

**Coves at Melville Home Owners Assn., Inc. v
Massapequa Cove, Inc.**

2010 NY Slip Op 30184(U)

January 25, 2010

Supreme Court, Suffolk County

Docket Number: 43034-08

Judge: Elizabeth H. Emerson

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 8-13-09
SUBMITTED: 10-22-09
MOTION NO.: 003-MG

_____x
THE COVES AT MELVILLE HOME OWNERS
ASSOCIATION, INC., THE BOARD OF
MANAGERS OF THE COVES AT MELVILLE
CONDOMINIUM I, THE COVES AT
MELVILLE CONDOMINIUM II,

SCHNEIDER MITOLA LLP
Attorneys for Plaintiffs
666 Old Country Road
Garden City, New York 11530

Plaintiffs,

-against-

AHMUTY, DEMERS & McMANUS, ESQS.
Attorneys for Defendants Nelson & Pope, LLP
and Robert G. Nelson, Jr.
200 I.U. Willets Road
Albertson, New York 11507

MASSAPEQUA COVE, INC., VIVIAN E.
KOVACS, ROCHELLE SAMEROFF,
STEPHEN SAMEROFF, NELSON & POPE,
LLP, ROBERT G. NELSON, JR.,
MCDONOUGH & CONROY ARCHITECTS,
P.C., JAMES MCDONOUGH, JR., "JOHN DOE
#1 THROUGH JOHN DOE #5" AND XYZ
CORP. #1 THROUGH XYZ CORP. #5, said last
ten (10) names being fictitious and unknown to
plaintiff.

Defendants.

_____x

Upon the following papers numbered 1 36 read on this motion to dismiss; Notice of Motion and supporting papers 1-17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18-35; Replying Affidavits and supporting papers 36; it is,

ORDERED that this motion by the defendants Nelson & Pope, LLP, and Robert G. Nelson, Jr., for an order dismissing the sixth and seventh causes of action insofar as asserted against them is granted.

The Coves at Melville consists of two condominiums, i.e., Condominium I with 92 residential units and Condominium II with 82 residential units. The defendant Massapequa Cove, Inc., was the sponsor of the project. The defendant Nelson & Pope was the engineer for the project pursuant to an agreement with the sponsor dated August 3, 1998, which was revised on August 12, 1998, and subject to several change orders between August 1998 and March 2001. Another agreement between Nelson & Pope and the sponsor to update the property line survey was dated March 11, 2002.¹ Nelson & Pope prepared the building plans and specifications for Condominium I and a report describing the construction of the property that was incorporated into the offering plan for Condominium I. On June 2, 2003, the defendant Robert G. Nelson, Jr., executed the architect's certification pursuant to 13 NYCRR 20.4(c) for Condominium I on behalf of Nelson & Pope. Nelson & Pope also prepared the building plans and specifications for Condominium II and a report describing the construction of the property that was incorporated into the offering plan for Condominium II. On May 27, 2003, the defendant Robert G. Nelson, Jr., executed the architect's certification pursuant to 13 NYCRR 20.4(c) for Condominium II on behalf of Nelson & Pope.

The plaintiffs represent the purchasers of homes in Condominiums I and II. They commenced this action on December 1, 2008, to recover damages for alleged design and construction defects in the common areas of both condominiums. The sixth and seventh causes of action sounding in fraud and breach of contract, respectively, are asserted against the defendants Robert G. Nelson, Jr., and Nelson & Pope (hereinafter the "Nelson & Pope defendants"). Specifically, the plaintiffs allege that the Nelson & Pope defendants made material misrepresentations in their certifications regarding the non-existence of design and construction defects upon which the purchasers of the condominiums relied to their detriment. The plaintiffs also allege that they and their members were intended third-party beneficiaries of the agreements between the Nelson & Pope defendants and the sponsor, which the Nelson & Pope defendants breached by failing to prepare appropriate plans and specifications for the common areas, by failing to properly supervise the construction of the common areas, by failing to ensure that the construction was performed in a good and workmanlike manner and in accordance with the plans and specifications, by failing to prepare an accurate description of the project, by failing to perform engineering services in a good and workmanlike manner, and by failing to provide a truthful certification. The Nelson & Pope defendants move to dismiss the sixth and seventh causes of action against them on the grounds that the plaintiffs do not have standing to assert a fraud claim based on alleged misrepresentations in the engineer's certification and that the plaintiffs were not third-party beneficiaries of the engineer's agreements with the sponsor.

Although this motion is denominated as a motion to dismiss pursuant to CPLR 3211(a), it is, in fact, a motion for summary judgment on CPLR 3211(a) grounds. Any of the

¹A proposal by Nelson & Pope dated April 30, 2002, to provide additional services is unsigned.

grounds on which a CPLR 3211 motion could have been made before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by way of a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (*see*, CPLR 3211[c]; Siegel, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:20). Contrary to the plaintiffs' contentions, the answer of the Nelson & Pope defendants includes as affirmative defenses that the plaintiffs lack standing to bring this lawsuit and that they lack privity with the Nelson & Pope defendants. Moreover, a motion pursuant to CPLR 3211(a)(7) may be made at any time (*see*, CPLR 3211[c]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:53).

The Martin Act authorizes the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds, and other securities within or from New York State (General Business Law §§ 352 & 353). The disclosure regulations adopted by the Attorney General pursuant to General Business Law § 352-e (6) to cover newly constructed condominiums detail the format and content of the offering plans and filings. They include the word-for-word representation that must be made in the certification to which the engineer or architect swears in the offering plan (13 NYCRR 20.4[c]). The Martin Act authorizes the Attorney General to enforce its provisions and implementing regulations (General Business Law §§ 352, 352-e, 353, 354) and to seek restitution and damages for injured parties (General Business Law § 353). The Attorney General bears sole responsibility for implementing and enforcing the Martin Act, and there is no private right of action thereunder (**Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership**, 12 NY3d 236, 243-244).

The court finds that the alleged misrepresentations by the Nelson & Pope defendants cannot form the basis for the sixth cause of action. **Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership** (*supra*), held that the purchaser of a condominium may not bring a claim for common-law fraud when the fraud is predicated solely on alleged material omissions from the offering plan. While the **Kerusa** court did not reach the issue of whether an alleged misrepresentation (rather than an alleged omission) of an item of information that the Martin Act or the Attorney General's implementing regulations required to be disclosed would support a cause of action for common-law fraud, the Appellate Division, Second Department, has extended the holding of **Kerusa** to cover such misrepresentations. In **Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.** (65 AD3d 1284), the Second Department upheld the dismissal of causes of action alleging fraudulent inducement and negligent misrepresentation against the sponsor's parent organizations that were based on unrealistic budget projections included in the offering plan, as required by the Martin Act and the Attorney General's implementing regulations. The Second Department also upheld the dismissal of the causes of action alleging breach of contract, fraudulent inducement, negligent misrepresentation, and negligence or malpractice asserted against the engineering and architectural firms. When, as here, the certifications in the offering plans executed by the engineer were pursuant to the Attorney General's implementing regulations, they may not form the basis of private causes of

action against such engineer (**Id.** at 1287-1288). Accordingly, the sixth cause of action is dismissed insofar as it is asserted against the Nelson & Pope defendants.

One may not maintain a cause of action for breach of contract in the absence of privity (**LaBarte v Seneca Resources Corp.**, 285 AD2d 974, 975). A third-party may sue to enforce a contract made for its benefit (*see*, **Port Chester Elec. Constr. Corp. v Atlas**, 40 NY2d 652, 655). In order to maintain an action to recover as the third-party beneficiary of a contract, the third-party must establish that it was the intent of the contracting parties to benefit the third-party (**Id.** at 655; *see also*, **Amin Realty v K & R Constr. Corp.**, 306 AD2d 230). A third-party who is only an incidental beneficiary to a contract may not sue to enforce it (*see*, **Port Chester Elec. Constr. Corp. v Atlas**, *supra* at 655; **Amin Realty v K & R Constr. Corp.**, *supra* at 232).

The plaintiffs allege that they and their members were intended third-party beneficiaries of the agreements between the Nelson & Pope defendants and the sponsor. The best evidence of whether contracting parties intended their contract to benefit third parties is the language of the contract itself (**Park East Constr. Corp. v East Meadow Union Free School District**, 13 Misc 3d 1210[A] at *3, *citing* **Nepco Forged Products, v Consolidated Edison Co. of New York**, 99 AD2d 508). Generally, an ordinary construction contract, i.e., one that does not expressly state that the intention of the contracting parties is to benefit a third party, does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such parties are generally considered mere incidental beneficiaries (**Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Bros. Dev. Corp.**, 182 AD2d 664, 665). The agreements between the Nelson & Pope defendants and the sponsor do not contain any determinative language expressing an intent to create or confer third-party beneficiary rights. Moreover, the plaintiffs' contention that the Nelson & Pope defendants may have additional contract documents which may have such language is insufficient to defeat the motion (*see*, **Hess v Schwartz**, 7 Misc 3d 1011[A] [and cases cited therein]). Accordingly, the court finds that the plaintiffs and their members were only incidental beneficiaries to the agreements between the sponsor and the Nelson & Pope defendants.

The plaintiffs, relying on **Board of Managers of Marke Gardens Condominium v 240/242 Franklin Ave. LLC** (20 Misc 3d 1138[A]) and **Bridge Street Homeowners Assn. v Brick Condominium Developers, LLC** (18 Misc 3d 1128[A]), contend that the language of the engineer's certification is sufficient to create or confer third-party beneficiary rights. The engineers' certifications executed by the Nelson & Pope defendants provide that they are made "for the benefit of all persons to whom this offer is made" and that the reports prepared by the Nelson & Pope defendants "[afford] potential investors, purchasers and participants an adequate basis upon which to found their judgment concerning the description of the property as it will exist upon completion of construction provided that construction is in accordance with the plans and specifications [the Nelson & Pope defendants] examined." In the **Marke Gardens** and **Bridge Street** cases, the Supreme Court, Kings County, relied on such

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language to impose liability on the defendant architects, finding that it expressed an intent to benefit the plaintiffs as third parties. Those cases, however, are not binding on this court. Moreover, the court finds that they have been overruled by the Second Department's affirmance in **Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.** (*supra*). In that case, the plaintiffs argued that they were third-party beneficiaries of the sponsor's contracts with the defendant architects and engineers based on their certifications in the offering plan. The Supreme Court, Nassau County, rejecting that argument, dismissed the plaintiff's breach-of-contract claims against the defendant architects and engineers. The Second Department affirmed on the ground that the certifications in the offering plans executed by those defendants were pursuant to the Attorney General's implementing regulations and, as such, may not form the basis of private causes of action against them (65 AD3d at 1287-1288). Accordingly, the seventh cause of action is dismissed.

Dated: January 25, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.