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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

MARTINE MANDRACCHIA and MENFI REALTY CORP.,

Plaintiffs,

-against-

901 STEWART PARTNERS, LLC, PROPERTY SOLUTIONS INC, GARY D. CANNELLA ASSOCIATES, GARY D. CANELLA, NAI LONG ISLAND and THE BOARD OF MANAGERS OF THE GARDEN CITY PROFESSIONAL PLAZA CONDOMINIUM,

Defendants.

Motion Sequence #1, #2, #3
Submitted September 4 and 15, 2009

INDEX NO: 14488/08

The following papers were read on these motion:

SOLUTIONS Notice of Motion to Dismiss.....1
Pedro Affirmation in Support 2
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Plaintiffs' Cross-Motion to Amend Complaint.....4
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Defendant, PROPERTY SOLUTIONS INC. (hereinafter referred to as "SOLUTIONS"), moves for an order, pursuant to CPLR §3211[a][1],[5],[7], dismissing plaintiffs' amended verified complaint insofar as asserted against it. Plaintiffs, MARTINE MANDRACCHIA, DMD. and MENFI REALTY CORP., oppose the motion and cross-move for an order, pursuant to CPLR §3025[b], granting them leave to further amend their amended verified complaint.

Subsequently, defendant NAI LONG ISLAND (hereinafter referred to as "NAI"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint insofar as asserted against it. The motions and cross-motion are determined as follows:

In April of 2006, the plaintiff, MARTINE MANDRACCHIA, DMD., entered into a contract by which she agreed to purchase a commercial condominium unit in the "Garden City Professional Plaza" complex from the seller/sponsor, co-defendant, 901 STEWART AVENUE PARTNERS, LLC. (hereinafter referred to as "STEWART"). The plaintiff's objective in acquiring the then unfinished unit was to conduct her dental practice in the unit she had purchased. At the time of purchase, the subject unit was in a "raw," incomplete state, with no ceiling or walls and was to be finished at a later date in conformity with filed

plans and the plaintiffs' specific needs and requirements.

The plaintiff MANDRACCHIA contends that, in January of 2006, before she signed the purchase agreement, she was given a "Condominium Offering Plan" from the project sponsor, co-defendant STEWART, which listed co-defendant NAI as the Plan's selling agent. The Offering Plan included a 22-page, "Property Condition Assessment" report and accompanying certification, drafted pursuant to 13 NYCRR § 20.4 (c) by co-defendant SOLUTIONS, a national engineering/environmental firm hired by STEWART in 2003 to perform the foregoing inspection and assessment. Also annexed to the Offering Plan, was a brief, "Certification of Sponsor's Expert Concerning Adequacy of Budget," prepared by NAI pursuant to 13 NYCRR § 20.4(d).

The SOLUTIONS report generally described the property's condition as "overall good to satisfactory," subject to specified "Items needing repair," which included certain roof leaks, parking lot drain leaks, and repairs to damaged ceiling tiles, facade-mounted light fixtures, the roof membrane, fencing, and damaged carpet, carpet tiles and various other items. SOLUTIONS attached certification further warranted and represented, *inter alia*, that its underlying report would afford purchasers "an adequate basis" on which to make a judgment concerning the physical state of the property, and that to SOLUTIONS' knowledge, there were no false, fraudulent or unreasonable statements contained in its report.

Notably, SOLUTIONS' report also contained an introductory section entitled, "Limitation and Exceptions of the Assessment," in which a qualifying proviso plainly advised that "[t]his report has been prepared for the sole benefit of 901 Stewart Partners, LLC and

may not be relied upon by any person or entity" without SOLUTIONS written authorization. The report provided as well that it "is not to be construed as a warranty or guaranty of future building conditions, performance or an estimate of value".

With respect to the projected operating budget for the complex, a Schedule "B" attached to the Offering Plan – entitled "Projected Budget for the First Year of Operation" – set forth certain cost projections relating to, *inter alia*, exterminating fees ($900.00), roof maintenance/repairs ($3,000.00), HVAC/Generator maintenance ($3,300.00) and "general Repairs & Maintenance" ($12,000.00). NAI's September 23, 2003, budget certification advised that NAI had reviewed the cost projections contained in Schedule "B" and determined that the figures "appear[ed] reasonable and adequate under existing circumstances" and also that projected income would suffice to meet anticipated "operating expenses for the first year of condominium operation". Additionally, and as required by regulation, NAI warranted that the foregoing budget projection/certification did not omit any material facts or contain any false, fraudulent or then unreasonable projections, or any statements which NAI then either knew to be false, or which NAI, with reasonable effort, could have discovered to be false. (NAI 2003 Certification) (*see also,* 13 NYCRR § 20.4[c]).

The plaintiff MANDRACCHIA claims that she read and relied upon these and other Offering Plan representations made by, *inter alia*, STEWART, SOLUTIONS and NAI prior to purchasing the unit in 2006. Thereafter, the plaintiff's closing took place in November of 2006, and title to the unit was conveyed to co-plaintiff, MENFI REALTY CORP., an entity in which MANDRACCHIA is the sole shareholder and President. The unit was later completed and the plaintiff moved her dental practice into the premises.

Shortly thereafter, however, the plaintiff allegedly discovered for the first time that the premises contained a series of significant construction defects and/or safety problems. Among other things, the plaintiff contends that there was an existing raccoon infestation, roof leakages, including a leak in her examining room, mold proliferation, odors, lack of hot water, plumbing defects, parking lot structural/lighting defects, as well as heat, air conditioning, ventilation and sound-proofing problems. Moreover, the plaintiffs assert that NAI's budget certification was "grossly inadequate" and that the items listed in SOLUTIONS Report/certification as requiring repair were understated and incomplete, since there were serious and substantial problems at the premises which had not been disclosed. Although the co-defendant, BOARD OF MANAGERS OF THE GARDEN CITY PROFESSIONAL PLAZA CONDOMINIUM (hereinafter referred to as the "BOARD OF MANAGERS"), was informed of the foregoing construction defects and safety/health problems, it is the plaintiff's position that the problems were not corrected. However, neither SOLUTIONS nor NAI actually performed any construction at the property or were contractually obligated to make repairs and/or remedy on-site construction defects.

Based on the above noted claims, and additional claims of alleged misconduct, the plaintiffs MANDRACCHIA and MENFI commenced the within action, in November of 2008, and subsequently served an amended complaint naming SOLUTIONS, NAI, STEWART and others as defendants.

The amended complaint interposed five (5) separately captioned causes of action, which alleged, *inter alia,* that the defendants, either collectively, or as separately denominated in certain cases, made false and fraudulent statements in the Offering Plan

with respect to the condition of the premises and the projected budget costs, failed to make proper and necessary repairs after they were notified that the defects existed, breached portions of the Offering Plan by failing to make those necessary repairs, committed professional malpractice, and/or breached applicable duties of care, and caused the plaintiff to suffer an unquantified, "loss of business" together with damages attributable to a diminished "professional stature" (*see generally*, Complaint., ¶¶ 16-48).

On the instant motion, defendants SOLUTIONS and NAI move to dismiss the complaint as against them, pursuant to, respectively, CPLR §3211[a][1],[5],[7] and CPLR §3212. The plaintiffs oppose both applications and cross- move for leave to file a second amended complaint.

In support of their applications, both SOLUTIONS and NAI assert that the claims advanced by the plaintiffs – irrespective of how nominally styled – are defective since they primarily derive from violations of applicable disclosure requirements imposed by the "Martin Act", violations which are enforceable exclusively by the New York State Attorney General (*see*, *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership,* 12 NY3d 236, 879 NYS2d 17, 906 NE2d 1049 [C.A.2009]; General Business Law, Article 23-A; 13 NYCRR, Part 20; *see* also, 13 NYCRR §§ 20.4[c], 20.4[d]). The Court agrees.

The Martin Act generally prohibits – and also "authorizes the Attorney General to investigate and enjoin" – a broad range of fraudulent and deceitful conduct in the advertisement, distribution, exchange, transfer, sale, and purchase of securities, including securities representing 'participation interests' in condominium and cooperative apartment buildings" (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, supra*, at 242;

Caboara v Babylon Cove Development, LLC, 54 AD3d 79, 862 NYS2d 535 [2nd Dept. 2008]; *see also*, *Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 799 NYS2d 433, 832 NE2d 707 [C.A. 2005]; *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 579 NYS2d 804, 514 NE2d 116 [C.A.1987]; *Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, ___ AD3d___, 2009 WL 3136368 [2nd Dept. 2009]).

Pursuant to the rule-making authority conferred by the Act (*e.g.*, General Business Law § 352-e[6]), the Attorney General has issued comprehensive regulations applicable to newly constructed condominiums, which "detail the format and content of offering plans and filings, including the word-for-word representation that must be made in the certification to be sworn to by the sponsor and the sponsor's principals in the offering plan (13 NYCRR 20.4 [b])" (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, supra* at 244; *Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, *supra*).

Significantly, the Court of Appeals has made clear that the "'[t]he Attorney General bears sole responsibility for implementing and enforcing the Martin Act,'" and that there exists "no private right of action under the statute" (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, *supra, at* 244, *quoting from, Kralik v 239 E. 79th St. Owners Corp.*, *supra*; *Vermeer Owners v Guterman*, 78 NY2d 1114, 578 NYS2d 128, 585 NE2d 377 [C.A.1991]; *CPC Intl. v McKesson Corp.*, *supra*; *Hamlet on Olde Oyster Bay Home Owners Association, Inc., et al., v Holiday, supra*; *cf.*, *Caboara v Babylon Cove Development, LLC*, *supra* at 82-83).

To be sure, a properly pleaded and distinct, "common law" fraud claim is still ostensibly maintainable notwithstanding the Martin Act's disclosure provisions (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, supra,* at 245-246; *CPC Intl. v McKesson Corp., supra*; *cf., Caboara v Babylon Cove Development, LLC*, *supra*, at 82). However, claims nominally pleaded as common law "fraud" theories, but which, in reality, derive from violations of Martin's Act extensive disclosure requirements, are not independently sustainable (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, supra,* at 245-246; *see*, *Hamlet on Olde Oyster Bay Home Owners Association, Inc., et al., v Holiday, supra; see also, Hsin Shen v Astoria Federal Savings & Loan,* 295 AD2d 319, 744 NYS2d 336 [2nd Dept. 2002]; *Whitehall Tenants Corp. v Estate of Olnick*, 213 AD2d 200, 623 NYS2d 585 [1st Dept. 1995]).

Significantly, the Appellate Division, Second Department, has recently applied these principles and dismissed claims involving allegedly misleading budget projections and/or construction defect claims – claims which were interposed in various permutations and causes of action, against various design professionals and the project sponsors (*see, Hamlet on Olde Oyster Bay Home Owners Association, Inc., et al., v Holiday, supra*).

Among other things, the Second Department held (upon reargument in light of the *Kerusa* holding), that the various fraud, negligence/malpractice and/or breach of contract claims there at issue were barred under the Martin Act. In sum, the Court found that the plaintiff's claims primarily arose from the mandatory certifications filed "pursuant to the Attorney General's implementing regulations" for which a private action did not exist (*Hamlet on Olde Oyster Bay Home Owners Association, Inc., et al., v Holiday, supra,* at 2;

see also, Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, *supra, at* 244-246; *see also, Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Organization, Inc.*, 59 AD3d 673, 874 NYS2d 508, *order recalled and vacated by, Hamlet on Olde Oyster Bay Home Owners Association, Inc., et al., v Holiday, supra*, 2009 WL 3136368 [2nd Dept. 2009]).

Here, a review of the plaintiffs' amended complaint – and in particular, the first ("misrepresentation") cause of action – similarly reveals that the plaintiffs' claims as to SOLUTIONS/NAI primarily arise from their certification statements, which were "included in the offering plan as required under the Martin Act * * * and the Attorney General's implementing regulations" (*Hamlet on Olde Oyster Bay Home Owners Association, Inc., et al., v Holiday, supra* at 2; *Hsin Shen v Astoria Federal Savings & Loan, supra* at 320-321; *Thompson v Parkchester Apartments Co.*, 249 AD2d 68, 670 NYS2d 858 [1st Dept. 1998]; *Whitehall Tenants Corp. v Estate of Olnick*, *supra*; *see also*, *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership.*, *supra*; Complaint ¶¶ 16-29).

While the plaintiffs contend that they have pleaded common law claims purportedly exempt from the reach of the Martin Act (*cf., Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, *supra at* 245-246), their submissions do not contain any explanatory analysis or discussion addressing – much less demonstrating – why the claims they have made as against SOLUTIONS/NAI qualify as separately assertable "common law" fraud theories. The Court of Appeals has recently cautioned against artfully pleaded attempts to circumvent the Martin Act, observing that such efforts – if validated – would invite unauthorized, "backdoor" private causes of action to enforce the Act (*Kerusa Co. LLC v*

W10Z/515 Real Estate Ltd. Partnership, *supra* at 244; *Hamlet on Olde Oyster Bay Home Owners Association, Inc., et al., v Holiday, supra*; *see*, *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244, 729 NYS2d 34 [1st Dept. 2001]; *Whitehall Tenants Corp. v Estate of Olnick*, *supra*).

Alternatively, and to the extent not precluded by the Martin Act, the Court agrees that dismissal as to SOLUTIONS/ NAI is also warranted upon the additional and further theories advanced by the movants, to the extent noted below.

Specifically, and whether nominally "characterized as negligence, malpractice, or breach of contract" (4th cause of action), the plaintiffs' malpractice/negligence claims are time-barred by three-year limitations period generally applicable malpractice claims against nonmedical professionals (*see generally*, *Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 854 NYS2d 645 [1st Dept. 2008]; *M.G. McLaren, P.C. v Massand Engineering, L.S., P.C.*, 51 AD3d 878, 858 NYS2d 3340 [2nd Dept. 2008]; *see also*, *Town of Wawarsing v Camp, Dresser & McKee, Inc.*, 49 AD3d 1100, 855 NYS2d 691 [3rd Dept. 2008]; *In re Stantec Consulting Group* (*Fonda-Fultonville Cent. School Dist.*), 36 AD3d 1051, 827 NYS2d 762 [3rd Dept. 2007]; *Frank v Mazs Group, LLC*, 30 AD3d 369, 815 NYS2d 738 [2nd Dept. 2006]; *see generally*, *In re R.M. Kliment & Frances Halsband, Architects* (*McKinsey & Co., Inc.*), 3 NY3d 538, 728 NYS2d 648; 821 NE2d 952 [C.A.2004]).

In general, "[a] cause of action alleging professional malpractice against an engineer 'accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship'" (*M.G. McLaren, P.C. v*

Massand Engineering, L.S., P.C., supra, quoting from, Town of Wawarsing v Camp, Dresser & McKee, Inc., supra; *Witt v Merrill,* 19 AD3d 998, 796 NYS2d 298 [4th Dept. 2005]; *see also, Heritage Hills Soc., Ltd. v Heritage Development Group, Inc., supra*; *Frank v Mazs Group, LLC, supra*; *Regatta Condominium Ass'n v Village of Mamaroneck*, 303 AD2d 737,758 NYS2d 348 [2nd Dept. 2003]. Here, the plaintiffs' claims – which generally allege a failure to use due care and reasonable skill (Complaint ¶¶ 44-45) accrued in the Fall of 2003 when SOLUTIONS completed all aspects of its work and issued its October, 2003 certification (*Regatta Condominium Ass'n v Village of Mamaroneck, supra*). It is undisputed that the plaintiffs instituted the within action in November of 2008 – well over three (3) years time frame in which to commence an action.

Contrary to the plaintiffs' contentions – and those of co-defendants CANELLA and CANELLA ASSOCIATES – the fact that the subject claim has been asserted by a non-client does not alter the foregoing accrual analysis (*Regatta Condominium Ass'n v Village of Mamaroneck, supra; see also*, *Gelwicks v Campbell*, 257 AD2d 601, 684 NYS2d 264 [2nd Dept. 1999]; *Board of Managers of Yardarm Beach Condominium v Vector Yardarm Corp.*, 109 AD2d 684, 487 NYS2d 17 [1st Dept. 1985]; *cf., Cubito v Kreisberg,* 69 AD2d 738,419 NYS2d 578 [2nd Dept. 1979]. *affd*, 51 NY2d 900, 434 NYS2d 991, 415 NE2d 979 [C.A. 1980]).

The holding in *Cubito v Kreisberg, supra*, is inapposite since there, the issue presented was when a cause of action accrued against a design professional arising from a claim founded solely upon personal/bodily injuries (*see, Cubito v Kreisberg, supra,* at 742; *cf., Access 4 All Inc. v Trump Intern. Hotel and Tower Condominium*,

___F.Supp2d___, 2007 WL 633951, at 8-9 [S.D.N.Y. 2007]; *see also, Barrell v Glen Oaks Village Owners, Inc.*, 29 AD3d 612, 814 NYS2d 276 [2nd Dept. 2006]).

With respect to the second cause of action, the plaintiffs first incorporate by reference the preceding allegations made and then generally assert that the BOARD OF MANAGERS was made aware of various, uncorrected construction defects at the premises. The ensuing paragraphs thereafter allege that despite this notice – received by the BOARD alone – the required repairs were never made by the "defendants," who are referenced collectively, allegedly as parties jointly duty-bound to make the stated repairs (Complaint ¶¶ 33-35). However, although the apparent theory of the foregoing claim is that all named "defendants" were in some sense jointly duty-bound to make the stated repairs, there is no reference to, or description of, the precise source of this alleged repair/maintenance duty as to either SOLUTIONS or NAI. Instead, the plaintiffs have simply lumped all the defendants together "without any specification as to the precise tortious conduct charged" to each, and without separately identifying the legal bases, if any, actually supporting the claims made against SOLUTIONS/NAI's with respect to the alleged obligation to make repairs and or maintain the property (*Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 444 NYS2d 79 [1st Dept. 1980]; *cf.*, *Daly v Kochanowicz*, ___AD3d___, 884 NYS2d 144, [2nd Dept. 2009]; Complaint ¶¶ 30-32). Nor does it appear from the papers before the Court that either SOLUTIONS or NAI was responsible for either the original construction work performed or post-construction repairs and maintenance at the subject premises.

Indeed, the amended complaint on more than one occasion relies upon obliquely framed allegations which collectively attribute wrongdoing and fraud to "the defendants" – without particularizing the discrete fraudulent and/or wrongful acts actually committed by each separately named entity (*e.g.*, Cmplt.,¶¶ 18, 20-26; 35, 45 48; *Henry v City of New York*, ___ F.Supp2d ___, 2007 WL 1062519 at 5 [E.D.N.Y. 2007]; *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, *supra*; *see also, Winsch v Esposito Bldg. Specialty, Inc.*, 48 AD3d 558, 852 NYS2d 199 [2nd Dept. 2008]; *Leitner v Jasa Housing Management Services for Aged, Inc.*, 6 AD3d 667, 776 NYS2d 588 [2nd Dept. 2004]).

It is well settled that "[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147, 910 NE2d 976 [C.A.2009]; *Dumas v Fiorito*, 13 AD3d 332, 786 NYS2d 106 [2nd Dept. 2004]; *cf.*, CPLR §3013), and in general, "may not rely on sweeping references to acts by all or some of the defendants * * *' " (*Henry v City of New York*, *supra,* at 5, *quoting from*, *Center Cadillac, Inc. v Bank Leumi Trust Co.*, 808 F.Supp. 213, 230 [S.D.N.Y. 1992], *aff'd*, 99 F3d 401 [2nd Cir.1995]; *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, *supra*; *see, Daly v Kochanowicz*, *supra; cf., Northern Valley Partners, LLC v Jenkins*, ___ Misc3d ___, 2009 WL 1058162 at 6 [Supreme Court, New York County 2009]; *Hughes v BCI Intl. Holdings,* 452 F Supp 2d 290, 317 [S. D. N.Y. 2006]; *see*, *Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, *supra*).

The third cause of action, which sounds in breach of contract, relies solely upon the sponsor's alleged violation of the purchase agreement, to which only the plaintiffs and the sponsor were signatories (Complaint ¶¶ 36-42); *e.g., Caprer v Nussbaum*, 36 AD3d 176,

825 NYS2d 55 [2nd Dept. 2006]; *see, Tutora v Siegel*, 40 AD3d 227, 833 NYS2d 385 [1st Dept. 2007; *Black Car & Livery Ins., Inc. v H & W Brokerage*, Inc., 28 AD3d 595, 813 NYS2d 751 [2nd Dept. 2006]). The amended complaint does not otherwise advance a contract-based claim against NAI or SOLUTIONS. Nor does the complaint make any reference to the unpleaded, third-party beneficiary and/or "functional privity" claims now raised in the plaintiffs' opposing submissions (*Ideal Steel Supply Corp. v Anza,*, 63 AD3d 884, 882 NYS2d 190 [2nd Dept. 2009]; *Halliwell v Gordon*, 61 AD3d 932, 878 NYS2d 1137 [2nd Dept. 2009]; *Mainline Elec. Corp. v Pav-Lak, Industries, Inc.*, 40 AD3d 939; 836 NYS2d 294 [2nd Dept. 2007]; *see also, Maldonado v Olympia Mechanical Piping & Heating Corp.*, 8 AD3d 348, 777 NYS2d 730 [2nd Dept. 2004]; *Atkinson v Mobil Oil Corp.*, 205 AD2d 719, 614 NYS2d 36 [2nd Dept. 1994]).

In any event, the Court disagrees with the assertion that the plaintiffs and SOLUTIONS/NAI were in a relationship functionally equivalent to privity (*Sykes v RFD Third Ave. 1 Associates, LLC*, ___AD3d___, 884 NYS2d 745, [1st Dept. 2009]; *see generally, A.O. Acquisition Corp. v Stavitsky,* 8 NY3d 144, 831 NYS2d 364, 863 NE2d 585 [C.A. 2007]; *Parrott v Coopers & Lybrand*, 95 NY2d 479, 718 NYS2d 709, 741 NE2d 506 [C.A.2000]; *Mandarin Trading Ltd. v Wildenstein,* 65 AD3d 448, 884 NYS2d 47 [1st Dept. 2009]), and/or that the plaintiffs were third-party beneficiaries entitled to enforce SOLUTIONS/NAI's agreements with the sponsor or others (*Board of Managers of Alexandria Condominium v Broadway/72nd Associates,* 285 AD2d 422, 729 NYS2d 16 [1st Dept. *see generally, Mendel v Henry Phipps Plaza West, Inc.,*6 NY3d 783, 811 NYS2d 294, 844 NE2d 748 [C.A.2006]).

With respect in particular to SOLUTIONS, and as set out earlier, the provisions of SOLUTIONS' contract with STEWART plainly and "explicitly negate[d] any implication of the third party rights" (*Mendel v Henry Phipps Plaza West, Inc., supra*; *Mid-Valley Oil Co., Inc. v Hughes Network Systems, Inc.*, 54 AD3d 394, 863 NYS2d 244 [2nd Dept. 2008]). It is settled that "[w]here a provision in the contract expressly negates enforcement by third parties, that provision is controlling" (*Edward B. Fitzpatrick, Jr. Constr. Corp. v County of Suffolk*, 138 AD2d 446, 525 NYS2d 863 [2nd Dept. 1988]; *see, Mendel v Henry Phipps Plaza West, Inc., supra; IMS Engineers-Architects, P.C. v State,* 51 AD3d 1355, 858 NYS2d 486 [3rd Dept. 2008]; *Board of Managers of Alexandria Condominium v Broadway/72nd Associates, supra*; *see also, Sykes v RFD Third Ave. 1 Associates, LLC, supra; cf., Board of Managers of Alfred Condominium v Carol Management, Inc.*, 214 AD2d 380, 624 NYS2d 598 [1st Dept. 1995]).

Although the plaintiffs alternatively theorize that SOLUTIONS – as selling agent – is answerable for all alleged misstatements contained in the Offering Plan – even those not included in its 2003 budget certification – SOLUTIONS has demonstrated that: (1) it did not itself prepare or otherwise issue the offering plan; (2) that it was not involved in the construction of the property or obligated by any written agreement to remedy construction defects and/or make on-site repairs; and (3) that the only written document contained in the offering plan which it actually authored, and in which it made any affirmative, written representations, was the budget certification issued pursuant to applicable regulatory requirements. Notably, the certification does not contain any pertinent representations regarding the construction work performed – or later to be performed – at the premises.

Indeed, the MANDRACCHIA unit was apparently not even constructed at the time the moving defendants' certifications were issued.

Moreover, and pursuant to the terms of the 2003 NAI certification, the statements made therein were limited to, and based upon, the then "existing circumstances" and applicable only to the ensuing budget year commencing February 1, 2004 – which period expired well prior to the plaintiffs' acquisition of the unit in 2006 (*cf.*, *Vermeer Owners, Inc. v Guterman*, *supra*).

The plaintiffs' fifth cause of action obscurely asserts in two (2) brief paragraphs, that because of the defective condition of the premises and the defendants' collective "failure to remedy that condition," the plaintiff sustained an unelaborated loss of business and professional stature, a vaguely asserted theory which apparently relies upon the previously asserted claims made – none of which are viable insofar as asserted against SOLUTIONS and NAI (Complaint ¶¶ 47-48).

To the extent that the plaintiffs rely upon unelaborated claims that NAI made other and/or oral representations relative to the physical condition of the premises (Complaint ¶¶ 18, 20-26), the Court finds that these allegations are conclusory in nature and lacking in probative import (CPLR §3016[b]; *see generally, Eurycleia Partners, LP v Seward & Kissel, LLP*, *supra*; *Dumas v Fiorito*, *supra*; *see also, Daly v Kochanowicz*, *supra*).

It is settled that "bare legal" allegations and "averments merely stating conclusions, of fact or of law, are insufficient" to "defeat summary judgment" and/or a motion to dismiss pursuant to CPLR §3211[a][7] (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 774 NYS2d 480, 806 NE2d 488 [C.A.2004], *quoting from*, *Mallad Constr.*

Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285, 344 NYS2d 925, 298 NE2d 96 [C.A. 1973]; *see*, *Daub v Future Tech Enterprise, Inc.*, 65 AD3d 1004, 885 NYS2d 115, [2nd Dept. 2009]; *Ruffino v New York City Transit Authority*, 55 AD3d 817, 865 NYS2d 667 [2nd Dept. 2008]; *see also, Maas v Cornell University*, 94 NY2d 87, 699 NYS2d 716, 721 NE2d 966 [C.A. 1999]).

The Court has considered the plaintiffs' remaining contentions and concludes that they are insufficient to defeat the movants' respective applications to dismiss the amended complaint.

Lastly, as to the plaintiffs' cross- motion to further amend its complaint, although leave to amend is to be freely given (CPLR §3025[b] *see*, *Edendale Contr. Co. v City of New York*, 60 NY2d 957, 471 NYS2d 55, 459 NE2d 164 [C.A.1983]; *Schuyler v Perry* ,___ AD3d___, 2009 WL 3134802 [2nd Dept. 2009]), a court should nevertheless deny the motion when, *inter alia*,"the insufficiency and lack of merit of the plaintiff's proposed amendment are clear and free from doubt (*see e.g., Hense v Hense,* 60 AD3d 814, 876 NYS2d 429 [2nd Dept. 2009]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2nd Dept. 2008]; *Tornheim v Blue & White Food Products Corp.*, 56 AD3d 761, 868 NYS2d 279 [2nd Dept. 2009]; *Scofield v Degraded*, 54 AD3d 1017, 864 NYS2d 174 [2nd Dept. 2008]; *Norman v Ferrari,* 107 AD2d 739, 484 NYS2d 600 [2nd Dept. 1985]). The decision whether to grant leave to amend a pleading rests within the court's discretion (*Schuyler v Perry, supra*; *Ingrami v Rovner*, 45 AD3d 806, 847 NYS2d 132 [2nd Dept. 2007]; *Pergament v Roach,* 41 AD3d 569, 838 NYS2d 597 [2nd Dept. 2007]).

Here, while the plaintiffs have requested leave to file a second amended complaint as to SOLUTIONS (see, Complaint ¶¶ 24-25; 27), they have not described the precise manner and fashion in which they intend to alter their existing pleading. Rather, the plaintiffs' supporting submissions have been conditionally framed, and seek leave only in the event that this Court dismisses the complaint – or portions thereof – as against SOLUTIONS (*accord, Barrett v Huff*, 6 AD3d 1164, 776 NYS2d 678 [4th Dept. 2004]).

Nor have the plaintiffs annexed a proposed amended pleading to their application by which the Court can assess the potential merit of the alterations and/or changes which the plaintiffs intend to make (*see generally*, *Lupski v County of Nassau*, 32 AD3d 997, 822 NYS2d 112 [2nd Dept. 2006]; *Black Car and Livery Ins., Inc. v H & W Brokerage, Inc.*, *supra*; *Chang v First American Title Ins. Co. of New York,* 20 AD3d 502, 799 NYS2d 121 [2nd Dept. 2005]; *Ferdinand v Crecca & Blair*, 5 AD3d 538, 774 NYS2d 714 [2nd Dept. 2004]). Upon these papers, and considering its assessment of the claims interposed as against SOLUTIONS, the Court declines to exercise its discretion by granting the plaintiffs' application for leave to further amend their complaint (*Lupski v County of Nassau*, *supra*). Based on the foregoing, it is hereby

ORDERED, that the motion pursuant to CPLR §3211[a][1],[5],[7] by the defendant, PROPERTY SOLUTIONS INC., for an order dismissing the amended verified complaint insofar as asserted against it, is granted; and it is further

ORDERED, that the motion pursuant to CPLR §3212 by the defendant NAI LONG ISLAND for summary judgment dismissing the complaint insofar as asserted against it, is granted; and it is further

ORDERED, that the cross motion pursuant to CPLR §3025[b] by the plaintiffs, MARTINE MANDRACCHIA, DMD. and MENFI REALTY CORP., for an order granting them leave to further amend their amended verified complaint, is denied; and it is further

ORDERED, that the caption shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

MARTINE MANDRACCHIA and MENFI REALTY CORP.,

Plaintiffs,

-against- **INDEX NO: 14488/08**

901 STEWART PARTNERS, LLC, GARY D. CANNELLA, ASSOCIATES, GARY D. CANELLA and THE BOARD OF MANAGERS OF THE GARDEN CITY PROFESSIONAL PLAZA CONDOMINIUM,

Defendants.

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and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on January 14, 2010, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 2, 2009

WILLIAM R. LaMARCA, J.S.C.

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