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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of March, 2010.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

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FREDERICK SANDS,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 11496/07

GERALD J. CALIENDO, R.A.,
GERALD J. CALIENDO, ARCHITECT, P.C.,
APPLE BUILDERS CORP.,
EDWARD MCLAUGHLIN, MERRYL CARRION,
HERTZEL MEIRI, HERZEL MEIRI,
HADAR MANAGEMENT CORP., HADAR MANAGEMENT,
ROBERT MALUENDA,
ROBERT MALUENDA CONTRACTOR CORPORATION,
SCHLOMO CHIA, MARY LAWLESS,
C2 PLUMBING CORPORATION, C2 PLUMBING CO., AND
STEVEN WASSERMAN, MASTER PLUMBER,

Defendants.

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The following papers numbered 1 to 46 read on these motions:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-7; 23-27; 33-37; 42-43
Opposing Affidavits (Affirmations)	8,9-12;[1] 28; 38; 44,45,46
Reply Affidavits (Affirmations)	13,14; 29;
Sur-Replies/Oppositions to Sur-Replies	15,[1]16-20;[1] 30; 39,40
Memoranda of Law	21,22; 31-32;
Architectural Plans	41

[1] 9-12, 15, and 16-20 also apply to 23-27 and 32-37, as well as to 1-7.

Upon the foregoing papers and after oral argument in this action to recover damages for breach of contract in the sale of a newly constructed home:

(1) defendants Apple Builders Corp. (ABC), Edward McLaughlin, Meryl Carrion (incorrectly sued herein as Merryl Carrion), Robert Maluenda, and Robert Maluenda Contractor Corporation (collectively, the ABC defendants); Hadar Management Corp. (Hadar), Hadar Management (HM), Herzel Meiri (also known as Hertzel Meiri [Meiri]), and Mary Lawless (collectively, the Hadar defendants); and Schlomo Chia (Chia), jointly move for an order, pursuant to CPLR 3211 (a), dismissing the complaint (sequence no. 5);

(2) defendants C2 Plumbing Corporation (C2), C2 Plumbing Co., and Steven Wasserman, Master Plumber (collectively, the C2 defendants), cross-move, by amended notice, for an order, pursuant to CPLR 3211 (a), dismissing the complaint (sequence no. 6 superseding sequence no. 1);

(3) pro se plaintiff Frederick Sands (plaintiff) moves for an order, pursuant to CPLR 3025 (b), for leave to serve and file a proposed amended complaint (sequence no. 4);[2] and

(4) plaintiff further moves for an order equitably estopping defendants from raising the doctrine of privity as a ground for dismissal of his complaint (sequence no. 7).

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[2] Plaintiff's additional request for an order, pursuant to CPLR 602 (a), consolidating the actions bearing index No. 11496/06, 11496/07, 11496/08, and 11496/09 is academic because the court has already consolidated these actions into the instant action by order, dated Dec. 17, 2008.

Facts and Procedural History

On April 11, 2002, Hadar acquired certain real property located at 175 Monroe Street in Brooklyn, New York (Block 1812, Lot 68) (the property).[3] At that time, Hadar had already been dissolved by proclamation of the New York Secretary of State published on June 27, 2001.[4]

On April 30, 2002, HM allegedly entered into an agreement with Gerald J. Caliendo, R.A., A.I.A. and his firm Gerald J. Caliendo, R.A., A.I.A., Architect, P.C. (collectively, the Architect) to design a new residence on the property.[5] On July 3, 2002, the Architect filed a certified Plan/Work Approval Application (Form PW-1) with the New York City Department of Buildings (the DOB) for the construction of a new three-family home on the property.[6] Mr. Meiri signed that application as president of HM, which was designated as

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[3] Document No. FT_3020008931402 as shown by ACRIS records.

[4] Plaintiff's Reply #1, Ex. 8 (Affidavit of Special Duty Secretary of State, noting that Hadar's dissolution was not annulled as of Mar. 9, 2009). Unless otherwise indicated, all exhibit references are to plaintiff's Reply #1, dated Apr. 15, 2009.

[5] Ex. 16 (Caliendo Aff., dated May 7, 2007), Ex. 30 (Letter from Caliendo to HM, dated Apr. 30, 2002). This letter is signed by Mr. Caliendo, but is not signed on behalf of HM.

[6] Ex. 6.

the property owner.[7] In a separate document, Mr. Meiri agreed to take any remedial measures necessary to meet the DOB requirements.[8]

On August 30, 2002, the Architect drafted construction plans for the property.[9] In addition, on the same date, the Architect prepared and filed a Technical Report/Statement of Responsibility (Form TR-1).[10] At some point which is unclear in the record, ABC was retained to build the house on the property in accordance with the construction plans approved, and the permits issued, by the DOB.[11] Thereafter, ABC verbally retained Steven Wasserman, a master plumber, and his firm (C2) to perform certain plumbing work.[12] At some point before March 25, 2004, a three-family brick house with a cellar was built on the property (the house),[13] and at some point before May 4, 2004, all plumbing work was

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[7] *Id.*

[8] Ex. 7, § 2.

[9] Ex. 4.

[10] Ex. 12.

[11] Ex. 24 (list of construction tasks performed by ABC at the property).

[12] Aff. of Steven Wasserman, an officer of C2 Plumbing Corp., dated Feb. 19, 2009, ¶ 3.

[13] Ex. 9-A (Certificate of Occupancy Application [Form PW-6]).

performed and completed at the property.[14] On March 25, 2004, Robert Maluenda, then president of the builder (ABC), applied for a final certificate of occupancy for the house.[15]

On April 30, 2004, plaintiff, represented by counsel,[16] entered into a purchase agreement with Hadar (by Mary Lawless, corporate secretary[17]) for the acquisition of the house (the purchase agreement).[18] Several provisions of the purchase agreement deserve specific mention. First, under the purchase agreement, plaintiff had until October 1, 2004 within which to close.[19] Yet, the closing took place on May 13, 2004, or within two weeks after the execution of the purchase agreement.[20] Second, under the purchase agreement, a temporary certificate of occupancy (C/O) was required before closing.[21] At closing, however, plaintiff waived his contractual right to a temporary C/O. Instead, he elected, as

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[14] Aff. of Steven Wasserman, an officer of C2 Plumbing Corp., dated Feb. 19, 2009, ¶ 3.

[15] Ex. 9-A (Certificate of Occupancy Application [Form PW-6]); Maluenda Aff., dated Jan. 9, 2009, ¶ 1.

[16] Purchase Agreement, ¶ 40; Ex. 22 (Real Property Transfer Report).

[17] The court reads Ms. Lawless's affidavit that she was "secretary of Hadar Management Corp." (Aff., dated Jan. 23, 2009, ¶ 1) to mean the corporate secretary, rather than an office secretary.

[18] Barisano Aff., dated Feb. 19, 2009, in support of C2 defendants' motion to dismiss, Ex. B (Purchase Agreement).

[19] Purchase Agreement, ¶ 4.

[20] Barisano Aff., dated Feb. 19, 2009, in support of C2 defendants' motion to dismiss, part of Ex. C (Deed).

[21] Purchase Agreement, ¶ 9 ("In the event that the dwelling or its environs shall not be completed at the time of the closing of title but a temporary Certificate of Occupancy has been issued, same shall not be deemed an objection to closing . . .").

was his right, to place a small portion of the $625,000 purchase price in escrow with the seller's attorney until a final C/O was obtained.[22] Third, the purchase agreement included Hadar's one-year warranty against the construction defects, with such warranty surviving the passage of title at closing.[23] Lastly, the purchase agreement named Hadar as the seller of the property,[24] but the deed which plaintiff took at closing named HM (not Hadar) as the seller.[25]

On May 7, 2004, in between the contract and closing dates, a DOB inspector visited the property.[26] He inspected a kitchen on the first floor of the house, noted that a kitchen vent shown on the blueprints was missing, and so advised ABC.[27] On May 10, 2004, ABC, by its then-president Meryl Carrion, asked the Architect to conform the blueprints to the reality of the situation by removing the kitchen vent at issue from the blueprints.[28]

On May 14, 2004, one day after the closing, plaintiff moved into the third floor of the house despite the lack of a C/O (either temporary or final) at that time. Plaintiff's move-in,

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[22] Purchase Agreement, ¶¶ 4, 7, 38. The escrow amount was either $5,000 according to ¶ 4 of the purchase agreement or $25,000 according to ¶ 38 of the purchase agreement.

[23] *Id.*, ¶ 39.

[24] Id., ¶ 2.

[25] Ex. 22. Plaintiff's title was later corrected by deed, dated Apr. 6, 2005, from HM executed by Ms. Lawless (Ex. 21).

[26] Ex. 1, page 1-A (Fax Transmittal, dated May 10, 2004, from ABC to the Architect.

[27] Ex. 1, page 1-B.

[28] Ex. 1, page 1-E.

without a C/O in place, violated the Building Code.[29] On June 2, 2004, the DOB refused to issue a final C/O until certain violations were remedied and sign-offs were obtained.[30]

On May 21, 2004, Schlomo Chia, a Hadar officer, delivered to plaintiff a complete set of the Architect's plans for the house. According to plaintiff, Mr. Chia advised him at that time that the house, as built, was accurately represented by those plans.[31] That isolated contact was the only involvement of Mr. Chia with this property or plaintiff.

On May 27, 2004, January 3, 2005, and May 18, 2005, the plans for the house were examined and approved by, or on behalf of, the DOB.[32] On June 21, 2004, the plumbing work for the house was approved.[33] On June 27, 2004, the Architect initialed a subsequent Technical Report, Statement of Responsibility (Form TR-1), certifying the completion of

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[29] Section 27-214 (a) of the 1968 Building Code then in effect provided, in relevant part:

> "[N]o building hereafter constructed shall be occupied or used, in whole or in part, unless and until a certificate of occupancy shall have been issued certifying that such building conforms substantially to the approved plans and the provisions of this code and other applicable laws and regulations."

That section was repealed effective July 1, 2008 and was re-enacted as § 28-118.2 of the 2008 Building Code.

[30] Ex. 17 (Brooklyn C of O Pilot Project Notice).

[31] Plaintiff's Reply #1, ¶ 24.A.iii (at 25).

[32] Barisano Aff., dated Feb. 19, 2009, in support of C2 defendants' motion to dismiss, Ex. D (DOB – Document Overview – Work Type(s)/Status/Job Description).

[33] *Id.*

certain other parts of the house (*e.g.*, masonry units).[34] That document also bears his signature and seal.

While living in the house, plaintiff noticed several problems, including rain water entering the cellar through a wall, defects in the ground supporting the outside stairs in the rear of the house, and rain water seeping into the front bedroom of the house around a windowsill. On June 24, 2004, within the one-year warranty period, plaintiff faxed a "punch list" of these and certain other items to ABC and HM.[35] In his fax, plaintiff noted that Edward McLaughlin, an ABC supervisor, had personally witnessed a water leak in the cellar.[36] About a year later in May 2005 and after the warranty had lapsed, Mr. McLaughlin returned to the house and advised plaintiff how ABC was going to repair the leak in the cellar wall, but plaintiff refused ABC's offer.[37] That was the last time that ABC or any other defendant was in contact with plaintiff.

On May 18, 2005, the DOB issued a final C/O for the house.[38] Thereafter, plaintiff filed plans with the DOB allow him to perform certain renovations, including alterations of

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[34] Ex. 13 (Technical Report/Statement of Responsibility, Form TR-1, with certifications of completed inspections).

[35] Proposed Amended Complaint, Ex. 2 (plaintiff's fax).

[36] *Id.* Ex. 2, at 2.

[37] Complaint in *Sands v Apple Builders Corp.*, index No. 11499/07, ¶ 10.

[38] Ex. 9.

apartment units on the first, second, and third floors of the house. On September 21, 2005, the DOB issued an alteration permit for that work.

While the renovation work was taking place, plaintiff discovered numerous defects in the original construction work of the house, which included both the Building Code violations and the construction work which failed to comply with the architectural plans for the house. Those defects included: (1) lack of insulation in walls throughout the house; (2) missing duct work between exhaust fans and the outside of the house; (3) missing moisture barriers on foundation floors and walls; (4) the pouring of concrete for the cellar floor directly onto the soil instead of a stone screening consisting of six inches of gravel; (5) an improper connection of the storm drain pipe with a sewer line; (6) an undersized boiler; (7) an incorrect placement of uninsulated water pipes in the bathrooms against the exterior wall; and (8) an improper installation of a sprinkler system.[39] As a result of those defects, plaintiff was forced to perform repairs and corrective work.

By summons and complaint filed on April 5, 2007, plaintiff brought four separate actions, pro se, against defendants. By order, dated December 17, 2008, the court consolidated all four actions into a single action under index No. 11496/07.

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[39] Ex. 35 (Aff. of Paul Jennings, R.A., dated Oct. 15, 2007), Ex. 36 (Aff. of Richard Wu, P.E., dated Oct. 16, 2007), Ex. 37 (Affidavit of Wayne Clark, P.E., dated Apr. 14, 2009). Plaintiff's Reply #3, part of Ex. 1 (Aff. of Steven Lewis, Master Plumber, undated).

Action Against Architect (Index No. 11497/07)

In this action, plaintiff alleges that the Architect was guilty of professional malpractice and otherwise responsible for the aforementioned construction defects inasmuch as he signed off on the final C/O despite the fact that the construction work failed to comply with both applicable Building Code regulations and the building plans. On April 20, 2007, the Architect interposed his answer. On May 25, 2007, the Architect moved under CPLR 3211 (a) (1), 3211 (a) (7), and 3212 to dismiss the complaint and for summary judgment for lack of contractual privity between him and plaintiff. By decision and order, dated April 9, 2008, the court denied that branch of the Architect's motion which was to dismiss, holding that plaintiff sufficiently alleged that the relationship in place between plaintiff and the Architect was so close as to approach privity. In reaching its conclusion, the court noted that plaintiff alleged that after he took title to the house and after he moved in, the Architect falsely certified to the DOB that the house was constructed in accordance with the Building Code and the building plans. It was also significant to the court's decision that under the terms of the alleged contract between HM and the Architect, the Architect was required to "[p]repare and sign-off on all required controlled inspections" and to "[f]ollow-up with inspectors at [the DOB] to obtain sign offs for new Certificate of Occupancy."[40] In addition, the court denied as premature, with leave to renew after completion of discovery, the remaining branch of the Architect's motion for summary judgment pursuant to

[40] Ex. 30 (letter from Caliendo to HM, dated Apr. 30, 2002), ¶¶ 6-7.

CPLR 3212. On February 9, 2009, the Architect served cross-claims against the other defendants for common-law and contractual indemnification, as well as for contribution.

Action Against Plumber (Index No. 11498/07)

In this action, plaintiff alleges that the C2 defendants were guilty of professional malpractice and were otherwise responsible for the aforementioned plumbing defects. On June 29, 2007, the C2 defendants imposed an answer to the complaint. Thereafter, the C2 defendants amended their answer to assert cross-claims against the other defendants.

By amended notice of motion, the C2 defendants seek an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint based on documentary evidence and for failure to state a cause of action and, in addition, pursuant to CPLR 3211 (a) (7), specifically dismissing plaintiff's fraud claims and his request for punitive damages. In support of their motion, the C2 defendants contend that there was no privity between them and plaintiff. In the alternative, the C2 defendants assert that even if there were privity between them and plaintiff, his fraud claims must be dismissed for lack of particularity, and that punitive damages may not be awarded because his complaint sets forth, at most, a common-law negligence claim.

Actions Against Builder and Developer (Index Nos. 11499/07 and 11496/07)

In these actions, plaintiff alleges that the Hadar defendants (together with Hadar's officer, Mr. Chia) and the ABC defendants acted negligently and fraudulently in constructing a defective house for plaintiff and obtaining an approval therefor from the DOB. On May 19,

2007, the Hadar defendants and the ABC defendants separately interposed answers denying the allegations in the respective actions and asserted counterclaims against plaintiff for the reasonable value of materials and services allegedly furnished by them at his request for the use at the property. To date, plaintiff has not replied to the counterclaims.

The Hadar defendants and the ABC defendants now move for an order, pursuant to CPLR 3211(a) (5) and (7), to dismiss the complaint for lack of privity of contract (except as to Hadar), inability to pierce Hadar's corporate veil, expiration of the statute of limitations, failure to plead fraud with particularity, and unavailability of *quantum meruit* recovery in a contract action.

Plaintiff moves, over defendants' objections, for an order equitably estopping defendants from raising the lack of privity defense. The C2 defendants and the Architect, in turn, request that the court enjoin plaintiff from instituting any additional motion practice without prior judicial permission.

In response to the foregoing motions to dismiss, plaintiff moves for leave to serve a proposed amended complaint based on the same set of transactions and occurrences that form the original four actions. In his proposed amended complaint, plaintiff asserts as to all defendants the following claims: (1) breach of contract; (2) common-law negligence; (3) negligent misrepresentation; (4) common-law fraud; (5) conspiracy to commit fraud;

(6) unjust enrichment; (7) emotional distress; and (8) constructive fraud.[41] Plaintiff also advances solely against the Architect an additional claim for tortious interference with contract.[42] The C2 defendants oppose plaintiff's motion for leave to amend on the ground that many of plaintiff's claims and proposed claims are not legally cognizable and are insufficiently pleaded.[43] Similarly, the Hadar defendants and the ABC defendants argue that "[t]he proposed amended complaint is completely lacking in merit for the reasons stated in all the affirmations and affidavits submitted in this action by co-defendants."[44] Lastly, the Architect characterizes the proposed amended complaint as redundant because plaintiff originally pleaded "all of the causes of action and demanded all of the types of damages for which he is now requesting leave to amend."[45]

Discussion

1. Leave to Amend

"Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*see Gitlin v Chirinkin*, 60 AD3d 901, 901-902 [2d Dept 2009]; CPLR 3025 [b]). "No evidentiary showing of merit is required under CPLR 3025 (b)"

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[41] Proposed Amended Complaint, ¶¶ 47-50.

[42] Proposed Amended Complaint, ¶ 49.

[43] Saeed Aff. in Opposition, dated Sept. 1, 2009, ¶¶ 13-14.

[44] Bowman Aff. in Opposition, dated Sept. 8, 2009, ¶ 4.

[45] Beitler Aff. in Partial Opposition, dated Nov. 25, 2008, ¶ 8.

(*Lucido v Mancuso*, 49 AD3d 220, 229 [2008], *appeal withdrawn* 12 NY3d 804, 813 [2009]). "If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing (*see* CPLR 3212)" (*id.*).

A plaintiff may amend his complaint if the amendment merely updates and amplifies the facts that were already known to the defendants and does not change the fundamental nature of the complaint (*see English v Ski Windham Operating Corp.*, 263 AD2d 443, 444 [2d Dept 1999] [granting leave to amend more than one year after the filing of the original complaint where "the allegations in the original complaint gave notice of the transactions and occurrences to be proved pursuant to the amended complaint"]; *Pepe v Tannenbaum*, 262 AD2d 381, 382 [2d Dept 1999] [leave to amend granted where "the amendment does not change the fundamental nature of the allegations in the complaint and the delay was not inordinate"] [internal citation omitted]). Thus, because defendants here were on notice of plaintiff's claims by the allegations in the original (later consolidated) complaint, they cannot legitimately assert surprise or prejudice.

The court will now assess the merits of the proposed amendments in conjunction with its review of the motions to dismiss by the Hadar defendants, ABC defendants, C2 defendants, and Mr. Chia. To the extent that plaintiff's claims are found to be sufficient to withstand a more rigorous standard of review under CPLR 3211 (a), they are obviously neither palpably insufficient to state a cause of action nor are patently devoid of merit under

the liberal amendment standard of CPLR 3025 (b), and plaintiff will be granted leave to serve the proposed amended complaint to the extent such claims survive the motions to dismiss under CPLR 3211 (a).

As a threshold matter, the court notes that because the filing of an amended pleading does not automatically abate a motion to dismiss that is addressed to the original pleading (*see Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d Dept 2003]), the moving party has the option to decide whether its motion should be applied to the new pleading (*see Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998]). Here, as defendants' motions are addressed to the merits of the action as well as to the sufficiency of both the original and the proposed complaints, the court will treat the dismissal motions as also encompassing the proposed complaint (*see Sage*, 251 AD2d at 38; *see also DiPasquale v Security Mut. Life Ins. Co. of New York*, 293 AD2d 394, 395 [1st Dept 2002] ["Since the insured did not attempt to defend his pleading but instead sought the amendment, we consider the insurers' motion to dismiss as directed to the proposed amendment . . ."]). Such treatment is procedurally fair because the proposed amendments do not change the nature of this action, which has always alleged, in one way or another, negligence, breach of contract, and fraud on defendants' part.

2. Motions to Dismiss

CPLR 3211(a) (1) provides, in pertinent part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense

is founded upon documentary evidence . . ." "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

CPLR 3211 (a) (5) provides, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [the] statute of limitations . . ." To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, "a defendant bears the initial burden of establishing *prima facie* that the time in which to sue has expired" (*Savarese v Shatz*, 273 AD2d 219, 220 [2d Dept 2000]). Only if such *prima facie* showing is made, will the burden shift to the plaintiff to "aver evidentiary facts establishing that the case falls within an exception" to the statute of limitations (*id.* [internal quotation marks and citations omitted]).

Finally, on a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, the pleading is to be afforded a liberal construction in the light most favorable to the plaintiff (*see Leon*, 84 NY2d at 87). In assessing a motion under CPLR 3211 (a) (7), a court is not limited to the four corners of the complaint and may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*id.* at 88). "The court must accept the facts alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Kempf v Magida*, 37 AD3d 763, 764 [2d Dept

2007]). "The pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment" (*Components Direct, Inc. v European Amn. Bank & Trust Co.*, 175 AD2d 227, 232 [2d Dept 1991]).

Breach Of Contract (First Cause of Action)

a. Hadar Defendants

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). The contract in this case was a purchase agreement. Because title to the property had closed and the deed was delivered, any claims that plaintiff might have had arising from the purchase agreement were extinguished by the doctrine of merger (*see Marcantonio v Picozzi*, 2010 NY Slip Op 00822, *2 [2d Dept 2010]), unless there was a clear intent evidenced by the parties that a particular provision of the purchase agreement would survive the delivery of the deed (*see Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006]). Under the purchase agreement in this case, the only pertinent provision which survived the passage of title at closing was Hadar's one-year warranty against the construction defects.[46] It is evident that plaintiff's case stems from Hadar's failure to comply with this warranty. In its moving papers, however, Hadar has not addressed plaintiff's allegations that it breached this warranty. Moreover, the parties have

[46] Purchase Agreement, ¶¶ 19 (the merger clause) 39 (the warranty).

not addressed, and the court, therefore, will not rule on, whether this warranty properly replaced the statutory warranty under General Business Law § 777-a (Housing merchant implied warranty) in accordance with General Business Law § 777-b (Exclusion or modification of warranties). Given the parties' failure to address these issues, the court holds that, for the pleading purposes, the complaint sufficiently states a cause of action to recover damages against Hadar for breach of the warranty, subject to Hadar's right to renew after completion of discovery.

Because Hadar had been dissolved before the date of the purchase agreement, it had "no existence, either *de jure* or *de facto*, except for a limited *de jure* existence for the sole purpose of winding up its affairs" (*Lodato v Greyhawk N. Am., LLC*, 39 AD3d 496, 497 [2d Dept 2007]). Generally, an individual who purports to act on behalf of a dissolved corporation is personally liable for the obligations he incurred (*id.*). This is based on the theory that one who assumes to act as agent for a non-existent principal is himself liable on the contract in the absence of an agreement to the contrary and on the theory of a breach of an implied warranty of authority (*see Metro Kitchenworks Sales, LLC v Continental Cabinets, LLC*, 31 AD3d 722, 723 [2d Dept 2006]). "Nonetheless, an individual who has no actual knowledge of the dissolution, and thus has not fraudulently represented the corporate status of the dissolved entity, will not be held personally liable for the obligations undertaken by the entity while it was dissolved" (*Lodato*, 39 AD3d at 497 [internal quotations marks and citation omitted]). In this case, Mary Lawless signed the purchase

agreement on behalf of Hadar. In addition, Herzel Meiri executed the original deed, while Ms. Lawless executed a corrective deed, on behalf of HM (not Hadar) conveying title to plaintiff. There are issues of fact as to (1) whether Ms. Lawless was aware of Hadar's dissolution when she signed the purchase agreement; (2) whether Mr. Meiri was aware of Hadar's dissolution when he executed and delivered the deed to plaintiff; (3) whether these individuals fraudulently represented Hadar's corporate status to plaintiff despite its dissolution; (4) whether Hadar was a separate entity from HM; and (5) if so, the legal status of HM. These issues cannot be determined on the present record and preclude dismissal of breach of contract claims against HM and the individual Hadar defendants, subject to their right to renew after completion of discovery.

The Hadar defendants further move for dismissal of all claims against them as barred by the statute of limitations. Generally, a cause of action accrues for commencement of the limitations period when all of the factual circumstances necessary to establish a right of action have occurred, thereby entitling a plaintiff to relief (*see Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]). Here, that date, at the earliest, was May 13, 2004 when the closing occurred. The summons and complaint in this case were filed on April 5, 2007, well before the expiration of the applicable six-year limitations period for a breach of contract claim (*see* CPLR 213 [2]). Accordingly, that branch of the Hadar defendants' motion, pursuant to CPLR 3211 (a) (5), for dismissal of the breach of contract claim insofar as asserted against them is denied.

b. Schlomo Chia

Plaintiff also asserts a separate claim against Mr. Chia, a Hadar officer, alleging, in pertinent part, that:

> "Schlomo Chia, the Vice Pres. of Hadar Management, brought to me, at my home of 175 Monroe Street, Brooklyn, NY 11216, a complete set of the Architect BluePrints/Plans (Exhibit #4) for Job # 301421067 which included BIN # 3821775 designed by Gerald Caliendo, R.A. The delivery, which occurred on or about May 21, 2004, of the 'Plans/Blueprints', was a cordial meeting and Mr. Chia expressly told me, the Plaintiff, that the 'property' which I purchased is represented by these 'Plans/Blueprints'."

(Plaintiff's Reply #1, ¶ 24.A.iii, at 25 [emphasis omitted]).

The record indicates that Mr. Chia's role in this matter was ministerial and limited to a delivery of the architectural plans to plaintiff after closing had occurred and plaintiff had moved into the house. Plaintiff does not allege that Mr. Chia signed any documents that related to this property. Not being an architect or an employee of one, Mr. Chia cannot be reasonably considered to have been a guarantor of the accuracy of the architectural plans he merely delivered to plaintiff. Accordingly, plaintiff's breach of contract and all other proposed claims against Mr. Chia are dismissed (*see Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 194 [2d Dept 2009] [while factual allegations contained in the complaint and in any submissions made in opposition are deemed true, "facts flatly contradicted on the record are not entitled to a presumption of truth"]).

c. ABC/C2 Defendants

As there was no contractual relationship between plaintiff and ABC, his recovery against ABC is dependent upon a showing that he was a third-party beneficiary of ABC's contract with Hadar. Similarly, plaintiff's recovery against C2 is dependent upon a showing that he was a third-party beneficiary of C2's subcontract with ABC.

> "Nonparty enforcement of a contractual promise is limited to an 'intended' as contrasted with an 'incidental' beneficiary. One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties to the contract *and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

(*Lake Placid Club Attached Lodges v Elizabethtown Builders, Inc.*, 131 AD2d 159, 161 [3d Dept 1987] [internal quotation marks and citations omitted]).

Plaintiff does not allege that ABC or C2 owed any obligation directly to him. Plaintiff has submitted no evidence from the contractual language or other circumstances manifesting a mutual intent of the contracting parties to confer rights to performance on plaintiff as the ultimate owner of the house. Nor is there any showing of an intent on the part of ABC and Hadar to give him any benefits from the performance promised by ABC to Hadar under the construction contract and promised by C2 to ABC under the plumbing subcontract. Paraphrasing an opinion of the Appellate Division, Third Department:

> "Indeed, there is nothing whatsoever in the record to suggest that the developer [Hadar] had in mind anything but the normal business motive to obtain a construction product of sufficient quality for ready marketability of the [house] to [a] potential

> customer[ ]. Such a motive is clearly not a basis from which to infer the requisite intent of the developer to bestow performance benefits upon the purchaser[ ] of the [house] . . ., and explains why, ordinarily, construction contracts are not construed as conferring third-party beneficiary enforcement rights."

(*Lake Placid Club*, 131 AD2d at 162 [internal citations omitted]). Accordingly, plaintiff has not stated a viable breach of contract claim against ABC or C2 (*see Regatta Condominium Assoc. v Village of Mamaroneck*, 303 AD2d 739 [2d Dept 2003]; *see also Kerusa Co. LLC v W10Z/515 Real Estate LP*, 50 AD3d 503, 504 [1st Dept 2008] [since the plaintiff, a condominium property owner, "had no contractual or other relationship with the general contractor, architect, mechanical engineer or structural engineer on the project and is, at best, only an incidental, rather than an intended, beneficiary of the contracts that defendants . . . entered into with the sponsors, plaintiff may not recover for . . . breach of contract from these defendants . . ."). Without the corporate liability, the respective principals of ABC or C2 are likewise not liable to plaintiff.

Common-Law Negligence (Second Cause of Action)

To prevail on a common-law negligence claim, "a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages" (*Luina v Katharine Gibbs School New York, Inc.*, 37 AD3d 555, 556 [2d Dept 2007]). "[M]ere breach of a contract does not give rise to a tort cause of action unless a legal duty independent of the contract has been violated" (*Feinman v Parker*, 252 AD2d 869, 869 [3d Dept 1998]). Here, although the proposed amended complaint asserts a common-law

negligence claim against Hadar, in reality this claim is for breach of contract because the proposed amended complaint does not allege that a legal duty independent of the contract was violated. Similarly, plaintiff's allegations against Ms. Lawless and Mr. Meiri, Hadar's alleged officers, for negligent construction of the subject house state only a breach of contract claim and not a common-law negligence claim (*see Merritt v Hooshang Constr.*, 216 AD2d 542, 543 [2d Dept 1995]).

The question of whether plaintiff may maintain a cause of action against the ABC/C2 defendants for negligence in constructing the house is answered in the negative. ABC, as the contractor of Hadar, and C2, as a subcontractor of ABC, owed no duty to plaintiff (*see Residential Bd. of Managers of Zeckendorf Towers v Union Square - 14th St. Assocs.*, 190 AD2d 636, 637 [1st Dept 1993] [a condominium board could not recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship]; *Lake Placid Club*, 131 AD2d at 162 [the plaintiff, an unincorporated joint venture which consisted of the owners of condominium units, had no negligence cause of action for economic losses against the builder of the condominium]).

Negligent Misrepresentation (Third Cause of Action)

a. Hadar Defendants

To sustain a cause of action for negligent misrepresentation, a plaintiff is required to demonstrate that the defendant had a duty, based upon some special relationship with him, to impart correct information, that the information given was false or incorrect and that the

plaintiff reasonably relied upon the information provided (*see Berger-Vespa v Rondack Building Inspectors Inc.*, 293 AD2d 838, 841 [3d Dept 2002]). "The tort of negligent misrepresentation cannot be independently asserted within the context of a breach of contract action unless a special relationship exists between the parties, and the alleged misrepresentation concerns a matter which is extraneous to the contract itself" (*Alamo Contr. Builders, Inc. v CTF Hotel Co.*, 242 AD2d 643, 644 [2d Dept 1997]).

Here, a lack of separate relationship distinct from and independent of the purchase agreement precludes a claim of negligent misrepresentation against Hadar. Plaintiff's allegations of negligent misrepresentation merely parallel his breach of contract claim that the house he purchased from Hadar was defective (*see RKB Enters., Inc. v Ernst & Young*, 182 AD2d 971, 972 [3d Dept 1992]).

b. ABC/C2 Defendants

To recover from a non-party to a contract for a negligent misrepresentation entailing direct and consequential non-accidental economic loss (*i.e.*, the cost of repair to make plaintiff's house of expected habitable quality), proof of "a relationship so close as to approach that of privity" is required (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424 [1989]). To establish such a relationship, there must be a showing that the non-party was aware that his work would be used for a particular purpose in furtherance of which a known party was intended to rely, and that there was some conduct on the part of the non-party linking him to that known party (*see Caprer v*

Nussbaum, 36 AD3d 176, 196 [2d Dept 2006]). Reliance by a plaintiff upon the representation must be "the end and aim of the transaction," rather than its "indirect or collateral" consequence (*see Glanzer v Shepard*, 233 NY 236, 238-239 [1922]).

Plaintiff's allegations in this case fall short of establishing a viable negligent misrepresentation claim against ABC or C2. There is nothing in the record demonstrating that ABC or C2 performed their contractual functions with knowledge that they would be doing so for a "particular" or unique purpose vis-à-vis plaintiff. In fact, ABC had built the house for Hadar before plaintiff signed the purchase agreement, and C2 completed the plumbing work for ABC before plaintiff took title (*see Sykes v RFD Third Ave. 1 Assocs., LLC*, 67 AD3d 162, 167-168 [1st Dept 2009]). That plaintiff communicated with ABC after title closing concerning certain problems with the house described on his "punch list" does not show the existence of a functional privity (*see Schneider v Campagna*, 2007 WL 4397752 [Sup Ct, Nassau County 2007]). ABC and C2 merely possessed a general knowledge and awareness that their work was for a home construction project for an unknown prospective purchaser. ABC's and C2's respective contractual performance did not place plaintiff in "a relationship significantly different from anyone else" who wanted to buy the subject house (*see Securities Investor Protection Corp. v BDO Seidman, L.L.P.*, 95 NY2d 702, 712 [2001]). The "end and aim" of ABC's and C2's involvement in the project was simply to build a house for, and to provide plumbing services to, Hadar and ABC, respectively, whereas the "end and aim" of the transaction, insofar as plaintiff was

concerned, was his purchase of a new house from Hadar. Plaintiff's allegations, at most, show only that his reliance was "indirect or collateral" (*see Schneider*, 2007 WL 4397752). Plaintiff has failed to establish the elements of a relationship with either ABC or C2 approaching privity to the extent necessary to sustain his claim that they are liable on his purchase agreement with Hadar (*see Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 105 [2d Dept 2009], *lv dismissed* 13 NY3d 900 [2009]; *see also Board of Managers of Marke Gardens Condominium v 240/242 Franklin Ave. LLC*, 20 Misc 3d 1138 [A], 2008 WL 4058677, *7, 2008 NY Slip Op 51789 [U] [Sup Ct, Kings County 2008, Starkey, J.] [dismissing claims against the general contractor where the plaintiff's attempt to demonstrate that the general contractor was in some way connected with the developer was "unconvincing and fail(ed) to meet the standard for invoking the 'functional equivalent' doctrine"]). Lastly, the court rejects plaintiff's contention that Mr. Wasserman, a licensed master plumber, was such a professional as an engineer, architect, or accountant, who by virtue of his training and expertise, had a special relationship of confidence and trust with his client (*see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *see also Schonfeld v Thompson*, 243 AD2d 343, 343 [1st Dept 1997] ["With respect to the non-attorney and non-accountant professionals, neither nondisclosure nor negligent misrepresentation gave rise to a cause of action since there were no fiduciary or confidential relationships emanating from this arm's length business transaction"]).

Plaintiff asserts, by way of motion, that defendants should be equitably estopped from raising the lack of privity defense. The doctrine of equitable estoppel is applied in "the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought" (*Nassau Trust Co. v Montrose Concrete Products Corp.*, 56 NY2d 175, 184 [1982]). Plaintiff does not allege that the ABC/C2 defendants made any representation to him that they would not raise the lack of privity defense, that he relied on any such representation, or that he changed his position as a result. Accordingly, plaintiff's motion to preclude the ABC/C2 defendants, under the doctrine of equitable estoppel, from raising the lack of privity defense is denied (*see Philip F. v Roman Catholic Diocese of Las Vegas*, 2010 WL 437671, *1, 2010 NY Slip Op 00922 [2d Dept 2010]).

c Architect

With respect to the Architect (a non-moving defendant), the court has already determined the issue of privity in its decision and order, dated April 9, 2008, and such determination remains the law of the case (*see Hampton Valley Farms, Inc. v Flower & Medalie*, 40 AD3d 699, 701 [2d Dept 2007]). Plaintiff's request to amend his complaint insofar as it relates to his negligent representation claim against the Architect does not prejudice the latter and is granted.

Common-Law Fraud (Fourth Cause Of Action)

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurecleia Partners, LP v Seward & Kissel LLP*, 12 NY3d 553, 559 [2009]). "The elements of fraud are narrowly defined, requiring proof by clear and convincing evidence . . ." (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 349 [1999]). A separate cause of action for common-law fraud is not stated where the alleged fraud relates to a breach of contract (*see Biancone v Bossi*, 24 AD3d 582, 583 [2d Dept 2005]).

a Hadar Defendants

The cause of action for common-law fraud against the Hadar defendants cannot be sustained because the alleged fraud (*i.e.*, the house being defective) relates to a breach of contract (*see e.g. Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2d Dept 2009]). Moreover, in New York, the doctrine of *caveat emptor* traditionally imposes no duty upon a vendor to disclose any information concerning the property in an arm's length real estate transaction (*see Meyers v Rosen*, 69 AD3d 1095, 1096 [3d Dept 2010]). While legal and equitable exceptions to the doctrine exist, imposing a duty on a seller, in certain circumstances, to disclose certain conditions affecting the property, in the instant action, plaintiff has not alleged any facts fitting within any of these exceptions. He has not alleged "active concealment," *i.e.*, an intent to deceive and conduct, on Hadar's part, that thwarted

his ability to discharge his duty to properly inspect the house before closing (*see Jablonski v Rapalje*, 14 AD3d 484, 485 [2d Dept 2005]). In particular, he has not alleged that he was precluded in any way from inspecting the house either on his own or by an engineer (*see Kerusa Co. LLC v W10Z/515 Real Estate LP*, 12 NY3d 236, 246 [2009] [the proposed amended complaint at most alleged only that the defendants tolerated shoddy construction; plaintiff "does not contend, for example, that drywall was painted over or taped over to cover up or prevent discovery of water damage; (plaintiff) does not allege that walls or bricks were put up to hide or prevent him from finding leaking pipes or holes in the foundation"]).

Moreover, although plaintiff was entitled under the purchase agreement to receive a temporary C/O at closing, he waived that right at closing and took title to the house without it. "Without the issuance of a certificate of occupancy, it is impossible to determine if a structure is built to code and safe for human habitation" (*Howard v Berkman, Henoch, Peterson & Peddy, P.C.*, 5 Misc 3d 1020 [A], 2004 WL 2732245,*4, 2004 NY Slip Op 51470 [U] [Civ Ct, Richmond County 2004]). A certificate of occupancy is designed to insure that "such building conforms substantially to the approved plans and the provisions of this code and other applicable laws and regulations" (§ 27-214 [a] of the 1968 Building Code). "The lack of a certificate of occupancy leads to the presumption that the premises is not constructed in conformity with the applicable code" (*Howard*, 2004 WL 2732245, at *4). Contrary to plaintiff's position, a closing without a C/O did not void the purchase agreement

(*see Howard*, 2004 WL 2732245,*2 ["the failure to have a certificate of occupancy is not an objection to title and does not affect the marketability or insurability of title. The issue of whether a premises can be legally occupied is not a title issue"]). That plaintiff was allegedly advised by the Hadar defendants that a temporary C/O had been obtained does not give rise to liability because the true facts could have been ascertained by him or his real estate counsel through the exercise of ordinary intelligence, *i.e.*, by checking a title report which often contains the C/O status information (*see Howard*, 2004 WL 2732245,*2), and ordinary diligence, *i.e.*, by checking the DOB's public records (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1056 [3d Dept 2009]).

Plaintiff's contention that Hadar fraudulently induced the DOB in issuing the final C/O, while concealing from the DOB the home's alleged structural defects, confuses two separate issues. Whether a C/O is valid is determined in the first instance in an administrative proceeding, and is not before the court (*see Cochard-Robinson v Concepcion*, 60 AD3d 800, 802 [2d Dept 2009]). The C/O, which remains valid to date, satisfied Hadar's obligations under the purchase agreement, since no determination to the contrary had been made by the DOB or any reviewing tribunal (*id.*). Accordingly, plaintiff has not stated a common-law fraud claim against the Hadar defendants.

b. ABC/C2 Defendants

With respect to the ABC/C2 defendants, plaintiff likewise has failed to allege a viable cause of action for fraud because the necessary element of justifiable reliance is

lacking. As stated, plaintiff does not allege that the ABC/C2 defendants were aware of him when they were building (or working on) the house for Hadar commencing some time in 2002, *i.e.*, approximately two years before he entered into the purchase agreement with Hadar. There is no evidence in the record that plaintiff relied on the ABC/C2 defendants, with whom he had no privity, that the house would be properly constructed for him.

Plaintiff contends that ABC's conduct was fraudulent because its officer had requested the Architect to delete a kitchen vent from the plans before closing. Regardless of whether or not that change to the plans was actually made, plaintiff's argument misses the point because the architectural plans played no role in his decision to close, as he did not review or even receive them before closing. Next, while the issuance of the C/O and the plumbing sign-off occurred post-closing, it is worth emphasizing that plaintiff did not rely on those post-closing events in purchasing his home. The documentary evidence conclusively establishes that plaintiff has not stated a viable common-law fraud claim against either the ABC or the C2 defendants.

c Architect

The court finds that plaintiff's proposed common-law fraud claim against the Architect is not palpably insufficient or devoid of merit.[47] A cause of action for common-law fraud is stated by plaintiff's allegations that the Architect concealed and affirmatively misrepresented that the Building Code violations existed throughout the duration and at the

[47] The Architect is not a moving party and, therefore, the applicable standard of review is that under CPLR 3025 (b), rather than under CPLR 3211 (a).

conclusion of the project, that numerous design and construction deficiencies plagued the project, and that he was retained to perform professional services that could only be performed by a licensed architect (*see Samuels v Fradkoff*, 38 AD3d 208 [1st Dept 2007] [refusing to dismiss a common-law fraud claim against an architect under substantially similar circumstances]). The fraud claim against the Architect is supported in adequate detail in the proposed amended complaint by plaintiff's allegations of the Architect's alleged misrepresentations and plaintiff's reliance thereon so as to permit a reasonable inference of the alleged conduct in accordance with CPLR 3016 (b) (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]; *Samaritan Hosp. v McManus, Longe, Brockwehl, Inc.*, 92 AD2d 957, 959 [3d Dept 1983]).

Conspiracy To Commit Fraud (Fifth Cause of Action)

Plaintiff has not sufficiently stated a claim for civil conspiracy to commit fraud. Civil conspiracy is not an independent cause of action in New York (*see Plymouth Drug Wholesalers v Kirschner*, 239 AD2d 479 [2d Dept 1997]). Since the underlying fraud cause of action against all defendants (other than the Architect) is dismissed, the proposed cause of action, which alleges a conspiracy on the defendants' part to defraud plaintiff, is also dismissed (*see Pappas v Passias*, 271 AD2d 420, 421 [2d Dept 2000]).

Unjust Enrichment (Sixth Cause of Action)

"The term 'unjust enrichment' does not signify a single well-defined cause of action" (22A NY Jur 2d, Contracts § 523). "Rather, such an action is for restitution or based upon

quasi-contract" (*Matter of Estate of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997]). The elements of a restitution claim in quasi-contract are that the defendant has received a benefit or was enriched at the plaintiff's expense under circumstances that would make it unjust and against equity and good conscience for the defendant to retain what is sought to be recovered (*see Anesthesia Assocs. of Mount Kisco, LLP v Northern*, 59 AD3d 481 [2d Dept 2009]). Where there is a bona-fide dispute regarding the existence of a contract or where the contract does not cover the dispute, a claim of unjust enrichment may be pleaded in the alternative (*see L & L Auto Distribs. & Suppliers Inc. v Auto Collection, Inc.*, 23 Misc 3d 1139 [A], 2009 WL 1652852, *5, 2009 NY Slip Op 51200 [U] [Sup Ct, Kings County 2009, Demarest, J.]). "It is impermissible, however, to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]).

Here, the relationship between the parties was governed by the purchase agreement. Plaintiff is not seeking to rescind the purchase agreement, but is suing to recover damages, which is his right. Thus, plaintiff may not seek recovery based on an alleged quasi-contract either against Hadar as a party to the purchase agreement or against ABC / C2 as the non-contracting parties (*see Clark-Fitzpatrick*, 70 NY2d at 389; *Bellino Schwartz Padob Adv., Inc. v Solaris Mktg. Group, Inc.*, 222 AD2d 313 [1st Dept 1995]).

Emotional Distress (Seventh Cause of Action)

Plaintiff has not stated a claim for negligent or intentional infliction of emotional distress. The moving defendants' allegedly negligent construction of plaintiff's residence, use of defective materials, and failure to construct the home in a workmanlike fashion and in accordance with the requirements of the Building Code, do not amount to the extreme and outrageous conduct required to support a cause of action for the negligent or intentional infliction of emotional distress (*see Rocco v Town of Smithtown*, 229 AD2d 1034, 1035 [4th Dept 1996], *appeal dismissed* 88 NY2d 1065 [1996]).

Constructive Fraud (Eighth Cause of Action)

In order to recover damages for constructive fraud, a plaintiff must establish, among other things, that the parties were in "a fiduciary or confidential relationship"(*Del Vecchio v Nassau County*, 118 AD2d 615, 617 [2d Dept 1986]). "A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge" (*WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]). A fiduciary relationship, however, "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Here, plaintiff has failed to demonstrate the existence of a fiduciary relationship between himself and any of the defendants. In particular, it does not appear that any of the defendants assumed any unique or distinct relationship with plaintiff, or that their

relationship with plaintiff was anything other than at arm's length (*see Iglesias v Dazi*, 253 AD2d 515, 516 [2d Dept 1998] [seller and purchaser of real property were not in a fiduciary or confidential relationship]).

Tortious Interference With Contract (Ninth Cause Of Action)

"[T]he elements of a cause of action to recover damages for tortious interference with contract . . . are the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*New York Merchants Protective Co., Inc. v Rodriguez*, 41 AD3d 565, 566 [2d Dept 2007]). Plaintiff's tortious interference claim, which is asserted solely against the Architect, fails to allege how the Architect caused Hadar to violate the purchase agreement with plaintiff.

3. Additional Relief

The remaining issues do not require extended discussion. That branch of the C2 defendants' request, joined in by the Architect, that the court preclude plaintiff from further motion practice without prior judicial permission is denied. As found by the court, some of plaintiff's allegations are meritorious. If defendants' position were taken to its logical conclusion, any plaintiff would be enjoined from further motion practice every time the court granted a portion of the defendant's motion to dismiss. That is not the intent or purpose of our public policy of open access to courts for all parties without fear of reprisal. In addition, plaintiff provided the court with a large number of well-organized exhibits which

permitted the court to better evaluate this case. One of these exhibits indicates that Hadar has been dissolved, which is a material factual statement that Hadar's counsel failed to disclose to the court.

Finally, the C2 defendants' request to strike plaintiff's demand for punitive damages is moot at this juncture because it appears from the proposed amended complaint that plaintiff is no longer seeking such damages. To the extent that plaintiff's unspecified demand in his proposed amended complaint for $3 million in damages includes lost profits from dental practice and lost rental income, the same may be stricken upon motion made after conclusion of discovery if plaintiff does not produce evidence that his lost profits and income were within the contemplation of the parties at the time the purchase agreement was made (*see Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 759 [2d Dept 2009]).

Summary

The court has carefully considered all of the parties' arguments. To the extent they are not dealt with above, they are either moot or without merit. Accordingly, it is

ORDERED that the branch of the motion of defendants Apple Builders Corp., Edward McLaughlin, Meryl Carrion (incorrectly sued herein as Merryl Carrion), Robert Maluenda, and Robert Maluenda Contractor Corporation for an order, pursuant to CPLR 3211 (a), is granted, and plaintiff's claims against each such defendant are dismissed; and it is further

ORDERED that the branch of the motion of defendants Hadar Management Corp., Hadar Management, Herzel Meiri (also known as Hertzel Meiri), and Mary Lawless for an

order, pursuant to CPLR 3211 (a), is granted to the extent that plaintiff's claims against each such defendant alleging common-law negligence, negligent misrepresentation, common-law fraud, conspiracy to commit fraud, unjust enrichment, emotional distress, and constructive fraud (the first, third, fourth, fifth, sixth, seventh, and eighth proposed causes of action, respectively) are dismissed, and is denied with respect to plaintiff's breach of contract claim against each such defendant (the second proposed cause of action), subject to the Hadar defendants' right to renew after completion of discovery; and it is further

ORDERED that the branch of the motion of defendant Schlomo Chia for an order, pursuant to CPLR 3211 (a) (7), is granted, and plaintiff's claims against Mr. Chia are dismissed; and it is further

ORDERED that the amended cross-motion of defendants C2 Plumbing Corporation, C2 Plumbing Co., and Steven Wasserman, Master Plumber, for an order, pursuant to CPLR 3211 (a), is granted to the extent that plaintiff's claims against each such defendant are dismissed; and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR 3025 (b), for leave to serve and file a proposed amended complaint is granted with respect to (1) defendants Hadar Management Corp., Hadar Management, Herzel Meiri (also known as Hertzel Meiri), and Mary Lawless as to the breach of contract claim against each such defendant (the second proposed cause of action), and (2) defendants Gerald J. Caliendo, R.A., A.I.A., Gerald J. Caliendo, R.A., A.I.A., Architect, P.C. (incorrectly sued herein as

Gerald J. Caliendo, R.A. and Gerald J. Caliendo, R.A., Architect, P.C.) as to the negligent representation claim and common-law fraud against each such defendant (the third and fourth proposed causes of action, respectively); and it is further

ORDERED that plaintiff is directed to serve a verified amended complaint, in accordance with this decision and order, within thirty (30) days after service of a copy of this decision and order with notice of entry, and the remaining defendants are directed to serve their answers to such amended complaint within twenty (20) days thereafter; and it is further

ORDERED that plaintiff's motion for an order equitably estopping defendants from asserting the doctrine of privity as a ground for dismissal of the complaint is denied; and it is further

ORDERED that all cross-claims by and between the dismissed defendants and the remaining defendants shall remain in effect; and it is further

ORDERED that all counterclaims against plaintiff shall remain in effect, and plaintiff shall answer such counterclaims within twenty (20) days after service of a copy of this decision and order with notice of entry; and it is further

ORDERED that nothing contained herein shall affect this court's decision and order, dated April 9, 2008, and entered on April 16, 2008 in *Sands v Gerald J. Caliendo, R.A. and Gerald J. Caliendo, Architect, P.C.*, index No. 11497/07 (Sup Ct, Kings County); and it is further

ORDERED that the caption of this case is amended to read as follows:

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FREDERICK SANDS,

Plaintiff,

- against -

Index No. 11496/07

GERALD J. CALIENDO, R.A., A.I.A.,
GERALD J. CALIENDO, ARCHITECT, P.C., A.I.A.,
HERZEL MEIRI, ALSO KNOWN AS HERTZEL MEIRI,
HADAR MANAGEMENT CORP., HADAR MANAGEMENT,
AND MARY LAWLESS,

Defendants.

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The parties are reminded to appear in the Central Compliance Part on April 6, 2010.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT