concrete substrate, (2) a plywood sub flooring, and (3) the hardwood flooring surface. The Lornes allege that it is crucial for the concrete substrate to be installed flat and level, and that the Construction Plans call for it to be inspected after installation.

The plaintiffs allege that the Sponsors finally acknowledged that the flooring in the unit had been improperly installed, and, after a few unsuccessful attempts to repair the floors in February and March 2006, it became clear that they were not repairable and that it would be necessary to remove and reinstall the flooring completely. In May 2006, allegedly at the Sponsors' request, the Lornes put their furniture into storage, moved out of their unit and into temporary housing. The Sponsors fully reimbursed the Lornes for all expenses incurred for both storage and temporary housing until early 2007. The Lornes allege, however, that Samson and the Sponsors never repaired the flooring in accordance with the Construction Plans or in any acceptable manner. Accordingly, the Lornes determined in March 2007 that they needed to "take control" of the flooring installation themselves. Verified Complaint ¶¶ 39-40. An engineer was retained by the Lornes, who advised that "a significant reason" for the inability of Samson and the Sponsors to have the flooring correctly installed was that the cement substrate had never been properly leveled and flattened as required by the Construction Plans. Id. ¶ 40; Aff. of Ludmila Lorne, ¶ 16. The engineer's examination also allegedly revealed that the defective condition had been observed at some point during the construction, because markings with yellow paint showing high spots and low spots had been painted on the concrete substrate. *Id.* There are

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allegedly deviations of as much as one inch within a span of only a few feet, which the Lornes contend present a rolling and undulating surface on which it would be virtually impossible to install hardwood floors of the type called for by the Construction Plans.

The Lornes allege that they immediately advised the Sponsors and the Board of Managers of the defective concrete substrate and the necessity of its repair to allow for the installation of the flooring and the re-occupancy of the unit. Although the concrete substrate was a common area of the condominium, which the Board of Managers was obligated to repair, they repeatedly advised the Lornes that they had no obligation in connection with the necessary repairs to the unit. The Lornes were told that they would be required to enter into the standard "Alteration/Installment Agreement" with the Board of Managers to do any work on the floors, rejected the Lornes' proposed modifications to an agreement which they believed did not apply to their situation, and insisted that the Lornes pay for the legal costs associated with having legal counsel review the Lornes' proposed modifications.

The Lornes commenced this action on August 16, 2007. Their Verified Complaint alleges that the Sponsors breached their contractual obligations to the Lornes in that their unit was designed and constructed in a careless, incompetent and unworkmanlike manner, such as to render it uninhabitable, with substantial design and construction defects, substantially below the appropriate standards for any residential unit, much less the luxury condominium project promised in the Offering Plan and spec-ed in the Construction Plans. In addition to the problems with the concrete substrate of the flooring, the Lornes allege that the windows in their unit were installed without proper hardware and did not provide proper insulation from cold and heat. They allege that the elevator, which opens directly into the residential units, and for which keys

are used to access a specific floor and unit, was improperly installed in that the same key could access more than one residential unit. In addition, the key system has consistently failed to operate in a secure manner, forcing the Lornes to install an ADT alarm system at their own expense. They allege that the bathtubs do not drain properly, a defect that may be due to the uneven concrete substrate, and other unspecified items on the Punch List that were never properly corrected notwithstanding their repeated requests and assurance of correction by Sampson.

The Lornes have also named the Board and its individual members as defendants, alleging that the Board breached its fiduciary duty to the Lornes by failing to protect their interests as owners of a unit in the condominium, and instead have consistently and improperly made more difficult the Lornes' efforts to have their floors properly installed in accordance with the construction plans. First, the Board is alleged to have denied Ludmila Lorne access to books and records, minutes of meetings and other information. Second, the Board sought to impose improper financial conditions on the Lornes. Third, David Moffitt, in furtherance of his own personal interest, allegedly sought to extract a monetary payment from the Lornes, and has specifically threatened and has made it more difficult for the Lornes to repair the wood flooring in the unit.

Based on these factual allegations, the Verified Complaint asserts the following five causes of action: (1) breach of contract against the Sponsors; (2) fraud by Samson and the Sponsors; (3) breach of express warranty by Samson and the Sponsors; (4) breach of the common law implied warranty of merchantability (the Housing Merchant Warranty law) by the Sponsors; and (5) breach of fiduciary duty by the Board of Managers. The Lornes seek damages on the first

four causes of action in an amount currently estimated to be $1,300,000. On the fifth cause of action, they seek damages against the Board of Managers as well as an "Order mandating compliance with their fiduciary obligations under law, permitting the [flooring work] to proceed unimpeded."

In the meantime, Dolner, the construction manager and general contractor on the project, commenced the *Dolner* action on January 16, 2007 against Samson and 50 Madison to recover payments allegedly due under a "Settlement Agreement" dated May 31, 2006, in which Dolner agreed, among other things, as follows:

> In any unit where an Owner complains about the Floors, Dolner shall, at its sole cost and expense, promptly take all actions reasonably necessary to inspect, repair, and, if necessary, replace all or a portion of the Floors in such unit to the Owner's and the Board [of Manager]'s reasonably satisfaction in accordance with the Contract Documents' specifications within the warranty period as herein extended [for 6 years].

Dolner Action Complaint, Exh. B thereto at ¶ 5, p. 3. The Settlement Agreement further provides that if any owner refuses to permit Dolner to perform work in any given unit, Dolner or Samson may negotiate for an alternative contractor to perform the work at Dolner's sole cost and expense. The complaint in the *Dolner* action alleges that, immediately after execution of the Settlement Agreement, Dolner undertook to perform all necessary floor repairs to the Lornes' unit, but that Ludmilla Lorne "made continuous and unreasonable objections to the floor installation, demanded installation outside of the specification standards, interfered with [Dolner's] attempts to complete installation in a timely fashion and otherwise made it impossible to complete the installation." *Dolner* Action Complaint, ¶ 22. On October 13, 2006, Dolner advised Samson that Ludmilla Lorne had made it impossible to complete the work in accordance

with the specification standards. Id., ¶ 23. Samson then arranged to retain another contractor to fix the floors in the Lornes' apartment, at Dolner's expense, but limited to the "usual and customary costs for such work under the circumstances." Dolner accuses of Samson of having instructed the new contractor to perform work above and beyond that which would be sufficient to satisfy the specifications set forth in Dolner's original contract and the Settlement Agreement.

In their responsive pleading to the complaint in the *Dolner* action (the Samson Counterclaim), Samson and 50 Madison deny that Dolner is due any monies under the Settlement Agreement with respect to flooring repairs in the Lornes' unit. Paragraph 73 of the Samson Counterclaim alleges that, almost immediately after the Condominium units became occupied, "several owners began complaining about serious material defects in the workmanship and/or materials of their wood floors, sub-floors, pads and the structural and components thereof." Specifically, with respect to the Lornes' unit, it is alleged that Dolner "defectively installed the wood floor in the 7th floor unit of the Building so that the entire floor *twice* had to be completely removed and replaced (emphasis in original)" Samson Counterclaim, ¶ 82. Samson and 50 Madison further contend that if the Lornes' allegations about the leveling of the concrete sub-floor prove to be true, it will be as a result, in whole or in part, of the acts or omissions of Dolner.

DISCUSSION

Standards For Dismissal Under CPLR 3211(a)

When considering a pre-answer motion to dismiss pursuant to CPLR 3211 (a), the court must accept as true the allegations in the complaint and any submissions in opposition to the motion. The "court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states

the elements of a legally cognizable cause of action." *P. T. Bank Cent. Asia v ABN AMRO Bank N. V.*, 301 AD2d 373, 376 (1st Dept 2003). In determining the motion, the court will "accord plaintiff the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *accord Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307, 318 (1995). Allegations consisting of bare legal conclusions or factual claims which are clearly contradicted by documentary evidence, are not entitled to such consideration. *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999); *Franklin v Winard*, 199 AD2d 220 (1st Dept 1993). In order for a defendant to prevail in a motion to dismiss, it must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim. Siegel, NY Prac, § 265 [3d ed.]). A complaint may be dismissed based upon a defense founded upon documentary evidence if the documentary evidence conclusively establishes the defense to the asserted claims as a matter of law. *See* CPLR 3211 (a) (1); *Leon v Martinez*, 84 NY2d at 88; *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 (1st Dept 2006).[1]

Claims Against Goldstein Properties

The Lornes' claims against Goldstein Properties must be dismissed. Goldstein Properties is not a party to any contract with the Lornes, and is not alleged anywhere in either the Verified Complaint or the proposed Verified Amended Complaint to have been a part of this transaction in any manner. The Lornes contracted with 50 Madison, and the complaint's conclusory allegations that the two companies are alter egos of each other is insufficient, as a matter of law,

[1]Although the notice of motion filed by 50 Madison, Goldstein Properties, Samson and Gregory Haye refers only to CPLR 3211 (a) (7)'s legal insufficiency provision as the ground upon which they seek dismissal of the complaint, they are, in reality, also moving to dismiss based on documentary evidence, namely the Contract of Sale, the Offering Plan, and other voluminous documentation annexed to the moving affidavit of Ralph Berman, Esq.

to state a cause of action under New York to pierce the corporate veil of 50 Madison to attribute liability to Goldstein Properties. *Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 (1st Dept 2007); *Albstein v Elany Contracting Corp.*, 30 AD3d 210 (1st Dept), *lv denied* 7 NY3d 712 (2006). The fact that the "Alteration/Installation Agreement" that the Lornes were asked to sign requires that insurance name Goldstein Properties as an additional insured is not evidence that an alter ego relationship exists between it and the actual sponsor, 50 Madison.

Breach of Contract and Express Warranty Against 50 Madison and Samson

50 Madison and Samson argue that the Lornes' first cause of action seeking damages for breach of contract and the fourth cause of action for breach of express warranty are both precluded by the Contract of Sale, and the Offering Plan incorporated therein, which limit the Lornes to the remedy of specific performance. They rely on section P-3.8 of the Offering Plan, which provides, in relevant part, as follows:

> If Sponsor defaults on its obligation to correct a Construction Defect, the sole right and remedy of Purchaser (if the Construction Defect pertains to such Purchaser's Unit) or the Condominium Board (if the Construction Defect pertains to the Common Elements) is for specific performance to compel Sponsor to repair, replace or otherwise correct such Construction Defect and in no event will Sponsor, a Sponsor Related Party or Sponsor's Agents, Employees and Contractors be liable for any losses or damages resulting therefrom, whether actual, consequential, or otherwise.

Offering Plan, Part I, § P-3.8, at p. P-19. Likewise, section 18.5(a) of the Contract of Sale provides that the sponsor's "only obligations and liability for Construction Defects" is to correct the defects after receiving written notice thereof. 50 Madison and Samson also argue that the Lornes are precluded from seeking correction of the concrete substrate, because it is part of the "Residential Common Elements" of the building (citing section B-7.2.3[g]) of the Offering Plan),

and section § P-3.8 limits the right to compel such repairs to the Board of Managers. This allegedly precludes any claims by the Lornes based on breach of contract or breach of warranty, express or implied.

Dismissal of the first and fourth causes of action is not warranted. First, with respect to the Lornes' standing, the claims in the Verified Complaint are not limited to the concrete substrate, but relate to other construction defects in their unit that are not Common Elements. Even if the cause of the alleged flooring problem is an uneven concrete substrate, it has allegedly caused construction defects in the plywood sub flooring and/or the hardwood flooring surface, for which the Lornes do have standing to demand repairs from 50 Madison. The fact that 50 Madison and Samson have asserted counterclaims against Dolner, the party whom they claim is responsible for the alleged defects in the Lornes' unit, in the *Dolner* action is also not grounds for dismissal of the first and fourth causes of action since the Contract of Sale requires performance of the necessary repairs, not merely litigation against the party that may or may not be ultimately responsible.

Finally, while any claim against 50 Madison or its agents for damages is precluded by the clear terms of the Contract of Sale and the Offering Plan, plaintiffs have moved to amend their complaint to include a cause of action seeking a declaration as to who is responsible to repair the concrete substrate and other defects in the unit, and if the court should find that 50 Madison or Samson is responsible, then the plaintiffs are clearly entitled by the Contract of Sale and the Offering Plan to specific performance of that repair obligation by these defendants.

Fraud by Samson and 50 Madison

The Lorne's second cause of action alleges that they were defrauded into closing on their

unit and paying the full purchase price for the unit even though it was not habitable or ready for occupancy and would not be made ready in any timely fashion.

50 Madison and Samson argue for dismissal of this fraud claim, arguing that the Lornes could not have been fraudulently induced into closing on their unit and paying the full purchase price, because they were legally obligated to close before the alleged false representations at the pre-closing "walk through" inspection were made. They rely on section 20.3(b) of the Contract of Sale, which provides that the purchaser cannot refuse to close despite the existence of required punch work if a certificate of occupancy has been issued, the unit is "substantially complete" and "substantially in broom clean condition." However, the Lornes allege that the existence of defects in the concrete substrate may have been known to these defendants at the time of the closing. Thus, any assurances by 50 Madison or Samson that the unit was substantially complete or in broom clean condition and ready for occupancy could constitute material misrepresentation of facts, as opposed to mere opinions, which defrauded the Lornes into closing on their unit and paying the balance of the purchase price.

Breach of Implied Warranty (Housing Merchant Warranty Law)

The fourth cause of action for breach of an implied warranty under the Housing Merchant Warranty law (General Business Law, Art. 36-B, §§ 777-777b), is dismissed. GBL Article 36-B covers "new home" warranties. It provides that "a housing merchant implied warranty is implied in the contract or agreement for the sale of a new home" and provides a six-year warranty for material defects. GBL § 77-a(1) . However, "new home" or "home" means any single family house or for-sale unit in a multi-unit residential structure of five stories or less in which title to the individual units is transferred to owners under a condominium or cooperative regime

(emphasis added)." There is no dispute that the condominium is an 11-story structure, and thus the statute is not applicable, a fact explicitly acknowledged in the offering plan at P-3.8. The protections afforded by this statute supplant any pre-existing common law remedy. Fumarelli v Marsam Dev., Inc., 92 NY2d 298, 302-07 (1998).

Breach of Fiduciary Duty by the Board of Managers

The standard by which the decisions of a board of managers of residential condominiums is reviewed "is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate officers." *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 8 (1st Dept 2006); *see also Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-38 (1990). Thus, to withstand dismissal of their fifth cause of action the Lornes must allege facts showing that the Board of Managers or any individual members acted outside of the scope of their authority, or in a way that did not legitimately further the condominium's legitimate purpose, or in bad faith. *40 West 67th St. Corp. v Pullman*, 100 NY2d 147, 153 (2003); *Pelton*, 38 AD3d at 9. The Offering Plan, at Part I, § R-13, further provides that "[a] Board Member or officer will not be liable to the Unit Owners for errors of judgment, negligence, or otherwise, but will be liable for any bad faith action or inaction or for willful misconduct."

In this case, the Lornes have sufficiently alleged and raised triable issues of fact that the Board of Managers has breached its fiduciary duty to them as unit owners. The Lornes allege that even though the sponsor and its agents are not required to repair defects to Common Elements unless so requested in writing by an independent board member (Offering Plan, Part I, § P-3.8 at P-19), the Board of Managers has continually advised the Lornes that it has no obligation to take any action in connection with the necessary repair to the concrete substrate of

their unit and, indeed, appear to take that position in this lawsuit. The Board of Managers makes this argument even though it argues that the concrete substrate is a "Structural Component" and any repairs to such requires its prior reasonable approval.[2] The Board of Manager's insistence that the Lorne's sign the standard "Alteration/Installment Agreement" is allegedly in bad faith or outside the scope of the Board's authority, because the work to be done consists of repairs to the initial defective work by 50 Madison and its agents and is not an "alteration" to the unit. When the Lornes attempted to modify the agreement to, for example, take out a clause requiring the Lornes to indemnify 50 Madison Avenue and Sampson, who are allegedly responsible for the initial defective work that needed repair, the Board of Managers allegedly insisted that the Lorne's proposed changes to this standard agreement must be reviewed by the board's legal counsel, and that the Lornes must pay those legal fees, which are alleged to be excessive and unfair.

The Board of Managers maintains, in defense of their actions, that they did not act in bad faith or outside the scope of its authority and only asked the Lornes to sign an agreement that the owners of two other units had already signed prior to conducting their own "renovations," and which is routinely required by condominium boards throughout Manhattan (*see* Reply Aff. of Brent Johnston, at ¶ 4). Plaintiffs, however, maintain that the work needed to be performed is not a "renovation" or "alteration" of their apartment but the repair and correction of a construction defect.

The Board of Managers defendants further contend that their decision to require the

[2]In addition, the court notes that the May 2006 Settlement Agreement between 50 Madison, Sampson and Dolner specifically provides that the flooring in the Lornes unit had to be repaired to the reasonable satisfaction of both and Lornes and Board of Managers.

Lornes to sign the form agreement or, to the extent the Lornes desired to amend it, to provide the Board of Managers with a retainer so that it could hire an attorney, was made pursuant to authority granted to it by the Offering Plan and the condominium's By-Laws. They rely on section S-4.1 of the Offering Plan, entitled "Maintenance and Repairs of Units" which requires a unit owner to obtain "the written Reasonable Approval of the Condominium Board before undertaking any extraordinary or structural Repairs" and section S-5.1(g) of the Offering Plan which states: "**(if required by the Condominium Board)** you must sign and deliver to the Condominium Board an Alteration agreement, on the standard form adopted by [the board] (emphasis added)." The clear language of this latter section, however, applies only to "Alterations" and also renders the written alteration agreement optional, and the Lornes contend that the form agreement was unnecessary and inappropriate in several material respects for the situation regarding their floors.

Finally, the Board of Managers contend that they were only acting to further a legitimate interest of the condominium, namely the safety of the community of residents as a whole, because alterations to structural components of a building have the potential to be dangerous and to adversely affect other unit owners, necessitating oversight by the Board of Managers. However, it is alleged that the floors were not fixed (which is itself arguably dangerous to the safety of the community), that the Lornes sought to do so (and obtained liability insurance to cover the work), and that consent was improperly withheld, raising a triable issue of fact regarding whether the Board of Managers acted in bad faith or outside the scope of its authority.

An action against an individual member of the Board of Managers must allege specifically, and with specificity, that such member committed separate tortious acts. *Pelton v 77*

Park Ave. Condominium, 38 AD3d at 10; *Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324, 326 (1st Dept 1998). With respect to the defendants Brent Johnston, Kenneth Raisler and Gregory Haye, there are no allegations that any of them committed any separate tortious acts vis-a-vis the Lornes, and thus the complaint should be dismissed as against them. *Brasseur v Speranza*, 21 AD3d 297, 298 (1st Dept 2005). With respect to David Moffitt, however, the affidavits of both Simon and Ludmila Lorne contain detailed factual allegations that, as a result of a dispute with Moffitt over a tax abatement issue, he threatened at a July 10, 2007 meeting of the condominium unit owners to "make it very difficult " for them to ever have their floors installed. Paragraph 68 of the Verified Complaint alleges that "David Moffet, for personal reasons of his own and in furtherance of his personal interests in seeking, upon information and belief, to extract a monetary payment from the Plaintiffs, has specifically threatened to, and has, made it more difficult for the Lornes to move toward completion of the installation of their flooring." Mr. Moffitt's denial of these allegations is clearly insufficient to award summary judgment in his favor.

Amendment of the Complaint

Defendants raise two procedural objections to the proposed amended complaint. First, they contend that the Lornes have failed to properly substantiate the motion with an affidavit of merits and evidentiary proof. However, even if that were still the proper standard for a motion to amend a pleading (*compare Marinelli v Shifrin*, 260 AD2d 227, 229 [1st Dept 1999] [amendment must be supported by an affidavit of merits and evidentiary proof that could be considered on summary judgment], *with Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008] [court need only determine whether amended pleading is "palpably insufficient" or "patently devoid of

merit" without reaching the merits]), both of the Lornes have, in opposition to the defendants' motions and only six days after service of their cross motion, submitted extensive and detailed sworn affidavits which contain all of the relevant information to support the proposed causes of action. Second, the fact that plaintiffs' counsel cited CPLR 3025, and not CPLR 1003, to support adding the condominium association as a party defendant is not a jurisdictional defect that would or should bar the relief. Both statutes require leave of court and adding a new defendant necessarily involves amending the complaint, which was cited as the relief sought in plaintiffs' moving papers. *See* CPLR 2214 (a).

It is settled law that leave to amend a pleading "shall be freely given" (CPLR 3025 [b]) in the absence of prejudice or surprise. *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-55 (1st Dept 2005); *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591(1st Dept 1990). However, leave to amend will be denied where the proposed pleading fails to state a cause of action, or is "palpably insufficient as a matter of law." CPLR 3025 (b); *Thompson v Cooper,* 24 AD3d 203, 205 (1st Dept 2005) (citations omitted).

Turning to the merits of the cross motion, the Lornes' proposed amended complaint seeks to: (1) add Sampson as a defendant to the breach of contract claim (first cause of action); (2) reformulate the facts on the breach of fiduciary claim (renumbered as the seventh cause of action); (3) add a claim under General Business Law (GBL) § 349, for deceptive business practices, and GBL § 350, for false advertising (new fifth cause of action) against 50 Madison and Sampson; (4) add 50 Madison Avenue Condominium Association (the Condominium) as a defendant and assert a negligence claim against it (proposed sixth cause of action); and (5) add a claim for declaratory relief against all parties to determine responsibility for repairing the

concrete substrate of the Lornes' unit (proposed new eighth cause of action).

There has been no showing of any prejudice or unfair surprise from the amendment, and it is granted with the following exceptions. There is no merit whatsoever to adding Sampson to the first cause of action since the only parties to the Contract of Sale, upon which the Lornes base that cause of action, is 50 Madison. For similar reasons, there is no basis on which to keep Goldstein Properties in this dispute. The proposed fourth of action, based upon the breach of an implied warranty of merchantability, has been dismissed as a matter of law, as have the claims against defendants Brent Johnston, Kenneth Raisler and Gregory Haye. The proposed new sixth cause of action against the Condominium for negligence is also legally insufficient, since the Condominium acts through the Board of Managers, and the latter is immune from claims of negligence by both the business judgment rule and the specific terms of the Offering Plan. *See, infra*, at p. 13.

As a basis of their proposed new fifth cause of action under GBL §§ 349 and 350, the Lornes allege that 50 Madison and Samson made false statements, both orally and in advertisements and the Contract of Sale, that the building and their unit "would be and was properly and adequately designed and constructed and completed in a competent and workmanlike matter [sic], in accordance with the Building Plans and Specifications and proper design, engineering and construction standards and practice consistent with the applicable standards for a first class, luxury condominium in Manhattan . . ."

50 Madison and Samson first argue that these proposed causes of action lack merit, because the alleged statements that form the basis for the Lornes' claims were made in the context of one real estate transaction for the sale of one building in Manhattan, and is the kind of

private transaction of a non-recurring nature that does not impact consumers at large and is not the proper subject of a consumer protection law cause of action. However, in *Board of Mgrs. of Bayberry Greens Condominium v Bayberry Greens Assocs.* (174 AD2d 595 [2d Dept 1991]), the Second Department held that GBL § 349 permits the maintenance of a private cause of action for deceptive practices in the advertisement and sale of condominium units.[3] *See also B.S.L. One Owners Corp. v Key Intl. Mfg., Inc.*, 225 AD2d 643, 644 (2d Dept1996) ("the instant sale of securities in a cooperative corporation to the residential shareholders is a consumer-oriented transaction within the meaning of [GBL §§ 349, 350]; *Breakwaters Townhomes Assn. of Buffalo v Breakwaters of Buffalo, Inc.*, 207 AD2d 963, 964 (4th Dept 1994) (sale of shares in cooperative housing corporation); *Board of Mgrs. of the Arches at Cobble Hill v Hicks and Warren*, 14 Misc 3d 1234A, 836 NYS2d 497 (Sup Ct, Kings County 2007).

Although not cited by any of the parties, *Thompson v Parkchester Apts. Co.* (271 AD2d 311 [1st Dept 2000]), does not compel a different result. That case was primarily decided based on the First Department's determination that the plaintiffs lacked standing to pursue a fraud claim in connection with the purchase of condominium units because only the Attorney-General could do so under the Martin Act. Notably, the First Department in *Kramer v W10z/515 Real Estate Limited Partnership* (44 Ad3d 457 [1st Dept 2007]), criticized this decision, and reached a contrary determination. However, the First Department in *Thompson* also determined that even if the complaint was not subject to the Martin Act, the allegations did not fall under GBL § 349

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[3]In denying a motion to dismiss a complaint under New York City's Consumer Protection Law, the Court of Appeals in *Polonetsky v Better Homes Depot, Inc.* (97 NY2d 46 [2001]), noted that it is "not surprisingly-Appellate Division cases have interpreted General Business Law §349 to cover real estate transactions" and cited, with approval, *Board of Mgrs. of Bayberry Greens Condominium v Bayberry Greens Assocs., supra.*

because the allegedly false materials, distributed by the defendant regarding plumbing, and "what the individual plaintiffs were told about the condition of the plumbing when they purchased their individual units, is unique to the parties at this particular complex." *Thompson v Parkchester Apts. Co.*, 271 AD2d 311-312, *supra*.

Here, to demonstrate that this is not merely a private dispute, the Verified Amended Complaint alleges that defendant developers published advertising and marketing materials to the public, containing false representations. At this point, the Court cannot say that the Lornes' GBL claims are "palpably insufficient" and discovery is needed to determine whether the challenged practices had a broader impact on the consumers at large.[4]

50 Madison and Sampson also argue that the alleged statements amount to mere puffery or opinion, and do not constitute actionable deceptive business practices or false advertising under BCL §§ 349 and 350. However, the only Appellate Division decisions cited are distinguishable. In *Serbalik v General Motors Corp.* (246 AD2d 724 [3d Dept 1998]), a new car buyer's claim of unfair and deceptive advertising practices against the dealer who sold him the car was dismissed on summary judgment. The alleged material misrepresentations which induced plaintiff to purchase a new Cadillac, were several comments made by the dealer's employees, that the car would provide "great traction, nice performance, nice riding, of course, and luxurious," "would have excellent service," "would perform excellently," and was "of high

[4]To the extent that the Third Department reached a different result based on a different set of facts in *Green Harbour Homeowners' Assn., Inc. v G.H. Dev. and Constr., Inc.* (307 AD2d 465 [3d Dept 2003]), does not render the Lornes' GBL claims "palpably insufficient" and constitute a basis for denying a motion to amend. *Canario v Gunn* (300 AD2d 332 [2d Dept 2002]), upon which defendants also rely, is distinguishable on its facts as it involved a single misrepresentation relating to the size of a luxury single-family home, and the only parties "truly affected" were the parties to the lawsuit.

quality" and "practically maintenance free." However, the evidence showed that the plaintiff was a regular purchaser of Cadillac automobiles for 25 years, had been awaiting the release of this particular model for some time, had read about it in automotive magazines and, on the morning of his purchase, went to the dealership intending to order it. The court thus concluded, on summary judgment, there is no basis for concluding that the salesperson's comments -- which were not made in response to any particular question or concern expressed by the plaintiff and were nothing more than innocent "puffery."

Likewise, in *Scaringe v Holstein* (103 AD2d 880 [3rd Dept 1984]), the buyer of a used car sued the seller claiming breach of express warranty, a claim which requires the buyer's reliance upon the seller's warranties. The claim was dismissed, because the buyer was found to be on notice that the car had a substantial transmission defect and could not be said to have reasonably relied on the seller's newspaper advertisement that the car was in "excellent condition." Neither of these cases provide a basis for denying the Lornes leave to amend their complaint to allege claims under GBL §§ 349 and 350.

Here, the Lornes allege that they were deceived into purchasing an apartment from 50 Madison based on the false assurances of both 50 Madison and its managing agent, Sampson, that the building was properly constructed as a first class, luxury condominium building. A jury could conclude that this is not mere "puffery," that a a reasonably prudent consumer could have been misled by these statements into putting up over $3 million to purchase an apartment that allegedly contained and still contains numerous defects, including, but not limited to, leaky sprinkler pipes, defective windows and bathtubs, unrepaired walls, an alleged material defect in the sub-flooring and substandard construction of the hard-wood flooring.

Consolidation and/or Joinder with the *Dolner* Action

In the alternative to complete dismissal, which has not been granted, 50 Madison and Sampson move, pursuant to CPLR 602, for consolidation of this case with the *Dolner* action or joining it for purposes of discovery and trial. Consolidation has been previously requested and denied. The overlap regarding the alleged failure of Dolner to properly repair defective flooring in the Lorne's unit, the problems with the building's elevator and the unfinished punch list items, is insufficient to merit consolidation, because it may result in significant delay of this action. However, the Court will reconsider the issue, on motion, after the filing of the Note of Issue in both cases.

CONCLUSION and ORDER

For the foregoing reasons, it is

ORDERED that the motion (seq. no. 001) by defendants Board of Managers of 50 Madison Avenue Condominium s/h/a The Board of Managers, Brent Johnston, Kenneth Raisler and David Moffitt for summary judgment, pursuant to CPLR 3212, dismissing the fifth cause of action is granted to the extent of dismissing the complaint as against Brent Johnston and Kenneth Raisler, and is denied in all other respects; and it is further

ORDERED that the motion (seq. no. 003) by defendants 50 Madison Avenue LLC, Goldstein Properties LLC, Samson Management, LLC and Gregory Haye for dismissal of the complaint, pursuant to CPLR 3211 (a), is granted to the extent of dismissing the third cause of action of the Verified Complaint dated August 14, 2007 and all claims asserted against Goldstein Properties LLC and Gregory Haye; and it is further

ORDERED that the aspect of the motion (seq. no. 003) by defendants 50 Madison

Avenue LLC, Goldstein Properties LLC, Samson Management, LLC and Gregory Haye for consolidation or joinder for purposes of discovery and trial with *RC Dolner LLC v Samson Mgt., LLC and 50 Madison Ave., LLC*, pending in the Supreme Court of the State of New York, County of New York, Index No. 100694/07, is denied with leave to renew, as stated herein; and it is further

ORDERED that plaintiffs' motion for leave to serve and file an Amended Verified Complaint is granted to the extent indicated herein, and the remaining defendants shall serve and file an answer to the Amended Verified Complaint within twenty (20) of service of a copy of this order with notice of entry.

This Constitutes the Decision and Order of the Court.

Dated: December 11, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN