

**Board of Directors of Maidstone Landing  
Homeowners v Maidstone Landing, LLC**

2009 NY Slip Op 30112(U)

January 8, 2009

Supreme Court, New York County

Docket Number: 600438/07

Judge: Martin Shulman

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

This opinion is uncorrected and not selected for official  
publication.

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

MARTIN SHULMAN

PRESENT: \_\_\_\_\_ J.S.C.

PART 1

Index Number : 600438/2007

THE BRD OF DIRECTORS OF THE

vs.

MAIDSTONE LANDING LLC.

SEQUENCE NUMBER : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO.

600438/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO.

002

MOTION CAL. NO. \_\_\_\_\_

In this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits 1-16

~~Notice of Cross-motion~~  
Answering Affidavits - Exhibits A-C

Replying Affidavits + Exhibits 1-5  
~~Reply Aff.~~

1  
2, 3  
4  
5, 6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are  
decided in accordance with the attached decision  
and order.

**FILED**

JAN 21 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: January 8, 2009

MARTIN SHULMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
THE BOARD OF DIRECTORS OF THE  
MAIDSTONE LANDING HOMEOWNERS  
ASSOCIATION, INC., suing on behalf of  
its members, THE BOARD OF MANAGERS OF  
THE MAIDSTONE LANDING CONDOMINIUM I,  
suing on behalf of its unit owners, and  
THE BOARD OF MANAGERS OF MAIDSTONE  
LANDING CONDOMINIUM II, suing on behalf  
of its unit owners,

Index No.: 600438/07

DECISION AND ORDER

Plaintiffs,

-against-

MAIDSTONE LANDING, LLC, WILBER FRIED,  
DAVID FRIED, JUDITH FRIED, EXETER  
BUILDING CORP., DOUGLAS R. SHARP, and  
BLOODGOOD, SHARP, BUSTER ARCHITECTS  
AND PLANNERS, INC.,

Defendants.

**FILED**  
JAN 21 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**SHULMAN, J.:**

Plaintiffs, representing the unit owners of a large condominium complex, move for partial summary judgment, pursuant to CPLR 3212, with respect to defendants' liability only. Defendants Maidstone Landing, LLC ("Maidstone"), the sponsor of the condominium development, and Wilber Fried ("Fried"), a member of Maidstone and officer of defendant Exeter Building Corp., cross-move for an order striking the complaint based on plaintiffs' alleged spoliation of evidence. Additionally, Fried seeks to have the sixth, seventh, eighth and ninth causes of action dismissed as against him in his individual capacity.

Plaintiffs are suing for property damage allegedly resulting from defendants' failure to construct the condominium units in a workmanlike manner, thereby breaching

the contract with the homeowners. Plaintiffs assert that, because of the shoddy construction, the units suffered severe leaks and water damage.

To support their contention, plaintiffs have included in their moving papers certified reports from two licensed professional engineers which state, in sum and substance, that the condominium suffered the water damage because of various construction defects. It is noted that one of the reports contains numerous photographs of the alleged defects. It is also noted that plaintiffs admit that there is a difference of opinion between the experts as to the extent and degree of these alleged defects.

## DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to “present facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs' motion is denied. The expert reports submitted with the motion papers, which form the basis of plaintiffs' allegations of liability, are not in legally admissible form, as required by CPLR 3212(b). *Giandana v Providence Rest Nursing Home*, 32

AD3d 126 (1<sup>st</sup> Dept 2006), *revd on other grounds* 8 NY3d 859 (2007). The certified reports of the licensed professional engineers are not admissible evidence without first being authenticated, which was not done. See CPLR 3122-a.

Regardless, even if the reports were legally admissible, plaintiffs would not prevail. As plaintiffs themselves admit in their response to the cross motion, there is a divergence of opinion between the experts as to the existence and/or the degree of the alleged defects. These conflicting expert reports raise issues of fact (*Frobose v Weiner*, 19 AD3d 258 [1<sup>st</sup> Dept 2005]), and “[w]hen experts offer conflicting opinions, a credibility question is presented requiring a jury’s resolution.” *Shields v Baktidy*, 11 AD3d 671, 672 (2d Dept 2004). “[T]he weight to be afforded the conflicting testimony of experts is a matter within the province of the jury [internal quotation marks and citation omitted].” *Gleeson-Casey v Otis Elevator Co.*, 268 AD2d 406, 407 (2d Dept 2000).

Likewise, Maidstone and Fried’s cross motion to dismiss the complaint based on plaintiffs’ alleged spoliation of evidence is denied. Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence before an adversary has had an opportunity to inspect them. *Kirkland v New York City Housing Authority*, 236 AD2d 170 (1<sup>st</sup> Dept 1997). One such sanction is the dismissal of the action (*Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning Corp.*, 221 AD2d 243 [1<sup>st</sup> Dept 1995]), which Maidstone and Fried are seeking. However, it is the court that determines the nature and extent of any penalties to be imposed. CPLR §3126.

The destruction of evidence alone is insufficient for the court to agree to strike the pleadings. The moving party must also demonstrate that the destroyed evidence was crucial to proving its case. *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 (2d Dept 1998). It is defendants' burden to prove that the alleged spoliation deprived them of the ability to establish a defense. *Chung v Caravan Coach Co.*, 285 AD2d 621 (2d Dept 2001). It has been held that where there is adequate documentation of the evidence, such as reports, photographs and testimony from persons who inspected the spoliated property, the destruction of such property is not deemed crucial. *Marro v St. Vincent's Hosp.*, 294 AD2d 341 (2d Dept 2002).

In the instant case, defendants' expert did have an opportunity to inspect the roof and siding, albeit only once. During this inspection the component parts were being torn down by plaintiffs in order to repair the alleged problems. Defendants' expert maintains that the one inspection was insufficient for him to base an opinion as to the extent, if any, of any defect in the products.

However, plaintiffs' expert report contains detailed photographs of the alleged defects, and plaintiffs bear the burden of proof at trial to demonstrate that the roof and siding components, which admittedly have been discarded, were, in fact, defective. Under these circumstances, the sanction of dismissing the complaint is overly severe. Should it become necessary, at trial the court may instruct the jury on the effect of the items having been destroyed.

In the opposition papers, Maidstone and Fried raise several other issues that may be briefly addressed. Maidstone and Fried argue that plaintiffs lack standing to institute this action which, they aver, may only be brought by the unit owners. However,

pursuant to Real Property Law §339-dd, a condominium association may bring a lawsuit for the alleged defective construction of a residential condominium complex. *Koatz v 1776 Second Ave. Associates*, 244 AD2d 201 (1<sup>st</sup> Dept 1997). “[T]he Board may bring any cause of action relating to the common elements of more than one unit.” *Tiffany at Westbury Condo. by its Bd. of Managers v Marelli Dev. Corp.*, 40 AD3d 1073, 1076 (2d Dept 2007).

Further, Maidstone and Fried argue that this action is pre-empted by the Martin Act (General Business Law Art. 23-A), which grants the Attorney General the exclusive authority to investigate and prosecute false or fraudulent representations contained in a publically disseminated condominium offering plan. *CPC Int'l Inc. v McKesson Corp.*, 70 NY2d 268 (1987). However, recent case law holds that the Martin Act does not prevent a condominium association from maintaining a private cause of action for breach of contract, negligence or fraud. *Bridge Street Homeowners Association v Brick Condo. Developers, LLC*, 18 Misc3d 1128A (Kings County 2008), citing *511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002).

Lastly, Fried argues that the sixth, seventh, eighth and ninth causes of action against him individually should be dismissed. Although defendants fail to make a motion on these points, plaintiffs treat this argument as a partial motion to dismiss and, pursuant to the authority granted to the court under CPLR 3212(b), the court will treat the argument as a cross motion.

The sixth cause of action is for negligent misrepresentation in the offering plan.

It is settled that a claim arising out of an alleged breach of contract, here, the [offering plan], may not be converted into a tort action absent the violation of a legal duty independent of that created in the contract.

*Givoldi, Inc. v United Parcel Service*, 286 AD2d 220, 221 (1<sup>st</sup> Dept 2001); *Board of Managers of Riverview at College Point Condo. III v Schorr Bros. Dev. Corp.*, 182 AD2d 664 (2d Dept 1992). Since no independent legal duty has been sufficiently alleged, this cause of action against Fried in his individual capacity is dismissed.

The seventh and eighth causes of action are for fraudulent inducement and fraudulent concealment respectively. As stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1<sup>st</sup> Dept 2005]):

'[a] mere recitation of the elements of fraud is insufficient to state a cause of action' (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9). Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required 'to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud' (*Handel v Bruder*, 209 AD2d 282, 282-283 [1994]).

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the alleged deception. In the instant matter plaintiff's allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016 (b). "The mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud." *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 (1<sup>st</sup> Dept 2004); *Modell's*

*N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248 (1<sup>st</sup> Dept 1997). Accordingly, the seventh and eighth causes of action against Fried individually are dismissed.

The ninth cause of action is for breach of fiduciary obligations allegedly resulting from Fried's role as controlling member of the board during its first few years. In order for a cause of action for breach of a fiduciary duty to survive a motion to dismiss, the complaint must set forth allegations that create a relationship of trust greater than would be created by the contractual relationship between the parties. *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 (2005)(underwriter under no special fiduciary duty other than that imposed by its contractual relation as an underwriter). Generally, where a contract exists, the courts look to the agreement to discover the nexus of the parties' relationship and, if the parties do not create a relationship of higher trust than that indicated in the contract, the court should not fashion a stricter duty for them. *Id.*

Generally, no fiduciary relationship exists between a sponsor and a condominium association. *Caprer v Nussbaum*, 36 AD3d 176 (2d Dept 2006). However, members of the board of managers of a condominium association do owe a fiduciary obligation to the unit owners. *Id.* Since the complaint alleges a breach of fiduciary duty by Fried against the unit owners in his capacity as a board member, this cause of action against him cannot be dismissed.

Based on the foregoing, it is hereby

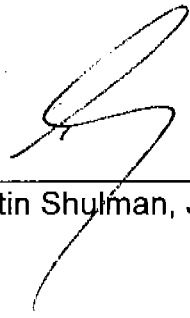
ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that defendants Maidstone Landing, LLC and Wilber Fried's cross motion is granted only to the extent of dismissing the sixth, seventh and eighth causes of action against Wilber Fried in his individual capacity, and is otherwise denied.

Counsel for the parties are directed to appear for a preliminary conference on February 10, 2009 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

The foregoing is the decision and order of this court. A copy of this decision and order has been sent to counsel for the parties.

Dated: January 8, 2009

  
\_\_\_\_\_  
Hon. Martin Shulman, J.S.C.

**FILED**  
JAN 21 2009  
COUNTY CLERK'S OFFICE  
NEW YORK