

**Board of Mgrs. of 374 Manhattan Ave. Condominium
v Harlem Infil LLC**

2010 NY Slip Op 31518(U)

June 14, 2010

Supreme Court, New York County

Docket Number: 105826/08

Judge: Emily Jane Goodman

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6/17/10

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

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Justice

Index Number : 105826/2008
374 MANHATTAN AVENUE CONDOMINIUM
 VS.
HARLEM INFIL LLC
 SEQUENCE NUMBER : # 001
 DISMISS

INDEX NO. 105826-08
 MOTION DATE _____
 MOTION SEQ. NO. #001
 MOTION CAL. NO. _____

_____ 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 is denied

as ordered

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

FILED
 JUN 18 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 6/14/10

[Signature]
 J.S.C.
 EMILY JANE GOODMAN
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
BOARD OF MANAGERS OF 374 MANHATTAN
AVENUE CONDOMINIUM,

Plaintiff,

Index No. 105826/08

-against-

DECISION AND ORDER

HARLEM INFIL LLC, THE COMMUNITY PRESERVATION
CORPORATION, HARLEM INFIL CORP., CPCR
OPPORTUNITY FUND, LLC, CPCR OPPORTUNITY FUND
II, LLC, CPC RESOURCES, INC., PHILLIP MORROW,
DAVID HIRSCH, JAMES FILLAS, URBAN
ARCHITECTURAL INITIATIVES, RA, P.C.,
ELLIOTT HARDIE, P.E., AMERISPEC, INC.,
AMERSPEC HOME INSPECTION SERVICE,
VERTEX RESTORATION CORP., and SOUTH BRONX
OVERALL ECONOMIC DEVELOPMENT CORPORATION,

Motion Sequence
Numbers 001-005

Defendants.

-----x
EMILY JANE GOODMAN, J.S.C.:

Plaintiff, the Board of Managers of 374 Manhattan Avenue
Condominium, commenced this action on behalf of the unit owners
of the condominium building located at 316 West 116th Street, New
York City (the Building). In the action, plaintiff seeks to
recover damages against the defendants for the alleged defects in
the design and construction of the Building. The complaint names
defendant Harlem Infil LLC (the Sponsor) as the sponsor and
selling agent in connection with the rehabilitation of the
Building and its conversion to condominium ownership. The
defendants affiliated with the Sponsor are The Community
Preservation Corporation (CPC), Harlem Infil Corp. (HIC), CPCR

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NEW YORK
COUNTY CLERK'S OFFICE

[* 3]

Opportunity Fund LLC (Fund I), CPCR Opportunity Fund II, LLC (Fund II), CPC Resources, Inc. (CPRC), Phillip Morrow (Morrow), David Hirsch (Hirsch) and James Fillas (Fillas). Morrow, Hirsch and Fillas are principal members of HIC and, they, together with the Sponsor, CPC, HIC, Fund I, Fund II and CPRC, are referred to herein collectively as the "Sponsor Defendants."

The complaint alleges that Hirsch is also a principal of defendant Urban Architectural Initiatives, RA, P.C. (UAI), which was hired by the Sponsor as the architect in connection with the design and rehabilitation of the Building; Hirsch and UAI are referred to herein collectively as the "Architect Defendants." The complaint also alleges that defendant Elliot Hardie, P.E. (Hardie), along with defendants Amerispec, Inc. and Amerispec Home Inspection Service, were hired by the Sponsor to provide engineering services; these entities are referred to in the complaint collectively as the "Engineer Defendants." Defendant Vertex Restoration Corp. (Vertex) is a firm hired by the Sponsor as the general contractor, and the complaint alleges that Fillas is a principal of Vertex and the Sponsor. The complaint further alleges that defendant South Bronx Overall Economic Development Corporation (SOBRO-EDC), at all relevant times, shared management personnel (such as Morrow) with the Sponsor and HIC.

In sum, the complaint asserts that this action stemmed from certain conditions at the Building (which was represented by the

[* 4]

Sponsor as a luxury condominium building) "that are materially different from those represented" in the condominium's Offering Plan, and that "the Building is rife with construction defects that are the result of the negligence of the project sponsor's design professionals, and their failure to meet their contractual obligations to the purchasers of the units in the Condominium." Complaint, ¶¶ 1-2. The complaint asserts twenty-two causes of action against the defendants, including breach of contract, negligence, fraud, unjust enrichment, professional malpractice, violation of consumer protection laws and fraudulent conveyance.

The defendants move to dismiss those causes of action that are specifically asserted against them, pursuant to CPLR 3211 or CPLR 3212, as the case may be. Defendant Hardie also moves to dismiss the cross claims asserted against him by defendant Vertex. The various motions (sequence numbers 001 through 005) are consolidated herein for disposition.

Background

According to the complaint, the Building developed by the Sponsor involved the rehabilitation of two vacant buildings (one located on 374 Manhattan Avenue and the other on 316 West 116th Street) into a single combined structure, with a private garden in between. Complaint, ¶ 23. The rehabilitation was performed, from 2003 to 2005, in conjunction with the conversion of the Building to condominium ownership. *Id.*, ¶¶ 24, 25. The six-

storied Building has 14 apartment units, which were offered for sale by the Sponsor pursuant to the Offering Plan filed with the New York State Department of Law in October 2005. *Id.*, ¶ 25. The sale commenced in October 2005 and continued through the completion of the Building's renovation and thereafter, with the first closing on the sale of an apartment unit occurring in or about March 2006. *Id.*, ¶ 27. The apartments were priced "to reflect their purported luxury status," and by selling at such prices, "Sponsor represented that the Building and the [apartment units] would be of premier caliber and would be constructed using the highest quality materials and workmanship." *Id.*, ¶ 28.

The complaint alleges that the Sponsor Defendants "committed themselves to delivering the Building (including the Units and Common Areas) in the conditions and with the features set forth in the Offering Plan." *Id.*, ¶ 29. It also alleges that the Offering Plan provided that the Sponsor Defendants, "and all those engaged by the Sponsor Defendants in connection with the condominium conversion of the Building," would comply or have complied with all applicable laws, rules, regulations and other government requirements, including the Building Code of the City of New York. *Id.*, ¶¶ 30-32. Moreover, the complaint alleges that many representations and promises were made in the Offering Plan as to the various features and conditions of the Building and the apartment units. *Id.*, ¶¶ 35-57. Furthermore, the

complaint asserts that the actual features and conditions of the Building and the apartment units do not correspond to those representations and promises set forth in the Offering Plan. *Id.*, ¶¶ 58-149.

By complaint dated October 10, 2008, plaintiff commenced the instant action, on behalf of the Building's unit-owners, seeking to recover damages against the named defendants, including the Sponsor Defendants, SOBRO-EDC, the Architect Defendants, the Engineer Defendants and Vertex. In opposition to the various causes of action asserted in the complaint, defendants move to dismiss those causes of action that are specific to them (motion sequence numbers 001-005), pursuant to CPLR 3211 or CPLR 3212, as the case may be. The defendants' five motions are consolidated herein for disposition, as fully set forth below.

Sponsor Defendants' Motion to Dismiss (Motion Sequence No. 001)

The complaint asserts the following causes of action against the Sponsor Defendants:¹ first (breach of contract), second (unjust enrichment), third (negligence), fourth (fraudulent misrepresentation), fifth (negligent misrepresentation), twelfth (violation of General Business Law §§ 349 and 350), and twenty-second (fraudulent conveyance). Notably, the first and second

¹ In the complaint, SOBRO-EDC is included as one of the Sponsor Defendants, which has retained its own counsel to represent it in this action. Thus, SOBRO-EDC's motion seeking dismissal of the claims against it will be addressed separately.

causes of action are asserted against the Sponsor only, and the Sponsor Defendants do not currently seek dismissal of the breach of contract cause of action. As to the remaining causes of action, the Sponsor Defendants seek dismissal based on various grounds, as discussed below.

1. Dismissal Based On § 609 Of Limited Liability Company Law

Section 609 (a) of the New York Limited Liability Company Law provides, in relevant part, that "[n]either a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company ... is liable for any debts, obligations or liabilities of the limited liability company ... solely by reason of being such member, manager or agent ... in the conduct of the business of the limited liability company."

The record in this case reflects that the Sponsor, CPR and Fund I are each a New York limited liability company, and that the Sponsor has two members: Fund I and HIC. In turn, CPR is the managing member of Fund I; and Morrow, Hirsch and Fillas are each a member of HIC. In this regard, the Sponsor Defendants argue that, based on the above statute, the claims against the foregoing entities (HIC, Fund I, CPR, Morrow, Hirsch and Fillas) must be dismissed because they should not be held liable for the claims against their respective limited liability company, solely by reason of being a member or manager of the company.

Sponsor Defendants' reliance on the statute is misplaced. Specifically, the tort claims asserted against the foregoing entities are not based solely by reason that they are a member or manager of a limited liability company. In fact, the complaint alleges that these entities "worked individually and in concert" to make, devise and publish the Offering Plan and the purported misrepresentations contained therein, in promoting the sales of the condominium apartments to the unit-owners. Complaint, ¶ 15. Thus, the statute does not bar plaintiff's tort claims. Also, Sponsor Defendants' reliance on *Retropolis, Inc. v 14th Street Development LLC* (17 AD3d 209 [1st Dept 2005]), for the proposition that a member of a limited liability company cannot be held liable for the company's obligations by virtue of its status as a member, is equally flawed. Indeed, the *Retropolis* court noted that, if the complaint pleads tort (as opposed to contractual) claims against a member who allegedly participated in the tort, such member "can be held personally liable" even if the participation is for the company's benefit. *Id.* at 211.

The Sponsor Defendants also argue that, because CPC and Fund II are not members of the Sponsor (directly or indirectly) and were not involved in the construction of the Building, there is no basis to name them as defendants in this action. In response, plaintiff points out that, pursuant to the Offering Plan, CPC is the corporate parent of CPCR, which in turn is the managing

partner of the Sponsor, and the complaint alleges that Fund II is a managing member of the Sponsor, which allegation is undisputed by the Sponsor Defendants. Plaintiff also contends that, besides the inter-relatedness of these entities due to their corporate structures, various documents (such as a form of the purchase agreement and a form of the inspection statement, copies of which are annexed as exhibits to the Schoenberg Affirmation) reflect that CPC, Fund II and the Sponsor all shared the same office and mailing address. Based on these facts and documentary evidence, plaintiff contends that discovery will show whether CPC and Fund II are, in fact, separate entities that had no involvement in the development and construction of the Building.

It is settled law that, in the context of a pre-answer motion to dismiss pursuant to CPLR 3211, the court must accept as true the allegations in the complaint. Indeed, the "court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *P.T. Bank Central Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003). Thus, in considering a motion to dismiss, the court will "accord plaintiff the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 (1994). On the other hand, in order to prevail on a motion to dismiss based on

documentary evidence, the documents relied upon by the movant must resolve all factual issues as a matter of law. *Weiss v Cuddy & Feder*, 200 AD2d 665, 667 (2nd Dept 1994).

In the instant case, the "documentary evidence" submitted by Sponsor Defendants consisted of a small excerpt of the Offering Plan, under the caption "Identity of Parties," a copy of which is annexed as Exhibit D to the Arzt Affidavit. This document is insufficient, as a matter of law, to resolve all factual issues regarding the role (if any) that CPC and Fund II played in the development, construction and sale of the condominium apartments to the unit owners. Hence, dismissal of claims based solely on section 609 of the Limited Liability Company Law is unwarranted.

2. Dismissal Based On The Martin Act

The Martin Act empowers the Attorney General to investigate and enjoin fraudulent practices in the marketing of securities in or from New York. General Business Law § 352. Section 352 (e) of the Act applies to the offering of securities consisting of participation interests in real estate, including condominium and cooperative units. The Act authorizes the Attorney General to enforce its provisions and to implement rules and regulations in respect of its disclosure requirements. 13 NYCRR Part 20.

The Sponsor Defendants argue that the fourth (fraudulent misrepresentation), fifth (negligent misrepresentation) and twelfth (violation of consumer protection laws) causes of action

allege violation of the Martin Act, and that the prosecution of these claims should rest exclusively with the Attorney General. In other words, they contend that the plaintiff cannot maintain private causes of action under the Act. They cite to *Thompson v Parkchester Apartments Co.* (271 AD2d 311 [1st Dept 2000]), among other cases, as support for such contention. See also *Whitehall Tenants Corp. v Estate of Olnick*, 213 AD2d 200, 200 (1st Dept 1995) ("private plaintiffs will not be permitted through artful pleading to press any claim based on the sort of wrong given over to the Attorney General under the Martin Act").

Fraud And Fraudulent Misrepresentation

In response, plaintiff relies on *Kramer v W10Z/515 Real Estate Ltd. Partnership* (44 AD3d 457 [1st Dept 2007], revd 12 NY3d 236 [2009]) for a contrary position. In *Kramer*, the appellate court noted that, because the Martin Act was enacted to protect the public from fraudulent practices, to construe the Act as having "abolished the right of purchasers of condominium and cooperative interests ... to sue sellers for common-law fraud is to give the Martin Act a construction that is antithetical to its remedial purpose." *Id.* at 460. The *Kramer* court relied on the Court of Appeals' decision in *CPC Intl. v McKesson Corp.* (70 NY2d 268 [1987]), which held that even though there is no private right of action for violation of the Martin Act, particularly as to section 352-c involving securities fraud, a plaintiff was

permitted to proceed with common-law fraud claims against the defendants who allegedly committed fraudulent practices. Based on the research performed to date, *Kramer* is the latest ruling by the Appellate Division, First Department, which determined that the Martin Act does not preclude a private cause of action based on common-law fraud, even though the Attorney General is empowered to prosecute all civil and criminal claims (including fraud claims, which do not require the Attorney General to allege or prove scienter or intentional fraud) under the Act.²

However, *Kramer* was reversed by the Court of Appeals, in *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236 [2009]), based on the specific facts and the related ruling in that case.³ In *Kerusa*, the plaintiff buyer (who was also a plaintiff in *Kramer*) alleged that the sponsor defendants failed to disclose various construction and design defects in the offering plan amendments, and represented therein that there were no material changes of fact affecting the condominium property or the offering. The Court of Appeals found that plaintiff's fraud claim relied on purported *omissions* from the disclosures required

² It is noteworthy that, in *Kramer*, the Appellate Division pointed out that there were conflicting rulings on this issue even within the First Department in the past. *Id.* at 458 ("To be sure, some support for the contrary conclusion - that such claims are barred by the Martin Act - appears in the case law").

³ In this case, plaintiff's complaint was filed after the *Kramer*, but before the *Kerusa*, decision.

by the Martin Act and the Attorney General's implementing regulations. In such regard, the Court noted that "the Appellate Division seems to have been of the view that a private party may bring an action for fraud grounded solely in alleged omissions from Martin Act disclosures so long as the elements of common-law fraud ... are pleaded with particularity [emphasis added]." *Id.* at 242. The Court further noted that "to accept Kerusa's pleading as valid would invite a backdoor private cause of action to enforce the Martin Act in contradiction to our holding in *CPC Intl.* that no private right to enforce that statute exists." *Id.* at 245.

Accordingly, the Court of Appeals reversed the Appellate Division's ruling, which had granted plaintiff's motion to amend the complaint to add a common-law fraud claim. In doing so, however, the Court explained that the "Martin Act dramatically altered the common-law rule" because under common law, "New York adhere[d] to the doctrine of caveat emptor and impose[d] no duty on the seller or the seller's agent to disclose any information concerning the premises...unless there was some conduct... constitut[ing] active concealment" i.e., "that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill...responsibilities fixed by the doctrine of caveat emptor" *Id.* at 244-245 (internal quotation marks and citations omitted). However, "in order to avoid transforming every

potential latent construction defect case into a claim for common-law fraud on account of alleged omissions in Martin Act disclosures" the complaint must support active concealment unrelated to alleged omissions from Martin Act disclosures (for example, that drywall was painted over, or taped up, to cover or prevent discovery of water damages, or, that wall or bricks were put up to hide leaking pipes or holes in foundation. *Id.* at 246. The Court of Appeals further noted that because *Kerusa* turned on the nondisclosure of information required by the Martin Act, as plaintiff alleged "no specific misrepresentation" other cases, which turned on the disclosure of deliberately false information, were distinguishable. *Id.* at 240, 246. Thus, the Court of Appeals did not foreclose a private party from bringing a common-law fraud claim for an alleged violation of the Martin Act based on an affirmative misrepresentation (as opposed to mere non-disclosure), as long as the requisite elements are fully pled.⁴ Nor did the Court foreclose a private party from bringing a claim based on fraudulent concealment, as long as the requisite elements are fully pled.

Here, the complaint pleads all the requisite elements of a

⁴The Court of Appeals indicated "we need not and do not decide whether the alleged misrepresentation of an item of information that the Martin Act or the Attorney General's implementing regulations require to be disclosed would support a cause of action for fraud, so long as the elements of common-law fraud are pleaded." *Id.* at 247, n 5.

fraud claim: fraudulent or affirmative misrepresentations of material facts; the manner in which they were false and allegedly known by the defendants to be false; reasonable reliance by the unit owners of the misrepresentations, and resulting damages. The complaint also sets forth examples in support of the alleged fraud. Complaint, ¶¶ 165-180. Hence, plaintiff asserts that the fraudulent misrepresentation claim is not preempted by the Martin Act. Plaintiff's Opposition Brief, at 13.

In reply, Sponsor Defendants argue that footnote 5 in *Kerusa* "otherwise left in place long standing First Department precedent providing that fraud claims predicated upon alleged material representations in a condominium offering plan are, likewise, preempted by the Martin Act." Defendants' Reply Brief, at 3. In support of this proposition, defendants cite, among other cases, *Whitehall Tenants* (213 AD2d at 201) ("plaintiff is endeavoring to vindicate its shareholders for information withheld or misrepresented by the sponsor, which is exactly what the Martin Act commits exclusively to the Attorney-General"); *167 Housing Corp. v 167 Partnership*, 252 AD2d 397, 398 (1st Dept 1998) ("plaintiff cooperative corporation lacked standing to assert a common-law fraud claim against defendant sponsors for information they allegedly withheld or misrepresented since such authority lies exclusively with the Attorney General").

Sponsor Defendants' argument is unpersuasive. As discussed

above, the First Department in *Kramer* pointed out the conflicting past rulings within the Department as to whether common-law fraud claims brought by private parties, whether based on information withheld or misrepresented, would be preempted by the Martin Act. Also, the Court of Appeals in *Kerusa* did not categorically rule that all fraud claims cannot be brought by a private party, or that the Attorney General has exclusive authority to prosecute such claims. Indeed, the Court of Appeals noted, in *511 West 232nd Owners Corp. v Jennifer Realty Co.* (98 NY2d 144 [2002]), that even the Attorney General had argued that it "does not have exclusive jurisdiction to prosecute Martin Act violations and that the Appellate Division erred in holding that plaintiffs had no standing to prosecute their fraud cause of action." 98 NY2d at 151, n 3. Moreover, the federal courts, in the context of determining the scope of Martin Act's preemption, have observed:

New York courts have offered a persuasive justification for allowing common law fraud claims to proceed while dismissing negligent representation and breach of fiduciary duty claims: "the latter two causes of action, like the Martin Act itself, do not require proof of deceitful intent; common law fraud, however, does ... courts concerned with preserving the Attorney General's exclusive domain therefore preclude claims which essentially mimic the Martin Act, but permit common law fraud claims, which require an additional element [citation omitted]."

Stephenson v Citco Group Limited, __ F Supp 2d __, 2010 WL 1244007 *11 (SD NY April 1, 2010) (collecting and analyzing New York and federal cases, including *Kerusa*); see also *Aris Multi-*

Strategy Offshore Fund v Devaney, 26 Misc 3d 1221(A), 2009 NY Slip Op 52738(U) * 11(U) (Sup Ct, NY County 2009) (same).

Post-*Kerusa*, the First Department has not had an opportunity to revisit this issue. The Second Department, however, in *Board of Managers of Marke Gardens Condominium v 240/242 Franklin Avenue, LLC* (71 AD3d 935 [2nd Dept 2010]), ruled that fraud claims by private parties were not precluded by the Martin Act. The appellate court noted that the fraud claim against the sponsor and its manager, who was also the president of the general contracting firm hired by the sponsor for the project, was based upon "the alleged fraud and material misrepresentations contained not only in the offering plan, but in brochures, advertisements, and purchase agreements, as well as oral statements made by the defendant." *Id.* at 936. The appellate court concluded that "the facts as alleged fit within a cognizable legal theory, and are not precluded by the Martin Act, as they do not 'rel[y] entirely on alleged omissions from filings required by the Martin Act ...'" *Id.* (quoting and construing *Kerusa* and citing other cases). Hence, the Second Department concluded that fraud claims are not precluded by the Martin Act.

In this case, the complaint alleges that the fraudulent misrepresentations were made "in the Offering Plan and/or in circulating the Offering Plan and/or in promoting sales of units

of the Condominium,"⁵ and Sponsor Defendants do not contend that the complaint does not adequately plead the requisite elements of a common-law action based on fraud, nor do they contend that the alleged misrepresentations constitute omissions.⁶ In light of the foregoing facts and applicable law, the motion to dismiss the fourth cause of action (fraudulent misrepresentation) is denied.

Negligence and Negligent Misrepresentation

The complaint alleges that the Sponsor Defendants "had a duty to the Unit Owners to use reasonable care to impart correct information to them because of a special relationship existing between the Sponsor Defendants and the Unit Owners." Complaint, ¶ 183. It also alleges that Sponsor Defendants made negligent misrepresentations that were "reasonably relied" on by the unit owners in purchasing their apartments, and the misrepresentations have injured the unit owners. *Id.*, ¶¶ 186-187.

⁵ Because the Sponsor was also the selling agent, it is not inconceivable that it made oral and written representations in promoting the sale of the condominium apartment units.

⁶It is unnecessary to address each of the many conditions alleged by plaintiff as instances of fraud, where the parties have not done so themselves. The allegation that the Offering Plan represented that the exterior walls would be restored to good condition, but in fact, were restored deficiently, does not support a fraud claim. Optimistic or boastful statements about performance or quality - puffery - do not support an action for fraud. *Jacobs v Lewis*, 261 AD2d 127 (1st Dept 1999). However, the allegation that the Offering Plan represented that the apartments on the lower floors would have exhaust fans on the fireplace flues, but in fact, they do not, is a specific statement, capable of being shown to be true or false, and supports a fraud claim.

A negligent misrepresentation claim "requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information." *Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 489 (2nd Dept 2004) (citations omitted). "[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Id.*, quoting *Kimmell v Schaefer*, 89 NY2d 257, 263 (1996).

In this case, other than a contractual relationship with the Sponsor, plaintiff has failed to articulate the nature of the alleged "special relationship" (if at all) between the unit owners and the other Sponsor Defendants. Thus, the negligent misrepresentation claim fails. Moreover, as noted above, both federal and state courts have held that causes of action relating to securities fraud that do not include scienter as an essential element (such as negligent misrepresentation, negligence and breach of fiduciary duty) are typically preempted by the Martin Act. See *Stephenson*, 2010 WL 124407 (federal) and *Aris Multi-Strategy Offshore Fund*, 26 Misc 3d 1221(A), 2009 NY Slip Op 52738(U) (state), *supra*; see also *Rego Park Gardens Owners, Inc. v*

Rego Park Gardens Assocs., 191 AD2d 621 (2nd Dept 1993) (negligent misrepresentation claim preempted); *Horn v 440 E 57th Co.*, 151 AD2d 112 (1st Dept 1989) (same). Thus, the fifth cause of action (negligent misrepresentation), as well as the third cause of action (negligence) should be dismissed.

New York General Business Law §§ 349-350

The complaint alleges, without elaboration, that Sponsor Defendants "engaged in deceptive consumer practices and false advertising in connection with the Sponsor's conversion of the Building to condominium ownership and the sale of the units" in violation of New York General Business Law (GBL) §§ 349-350, and by reason of the alleged violation, the unit owners were injured. Complaint, ¶¶ 228-229 (twelfth cause of action).

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce which have a broad impact on consumers at large [internal quotation marks and citations omitted]." *Four Winds of Saratoga, Inc. v Blue Cross and Blue Shield of Central New York, Inc.*, 241 AD2d 906, 907 (3d Dept 1997); see also *Medical Society of State of New York v Oxford Health Plans, Inc.*, 15 AD3d 206, 207 (1st Dept 2005). Also, to properly plead a GBL § 350 violation, a plaintiff must allege that the defendant's advertisement or promotional material "(1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury." *Andre*

Strishak & Associates, P.C. v Hewlett Packard Co., 300 AD2d 608, 609 (2nd Dept 2002). In fact, it has been held that in order to claim the benefit of this statute, the complaint must "at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large." *New York University v Continental Ins. Co.*, 87 NY2d 308, 320 (1995).

In this case, because the complaint fails to allege facts supporting a threshold element of the statute - defendants' alleged practices had a broad impact on consumers at large - this cause of action should be dismissed. Further, it has been held by the Appellate Division, First Department, that, unlike common-law fraud claims, a private plaintiff does not have standing to raise GBL §§ 349 and 350 claims because only the Attorney General can prosecute such claims, where those claims involve omissions under the Martin Act. *511 West 232nd Owners Corp.*, 285 AD2d at 248. Here, plaintiff's unspecified deceptive acts and false advertising, which appear to be based on omissions under the Martin Act, is insufficient to support a GBL claim.

Fraudulent Conveyance

As the twenty-second cause of action, which is asserted against Sponsor, HIC and CPCR only (as opposed to all Sponsor Defendants), the complaint alleges, among other things and upon information and belief, that (1) Sponsor made distributions or

other property transfers to its members, HIC and CPCR, that left Sponsor with liabilities which exceeded the fair market value of its assets; (2) such distributions or transfers were made without fair consideration, which left Sponsor with an unreasonably small amount of capital to conduct its business or to meet its payment obligations; (3) such distributions or transfers were made with the actual intent to hinder, delay or defraud Sponsor's creditors, including plaintiff; and (4) as a result, the unit owners and the condominium were injured, and are entitled to set aside the distributions or transfers. Complaint, ¶¶ 284-293.

The Sponsor Defendants seek to dismiss the fraudulent conveyance claim, arguing that the complaint's allegations are conclusory and unsubstantiated, and that the claim should be stricken pursuant to CPLR 3016 (b) for lack of specificity. See *IDC (Queens) Corp. v Illuminating Experiences, Inc.*, 220 AD2d 337 (1st Dept 1995) (dismissing fraudulent conveyance claim for lack of particularity); accord *Wildman & Bernhardt Construction, Inc. v BPM Assocs., L.P.*, 273 AD2d 38, 39 (1st Dept 2000) (same).

More recently, the pleading requirement of CPLR 3016 (b) has been relaxed by the Court of Appeals. See *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486 (2008). In *Pludeman*, the Court noted that the purpose of the CPLR pleading requirement "is to inform a defendant with respect to the incidents complained of," but to strictly enforce such requirement would "prevent an

otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." *Id.* at 491 (internal citations and quotation marks omitted). The Court observed that where the facts are peculiarly within the knowledge of the party charged with the fraud, it would be an injustice to dismiss a case at an early stage if the pleading deficiency could be cured later, after discovery. *Id.* While cautioning that CPLR 3016 (b) requires a complaint to sufficiently detail the fraud, the Court explained that such requirement "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Id.*, at 492. Applying these principles, the Court affirmed the appellate decision which held that the complaint pleaded fraud with sufficient particularity. *See also Holme v Global Minerals and Metals Corp.*, 22 Misc 3d 1123(A), 2009 NY Slip Op 50252(U) (Sup Ct, NY County 2009) (following *Pludeman*, and adding that CPLR 3211 (d) allows for latitude in pleading requirements for facts unavailable to non-movant), *affd* 63 AD3d 417 (1st Dept 2009).

In this case, while the complaint alleges the required elements for a fraudulent conveyance claim, it does not recite facts to support the allegations. Plaintiff sought to remedy the deficiency by alleging, in its brief, the following: sponsors in real estate developments are typically single-purpose limited liability companies, which distribute or transfer their assets to

members or affiliates soon after completion of the development and sale of the apartment units, leaving the sponsor as a "hollow shell" with little or no assets by the time construction defects "rear their ugly head." Plaintiff's Opposition Brief, at 18-19. Such allegation, though lacking in supporting facts, permits a reasonable inference of the alleged conduct as to the real estate industry as a whole, but is insufficient to permit a reasonable inference as to the alleged conduct of the subject defendants (the Sponsor, HIC and CPCR). Thus, the fraudulent conveyance claim is dismissed, without prejudice to replead, and leave is granted to conduct discovery prior to any such repleading.

Unjust Enrichment

As noted above, the first (breach of contract) and the second (unjust enrichment) causes of action are asserted against the Sponsor only, and the Sponsor Defendants do not now seek dismissal of the breach of contract claim, which is based upon the Sponsor's alleged breach of the terms of the Offering Plan.

It is well-established that the existence of a valid and enforceable written contract governing a subject matter generally precludes the pursuit of quasi-contractual remedies (such as a claim asserting unjust enrichment) based upon the same subject matter. *Clark-Fitzpatrick, Inc. v Long Island Rail Road Company*, 70 NY2d 382, 388 (1987); see also *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 23 (2005) (Court dismissed quasi-contract claim

of unjust enrichment and held that existence of a valid contract governing the subject matter precluded recovery in quasi contract for events arising out of the same subject matter).

Plaintiff argues that it is permissible to plead alternative causes of action (i.e., a breach of contract claim and a quasi-contract claim such as unjust enrichment) where, as here, "the scope of the parties' relationship has not been established." Plaintiff's Opposition Brief, at 16-17. Plaintiff relies on *Goldman v Simon Prop. Group* (58 AD3d 208 [2nd Dept 2008]) for the proposition that pleading in quasi-contract, in the alternative, is permissible "where there is a bona fide dispute as to the existence of a contract or the application of a contract to the dispute in issue." 58 AD3d at 220.

However, it is undisputed that the Offering Plan is the contract which governs the parties' relationship in this case. Indeed, in *511 West 232nd Owners Corp., supra*, it was held that "[a]n offering plan is a contract between the sponsor and the unit purchasers." 285 AD2d at 247 (citation omitted). It also seems undisputed that the unjust enrichment claim is essentially based upon the same factual allegations as the breach of contract claim, namely: the conditions of the Building and the apartment units are different from those represented or promised in the Offering Plan. Hence, the unjust enrichment claim should be dismissed. *Katz v American Mayflower Life Ins. Co.*, 14 AD3d 195,

201 (1st Dept 2004), affd 5 NY3d 561 (2005) (holding that unjust enrichment claim cannot survive and must be dismissed pursuant to *Clark-Fitzpatrick*).

SOBRO-EDC'S Motion to Dismiss (Motion Sequence No. 002)

The complaint asserts the following causes of action against SOBRO-EDC: third (negligence), fourth (fraud), fifth (negligent misrepresentation), and twelfth (violation of General Business Law §§ 349-350). SOBRO-EDC moves to dismiss these causes of action pursuant to CPLR 3211 (a) (1) and (7) and 3016 (b).

Notably, SOBRO-EDC is not mentioned in the Offering Plan, nor is there any evidence which shows that SOBRO-EDC was involved in the renovation, construction and sale of the apartment units. However, SOBRO-EDC's President/CEO is Morrow, who is not only a principal of the Sponsor, but also a president of HIC and the President/CEO of South Bronx Local Development Corp. (SOBRO-LDC), a subsidiary of SOBRO-EDC. While SOBRO-EDC's purported mission is to improve the economic and social conditions in the South Bronx and nearby communities, SOBRO-LDC's mission appears more limited in that it provides property management services to certain residential buildings in target areas, including the Building. In fact, the record shows that SOBRO-LDC entered into a contract with the Sponsor to be its managing agent for a period of one year, starting after the first closing of the Building's

condominium units, a period that post-dated the conversion of the Building to condominium ownership pursuant to the Offering Plan.

In opposing SOBRO-EDC's motion to dismiss the claims against it, plaintiff stresses that it does not now seek to hold SOBRO-LDC liable (as SOBRO-LDC is not a named defendant), but to hold SOBRO-EDC liable as an alter ego of Morrow. In support of such allegation, plaintiff relies on the following: (1) a printout from SOBRO-EDC's own website, which shows, inter alia, that it builds new properties and rehabilitates existing buildings in vacant spaces in the South Bronx and Harlem, and the Building is located in Harlem; (2) a letter from a tax consultant regarding the Building's eligibility for real estate tax abatement that was incorporated into the Offering Plan, which was written to HIC (to the attention of Morrow) at SOBRO-EDC's corporate address; (3) a check from the Building's operating account that was payable to "Woodycrest," one of the residential buildings that is managed by "SOBRO"; (4) a check from SOBRO-EDC's account to pay for the Building's expenses, a check to Otis Elevator from Morrow's own personal account for repairs, and a SOBRO-EDC cash disbursement-invoice sheet regarding payment of the Building's real estate taxes; (5) a few memoranda written on SOBRO-EDC's letterhead that related to the Building; and (6) two checks from the Building's account payable to SOBRO-EDC, one of which was for management fees that should have been paid to SOBRO-LDC. Based on these

documents, copies of which were annexed as Exhibits 2-6 to the Schoenberg Affirmation in Opposition to SOBRO-EDC's Motion to Dismiss, plaintiff argues that there is "sufficient evidence that EDC was used by Morrow as an alter ego in connection with the Building," and that more documents could well be uncovered in discovery. Schoenberg Affirmation, ¶ 35. Thus, plaintiff argues that dismissal of the claims against SOBRO-EDC is unwarranted at the pre-discovery stage of this action. *Id.*, ¶¶ 36-37.

Generally speaking, in using the theories of "alter ego" or "piercing the corporate veil," a plaintiff needs to show: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 1412 (1993) (citations omitted). In other words, plaintiff "must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice ... such that a court in equity will intervene." *Id.* at 142.

In this case, although the web-printout states that SOBRO-EDC builds and rehabilitates buildings, it does not state that the Building was built or rehabilitated by SOBRO-EDC. Also, the various memoranda and checks (for payment of the Building's taxes, elevator repair bills and other maintenance charges)

apparently related to SOBRO-LDC's services under its management contract with the Sponsor, which had nothing to do with the crux of the complaint's allegation (i.e., the existing conditions at the Building are materially different from the representations in the Offering Plan). While it is arguable that SOBRO-EDC, as the parent, might have neglected corporate formalities or acted as SOBRO-LDC's alter ego,⁷ it is tenuous to make a similar argument regarding Morrow's relation with SOBRO-EDC, based solely upon the documents relied on by plaintiff. Further, the fact that the letter from the tax consultant was mailed to Morrow at SOBRO-EDC's address does not indicate an "intermixing of corporate boundaries." Schoenberg Affirmation, ¶ 29. Because Morrow was acting in a dual capacity at that time (as a principal of both SOBRO-EDC and HIC), it was not improper to send mail to him at SOBRO-EDC's address where he could be reached. Indeed, it appears that plaintiff's claim is based on the fact that Sponsor Defendants shared one management person (i.e., Morrow) with SOBRO-EDC. This fact, standing alone, is insufficient to sustain the allegation that SOBRO-EDC should be held co-liable with Sponsor Defendants for the alleged defects in the design and construction of the Building, or that SOBRO-EDC was an alter ego of Morrow or the Sponsor. *Albstein v Elany Contracting Corp.*, 30

⁷ This argument has not been made by plaintiff in the complaint, and there are no claims made against SOBRO-LDC.

AD3d 210 (1st Dept 2006) (allegations of alter ego, piercing the corporate veil or that the corporate form was used to commit a fraud, were rejected because the complaint failed to plead facts with particularity to substantiate the conclusory claims).

Besides the legal insufficiency to impute Morrow's alleged misconduct on behalf of the Sponsor and HIC to SOBRO-EDC, the claims sounding in negligence, fraud, negligent misrepresentation and GBL §§ 349-350 violation should also be dismissed for legal insufficiency. Specifically, the complaint fails to plead or show that SOBRO-EDC owed a duty to the unit owners in connection with the construction or sale of the Building's units, an element necessary for a negligence claim. *Friedman v Anderson*, 23 AD3d 163, 164 (1st Dept 2005). Also, although the Martin Act does not preempt a fraud claim (as explained above), the complaint fails to plead or show, with particularity, that SOBRO-EDC was involved in the preparation or circulation of the Offering Plan or the allegedly fraudulent representations made therein. Thus, the fraud claim fails. *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 (1st Dept 2006) (failure to plead fraud with particularity required dismissal under CPLR 3016 [b]). Further, the negligent misrepresentation claim fails because the complaint does not plead or show the existence of a "special or privity-like relationship" between SOBRO-EDC and the unit owners, a requisite element for such claim. *J.A.O. Acquisition Corp. v Stavitsky*, 8

NY3d 144, 148 (2007). The GBL §§ 349-350 claim should be dismissed because the complaint fails to plead or show with specificity that SOBRO-EDC engaged in false advertising in connection with the Sponsor's sale of the condominium units, or that the allegedly deceptive acts (if any by SOBRO-EDC) had a broad impact on consumers at large. *Thompson v Parkchester Apartments Co.*, 271 AD2d 311 (1st Dept 2000).

Based on all of the foregoing, the motion of SOBRO-EDC (motion sequence number 002), seeking dismissal of the causes of action as against it, is granted in all respects.⁸

Architect Defendants' Motion to Dismiss (Motion Sequence No. 003)

The complaint asserts seven causes of action against the Architect Defendants: sixth (negligence); seventh (fraudulent misrepresentation), eighth (negligent misrepresentation), ninth (breach of contract based on a third-party beneficiary theory), tenth (unjust enrichment), eleventh (professional malpractice), and twelfth (violations of GBL §§ 349-350). Prior to the filing of an answer to the complaint⁹ and the joining of issues, the

⁸ It should be noted that SOBRO-EDC does not seek to dismiss all claims against Morrow, particularly those that relate to his role with the Sponsor Defendants. Instead, SOBRO-EDC only seeks to dismiss all claims against it and Morrow, to the extent they relate to his acts on behalf of SOBRO-EDC, as its President/CEO.

⁹ As noted by plaintiff in its opposition, even though the Architect Defendants allege that they have filed an answer, no copy of the alleged answer is annexed as an exhibit to their moving papers. Plaintiff's Opposition Brief, at 5.

Architect Defendants move for summary judgment dismissing the complaint pursuant to CPLR 3211 (c) and 3212.

CPLR 3211 (c) provides, in relevant part, that "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion a motion for summary judgment." In this case, while plaintiff acknowledges that the Architect Defendants, in their Notice of Motion, can request that this court "treat the instant motion as a motion for summary judgment" pursuant to CPLR 3211 (c), it argues that "the Architect Defendants have utterly failed to demonstrate that Plaintiff's claims against them should be dismissed as matter of law." *Id.* For the reasons set forth below, except with respect to the argument that Hirsch cannot be held personally liable to plaintiff simply because he executed a contract on behalf of UAI, the claims against the Architect Defendants should be dismissed as a matter of law.

As an initial matter, the Architect Defendants argue that Hirsch, individually, cannot be held personally liable because he, in his capacity as president of UAI, executed the contract on behalf of UAI (as architect) with HIC (as owner of the Building), to provide architectural services in connection with the design and construction of the Building (the Architect Contract).

Pursuant to the doctrine of respondeat superior, an employer is vicariously liable for the tortious acts of its employees that are committed within the scope of employment. *Bowman v State of New York*, 910 AD2d 315, 316 [1st Dept 2004]) ("[a]n employer may be vicariously liable for its employees' tortious acts on the theory of respondeat superior only if they were committed in furtherance of the employer's business and within the scope of employment"). The doctrine, however, does not shield the employees from personal liability for their own tortious acts. Thus, in *Morell v Balasubramanian* (70 NY2d 297, 301 [1987]), the Court of Appeals ruled that, although the State of New York could be held "secondarily liable for the tortious acts under respondeat superior," the individual defendants who were state-employed physicians could be held personally liable for their breach of the duty of care owed to the plaintiff. Moreover, the corporate form does not necessarily protect the corporation's officers and principals from liability for their own tortious acts. Indeed, it has been repeatedly held that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." *Espinosa v Rand*, 24 AD3d 102, 102 (1st Dept 2005), quoting *American Express Travel Related Servs. Co. v North Atlantic Resources, Inc.*, 261

AD2d 310, 311 (1st Dept 1999).

Here, plaintiff alleges that the Architect Defendants, a term defined in the complaint to include Hirsch, individually (Complaint, ¶ 13), committed various tortious acts, such as professional negligence and malpractice, deceptive consumer practice and fraudulent misrepresentation. The defense or argument that Hirsch cannot be held personally liable simply because he signed the Architect Contract on behalf of UAI (an argument apparently based on documentary evidence, a copy of which was annexed as Exhibit 1 to the Hirsch Affidavit in Support of Motion), however, is insufficient to conclusively support a summary dismissal of all of the tort claims asserted against him, as a matter of law, where Hirsch is not only a principal in the Architect Defendants but also played a role as one of the Sponsor Defendants. See *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept 2004) (documentary evidence has to conclusively establish a defense, before a court may dismiss the claim pursuant to CPLR 3211).

Breach of Contract Claim Based on Third Party Beneficiary Theory

Without substantiation, the complaint alleges that the unit owners were the "intended beneficiaries" of the Architect Contract between UAI and HIC, and by reason of the Architect Defendants' breach of such contract, the plaintiff and the unit-owners were injured. Complaint, ¶¶ 216-219. In opposition to

Architect Defendants' motion for summary dismissal of such claim, plaintiff relies on, inter alia, *Hamlet on Olde Oyster Bay Home Owners Association, Inc. v Holiday Organization, Inc.* (59 AD3d 673 [2nd Dept 2009]), for the proposition of law that a third party beneficiary theory may support a breach of contract claim against a design professional, such as the Architect Defendants. Plaintiff's Opposition Brief, at 9. Plaintiff also argues that "the certification executed by Hirsch [in connection with the disclosures in the Offering Plan] clearly manifests an intent to benefit third-parties." *Id.* at 12.

However, the decision relied on by plaintiff was recalled and vacated by the Appellate Division, Second Department, in view of the holding of the Court of Appeals in *Kerusa*. *Hamlet on Olde Oyster Bay Home Owners Association, Inc. v Holiday Organization, Inc.*, 65 AD3d 1284 (2nd Dept 2009) (*Hamlet II*). In the subsequent decision, *Hamlet II*, the appellate court stated:

Similarly, the Supreme Court properly granted those branches of the motion of the real estate broker, the engineering firm, and the architectural firm which were to dismiss the causes of action alleging *breach of contract*, fraudulent inducement, negligent misrepresentation, and negligence/malpractice insofar as asserted against them. The certifications in the offering plan executed by these defendants were pursuant to the Attorney General's implementing regulations [under the Martin Act] and, as such, may not be the basis of private cause of action against them [citing, *Kerusa*, 12 NY3d at 236].

Id. at 1287-1288 (emphasis added). *Hamlet II* leads to the conclusion that, the claims (such as breach of contract) premised

on a certification executed by a design professional (other than the sponsor) in connection the offering plan, may not be the basis of a private cause of action under the Martin Act. See also *Mandracchia v 901 Stewart Partners, LLC*, 2009 WL 5078846, 2009 NY Slip Op. 32969 (U) (Sup Ct, Nassau Cty December 2, 2009) (dismissing various claims against design professionals based on the rationale in *Hamlet II*).

Furthermore, the Appellate Division, First Department, in *Kerusa Co. LLC v W10Z/515 Real Estate Limited Partnership* (50 AD3d 503, 504 [1st Dept 2008]) (*Unappealed Kerusa*), stated:

Nor does the record evidence any viable cause of action by plaintiff against any of the defendants other than the sponsors. Since plaintiff 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 contract that [such defendants] entered into with the sponsors, plaintiff may not recover for negligence or breach of contract from these defendants either

Here, it is undisputed that the unit owners are not in contractual privity with the Architect Defendants, and despite plaintiff's argument to the contrary, the unit owners are (at best) incidental beneficiaries of the Architect Contract, because it contained a specific provision (paragraph 9.7 thereof) which stated that "[n]othing in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner of Architect." Thus, the ninth cause of action (breach of contract) should be dismissed.

[* 37]

The Fraudulent Misrepresentation Claim

The complaint alleges that the Architect Defendants were required to inspect the Building and to issue a report certifying that the work performed complied with the Building Code. It also alleges that the statements in the report, which were made a part of the Offering Plan, were false (or the Architect Defendants had a reason to know of their falsity based on their inspections) when made, and that the unit owners reasonably relied on such misrepresentations to their detriment. Complaint, ¶¶ 194-207.

The Architect Defendants argue that the fraud claim must be dismissed, because under the Martin Act, the power to raise such claim is within the exclusive jurisdiction of the Attorney General. This argument is apparently based on their reading of the Court of Appeals' decision in *Kerusa*. Defendants' Reply Brief, at 4-6. However, as explained above, a properly pleaded common-law fraud claim is still actionable notwithstanding the Martin Act, and has not been foreclosed by *Kerusa*. However, as also explained above, the Second Department has concluded (in view of *Kerusa*) that even a fraud cause of action can be precluded by the Martin Act, if it is primarily based upon the mandatory certifications filed "pursuant to the Attorney General's implementing regulations." *Hamlet II*, 65 AD3d 1287-1288. In this case, the fraud claim is based primarily on the Architect Defendants' report and the certification that were

required to be filed pursuant to the regulations. Therefore, the fraudulent misrepresentation claim should be dismissed.¹⁰

The Remaining Causes Of Action Against Architect Defendants

Based on the holdings in *Hamlet II* and *Unappealed Kerusa*, the following remaining causes of action against the Architect Defendants should be dismissed as a matter of law, namely: sixth (negligence), eighth (negligent misrepresentation), tenth (unjust enrichment), eleventh (professional malpractice), and twelfth (violation of GBL §§ 349-350). As discussed in these decisions, such causes of action are within the exclusive purview of the Attorney General under the Martin Act and related implementing regulations, and a private party cannot raise them as causes of action in connection with the alleged unfulfilled promises or representations made in an offering plan.

Alternatively, dismissal of the foregoing causes of action is warranted based upon the additional reasons discussed below. In particular, the negligent misrepresentation claim fails because the complaint does not allege reliance by a "known party" (i.e., one or more unit-owners known to the Architect Defendants) at the time of the alleged misrepresentation. *Sykes v RFD Third Avenue 1 Associates, LLC*, 67 AD3d 162, 167 (1st Dept

¹⁰ Unlike the Sponsor, who was the selling agent, Architect Defendants were not involved in the sale, and was unlikely to have orally represented the Buildings' conditions to buyers.

2009) (stating that before a stranger to a contract can claim harm from an alleged misrepresentation, reliance by a "known party" is a requisite element for such claim).¹¹ The negligence claim fails because the complaint does not allege or show that the Architect Defendants owed a legal duty to the unit owners, *Friedman v Anderson* (23 AD3d 163, 164 [1st Dept 2005]), and in any event, the claim is duplicative of the breach of contract claim because both arose from the same factual allegations and subject matter. *Clark-Fitzpatrick*, 70 NY2d at 388. The unjust enrichment and professional malpractice claims should be dismissed because they are based substantially on the same factual allegations as the breach of contract or negligence claims. *Katz*, 14 AD3d at 202. The GBL §§ 349-350 claim fails because the complaint does not show that the Architect Defendants were involved in the sale of the units or that their purportedly deceptive acts had a "broad impact on consumers at large." *Thompson*, 271 AD2d at 311. Therefore, the causes of action against the Architect Defendants should be dismissed as a matter of law.¹²

As noted, the Architect Defendants have requested summary

¹¹ The *Sykes* decision post-dated the Court of Appeals' decision in *Kerusa* and involved a condominium offering plan. However, neither the parties nor the court in *Sykes* addressed the applicability of the Martin Act and its preclusive effects.

¹² It should be noted that the claims against Hirsch, in his other role as one of the Sponsor Defendants, are unaffected by the disposition with respect to the Architect Defendants' motion.

dismissal of these causes of action pursuant to CPLR 3211 (c). It has been observed that, although the court has the discretion, under this CPLR provision, to go beyond the face of the complaint by treating a motion as though it were one for summary judgment, the court has to give the parties notice of its intention to so treat the motion. *Four Seasons Hotels Limited v Vinnik*, 127 AD2d 310, 318-320 (1st Dept 1987). However, there are three exceptions to this notice requirement, one of which is when the controversy involves "no issues of fact, but only issues of law fully appreciated and argued by both sides." *Id.* at 320. In such a scenario, "it is proper for the court to grant summary judgment to either side without first giving notice of its intention to do so." *Id.* (citations omitted). *Accord Richardson v Lindenbaum & Young*, 14 Misc 3d 1223(A) (Sup Ct, Kings County 2007), *affd in part and appeal dismissed in part*, 56 AD3d 645 (2nd Dept 2008) (another exception to the notice requirement is when both sides make it clear that they are laying bare their proof and charting a summary judgment course); *International Flavors & Fragrances, Inc. v Royal Ins. Co. of America*, 6 Misc 3d 1024(A), 2003 NY Slip Op 51750(U) (Sup Ct, NY County 2003). Here, the parties have charted a summary judgment course, and the issues involved are only issues of law (i.e., the scope of the Martin Act, in particular, as interpreted by the courts), which have been fully argued. Accordingly, the motion of the Architect Defendants

(motion sequence number 003), seeking summary judgment dismissing the causes of action as against them, is granted.

Defendant Hardie's Motion to Dismiss (Motion Sequence No. 004)

Hardie, a licensed engineer, was retained by the Sponsor to review the report prepared by UAI in connection with the Building and the Offering Plan. Francoeur Affirmation in Support of Hardie's Motion to Dismiss, Exhibit B (Certification of Sponsor's Engineer Pursuant to Part 20.4 (c) of the Regulations Issued Pursuant to General Business Law Article 23-A, As Amended) (the Hardie Certification). Hardie visually inspected portions of the renovated Building on July 15, 2005, as well as examined the Building's plans and specifications prepared by UAI, before issuing his certification, dated July 19, 2005. *Id.* at 1.

The complaint asserts seven causes of action against Hardie: twelfth (violations of GBL §§ 349-350), thirteenth (negligence), fourteenth (breach of contract based on third party beneficiary theory), fifteenth (unjust enrichment), sixteenth (malpractice), seventeenth (fraudulent misrepresentation), and eighteenth (negligent misrepresentation).¹³ Hardie moves to dismiss the causes of action pursuant to CPLR 3211 (a) (1), (3), (5) and (7).

¹³ The complaint lumps Hardie, together with Amerispec, Inc. and Amerispec Home Inspection Service, and defines them collectively as the "Engineer Defendants." However, only Hardie moves to dismiss the claims asserted against him.

The causes of action against Hardie are identical to those against the Architect Defendants, as discussed above. Therefore, the discussions regarding the facts and the laws applicable to such causes of action will be in a summary fashion, except in those specific instances where a more detailed discussion is appropriate, as set forth below.

Breach of Contract Claim

First, Hardie argues that this claim is time-barred. His argument is as follows: the breach of contract claim should be recharacterized as a malpractice claim, which has a three year limitations period under CPLR 214(6), and since he completed his engineering services on July 19, 2005 but was not served with the summons until August 13, 2008, the claim should be dismissed. This argument is flawed. Pursuant to CPLR 304, an action is commenced by the filing (not service) of the summons with notice, and based on the record of this case, such filing was performed on or about April 24, 2008. Thus, even if the breach of contract claim is characterized as a malpractice, it is not time-barred.

Next, Hardie argues that because the complaint neither attach a copy of the contract nor identify what provision therein was breached, the breach of contract claim should be dismissed. In response, plaintiff contends that, because it was not a signatory to the contract and does not have a copy of same, it has no knowledge of the specific terms. Plaintiff also contends

that its inability to identify a specific term is not a basis for dismissal of the claim at this early, pre-discovery phase of the litigation. Plaintiff further contends that the allegations in the complaint, including the Hardie Certification itself, which stated that it was "made for the benefit of all persons to whom this offer is made", support a breach of contract claim based on the third-party beneficiary theory. In reply, Hardie argues that he did not breach the limited duties he had in the preparation of the Hardie Certification, which, according to the terms therein, indicated that the certification was (1) based upon his visual inspection of only portions of the Building prior to completion; (2) conditioned upon the construction of the entire Building being completed according to UAI's plans and specifications; and (3) not intended to serve as a guarantee or warranty of the physical condition of the Building. Thus, Hardie argues that, due to the limited role he played in the construction-inspection of the Building and the disclaimer that his certification was not a warranty, the breach of contract claim must be dismissed where it is contradicted by documentary evidence.

It is unnecessary to determine the merit (or the lack thereof) as to the respective contentions of the parties. Because the instant claim is based primarily upon the Hardie Certification, which was made a part of the Offering Plan that was required to be filed pursuant to the regulations under the

Martin Act, such claim is precluded by the Act. See *Hamlet II* and *Unappealed Kerusa, supra*. Thus, the ninth cause of action (breach of contract) should be dismissed as a matter of law.

The Fraudulent Misrepresentation Claim

Based on counsel's reading of the Court of Appeals' ruling in *Kerusa*, Hardie argues that the ruling "rejected a private right of action for even a common law fraud claim resting upon concealment of material facts in an Offering Plan." Hardie's Reply Brief, at 3. This argument is flawed, as the Court noted that active or fraudulent concealment of material fact was not the same as "omissions." Indeed, the Court observed:

[T]he proposed second amended complaint at most alleges only that the sponsor defendants tolerated shoddy construction. *Kerusa* does not contend, for example, that drywall was painted over or taped over to cover up or prevent discovery of water damage; *Kerusa* does not allege that walls or bricks were put up to hide or prevent it from finding leaking pipes or holes in the foundation. Nothing in the proposed second amended complaint supports active concealment unrelated to alleged omissions from Martin Act disclosures.

Kerusa, 12 NY3d at 246. Because the Court found that *Kerusa's* fraud claim relied entirely on "alleged omissions from filings required by the Martin Act," it concluded that such claim "does not transmute a prohibited private cause of action to enforce Martin Act disclosures requirements into an independent common-law tort." *Id.* at 247. See also *Hiralion Real Estate, Inc. v 225 5th, LLC*, 2010 WL 1256560, 2010 NY Slip Op 30625 (U) (Sup Ct, NY County, March 23, 2010) (holding that a plaintiff's fraud claim

may be based on the sponsor's active concealment of information unrelated to the alleged Martin Act omission and that such claim is not precluded by the Act). Also, as noted above, the Court stated in footnote 5 of *Kerusa* that it was not ruling on whether a common-law fraud cause of action is preempted by the Act when all of its elements are properly pled. Therefore, contrary to the contention of Hardie, well pled fraud causes of action can still be brought by private parties in cases where violations of the Martin Act are also involved.

However, the instant fraudulent misrepresentation cause of action is based primarily upon the Hardie Certification that was incorporated into the Offering Plan and required to be filed pursuant to the Attorney General's implementing regulations under the Martin Act. Therefore, the fraud claim (seventeenth cause of action) should be dismissed because it is preempted by the Act. See *Hamlet II*, 65 AD3d 1287-1288.

The Remaining Claims Against Hardie

The remaining causes of action against Hardie are: alleged violation of GBL §§ 349-350 (twelfth), negligence (thirteenth), unjust enrichment (fifteenth), malpractice (sixteenth), and negligent misrepresentation (eighteenth). Notably, the arguments raised by Hardie in seeking dismissal of such causes of action (as well as the corresponding oppositions raised by plaintiff in response thereto) are substantially similar to those raised by

the Architect Defendants (and plaintiff's responses thereto).

In light of the discussions and rationales stated above in connection with the dismissal of those causes of action against the Architect Defendants, which are incorporated herein as fully set forth herein, the twelfth, thirteenth, fifteenth, sixteenth and eighteenth causes of action against Hardie are dismissed.

Accordingly, the motion of Hardie (motion sequence number 004), seeking dismissal of the causes of action asserted against him in the complaint, is granted in all respects.

**Hardie's Motion to Dismiss Cross Claims of Vertex
(Motion Sequence Number 005)**

Vertex, the general contractor retained by the Sponsor in connection with the rehabilitation and construction of the Building, asserted two cross-claims (contribution and indemnification) against all co-defendants, including Hardie, in its answer interposed to the complaint. Hardie moves to dismiss the cross claims as against him pursuant to CPLR 3211 (a) (7).

Hardie argues that the cross claims are barred by the Martin Act, as reflected in *Kerusa*. This argument is unpersuasive. Notably, the Court of Appeals stated in *Kerusa* that the Martin Act was enacted for "the protection of purchasers in offerings of cooperative and condominium unit" and that the Act "authorizes the Attorney General to enforce its provisions." *Id.* at 243-244. Hardie has not pointed to anything in *Kerusa* or in the Act's legislative history, which indicates that the statute is intended

to give the Attorney General exclusive authority to prosecute claims or cross-claims between or among construction-related professionals. Hardie does not argue that claims or cross claims between or among such professionals are tantamount to enforcing the Act. Thus, Hardie's attempt to stretch the scope of the Martin Act is rejected.

Vertex's indemnification cross claim is apparently based on common law, rather than contractual indemnification, and Vertex does not allege otherwise. The law is well-settled that "[s]ince the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." *Trump Village Section 3, Inc. v New York State Housing Finance Agency*, 307 AD2d 891, 895 (1st Dept 2003), quoting *Trustees of Columbia University v Mitchell*, 109 AD2d 449, 453 (1st Dept 1985). Here, although Vertex, as the general contractor, may be only vicariously liable for the acts of other defendants, Vertex cannot be vicariously liable for the acts of Hardie as the court has dismissed plaintiff's claims against Hardie. Accordingly, the indemnity cross claim should be dismissed.

Unlike an indemnification claim, a contribution claim may be viable when "two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the

injured person." *Trump Village*, 307 AD2d at 896, quoting *Garrett v Holiday Inns*, 58 NY2d 253, 258 (1983). Vertex's contribution claim, however, does not allege that Hardie had violated or breached a duty owed to it or to the plaintiff. In any event, as the court has dismissed plaintiff's claims against Hardie, the cross claim for contribution should also be dismissed.

Conclusion

Based on all of the foregoing, it is hereby

ORDERED that the motion of defendants Harlem Infil LLC, The Community Preservation Corp., Harlem Infil Corp., CPCRC Opportunity Fund, LLC, CPCRC Opportunity Fund II, LLC, CPC Resources, Inc., Phillip Morrow, David Hirsch and James Fillas (collectively, Sponsor Defendants) (motion sequence number 001) seeking dismissal of the causes of action (second, third, fifth, twelfth and twenty-second) against them is granted, except with respect to the fourth (fraudulent misrepresentation) cause of action; and it is further

ORDERED that the motion of defendant South Bronx Overall Economic Development Corporation (motion sequence number 002) seeking dismissal of the causes of action (third, fourth, fifth and twelfth) against it is granted in all respects; and it is further

ORDERED that the motion of defendant Urban Architectural

Initiatives, RA, P.C. (motion sequence number 003) seeking summary judgment dismissing the causes of action (sixth, seventh, eighth, ninth, tenth, eleventh and twelfth) against it is granted, and the Clerk of Court is directed to enter summary judgment dismissing the complaint as against such defendant; it is further

ORDERED that the motion of defendant Elliott Hardie, P.E. (motion sequence number 004) seeking dismissal of the causes of action (twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth) against him is granted in all respects; and it is further

ORDERED that the motion of defendant Elliott Hardie, P.E. (Motion sequence number 005) seeking dismissal of the cross claims (contribution and indemnification) of defendant Vertex Restoration Corp. is granted.

This Constitutes the Decision and Order of the Court.

Dated: June 14, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED

JUN 18 2010

NEW YORK
COUNTY CLERK'S OFFICE