

Capellan v Jackson Ave. Realty, LLC

2011 NY Slip Op 33871(U)

September 26, 2011

Sup Ct, Queens County

Docket Number: 700146/2011

Judge: Diccia T. Pineda-Kirwan

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN
Justice

IA PART 36

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CARLOS CAPELLAN, ET AL,

Index No.: 700146/11
Motion Date: 07/28/11
Motion Cal. No.: 3, 4, 5
Motion Seq. No.: 1, 2, 3

Plaintiff(s),

-against-

JACKSON AVENUE REALTY, LLC, ET AL,

Defendant(s).
-----X

The following papers numbered 1 to 20 read on this motion by defendants Jackson Avenue Realty LLC, Yaron Herscho, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmerman for an order dismissing the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action, pursuant to CPLR 3211(a)(4)(5) and (7), and in the alternative for summary judgment dismissing the complaint. Defendant Developers Group LLC separately moves for an order dismissing the complaint pursuant to CPLR 3211(a)(3)(5) and (7). Defendant NDG Architect, P.C., d/b/a Newman Design Group separately moves for an order dismissing the complaint, pursuant to CPLR 3211(a)(1)(3)(5) and (7).

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QUEENS COUNTY CLERK
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Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of a single decision and are determined as follows:

Plaintiffs previously commenced an action entitled Sung Hyun Hwang v Jackson Avenue Realty, LLC (Index No. 70072/10) which was dismissed pursuant to an order dated February 11, 2011, due to certain pleading deficiencies, with leave to commence a new action. The within action was thereafter commenced on March 30, 2011. Defendants Jackson Avenue Realty LLC, Yaron Herscho, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmerman have served an answer and interposed fourteen affirmative defenses.

The individual plaintiffs each own a condominium apartment unit in a building located at 13-11 Jackson Avenue, Long Island City, New York. Plaintiff The Echelon Condominium was formed in 2007. Defendant Jackson Avenue Realty LLC, is the sponsor of a said condominium. Defendants the Developers Group LLC (DG) is the sales and marketing agent for the sponsor. Defendant Yaron Hershco, also known as Ron Hershco, Yaron Hershko and Ron Hershko, (Hershco) is identified in the complaint as the principal and alter ego of the sponsor, and the principal and alter ego of defendants' United Homes LLC, Ramon Building and Construction Corp. These entities are alleged to have purchased the real property, constructed the subject building, and offered the units for sale to the plaintiffs and members of the general public.

The complaint alleges, among other things, that the building, its common areas, and the individual units suffer from numerous design and construction defects. Plaintiffs allege that after they purchased their respective units, the sponsor, Hershco and his affiliated companies failed to construct the building in accordance with the plans, specifications and representations made by the defendants and their authorized agents, and used substandard construction materials. Defendants allegedly failed to properly insulate the interior walls; substituted inferior appliances for the advertised "luxury" appliances; installed hollow metal doors and frames rather than the promised "solid wood doors with wood frames"; failed to construct an enclosed parking garage as required by the zoning regulations and as represented by the sponsor, Hershco and Developers Group LLC; the sponsor's sales and marketing agent; failed to engage FXFOWLE Architects to design any part of the building except the lobby; failed to provide "as built" plans; and failed to obtain a permanent certificate of occupancy. It is further alleged that the sponsor and Hershco have acted so as to cause the sponsor controlled board members to not attend board meeting, thereby preventing the establishment of a quorum and the conducting of essential and required business.

Plaintiffs further allege that although Hershco is not a member of the condominium's Board of Managers he has attended board meetings and has spoken as the sponsor and directed the votes of the sponsor controlled members. Richard Zimmerman is alleged to be a former or present employee or agent of the sponsor, Hershco or their controlled affiliates, and has been designated by the sponsor and Hershco as a member of the Board of Managers. It is alleged that prior to this action the sponsor controlled members of the Board of Managers voted against the retention of an attorney to commence this action and assert claims against the sponsor and Hershco, and that Hershco and his counsel have made it known that the sponsor and Hershco would not cede any control so as to authorize any action against the sponsor and Hershco. It is therefore alleged that it would be futile to make a demand upon the Board of Managers.

That branch of the motion by defendants Jackson Avenue Realty LLC, Yaron Hershco, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmerman which seeks to dismiss the within action on the grounds of another action pending, pursuant to CPLR 3211(a)(4), is denied. There is no prior action pending between the parties, as the complaint in the prior action was dismissed as to all defendants, and the plaintiffs therein have withdrawn their appeal of the February 22, 2011 orders (*Hwang v Jackson Avenue Realty, LLC*, 2011 NY Slip Op 73935(U)[Appellate Division, Second Department, May 26, 2011]).

The branch of the motion by defendants Jackson Avenue Realty LLC, Yaron Hershco, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmerman which seeks to dismiss the complaint on the grounds of *res judicata*, collateral estoppel and issue preclusion, is denied. *Res Judicata*, or claim preclusion, dictates that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343 [1999]). Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action . . . and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]). Collateral estoppel requires that the party to be precluded from relitigating the issue "had a full and fair opportunity to contest the prior issue" (*Ryan, supra*, 62 NY2d at 501). Here, as the prior claims were dismissed for pleading deficiencies and were not litigated on the merits, neither *res judicata*, collateral estoppel, nor the doctrine of issue preclusion are applicable.

It is noted that although defendant Developers Group LLC(DG) refers to CPLR 3211(a)(3) and (5), in its notice of motion, this defendant has not articulated a basis for dismissal of the complaint on these grounds.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory (*Mendelovitz v Cohen*, 37 AD3d 670, 671, [2007]; *P.T. Bank Central Asia v ABNAMRO Bank N.V.*, 301 AD2d 373, 375, [2003]).

The first cause of action by the individual unit owners sufficiently states a claim for breach of contract against the sponsor. Plaintiffs' claims for breach of contract against defendant Yaron Herscho, also known as Ron Hershco, Yaron Herschko and Ron Hershko (Hershco) are based upon the doctrine of piercing the corporate veil; plaintiffs do not allege Hershco was a party to the contract of sale of the condominium units, or contracted to construct the common elements. Defendant Hershco is alleged to be the owner, principal, and alter ego of the sponsor, and the owner, principal and alter ego of United Homes LLC and Ramon Building and Construction Corp. United Homes LLC and Ramon Building and Construction Corp. are alleged to have constructed the building, the individual units and the common elements.

The doctrine of piercing the corporate veil applies to limited liability companies as well as to corporations (*Retropolis, Inc. v 14th St. Development*, 17 AD3d 209, 210, [2005]). In order to pierce the corporate veil and impose alter ego liability, a plaintiff must allege: (1) that the owners exercised complete domination of the corporation in respect to the transaction attacked; (2) that the owners used such domination to commit a fraud, wrong or unjust act against the plaintiff; and (3) damages. (*TNS Holdings Inc. v MKI Securities Corp.*, 92 NY2d 335, 339-40 [1998] citing *Morris v State Dep't of Taxation & Finance*, 82 NY2d 135, 141-142, [1993]). 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 AD2d 214[2007]; *Kralic v Helmsley*, 294 AD2d 234, 235-36 [2002]; *Int'l Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1998]). Here, as there has been no discovery, the court finds that the complaint sets forth sufficient allegations to establish *prima facie* merit on the cause of action for breach of contract against Hershco, based upon piercing the corporate veil.

The individual unit owners in the second cause of action for common law fraud allege that the sponsor, Herscho, and DG, made specific oral and written representations concerning the construction of a parking garage; the construction of luxury residences; the quality of the materials to be used in the construction of the building, units and common elements; the design of the entire building would be done by a named architectural firm; the certificate of occupancy would be obtained; and the the sponsor would make certain payments. Plaintiffs specifically allege that defendants deliberately concealed the poor construction of the building, including the failure to properly attach the exterior brick wall, which caused it to bulge and crack, and fall, and the failure to install insulation between interior walls, causing unhealthy and uncomfortable temperatures in the units, resulting in substantially increased expenses for heating and air conditioning.

Defendants assert that these common law fraud claims are duplicative of the breach of contract claim. It is noted that as plaintiffs have not asserted a claim against DG for breach of contract, they may maintain a claim against this defendant for common law fraud.

With respect to the sponsor and Hershco, it is well established that "[i]n order to establish a fraud claim in addition to a breach of contract claim, plaintiff must show misrepresentations that are misstatements of material fact or promises with a present, but undisclosed, intent not to perform, not merely promissory statements as to future acts" (*Mora v RGB, Inc.*, 17 AD3d 849, 852 [2005]). Moreover, "a misrepresentation of a material fact which is collateral to the contract and serves as an inducement for the contract is sufficient to allege fraud" (*Mendelovitz v Cohen*, 37 AD2d 670 [2007]; see also *First Bank of the Americas v Motor Car Funding*, 257 AD2d 287, 291-92 [1999]). Here, the fraud claims against the sponsor and Hershco are duplicative of the breach of contract claim, and are not collateral to the contract of sale. Therefore, the branches of the defendants' motions which seek to dismiss the second cause of action are denied as to DG, and are granted as to the sponsor, Jackson Avenue Realty LLC and Hershco.

The third cause of action by the individual unit owners allege violations of Sections 349 and 350 of the General Business Law. "The elements of [a cause of action pursuant to General Business Law § 349] are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act. In determining whether a representation or omission is a deceptive act, the test is whether such act is likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Andre Strishak & Assocs., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609, [2002] [internal citations omitted]). Pursuant to General Business Law § 350, "[a] plaintiff must demonstrate that [an] advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury. Similarly, the test is whether the advertisement is likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Andre Strishak*, 300 AD2d at 609 [internal citations omitted]).

Here, plaintiffs fail to properly allege an act or practice that was misleading in a material respect or allege that plaintiffs relied on false advertisements when purchasing the condominium units. The complaint generally alleges that the condominium was not constructed in accordance with the plans, specifications and offering plan. Plaintiffs' only allegation of a misleading practice in the complaint is the general assertion that the sponsor, Hershco and DG made representations that were "consumer-oriented" and "broadly disseminated", and that the representations recited in the complaint were deceptive and intended to mislead reasonably diligent potential consumers, including the unit owners, and that they were actually misled and sustained damages. While the plaintiffs clearly allege that defendants breached the contract by failing to build the condominium in accordance with the plans and offering plan, the complaint fails to allege an act or practice that was misleading in a material respect pursuant to General Business Law § 349 (see *Andre Strishak*, 300 AD2d at 610). Furthermore, the complaint fails to allege that defendants "relied upon or were aware of [an] allegedly false advertisement" when purchasing the condominium units pursuant to General Business Law § 350 (*Andre Strishak*, 300 AD2d at 610). As the complaint fails to properly allege the elements for a cause of action pursuant to General Business Law §§ 349 or 350, the third cause of action cannot be maintained. The court need not address defendants' contention that the Martin Act precludes plaintiffs' cause of action under General Business Law §§ 349 and 350. Therefore, the branch of the motion by defendants Jackson Avenue Realty LLC, Yaron Herscho, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmerman, and the branch of the motion by defendant DG, which seeks to dismiss the third cause of action, is granted.

The fourth, fifth and sixth causes of action for breach of fiduciary duty and for injunctive relief are derivative actions brought by the unit owners on behalf of the condominium against the sponsor, Hershco and the sponsor controlled members of the Board of Managers. Plaintiffs, as unit owners, have the capacity and interest to assert a claim on behalf of The Echelon Condominium against the sponsor controlled members of the Board of Managers, including defendant Richard Zimmerman (*see generally Abrams v Donati* 66 NY2d 951 [1987]; *Caprer v Nussbaum*, 36 AD3d 176, 193, [2006]). Contrary to these defendants' assertions, plaintiffs have properly alleged that a demand upon the sponsor controlled members of the Board of Managers would be futile. It is noted that plaintiffs allege that the sponsor controlled members of the Board of Managers voted against the hiring of an attorney in order to pursue the subject claims against the sponsor and Hershco.

With respect to the sponsor and Hershco, it is well settled that one who aids and abets a breach of a fiduciary duty is liable for that breach, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered substantial assistance to the fiduciary in the course of effecting the alleged breach of duty (*see Velazquez v Decaudin*, 49 AD3d 712, 716 [2008]; *Caprer v Nussbaum*, 36 AD3d at 193 [2006]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 [2010], quoting *Kaufman v Cohen*, 307 AD2d 113, 126 [2003]). Here, the complaint alleges that the sponsor and Hershco affirmatively induced the sponsor controlled members of the Board of Managers, including Richard Zimmerman, to not attend Board of Manager meetings so that a quorum could not be obtained, and to refuse to take any action to enforce various contracts and agreements benefitting the condominium, including construction contracts, commitments made by the sponsor and Hershco to pay common charges for units owned by the sponsor, the construction of a garage and obtaining of a permanent certificate of occupancy. Plaintiffs' allegations thus are sufficient to state a claim against defendant Zimmerman, the sponsor, and Hershco for breach of fiduciary duty.

The seventh cause of action by the individual unit owners, seeks a permanent injunction directing the sponsor and Hershco to cure and remove all violations of record and obtain a permanent Certificate of Occupancy. Contrary to defendants' assertion, although the complaint joins individual claims with derivative claims on behalf of the condominium, the complaint need not be dismissed, as the plaintiffs have "not confused individual and derivative claims within each cause of action" (*Baliotti v Walkes*, 134 AD2d 554, 555, [1987]; *see also Wallace v Perret*, 28 Misc 3d 1023 [2010]; *Brescia v Silberman*, 2009 NY Slip Op 30597[U] [2009]). As both the derivative and personal claims are properly pled here, a hybrid action may be maintained.

The eighth cause of action by the individual unit owners and the ninth cause of action against defendants ABC Corp.(a fictitious entity) United Homes LLC and Ramon Building and Construction Corp., alleges negligence and gross negligence in the construction of the building, units and common elements. The construction contracts are alleged to have been entered into with the sponsor. Plaintiffs, however, do not allege that the construction defendants owed a duty to them, and the individual unit owners cannot recover for economic loss arising out of the negligent construction of their units and the common elements, absent privity of contract (*see Residential Bd.*

of *Managers of Zeckendorf Towers v Union Square - 14th St. Assocs.*, 190 AD2d 636, 637, [1993]; see also *Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159 [1987]). That branch of defendants Jackson Avenue Realty LLC, Yaron Herscho, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmerman motion which seeks to dismiss the eighth cause of action, therefore, is granted.

The ninth cause of action alleges a derivative claim on behalf of the condominium against the construction defendants for breach of contract. Plaintiffs alleged that these defendants owed a duty to the condominium, as the expressly intended owner of the building. Plaintiffs, however, do not allege that the building and common elements were expressly contracted for by the condominium, and that the condominium relied upon the construction contractors' obligations under the contracts. Contrary to plaintiffs' assertions, the condominium is an incidental beneficiary, and not an intended beneficiary of the contracts between the sponsor and the general contractors. Therefore, as the condominium lacks privity, plaintiffs may not maintain a claim for breach of contract against the construction defendants (see *Residential Board of Managers of Zeckendorf Towers v Union Square-14th Street Associates*, *supra*). The branch of the motion by defendants Jackson Avenue Realty LLC, Yaron Herscho, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmermann, which seeks to dismiss the ninth cause of action, is granted.

The tenth cause of action alleges a derivative claim for negligence and gross negligence on behalf of the condominium against the architect, NDG Architect, PC, d/b/a Newman Design Group,(NDG). Plaintiffs' assertion that they have standing to maintain this derivative cause of action is rejected. Condominium ownership is a hybrid form of real property ownership, created by statute (see Real Property Law art 9-B [§ 339-d et seq.] [Condominium Act]; *Caprer v Nussbaum*, 36 AD3d 176, [2006]). Pursuant to the Condominium Act, each owner holds a real property interest in his or her unit and its appurtenances (see Real Property Law § 339-g), which consists of an exclusive possessory interest in the unit (see Real Property Law § 339-h) and an undivided interest in the common elements of the condominium (see Real Property Law §339-I; *Caprer v Nussbaum*, 36 AD3d at 183; *Murphy v State of New York*, 14 AD3d 127, 132-133,[2004]; *Schoninger v Yardarm Beach Homeowners' Assn.*, 134 AD2d 1, 5-6, [1987]).

Upon the filing of a declaration (see Real Property Law § 339-n), a condominium is subject to the jurisdiction of the Condominium Act (see Real Property Law § 339-f). In addition, the administration of the condominium's affairs is governed principally by its bylaws, "which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements" (*Schoninger v Yardarm Beach Homeowners' Assn.*, 134 AD2d at 6; see *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536,[1990]; *Murphy v State of New York*, 14 AD3d at 133; *Four Bros. Homes at Heartland Condominium II v Gerbino*, 262 AD2d 279, 280,[1999]; *Quinones v Board of Mgrs. of Regalwalk Condominium I*, 242 AD2d 52, 54,[1998]). Under the Condominium Act, there are a number of mandatory items which the condominium's bylaws must contain, including provisions for the nomination and election of a board of managers to serve as the principal agents of the condominium and a statement of the powers and duties of that board (see Real Property Law § 339-v

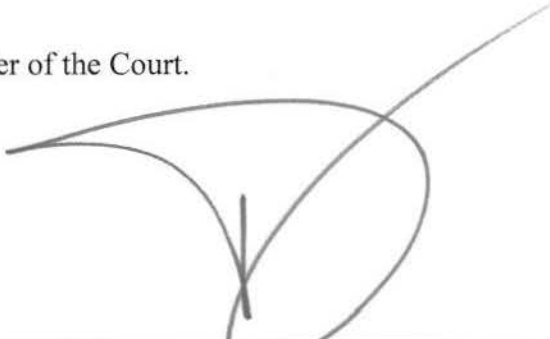
[1] [a]). (See *Board of Mgrs. of Vil. View Condominium v Forman*, 78 AD3d 687 [2010]). Plaintiffs neither allege, nor claim, that bylaws of The Echelon Condominium permit individual unit owners to sue, derivatively, on behalf of the condominium.

A condominium may be an unincorporated association, or a corporation formed under the Business Corporation Law or the Not-For-Profit Corporation Law. Plaintiff's neither allege nor claim that The Echelon Condominium is incorporated. Therefore, it is apparent that the condominium is an unincorporated association managed by a board of managers. Plaintiffs affirmatively state that this claim is not brought pursuant to General Associations Law §12. Nor do they rely upon the common law, which permits members of an unincorporated association to 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]). Rather, plaintiffs' assert that pursuant to *Caprer, supra*, and *Di Fabio v Ominipoint Communications, Inc.* (66 AD3d 635 [2009]), they are entitled to maintain a derivative action against the sponsor's architect. The courts therein, however, only recognized an individual unit owner's right to maintain a derivative action against a condominium's board of managers on behalf of the condominium, and did not permit derivative claims against third parties.

Finally, even if plaintiffs had standing to maintain a derivative claim, they may not seek to recover damages for economic loss arising out of negligent construction in the absence of a contractual relationship (*Lake Placid Club Attached Lodges v Elizabethtown Bldgs., supra*). Contrary to plaintiffs' assertions the condominium is an incidental, and an not intended beneficiary of the architect's contract with the sponsor. Absent privity of contract, plaintiffs have no right to recover from defendant NDG for negligence or gross negligence. (*Residential Bd. of Managers of Zeckendorf Towers v Union Square-14th St. Assocs., supra*). The court notes that NDG's participation in meetings with the Department of Buildings, and others, including any individual unit owners, does not approximate privity of contract with the condominium. Therefore, NDG's motion to dismiss the complaint, is granted.

In view of the foregoing, the motion by defendants Jackson Avenue Realty LLC, Yaron Herscho, United Homes LLC, Ramon Building and Construction Corp., and Richard Zimmerman is granted solely to the extent that the second, third, eighth and ninth causes of actions against these defendants are dismissed. The motion by defendant Developers Group LLC to dismiss the complaint is granted solely to the extent that the third cause of action is dismissed. The motion by defendant NDG Architect, P.C., d/b/a Newman Design Group to dismiss the complaint, is granted in its entirety.

This constitutes the decision and order of the Court.



DICCIA T. PINEDA-KIRWAN, J.S.C.

2011 OCT 24 AM 6:15
Dated: September 26, 2011
FILED
QUEENS COUNTY CLERK