

**Merin v Precint Devs. LLC**

2009 NY Slip Op 31952(U)

August 18, 2009

Supreme Court, New York County

Docket Number: 117261/08

Judge: Marilyn Shafer

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

PRESENT: Hon. Marilyn Supra

PART 8

Index Number : 117261/2008  
MERIN, DAVID  
VS.  
PRECINT DEVELOPERS LLC  
SEQUENCE NUMBER : 002  
DISMISS

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 in*

*accord with the annexed memorandum.*

**FILED**

AUG 19 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/18/09

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 8

-----x  
DAVID MERIN and NAROFSKY DESIGNS, LLC,

Plaintiffs,

Index No.: 117261/08

-against-

PRECINCT DEVELOPERS LLC, BERND H. ALLEN,  
BHA 24 LLC, ALLEN, MORRIS, TROISI &  
SIMON LLP, and LEONARD J. HERCZEG,  
A.I.A. ARCHITECTS,

Defendants.  
-----x

DECISION  
**FILED**  
AUG 19 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

MARILYN SHAFER, J.:

**BACKGROUND**

Defendants Bernd H. Allen (Allen) and Allen, Morris, Troisi & Simon LLP (AMTS), (collectively, moving defendants) move, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint as against them.

Plaintiffs are purchasers of two condominium units in a building for which defendant Precinct Developers LLC (Precinct) was the sponsor of the Offering Plan, defendant BHA 24 LLC (BHA) is a managing member of Precinct, defendant Leonard J. Herczeg, A.I.A. Architects was the architect for the building conversion, defendant AMTS was the legal counsel involved in providing legal advice to the other defendants with respect to the Offering Plan, and defendant Allen is a member of BHA and a partner in AMTS.

Plaintiffs allege that, after they moved into the

condominium, they discovered several serious problems with the building, including chimney flues, support beams, lobby fire-rated demising walls, fire sprinklers, glass on the rear yard level, ventilation in the boiler room, and pressurized water pipes that did not meet applicable municipal codes. Plaintiffs assert that the defendants omitted this information from the Offering Plan, and that such defects were not visibly apparent.

In the complaint, plaintiffs only allege three causes of action (first, second and fourth causes of action) against moving defendants: (1) material misrepresentations and fraud in the Offering Plan; (2) violation of General Business Law § 349; and (4) unjust enrichment. It is noted that moving defendants, at no time, represented plaintiffs with respect to their purchases of the subject units, and plaintiffs were represented in their purchases by independent legal counsel.

#### DISCUSSION

CPLR 3211 (a) "Motion to dismiss cause of action" states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or

...  
(5) the cause of action may not be maintained because of ...infancy or other disability of the moving party[; or]

...  
(7) the pleading fails to state a cause of action ... ."

As stated in *Ladenberg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1<sup>st</sup> Dept 2000]),

[\*4]  
"[T]he court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1<sup>st</sup> Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1<sup>st</sup> Dept 1996).

Moving defendants' motion with respect to dismissing the first cause of action as against them, alleging a material misrepresentation, fraud and other wrongs in the Offering Plan, is granted.

"[A] purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act (General Business Law art 23-A) and the Attorney General's implementing regulations (13 NYCRR part 20)."

*Kerusa Co. LLC v W10Z/515 Real Estate Limited Partnership*, 12 NY3d 236, 239 (2009).

Although plaintiffs rely on a Second Department case, *Hamlet on Olde Oyster Bay Home Owners Association, Inc. v Holiday Organization, Inc.* (59 AD3d 673 [2d Dept 2009]), for the proposition that a private right of action sounding in common-law fraud may rest on the same facts that would support a Martin Act violation, this court finds the reasoning from the Court of Appeals cited above to be more apposite to the case at bar.

The purpose of the Martin Act is to authorize the Attorney General to investigate and enjoin fraudulent practices with respect to the preparation and dissemination of cooperative and condominium offering plans. The Martin Act grants the Attorney General the sole responsibility for enforcing its provisions (*Kralik v 239 E. 79<sup>th</sup> Street Owners Corp.*, 5 NY3d 54 [2005]), and, therefore, there is no private right of action under the Martin Act. *CPC International, Inc. v McKesson Corp.*, 70 NY2d 268 (1987).

Since the inception of the Martin Act, private purchasers no longer have the right to institute a common-law claim for fraud with respect to a cooperative or condominium offering plan. *Kerusa Co. LLC v W10Z/51 Real Estate Limited Partnership*, 12 NY3d at 245, *supra*. Consequently, plaintiffs may not maintain the first cause of action against moving defendants.

Moving defendants' motion to dismiss the second cause of action as against them, alleging violations of General Business

Law § 349, is granted.

"The threshold under section 349 requires allegations that the defendants' practices have a broad impact on consumers at large. [C]learly not cognizable under the statute are large, private, single-shot contractual transaction[s]. Section 349 was intended [as] a consumer protection statute, so [p]rivate transactions without ramifications for the public at large are not the proper subject of [such] a claim [internal quotation marks and citations omitted]."

*Green Harbour Homeowners' Association, Inc. v G.H. Development and Construction, Inc.*, 307 AD2d 465, 468-469 (3d Dept 2003).

In the instant action, plaintiffs have failed to allege "a unique set of circumstances whose remedy is not already available to the Attorney-General [internal quotation marks and citations omitted]." *Thompson v Parkchester Apartments Co.*, 271 AD2d 311, 311 (1<sup>st</sup> Dept 2000). Because plaintiffs have only alleged individual injury, a cause of action premised on General Business Law § 349 cannot be maintained.

Defendants' motion to dismiss the fourth cause of action for unjust enrichment as against them is granted. Plaintiffs are arguing that there was a breach of the purchase agreement, the proceeds from which unjustly enriched moving defendants. The purchase agreement is a contract, and, as a consequence, the existence of a valid contract bars a cause of action in quantum meruit. *Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320 (1<sup>st</sup> Dept 2004); see also *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295

[\*7]  
(1<sup>st</sup> Dept 2002).<sup>1</sup>

The court finds that moving defendants' argument that plaintiffs lack standing to be without merit. The case cited by moving defendants, *Devlin v 645 First Avenue Manhattan Company* (229 AD2d 343 [1<sup>st</sup> Dept 1996]), holds that individual condominium unit owners may not maintain a cause of action for alleged injuries to the common areas, but may maintain actions for injuries to their individual units. In the case at bar, several of the alleged problems affect the individual units of the plaintiffs, and so, even under the judicial decision used by moving defendants as support for their position, plaintiffs have standing to maintain this action.

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<sup>1</sup> Although moving defendants seek dismissal of the aforementioned three causes of action as against Allen in his position as attorney only, the above discussion renders any consideration of this point unnecessary.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants Bernd H. Allen's and Allen, Morris, Troisi & Simon, LLP's motion to dismiss the complaint as against them is granted and the complaint is severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants, with costs and expenses as taxed by the Clerk of the Court; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 8/18/09

ENTER: ~~MARILYN SHAFER~~  
J.S.C.  
Marilyn Shafer, J.S.C.

FILED  
AUG 19 2009  
COUNTY CLERK'S OFFICE  
NEW YORK