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

PRESENT: Hon. Joan A. Madden, Justice

PART 11

Cardona, J.

- v -

Yankee, M.

INDEX NO. 600006/09

MOTION DATE 2/24/11

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for dismiss & cross motion to amend.

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed ~~to~~ Memorandum Decision & Order.

FILED

JUL 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 7, 2011

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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JEFFREY R. GARDNER and SANDY F. CHIN,

Index No.: 600606/09

Plaintiffs,

-against -

MICHAEL YANKO, ERAN CONFORTY, SOMA HUDSON BLUE LLC, BY DESIGN LLC, and HORIZON GLOBAL LLC

Defendants.

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JOAN A. MADDEN, J.

In an action to recover damages for injuries allegedly sustained by plaintiffs in the purchase and ownership of a condominium unit as a result of defendants' alleged material misrepresentations, defendants Michael Yanko ("Yanko"), Eran Conforty ("Conforty ") (together "the moving defendants") move to dismiss the claims against them. Plaintiffs oppose the motion and cross move for leave to amend their complaint pursuant to CPLR 3025(b).

BACKGROUND[1]

Plaintiffs reside in Unit #1 ("the Unit") of the Soma Condominiums at 116 West 22nd Street, New York, NY ("the Building"), which is owned by defendant SOMA Hudson Blue, LLC ("SOMA"). Defendant Michael Yanko ("Yanko") is alleged to be a principal and officer of SOMA and the other corporate defendants. Defendant Eran Conforty ("Conforty") is alleged to be a principal and officer of SOMA and the other corporate defendants.

In February 2007, plaintiffs began the process of purchasing Unit #1. On March 6, 2007, plaintiffs entered into a purchase agreement for the Unit with SOMA (hereinafter "the Purchase Agreement"). In visits to the Unit prior to the execution of the Purchase Agreement, plaintiffs

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[1]Unless otherwise noted, the following facts are based on the allegations in the proposed amended complaint.

noted that many items had yet to be completed and, on one visit, that serious water damage had occurred. Plaintiffs received assurances from non-party Omer Barnes ("Barnes"), an employee and agent of defendants, that the water problems were due to malfunctioning emergency sprinklers, that the problem had been corrected and the damage would be rectified by removing the wood and putting in slate floors. It is also alleged that Yanko confirmed to them that the floors would be repaired in this manner.

In light of these assurances, plaintiffs' broker notified the seller's broker on February 23, 2007, that plaintiffs would go ahead with the purchase at the price of $1,385,000. Shortly thereafter, Yanko contacted the plaintiffs to try and charge an additional $9,250 for the replacement of water-damaged wood. Plaintiffs declined to pay this amount, but agreed to an increase in the purchase price to $1,387,000.

Before its execution, the Purchase Agreement was appended with two riders and a supplemental letter. Portions of the second rider reiterated the seller's obligation to replace the wood flooring that had suffered water damage with slate flooring prior to closing and at its own expense, and provided for plaintiffs' ability to both inspect the unit prior to closing and have access for a bank appraiser and walkthrough to develop a "punch list" within seven days of closing. The supplemental letter also allowed plaintiffs to remove or adjust a temporary wall, provided that the work be done post-closing at cost to Plaintiffs. On March 6, 2007, the Purchase Agreement was executed, with a listed closing date of May 8, 2007. Yanko's signature, as Manager of SOMA, appears on both the agreement and the two riders, as well as other documents related to the transfer of the deed. Plaintiffs state that certain warranties and obligations were owed by SOMA to the plaintiffs as inherent in the purchase agreement. Moreover, additional

warranties and obligations were contained in the offering plan, which was filed with the New York State Attorney General's office by SOMA.

On March 26, 2007, plaintiffs inspected the Unit and again noticed severe water damage. This time, Mr. Barnes told the plaintiffs that the cause was accumulated snow on the skylight, and that the problem was being repaired. Around this time, SOMA requested that the closing date be moved up to April 17. Plaintiffs agreed to this on the condition that all repairs would still be made and all other terms honored in the Purchase Agreement.

SOMA refused to allow plaintiffs access to the Unit until April 13, at which point plaintiffs discovered that the skylights were incomplete, were still leaking, and the tile floors had just been laid, and the tiling prevented plaintiffs from conducting a thorough inspection of the premises. Plaintiffs were able to discover that the wall referred to in the Supplemental Letter had been badly damaged by the laying of new slate floors, to the point that Mr. Barnes asked that SOMA just be allowed to remove the wall entirely. Plaintiffs acquiesced to this request, but also noted that many fixtures promised in the SOMA offering plan seemed to be missing. Mr. Barnes assured them, however, that the fixtures in all the units were identical and the standards of the offering. Plaintiffs state that he would not allow them to access other units for comparison, however.

On October 25, 2007, the Board of Managers of the SOMA Condominium ("the Board") filed a complaint with the New York State Attorney General's Office. This resulted in a settlement agreement with Yanko and SOMA, who are treated collectively, jointly and severally in the settlement as the "Sponsor" (Plaintiffs' Exhibits D, F). In the course of the settlement, it was agreed that the Board would be paid $60,000 from the proceeds of sale of a unit owned

jointly and severally by Yanko and Conforty (Plaintiffs' Exhibit E, F).

A wide range of incomplete, poorly done, or faulty features within the Unit were memorialized in the punch list. A condition guaranteeing that the Unit would be completed within thirty days of closing, and which plaintiffs allege they had discussed with Mr. Barnes, was also added as an addendum to the punch list. Plaintiffs allege that the punch list items were not remedied within the 30-day period stipulated by the contracts, that some have still not been remedied, and that the inept attempts at repair in fact generated more damages.

Over the course of dealing with the Unit's myriad problems, the plaintiffs were directed to deal with numerous individuals, including Yanko and Conforty. The individuals plaintiffs dealt with and other individuals working for the corporate defendants represented to plaintiffs that they were working directly under the control of Yanko and Conforty. Plaintiffs allege a wide variety of deviations from the Purchase Agreement, addendums and offering plan, as well as on-going problems such as broken utilities and the growth of toxic mold due to continuing water damage.

Plaintiffs, as *pro se* litigants, initially filed a complaint for breach of contract, implied breach of contract, and common law fraud against defendant Yanko and Conforty, as well as SOMA, By Design LLC, and Horizon Global LLC.

Defendants Yanko and Conforty (hereinafter "the moving defendants") now move to dismiss the complaint against them for failure to state a cause of action. As for the causes of action for breach of contract, they argue as the documentary evidence shows that the Purchase Agreement was between SOMA and the plaintiffs only, they cannot be held liable for any alleged breach based their alleged status as principals and/or officers of SOMA. With respect to the fraud claim, the moving defendants argue that the allegations of fraud against SOMA and its personnel

are nothing more than recast allegations of breach of contract, and that, in any event, the complaint does not allege any false statements made by Yanko and Conforty, justifiable reliance on those statements, or damages resulting from such reliance.

Plaintiffs, who retained counsel, oppose the motion, and cross move for leave to amend their complaint, stating that they have been litigating *pro se* without the benefit of counsel, and arguing that they have asserted both additional cognizable causes of action and named new defendants[2] in their amended complaint.

Plaintiffs' proposed amended complaint alleges a total of twelve causes of action: (1) breach of contract, (2) unjust enrichment, (3) breach of express warranty, (4) common law fraud, (5) promissory fraud, (6) fraudulent concealment, (7) piercing the corporate veil, (8 & 9) violations of NY General Business Law §§ 349 and 350, (10) promissory estoppel, (11) breach of fiduciary duty, and (12) breach of the implied covenant of good faith and fair dealing.

Defendants oppose the cross motion, arguing that plaintiffs have failed to refute their arguments that claims for breach of contract and fraud should be dismissed. They also argue that the proposed amended complaint should be denied as futile given that the new claims do not protect the complaint from dismissal, and that plaintiffs' allegations fail as a matter of law to establish a basis for piercing the corporate veil. Defendants also argue plaintiffs lack standing to bring claims based on false statements made in the offering plan, including those for fraud and for relief under General Business Law §§349 and 350, as the Attorney General has exclusive jurisdiction to bring such claims under the Martin Act.

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[2]The additional proposed defendants include SOMA Hudson Development LLC, Chelsea Condos LLC, and 22nd Street Development, LLC. The defendants named in the original complaint do not object to the inclusion of these additional defendants.

Defendants also assert that the claims under General Business Law §§349 and 350 are insufficient as they fail to allege a broad impact of the alleged wrongdoing on consumers, that the unjust enrichment claim is barred in light of the existence of express contract, and that there is no cognizable claim for breach of fiduciary duty as a sponsor of a condominium conversion owes no duty to a prospective purchaser.

In reply, plaintiffs argue that they have alleged sufficient facts to support their initial breach of contract and fraud claims. They also argue that their fraud claims and those seeking relief under the General Business Law are not barred by the Martin Act, and that their claims of unjust enrichment, promissory estoppel, breach of warranty and breach of the duty of good faith and fair dealing are all appropriate alternatives theories of liability to their initial breach of contract claim. Plaintiffs also argue that their claims for breach of fiduciary duty and veil piercing are adequately pleaded.

DISCUSSION

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted). In addition, "[o]nce a prima facie

basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment" Pier 59 Studios, L.P. v. ChelseaPiers, L.P., 40 AD3d 363, 365 (1st Dept 2007).[3] Here, as the moving defendants do not argue that they will be prejudiced or surprised by the proposed amended complaint, the only issue is whether the proposed pleading is of sufficient merit.

The first proposed cause of action is for breach of the Purchase Agreement, the Punch List, Addendums, and Offering Plan. Here, the documentary evidence establishes that the moving defendants were not parties to the Purchase Agreement (and related documents) since the only parties to such agreement are plaintiffs and SOMA. While it is alleged that the moving defendants are principals and/or officers of SOMA, it is well established that an agent of a corporation "will not be personally bound [to comply with the obligations under an agreement] unless there is clear and explicit evidence of the agent's intention to substitute or supercadd his personal liability for, or to, that of the principal." Mencher v. Weiss, 306 N.Y. 1, 4 (1953); Salzman Sign Co. v. Beck, 10 N.Y.2d 63, 66-67 (1961); see also, Application of Jevremov, 129 A.D.2d 174, 176 (1st Dept. 1987). Here, there is no evidence of any intent by either of the moving defendants to be held personally liable under the Purchase Agreement.

On the other hand, a corporate officer who is not a party to a corporation's contract may be held personally liable for its breach under a theory that officer was the alter ego of the corporation and exercised such dominion and control over the corporation that the corporate veil should be pierced. See Port Chester Electrical Construction Corp. v. Atlas, 40 N.Y.2d 652, 656-657 (1976).

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[3]Since plaintiffs responded to the motion to dismiss by seeking to amend the complaint, the court will consider the proposed pleading under the standard for a motion to amend.

Here, as indicated above, the proposed seventh cause of action seeks to pierce the corporate veil based on the theory that Yanko and Conforty were the alter egos of the corporate defendants.

Specifically, the seventh cause of action alleges that the moving defendants are "owners principals and alter egos of the corporate defendants" and "controlled their affairs without regard to the separate existence of the corporate entities" and "completely dominated the corporate defendants in regard to the sale of the Unit to plaintiffs and their domination was used to commit fraud against the plaintiffs which resulted in plaintiff being damaged" (Proposed Amended Complaint, ¶'s 162-164). It is further alleged that Yanko and Conforty "disregarded corporate formalities of the corporate defendants and accepted personal liability" and "commingled funds" (Id., at 168, 184), as evidenced by the agreement of Yanko and Conforty to be personally liable in connection with the settlement of complaint filed with the Attorney General by the Board Managers of the SOMA Condominium, and their agreement to be personally responsible for payment of a plaintiff in an action brought by another individual unit owner for defects in the unit.

It is also alleged that Yanko and Conforty failed to publish the names of the corporate Defendants as required by § 206 of the Limited Liability Act, and that the failure to publish the names of the corporate defendants prevents the moving defendants from shielding themselves from liability,[4] and that the failure to comply with § 206 demonstrates that "any business transacted with plaintiffs was done individually by Mr. Yanko and Mr. Conforty and that the use

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[4]Notably, however, the penalty for failing to comply with Limited Liability Law § 206 is the suspension of the authority to conduct business, and the statute provides that such suspension"shall not ...result in any member, manager or agent of such [LLC] becoming liable for the contractual obligations or other liabilities of the [LLC]." Limited Liability Act § 206 (b)(4).

of the companies constituted nothing more than alter egos or "doing business as " or "DBA" names (Amended Complaint ¶ 186).

In general, to pierce the corporate veil and impose alter ego liability, a plaintiff must show that: (1) the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue; and (2) such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury. TNS Holdings., Inc. v MKI Securities Corp., 92 NY2d 335, 339-40 (1998); Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141-42 (1993). However, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d at 339, *citing* Morris v New York State Dept. of Taxation and Fin., 82 NY2d at 141-42.

The theory of piercing the corporate veil involves a fact intensive inquiry that is not well suited for determination prior to discovery. See Ledy v Wilson, 38 AD3d 214, 214 (1st Dept 2007); Kralic v Helmsley, 294 AD2d 234, 235-36 (1st Dept 2002); International Credit Brokerage Co., Inc. v. Agapov, 249 AD2d 77, 78 (1st Dept 1998).

Here, the court finds that particularly as there has been no discovery, the proposed amended complaint sets forth sufficient allegations to establish the prima facie merit of the cause of action seeking to pierce the corporate veil. Specifically, the proposed amended complaint alleges the lack of corporate formalities, that the moving defendants commingled their personal funds with that of the corporations, and that the moving defendants dominated the corporate defendants and acted as their alter egos to perpetuate fraud on plaintiffs in connection with the purchase of the Unit.

Furthermore, evidence that the moving defendants used personal funds to settle a complaint filed with the Attorney General by the Board of Managers of SOMA regarding defects and unfinished work in the Building and that the settlement agreement referred to SOMA and Yanko, collectively, jointly, and severally as "the Sponsor" arguably supports a theory that the moving defendants commingled their funds with the corporate defendants, did not obey corporate formalities and/or acted as alter egos for corporate defendants. Under these circumstances, plaintiffs should be permitted to amend the complaint to include both the first cause of action (for breach of contract) and the seventh cause of action (seeking to pierce the corporate veil). See Thompson v. Cooper, 24 AD3d 203 (1st Dept 2005)(trial court erred in refusing to permit plaintiff to amend the complaint to add allegations concerning the alter ego status of corporate defendants and the piercing of the corporate veil of those entities).

In addition, in the event the corporate veil is pierced, Yanko and Conforty may be held potentially liable in connection with the Purchase Agreement for a breach of an express warranty relating to the warranty of fitness of purpose and habitability (third cause of action) and for breach of the implied duty of good faith and fair dealing (twelfth cause of action).

The next issue is whether the proposed claims for fraud (fourth cause of action), promissory fraud (fifth cause of action) and fraudulent concealment (sixth cause of action) are of sufficient merit. The threshold issue raised by the moving defendants is whether these claims are barred by the Martin Act. It is well established that the Martin Act does not create a private cause of action and thus only the Attorney General can sue for violations of the act. CPC Int'l Inc. v. McKesson Corp., 70 NY2d 268 (1987). In keeping with this rule, the Court of Appeals in Kerusa v. W10Z/515 Real Estate Limited Partnership, 12 NY3d 236, 239 (2009), held that a purchaser of

a condominium "may not bring a claim for common-law fraud against the building's sponsor predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act...and the Attorney General's implementing regulations." Relying on the holding in Kerusa , the moving defendants argue that plaintiffs lack standing under the Martin Act to pursue the fraud claims which allege a failure to conform with the offering plan and a failure to make various disclosures concerning conditions governed by Martin Act regulations.

While this motion was pending, the Appellate Division, First Department issued Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Management, Inc., 80 AD3d 293 (1st Dept 2010). In that decision, the First Department indicated its agreement with the Second Department's interpretation of Kerusa "to mean that where the facts as alleged in the complaint 'fit within a cognizable legal theory, and are not precluded by the Martin Act, as they do not re[ly] entirely on alleged omissions from the filing required by the Martin Act and the Attorney General's implementing regulations' such action will be permitted to proceed and a motion to dismiss based on a Martin Act preemption theory will be properly denied." Id., at 301, quoting Board of Managers of Marke Gardens Condominium v. 240/242 Franklin Ave., LLC, 71 AD3d 935, 936 (2d Dept 2010)(internal citations and quotations omitted).

Under the rule in Kerusa, as interpreted by the First Department, the court finds that the proposed fraud claims are not preempted by the Martin Act. Giving the proposed amended complaint every favorable intendment, the fraud claims cannot be said to be "predicated solely on material omissions from the offering plan" as mandated under the Martin Act (Kerusa, 12 NY3d at 239) such that it can be said that the claims are "indistinguishable from its Martin Act claim and [are] thus merely 'a backdoor private cause of action to enforce the Martin Act.'" Assured

Guar. (UK) Ltd., 80 AD3d at 300, quoting Kerusa, 12 NY3d at 245. Instead, the fraud claims are based on allegations that defendants made material misrepresentations and omissions as to the condition of the Unit and the Building and actively concealed defects, including, *inter alia,* the absence of a functional fire monitoring system for the Building and the Unit, the source of water damage to the Unit, and hidden fire emergency pipes behind the Unit's recreation wall. As noted by the Court of Appeals in Kerusa, allegations of active concealment of defects are sufficient to state a claim distinct from the Martin Act and to give rise to a private cause of action. 12 NY3d at 345.

Defendants also argue that the fraud claims are duplicative of the breach of contract claim. "A fraud based cause of action is duplicative of a breach of contract claim 'when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract'" Manas v. VMS Associates, LLC, 53 AD3d 451, 454 (1st Dept 2008), quoting First Bank of the Americas v. Motor Car Funding, 257 AD2d 287, 291 (1st Dept 1999). Otherwise put, "[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." Id. See also, Linea Nuova, S.A. v. Slowchowsky, 62 A.D.3d 473 (1st Dept. 2009). However, a fraudulent inducement claim may be based on allegations that a defendant made "a misrepresentation of present facts [that] is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of a duty." First Bank of the Americas v. Motor Car Funding, 257 AD2d at 291-292. Here, the proposed amended complaint sets forth numerous misrepresentations regarding present facts that are collateral to the contract regarding the condition of the Unit and Building and their intent to repair certain defects, as opposed to a misrepresentation as to a future intent to perform the terms of the Purchase

Agreement. Moreover, contrary to defendants' position, the fraud claims satisfy the pleading requirements of CPLR 3016(b), and are sufficient to allege fraud by Yanko and Confronty based on allegations as to misrepresentations made by individuals purportedly acting under their direction and control. See Parlato v. Equitable Life Assur Soc'y of U.S., 299 AD2d 108, 113 (1st Dept 2002). Accordingly, the causes of action for fraud, promissory fraud, and fraudulent concealment are of sufficient merit.

That being said, however, the causes of action for violations under §§ 349 and 350 of the General Business Law cannot be added as they do not sufficiently allege that the purported misrepresentations in the offering plan had a broad impact on consumers at large. See Thompson v. Parkchester Apartments, Co., 271 AD2d 311, 311 (1st Dept 2000)(dismissing complaint regarding alleged misrepresentations regarding plumbing defects in individual unit). Accordingly, the court need not reach defendants' additional argument that these claims are barred by the Martin Act.

Next, the claim for promissory estoppel cannot be sustained as the parties' relationship is defined by the Purchase Agreement, which contains an integration clause precluding reliance on collateral promises. See Fariello v. Checkmate Holdings, LLC, 82 AD3d 437, 438 (1st Dept 2011). Likewise, the unjust enrichment claim is without merit in light of the existence of an express agreement. MJM Advertising v Panasonic Indus. Co., 294 AD2d 265, 266 (1st Dept 2002). The claim for breach of fiduciary duty is also unavailing as there is no fiduciary relationship between plaintiffs and the moving defendants. See Vermeer Owners, Inc. v. Guterman, 169 AD2d 442, 443 (1st Dept), aff'd, 78 NY2d 1114 (1991)(dismissing a fiduciary cause of action on grounds that a sponsor of a condominium conversion owes no fiduciary duty to prospective purchaser).

CONCLUSION

In view of the above, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the cross motion to amend is granted to the extent of permitting plaintiffs to amend the complaint in the proposed form annexed to the cross motion except insofar as they seek to add claims for unjust enrichment (proposed second cause of action), violations of General New York's General Business Law §§ 349 and 350 (proposed eighth and ninth causes of action), promissory estoppel (proposed tenth cause of action) and breach of fiduciary duty (proposed eleventh cause of action); and it is further

ORDERED that within fifteen days of the date of this decision and order, plaintiffs shall serve an amended complaint consistent with the foregoing; and it is further

ORDERED that defendants shall answer the amended complaint within 15 days of service; and it is further

ORDERED that the parties shall appear on August 25, 2011, at 9:30 am, in Part 11, room 351, 60 Centre Street for a preliminary conference.

A copy of this decision and order is being mailed by my chambers to the parties.

DATED: ~~June~~ July 11, 2011

J.S.C.