

Sung Hyun Hwang v Jackson Ave. Realty, LLC

2011 NY Slip Op 30468(U)

February 22, 2011

Supreme Court, Queens County

Docket Number: 700072/2010

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
JusticeIA Part 17

SUNG HYUN HWANG, et al.	x	Index Number <u>700072</u> 2010
- against -		Motion Date <u>November 17,</u> 2010
JACKSON AVENUE REALTY, LLC, et al.		Motion Cal. Number <u>34</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 14 read on this motion by defendants Jackson Avenue Realty, LLC, Yaron Hershco, Galit Network, LLC, United Property Group, LLC, United Homes, LLC, Galit Development Corp., Ramon Building and Construction Corp., and Richard Zimmerman seek an order dismissing the first, seventh, eighth, ninth, and tenth causes of action and dismissal of the amended complaint on the grounds of failure to state a cause of action, pursuant to CPLR 3211(a)(7). Defendants NDG Architect, P.C., d/b/a Newman Design Group, Mitchell D. Newman, DiBari Engineering, P.C., and John A. DiBari, P.E. cross-move for an order dismissing the complaint in its entirety on the grounds that plaintiffs lack standing to sue these defendants. Defendant The Developers Group LLC cross-moves for an order dismissing the complaint on the grounds that the plaintiffs lack standing to sue.

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Upon the foregoing papers the motion and cross motions are determined as follows:

Sung Hyun Hwang, Ron Stankiewicz and Carlos Capellan each purchased a condominium unit at a development known as Echelon Condominium, located at 13-11 Jackson Avenue, Long Island City, New York. This action was commenced on March 3, 2010 by electronic filing. Plaintiffs allege that more than three years after the individual units were offered for sale, the building still does not have a permanent Certificate of Occupancy, and that the sponsor has refused to repair certain construction deficiencies.

In the first amended complaint, dated June 21, 2010, plaintiffs Sung Hyun Hwang, Ron Stankiewicz and Carlos Capellan, allege that they are unit owners in the condominium and members of The Echelon Unit Owners Association, an unincorporated association. The complaint alleges that the individual plaintiffs “bring this action on their own behalf as unit owners and derivatively on behalf of the Condominium and each of its Unit Owners,” and identifies the unit owners listed in Schedule I as the owners of individual units in the condominium.

The complaint identifies the defendants as follows: Jackson Avenue Realty, LLC, the sponsor of the condominium; Yaron Hershco, as the “principal and alter ego of the Sponsor”; Galit Network, LLC, United Property Group, LLC, United Homes, LLC, Ramon Building and Construction Corp., Galit Development Corp., as the “affiliates and alter egos of defendants Sponsor and Hershco, which together with ABC Corporation constructed” the subject building; Sky Climber Contracting Inc, “which together with other entities,” constructed the building; ABC Corporation is a fictitious name for an unknown entity that with other entities constructed the building; NDG Architect, P.C., d/b/a Newman Design Group and Mitchell D. Newman was retained by the sponsor to prepare the plans and construction specifications for the building and a report of the building conditions to be included in the offering plan; the Office of James Ruderman, LLP was retained by the respondent to prepare engineering plans and specifications for the building and supervise construction of the building; defendants DiBari Engineering, P.C., and John A. DiBari, P.E. are engineers who were retained by the sponsor to prepare engineers’ plans and supervise construction of the building; The Developers Group LLC acted as the sponsor’s sales and marketing agent; and that defendants Amir Arnan, Richard Zimmerman and Idan Nir, are members of the Board of Managers of the condominium designated by the sponsor.

The first cause of action against the sponsor and Hershco seeks to recover damages for breach of contract, based upon alleged breaches of the purchasing agreement and offering plan; the second cause of action against the architects seeks to recover damages for negligent preparation of the architects’ report and plans causing the building to be constructed with architectural defects; the third cause of action against the architects seeks to recover damages

for breach of the contract which was intended to benefit the condominium and its individual unit purchasers; the fourth cause of action against the engineers seeks to recover damages for negligent preparation of the engineers' report and plans causing the building to be constructed with engineering defects; the fifth cause of action against the engineers seeks to recover damages for breach of the contract which was intended to benefit the condominium and its individual unit purchasers; the sixth cause of action against the construction defendants seeks to recover damages for negligence based upon the alleged failure to construct the building in a good and workmanlike manner in accordance with applicable codes, the architects' report and plans and the engineers' plans and in conformity with customary building industry standards; the seventh cause of action against the sponsor defendants and The Developers Group LLC, seeks to recover damages for common-law fraud; the eighth cause of action against the sponsor defendants and The Developers Group LLC, seeks to recover damages for violations of General Business Law §§ 349 and 350; the ninth cause of action against the sponsor defendants and sponsor-controlled members of the Board of Managers seeks to recover damages for breach of fiduciary duty; and the tenth cause of action against the sponsor defendants and sponsor-controlled members of the Board of Managers seeks to enjoin these defendants from exercising their votes on the Board of Managers.

Defendants Jackson Avenue Realty, LLC, Yaron Hershco, Galit Network, LLC, United Property Group, LLC, United Homes, LLC, Galit Development Corp., Ramon Building and Construction Corp., Amir Arnan, Richard Zimmerman, and Idan Nir served an answer, and interposed the following eight affirmative defenses: failure to state a cause of action, documentary evidence, statute of limitations, laches, waiver, estoppel, and unclean hands.

Defendants NDG Architect, P.C., d/b/a Newman Design Group, and Mitchell D. Newman served an answer and interposed the following affirmative defenses: failure to state a cause of action; contributory negligence and comparative fault, negligence or culpable actions and/or breach of duty by independent third parties, lack of privity, statute of limitations, that the action is barred by the Martin Act, lack of proximate cause, intervening causes, superseding causes, plaintiffs' culpable conduct, CPLR Article 16 (apportionment of damages), CPLR 4545 (collateral source rule), waiver and estoppel, accord and satisfaction, and the failure to mitigate damages. These defendants also interposed a cross claim for indemnification and contribution.

Defendants DiBari Engineering, P.C. and John A. DiBari, P.E. served an answer and interposed the following 16 affirmative defenses: failure to state a cause of action; contributory negligence and comparative fault, negligence or culpable actions and/or breach of duty by independent third parties, lack of privity, statute of limitations, that the action is

barred by the Martin Act, lack of proximate cause, intervening causes, superseding causes, plaintiffs' culpable conduct, CPLR Article 16 (apportionment of damages), CPLR 4545 (collateral source rule), waiver and estoppel, accord and satisfaction, and the failure to mitigate damages. These defendants also interposed a cross claim for indemnification and contribution.

Defendant The Developers Group LLC, served an answer and interposed the following affirmative defenses: failure to state a cause of action; failure to mitigate damages; contributory negligence; culpable conduct, negligence, carelessness or lack of care by third parties; actions of third parties over whom this defendant exercised no control or supervision; waiver, estoppel and unclean hands; no private right of action under General Business Law §§ 349 and 350; dismiss the seventh cause of action as it seeks recovery in tort for pecuniary loss damages; dismiss the seventh and eighth causes of action as duplicative of contractual claims; failure to plead the claim for fraud with particularity as required by CPLR 3016(b); lack of proximate cause; intervening causes; and offsets for collateral source payments. This defendant also interposed a cross claim against all defendants for indemnification and contribution.

The court notes that defendants NDG Architect, P.C., d/b/a Newman Design Group, and Mitchell D. Newman, defendants DiBari Engineering, P.C. and John A. DiBari, P.E., and defendant The Developers Group LLC, each assert as an additional affirmative defense that they rely upon and incorporate by reference any and all affirmative defenses asserted or entitled to be asserted by their co-defendants in their respective answers. This does not constitute an affirmative defense, as it is too vague to apprise the plaintiffs of the claimed defense.

The within cross motions to dismiss the complaint on the ground of lack of standing to sue are denied. Having failed to raise the affirmative defense of lack of standing in their pre-answer motion, or to plead it in their subsequently served answer, the cross-moving defendants waived their contention that the plaintiffs and homeowners association lack standing (*see* CPLR 3211[a][3], 3211[e]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Org.*, ___ AD3d ___, 915 NYS2d 117 [2011]; 2011 NY Slip Op 345; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989 [2010]; *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 819 [2009]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 680 [2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 244 [2007]).

Turning now to defendants Jackson Avenue Realty, LLC, Yaron Hershco, Galit Network, LLC, United Property Group, LLC, United Homes, LLC, Galit Development Corp., Ramon Building and Construction Corp., and Richard Zimmerman's motion to dismiss the first, seventh, eighth, ninth, and tenth causes of action, and to dismiss the entire

amended complaint, it is well settled that “[o]n a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated” (*Schneider v Hand*, 296 AD2d 454, 454 [2002]). Such a motion will fail if, from the four corners of the complaint, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, “bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true” (*Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2007] *see Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Org., supra*).

At the outset the court finds that the complaint fails to properly allege a claim on behalf of The Echelon Unit Owners Association. General Associations Law § 12 provides that an action may be brought by the president or treasurer of the unincorporated association, or in the names of all its individual members (*see Concerned Citizens of Albany-Shaker Rd. v State*, 140 AD2d 842 [1988]; *Matter of International Union United Auto. Aircraft & Agric. Implement Workers*, 284 App Div 835 [1954]). In addition, under the common law, members of an unincorporated association may bring an action on behalf of themselves and all other members of the association (*see McOwen, Hamp Funeral Home, Inc. v Boccaccio*, 79 AD2d 1098 [1981]; *Locke Associates, Inc. v Foundation for Support of United Nations*, 173 Misc 2d 502 [1997]; *House v Schwartz*, 18 Misc 2d 21 [1958]; *Hogan v Williams*, 185 Misc 338 [1945], *affd* 270 AD 789 [1946]; *see also* CPLR 1025).

Here, as the moving defendants’ observe, the complaint does not comport with the provisions of General Associations Law § 12, as the individual plaintiffs do not allege that they are either the president or treasurer of The Echelon Unit Owners Association, nor do they allege that the action is brought on behalf of all the members of said association. Rather, the first amended complaint alleges that The Echelon Condominium was formed on March 6, 2007, and owns the common interests in the subject real property and the common areas of the apartment building constructed thereon; that Hwang, Stankiewicz and Capellan are owners of units of the condominium, and members of The Echelon Unit Owners Association, an unincorporated association, which represents all but four of the non-sponsor affiliated unit owners; that the unit owners are identified in Schedule 1 annexed to the complaint; and that this action is brought by Hwang, Stankiewicz and Capellan “on their own behalf as unit owners and derivatively on behalf of the Condominium and each of its Unit Owners.”

To the extent that plaintiffs may have a cause of action under the common law as members of The Echelon Unit Owners Association, they have failed to allege that they are

asserting their claims on behalf of themselves and all other members to enforce association rights (*see McOwen, Hamp Funeral Home, Inc. v Boccaccio, supra; Locke Associates, Inc. v Foundation for Support of United Nations, supra*).

Mr. Capellan, in his opposing affidavit, states that he is the treasurer of The Echelon Unit Owners Association, and that all members of said Association are plaintiffs in this action. These pleading defects, however, cannot be cured by an opposing affidavit (*see generally Gianunzio v Kelly*, 90 AD2d 623, 624 [1982]).

With respect to Hwang, Stankiewicz and Capellan's individual causes of action, an owner of an individual condominium unit may not assert a claim for damages to the common interest of a condominium (*see Caprer v Nussbaum*, 36 AD3d 176, 185-186 [2006]). Although an individual unit owner may maintain a shareholder's derivative action against a condominium's board of managers on behalf of the condominium (*Abrams v Donati*, 66 NY2d 951 [1987]; *Caprer v Nussbaum, supra* at 187-190), plaintiffs have failed to allege that The Echelon Condominium is incorporated and have also failed to allege that a demand was made on the Board of Managers of The Echelon Condominium, or that such a demand would have been futile as required by Business Corporation Law § 626(c). The court notes that Mr. Capellan, in his affidavit in opposition to the motion, asserts that such a demand would have been futile. Mr. Capellan does not assert that the Board of Managers is controlled by the defendants, or that the defendants constitute a majority of the Board of Managers. Mr. Capellan's affidavit, submitted in opposition to a motion to dismiss, is not a pleading (*see CPLR 3011*), and cannot serve to remedy these pleading defects.

Furthermore, a shareholders' derivative suit that alleges injuries to individual shareholders, as well as injuries to the corporation, mandates dismissal of the action (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996); *Abrams v Donati, supra; Leonard v Gateway II, LLC*, 68 AD3d 408 [2009]; *Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635 [2009]). Here, plaintiffs' amended complaint is a confusing hodgepodge of plaintiffs' personal claims, alleged derivative claims, and claims alleged to be asserted on behalf of other members of an unincorporated association. As plaintiffs have failed to properly plead the derivative claims, they cannot be preserved here (*cf. Hu v Shen*, 57 AD3d 616 [2008]).

The court further finds that even if the individual actions were properly asserted, the amended complaint's conclusory allegations that Yaron Hershco is a "principal and alter ego of the Sponsor" and that Galit Network, LLC, United Property Group, LLC, Ramon Building and Construction Corp., and Galit Development Corp., are "affiliates and alter egos of the sponsor and Hershco" without more, are insufficient to support the equitable relief of piercing the corporate veil as to the corporate defendants and limited liability companies (*see*

Retropolis, Inc. v 14th St. Dev. LLC, 17 AD3d 209, 210 [2005]; *Goldman v Chapman*, 44 AD3d 938, 939 [2007]).

The allegations contained in the amended complaint are also insufficient to maintain a claim against Yaron Hershco, based on his alleged role as “a principal and alter ego” of the sponsor. Plaintiffs do not allege that Mr. Hershco executed the offering plan or the purchase agreements in his individual capacity. Members, managers and employees of a limited liability company are expressly exempt from liabilities of the limited liability company, whether the liability arises in contract, tort or otherwise, by sole reason of being such member, manager or agent or acting in such capacities or participating in the business of the limited liability company (Limited Liability Company Law § 609).

The allegations contained in the amended complaint are insufficient to state a cause of action for common-law fraud. The essential elements required to sustain a cause of action for fraud “are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Orlando v Kukielka*, 40 AD3d 829, 831 [2007]; *see also Lama Holding Co. v Smith Barney*, *supra* at 421; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]). In order to plead a prima facie cause of action for fraud, a plaintiff must allege each of these elements of fraud with particularity and support them with allegations of fact (*see* CPLR 3016[b]; *Fink v Citizens Mtge. Banking*, 148 AD2d 578, 578 [1989]; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [1976], *affd* 43 NY2d 778 [1977]). Bare, conclusory allegations are insufficient to sustain a cause of action for fraud (*see Fink*, 148 AD2d at 578; *Glassman v Catli*, 111 AD2d 744, 745 [1985]; *Lanzi*, 54 AD2d at 1058).

It is well settled that a cause of action seeking damages for fraud cannot be sustained when the only fraud charged relates to a breach of contract (*Elsky v KM Ins. Brokers*, 139 AD2d 691, 691, 527 NYS2d 446 [1988]; *see also Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1076 [2007]; *Ross v DeLorenzo*, 28 AD3d 631, 636 [2006]; *34-35th Corp. v 1-10 Indus. Assoc.*, 2 AD3d 711, 712 [2003]; *Edwil Indus. v Stroba Instruments Corp.*, 131 AD2d 425, 425 [1987]). Moreover, a fraud claim must be dismissed unless it arises from representations that are collateral or extraneous to the parties’ contract (*see 34-35th Corp.*, 2 AD3d at 712; *Tsilogiannis v 53-11 90th St. Assoc.*, 293 AD2d 468, 469 [2002]; *Gupta Realty Corp. v Gross*, 251 AD2d 544, 545 [1998]; *Alamo Contract Bldrs. v CTF Hotel Co.*, 242 AD2d 643, 643 [1997]).

Here, plaintiffs’ allegations that the sponsor, Mr. Hershco, and the The Developers Group LLC made material representations and failed to disclose material facts concerning the property and the building, constitutes a restatement of plaintiffs’ breach of contract claim,

without alleging a breach of duty owed to plaintiffs independent of the purchase agreements (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]). In addition, plaintiffs fail to specifically allege who made the alleged misrepresentations and when they were made.

Plaintiffs' claims for breach of contract and for negligence against the architects, engineers and construction firms hired by the sponsor, are based upon statements made in the offering plan given to the individual plaintiffs before they purchased their apartments. Plaintiffs do not allege that they executed the purchase agreements with any entity other than the sponsor. Plaintiffs do not allege that the condominium units were specifically built for them, or that the architects, engineers or builders knew that the plaintiffs were the possible purchasers of the apartments. Therefore, as no privity exists between the plaintiffs and these defendants, and as they are not third-party beneficiaries of said contracts, plaintiffs have failed to state a claim against the architects, engineers or construction firms for breach of contract or negligence (*see generally Sykes v RFD Third I Associates, LLC*, 15 NY3d 370 [2010]; *Leonard v Gateway II, LLC, supra*; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1993]).

The eighth cause of action for consumer fraud based upon alleged violations of the General Business Law §§ 349 and 350 alleges material misrepresentations and failure to disclose material facts when marketing and promoting the offering plan, disclosure of which is mandated by the Martin Act (General Business Law art 23-A), but for which there is no private right of action (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). The Attorney General has exclusive jurisdiction to prosecute sponsors who violate the disclosure requirements of the act (*see CPC Intl. v McKesson Corp.*, 70 NY2d 268 [1987]). While private plaintiffs may maintain common-law fraud claims, plaintiffs are not permitted to disguise claims which rightfully belong to the Attorney General as their own (*Merin v Precinct Developers LLC*, 74 AD3d 688 [2010]; *Whitehall Tenants Corp. v Estate of Olnick*, 213 AD2d 200 [2001], *lv denied* 86 NY2d 704 [1995]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244, 247-248 [2001]).

The ninth cause of action alleges that the sponsor-controlled members of the Board of Managers violated their fiduciary duties to the plaintiffs with respect to the collection of common charges from the sponsor defendants for sponsor-owned units; the enforcement of warranties in the Offering Plan; the setting up a repair escrow fund; making repairs to common elements of the building; communicating with the plaintiffs; and the failure to retain an attorney or engineer with regard to claims of defects in the building and interfering with the efforts of other members of the Board of Managers to do so. The tenth cause of action seeks to permanently enjoin the sponsor defendants and sponsor-controlled members from voting on the Board of Managers and deeming a quorum to exist without their participation or attendance. In view of the fact that the complaint improperly interweaves individual,

alleged shareholder derivative claims and alleged claims on behalf of an unincorporated association, these causes of action must also be dismissed.

In view of the foregoing, the motion by defendants Jackson Avenue Realty, LLC, Yaron Hershco, Galit Network, LLC, United Property Group, LLC, United Homes, LLC, Galit Development Corp., Ramon Building and Construction Corp., and Richard Zimmerman for an order dismissing the first, seventh, eighth, ninth, and tenth causes of action and dismissal of the amended complaint on the grounds of failure to state a cause of action, pursuant to CPLR 3211(a)(7), is granted. The cross motion of defendants NDG Architect, P.C., d/b/a Newman Design Group, Mitchell D. Newman, DiBari Engineering, P.C., and John A. DiBari, P.E. for an order dismissing the complaint in its entirety on the grounds that plaintiffs lack standing to sue, is denied. The cross motion by The Developers Group LLC or an order dismissing the complaint on the grounds that the plaintiffs lack standing to sue, is denied. However, as a motion for summary judgment searches the record, the complaint is also dismissed as to all defendants. Plaintiffs may commence a new action, if so advised, consistent with this order.

Dated: February 22, 2011

J.S.C.