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

PRESENT: MADDEN Justice PART 11

KLEINBERG, PAUL, ET AL.

- V -

519 WEST 19TH STREET, LLC, ET AL.

INDEX NO. 109371/09

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

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

FILED

MAY 21 2010

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: May 18, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PAUL KLEINBERG, CAROL KLEINBERG, MASSY GHAUSI and DENISE DORN,

Plaintiffs,

INDEX NO. 109371/09

-against-

516 WEST 19TH STREET, LLC, THE J. CONSTRUCTION COMPANY LLC, SLCE ARCHITECTS, LLC, and THE BOARD OF MANAGERS OF THE 520 WEST 19TH STREET CONDOMINIUM,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages allegedly resulting from defects in the construction and design of a condominium building, defendant J Construction Company LLC ("J Construction") moves for an order pursuant to CPLR 3211(a)(7) dismissing the fifth, eighth, tenth, eleventh, twelfth and thirteenth causes of action asserted against it in the Amended Complaint. Plaintiffs oppose the motion in part, and cross-move for an order pursuant to CPLR 3025(b) granting leave to serve a second amended complaint. None of the other parties has responded to the motion or cross-motion.

Defendant 516 West 19th LLC (hereinafter the "Sponsor") was the Sponsor of a project involving the construction of a luxury condominium apartment building located at 516 West 19th Street in Manhattan. Defendant J Construction Company LLC ("J Construction") served as the construction manager for the project, and defendant SLCE Architects, LLP ("SLCE Architects") served as the architect. On or about August 28, 2008, plaintiffs Massy Ghausi and Denise Dorn purchased Penthouse A in the building for $8.3 million, and on or about December 15, 2008,

plaintiffs Paul and Carol Kleinberg purchased Penthouse B for $9 million. On July 1, 2009, plaintiffs commenced the instant action seeking $1 million in damages. Plaintiffs allege that defendants refused "to take the appropriate and necessary steps to remedy a multitude of construction defects, building and electrical code violations and resulting property damage arising out of the design and construction of the Condominium." Specifically, plaintiffs allege that after they closed on their penthouse apartments, they discovered substantial and ongoing water leaks in each apartment, caused *inter alia* by the defective construction of the roof, the roof drain and the roof pitch pockets, the inadequate sealing of the trash chute, and the defective construction of the patio wall and glass.

With respect to the movant, defendant J Construction, the Amended Complaint asserts six causes of action for negligence (fifth and eleventh causes of action), breach of express warranty (eighth and twelfth causes of action), and breach of implied warranty (tenth and thirteenth causes of action). Defendant J Construction is now moving to dismiss those claims for failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendant J Construction argues that plaintiffs cannot maintain claims for negligence or breach of express and implied warranties, since J Construction owed no duty to plaintiffs, and plaintiffs do not have a contractual relationship with J Construction and are not in privity with J Construction.

Conceding that the Amended Complaint "inadvertently duplicated each of the causes of action against J Construction," plaintiffs consent to the dismissal of the eleventh, twelfth and thirteenth causes of action as duplicative, but oppose dismissal of the fifth, eighth and tenth causes of action. Plaintiffs also cross-move for leave to amend the complaint and submit a Proposed Second Amended Complaint which eliminates the allegations and causes of action

against the Sponsor.[1] In the Proposed Second Amended Complaint, the negligence claims against J Construction and SLCE Architects (fourth and fifth causes of action), and the breach of express and implied warranties claims against J Construction (sixth and seventh causes of action), are identical to the claims in the Amended Complaint. The Second Amended Complaint also adds new claims for breach of contract against J Construction and SLCE Architects, alleging that plaintiffs are intended third-party beneficiaries of the Sponsor's contracts with those entities (first, second and third causes of action).

Plaintiffs' negligence claim against J Construction is dismissed as without merit. The Amended Complaint and Second Amended Complaint allege that "[a]s a contractor performing work at the Condominium" and at plaintiffs' penthouse units, "J Construction owed a duty to the Condominium and to Plaintiffs to perform such work in a manner consistent with the level of learning, skill and experience ordinarily exercised by similar construction contractors, and to use reasonable and ordinary care and diligence to perform such work." The complaint further alleges that "J Construction breached it duty to the Condominium and plaintiffs, by among other things, performing its work on the Condominium and the Units defectively and contrary to sound construction practices, and failing to execute the work in an efficient, workmanlike, professional and competent manner." Plaintiffs do not assert a claim for negligent misrepresentation.

The Court of Appeals recognizes three exceptions to the general rule that a breach of contract by itself does not give right to tort liability in favor of a third-party. See Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 (2002). The three situations where a party who

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[1]Plaintiffs state that they have settled their claims against the Sponsor, and are now proceeding only against J Construction and SLCE.

has entered into a contract to render services, may be said to have assumed a duty of care, and thus be liable in tort to third persons, are as follows: 1) the contracting party, in failing to exercise reasonable care in the performance of its duties, "launches a force or instrument of harm"; 2) plaintiffs detrimentally rely on the contracting party's continued performance of its duties; and 3) the contracting party entirely displaces the other party's duty to maintain the premises. Id at 140 (quoting and citing H.R. Moch Co. v. Rensselaer Water Co., 247 NY 160, 168 [1928], and citing Palka v. Servicemanter Management Services Corp., 83 NY2d 579 [1994], Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 NY2d 220 [1990]).

Here, plaintiffs neither plead nor demonstrate a sufficient factual or legal basis to support the application of any of those exceptions so as find that J Construction owed a duty of care to plaintiffs and can be held liable in tort. The cases cited by plaintiffs are distinguishable on the facts, as they do not involve allegations of negligence in the performance of construction contract. For example, in Cossu v. JWP, Inc., 173 Misc2d 277 (Sup Ct, NY Co 1997), defendant had an ongoing maintenance contract with the City of New York for the repair and maintenance of street lights, and in Ossining Union Free School District v. Anderson LaRocca Anderson, 73 NY2d 417 (1989), plaintiff asserted a claim for negligent misrepresentations against a consulting engineer hired by the its architect. Thus, since plaintiffs cannot maintain a negligence claim against J Construction, the fifth cause of action in the Amended Complaint is dismissed.

Plaintiffs' claims for breach of express and implied warranties against J Construction shall stand. Pursuant to Article 2.6.3 of the Construction Management Agreement ("CM Agreement") between J Construction and the Sponsor, J Construction "agree[d] to require each Subcontractor to perform and complete its respective portion of the Work in accordance with the

Trade Subcontract and Contract Documents pertaining to said Subcontractor, and Construction Manger [J Construction] *shall be liable and responsible for the acts or omissions of all Subcontractors as if such work was performed by the Construction Manager's own forces"* (emphasis added). The "Trade Subcontract Form" is annexed as Exhibit E to the CM Agreement, and is incorporated by reference into the CM Agreement, which provides in paragraph 2.5.10(iii) that "Construction Manager [J Construction] shall require that each Subcontractor execute the form of Trade Subcontract (subject to Owner's proper approval) annexed (or to be annexed) hereto as Exhibit E."

Section 16.1 of the Trade Subcontract is entitled "Warranties." Section 16.1(a) states that the "Contractor [subcontractor] warrants to the Construction Manager [J Construction], Owner [Sponsor], Lender and the Architect that all materials and equipment furnished under this Contract will be new unless otherwise specified and that all Work will be of first-class quality, free from faults and defects and in conformance with the Contract Documents." Section 16.1(b) states in relevant part as follows:

> Contractor [subcontractor] hereby agrees that all warranties and guaranties in this Contract, or in respect of the Work and materials covered hereby, made by Contractor shall inure to the benefit of Construction Manager [J Construction], Owner [Sponsor] and to assignees and/or designees of Owner, including without limitation, to the purchaser(s) of all or any portion of the Project, and in the event all or any portion of the Project is converted to condominium ownership, to the condominium(s), the board(s) of managers of the condominium(s) and the unit owners of the condominium units therein and the condominium(s), the board(s) of managers of the condominium(s) and the *unit owners of the condominium units shall be third-party beneficiaries of such warranties and guarantees and may enforce directly against Contractor all such warranties and guarantees* [emphasis added] . . .

Thus, pursuant to Section 16.1(b) of the Trade Subcontract between J Construction and all

subcontractors, the unit owners were third-party beneficiaries of the "subcontractors' warranties and guarantees."

Reading Article 2.6.3 of the CM Agreement together with Section 16.1(b) of the Trade Subcontract, it is clear that plaintiffs as unit owners are third-party beneficiaries of the subcontractors' warranties, and since J Construction stepped into the subcontractors' shoes, plaintiffs are entitled to maintain an action directly against J Construction for breach of the subcontractors' warranties.

In the alternative, plaintiffs argue that the Sponsor assigned to them "the right to proceed under all assignable warranties," based the following language in the Offering Plan:

> At the First Closing, Sponsor will deliver, assign, or otherwise grant to the Condominium Board, on behalf of all Unit Owners, the right to proceed under any assignable warranties and other undertakings received by Sponsor from contractors, suppliers, or others in connection with the construction and equipping of the Building, except that warranties and undertakings received by Sponsor which relate to appliances, equipment or fixtures located in any Unit shall be assigned to the Purchaser on the Closing Date, including the warranties and undertakings received by the Sponsor which relate to appliances, equipment, or fixtures located in the Units and the Common Elements.

Plaintiffs' reliance on the foregoing provision is misplaced, as the only warranties assigned to plaintiffs as "purchasers" are warranties relating to "appliances, equipment or fixtures located in the Units and the Common Elements." Any other warranties including those relating to the construction of the building, are assigned to "to the Condominium Board, on behalf of all Unit Owners," as opposed to the unit owners personally and individually.

The court therefore concludes that based on the CM Agreement and the Trade Subcontract, plaintiffs have properly asserted claims against J Construction for breach of the subcontractors' express and implied warranties, and the motion to dismiss is denied as to the

eighth and tenth causes of action in the Amended Complaint.

Turning to the cross-motion to amend the complaint to add new claims for breach of contract against J Construction and SLCE, plaintiffs allege that they are intended third-party beneficiaries of the Sponsor's contracts with those entities. For the purposes of the cross-motion, plaintiffs rely on the copy of the CM Agreement annexed to J Construction's motion papers. Plaintiffs, however, assert that they have not had an opportunity to obtain a copy of the Sponsor's agreement with SLCE Architects, since discovery has not yet commenced.

As to the proposed breach of contract against J Construction, the CM Agreement between the Sponsor and J Construction provides in Article 22.5 that "[t]his Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of Owner [Sponsor]." Under the circumstances presented in this action, plaintiffs as purchasers of condominium units are "successors" to the Sponsor and, and pursuant to Article 22.5, as successors to the sponsor, plaintiffs are intended third-party beneficiaries of the Sponsor's CM Agreement with J Construction. See Board of Managers of the Alfred Condominium v. Carol Management, Inc., 214 AD2d 380, 382 (1st Dept 1995).

J Construction disagrees with the foregoing conclusion, and points to the language in Article 22.1 of the CM Agreement which states that "[t]his Agreement shall be *assignable* by Owner [Sponsor] without the consent of Construction Manager, provided such *Assignee* shall assume Owner [sic] payment obligations under this Agreement" (emphasis added). Based on this provision, J Construction argues that plaintiffs cannot be "assignees" of the CM Agreement, since they could not have assumed the Sponsor's obligations to pay millions of dollars. This argument is without merit, as Article 22.1 is limited by its terms to "assignees," while Article

22.5 covers both "assignees" and "successors," and plaintiffs as unit purchasers are "successors" to the Sponsor.

J Construction also argues that CM Agreement prohibits claims on behalf of third-party beneficiaries, and cites the language in Article 22.12, stating that "[t]he Owner [Sponsor] and Construction Manager [J Construction] do not intend to create any interest in favor of any third party by this Contract." Despite this general disclaimer of any obligations to third parties, Article 22.5 of the CM Agreement is a more specific provision which expressly states a clear intent to benefit certain third parties, such as plaintiffs, who are "successors and assigns of Owner." See Board of Managers of the Alfred Condominium v. Carol Management, Inc., supra.

Finally, the court notes that J Construction objects that plaintiffs' cross-motion to amend should be denied because they have not submitted an affidavit of merit. As determined above, based on the documentary evidence, plaintiffs have adequately established the merits of their proposed breach of contract claims against J Construction, and shall be permitted to amend their complaint to add the first and second causes of action in the Proposed Second Amended Complaint. Furthermore, in the absence of opposition from defendant SLCE Architects, plaintiffs shall also be permitted to amend their complaint to add the third cause of action in Proposed Second Amended Complaint for breach of contract against SLCE Architects.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant The J Construction Company LLC is granted only to the extent of dismissing the negligence claim asserted against it (fifth cause of action in the Amended Complaint), and the claims plaintiffs agree are duplicative (eleventh, twelfth and thirteenth causes of action in the Amended Complaint), and the motion to dismiss is

denied in all other respects; and it is further

ORDERED that plaintiffs' cross-motion to amend the complaint is granted and within 20 days of the date of this decision and order, plaintiffs shall prepare, serve and file a Second Amended Complaint that conforms with the court's decision herein; and it is further

ORDERED that within 20 days of receipt of the Second Amended Complaint, defendants shall serve and file answers to the Second Amended Complaint; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for June 24, 2010 at 3:30 p.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: May 17, 2010

ENTER:

J.S.C.