

<b>Board of Mgrs. of the Downtown Condominium v 15 Broad St., LLC</b>
2011 NY Slip Op 33917(U)
November 14, 2011
Sup Ct, NY County
Docket Number: 102963/09
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART 45

Board of Managers, et al.

INDEX NO. 102963/09

- v -

15 Broad Street, LLC, et al.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is granted in part and denied in part per the attached decision and order.*

Dated: November 14, 2011

*Michael J. Adams*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X  
 THE BOARD OF MANAGERS OF THE DOWNTOWN :  
 CONDOMINIUM and THE DOWNTOWN :  
 CONDOMINIUM, :  
 :  
 Plaintiffs, :  
 :  
 -against- :  
 :  
 15 BROAD STREET, LLC, YESHAYAHU :  
 BOYMELGREEN a/k/a SHAYA BOYMELGREEN, :  
 PINCHAS COHEN, 15 BROAD STREET MANAGERS, :  
 LLC, AI PROPERTIES AND DEVELOPMENT (USA) :  
 CORP., AFRICA ISRAEL INTERNATIONAL :  
 INVESTMENTS 1997 LIMITED, AFRICA ISRAEL :  
 INVESTMENTS LIMITED, BOYMELGREEN FAMILY :  
 LLC, HF 15 BROAD STREET OWNERS, LLC, :  
 FRANCIS PISANI II, DAMIEN STEIN, ANDREW :  
 FAULDS, ANDREW ASHWAL, EUGENE :  
 ZLATOPOLSKY, JONA RECHNITZ, ALISA :  
 CONSTRUCTION CO., INC., and ISMAEL LEVYA :  
 ARCHITECTS, P.C., :  
 Defendants. :  
 -----X

Index No. 102963/09  
 DECISION AND ORDER  
 Motion Sequence No. 002

**MELVIN L. SCHWEITZER, J.:**

This matter arises out of various alleged construction defects in connection with the conversion of a building at 15 Broad Street into condominium ownership. 15 Broad Street is where the former J.P. Morgan & Co. headquarters was located, and now consists of a 40-story structure containing 386 residential units and two retail units. Plaintiffs, The Board of Managers of the Downtown Condominium (Board of Managers) and The Downtown Condominium (Condominium) filed a complaint on its behalf, on behalf of the Condominium, and on behalf of an unincorporated association of unit owners against defendants Frank Pisani II (“Mr. Pisani”) and Ismael Leyva Architects, P.C. (collectively, the “Architect Defendants”). Ismael Leyva

Architects, P.C. was the architectural firm retained to render architectural design services with respect to the conversion of 15 Broad Street to condominium ownership. Frank Pisani II is alleged to be the managing principal at Ismael Leyva Architects, P.C. and is alleged to have made representations as to the Description of Property in the Offering Plan.<sup>1</sup> The dispute involves a comparison of actual building conditions with representations made in the building's offering plan (Offering Plan). These Architect defendants move pursuant to CPLR 3211 (a)(1) and (7) for an order dismissing six causes of action asserted against them. They include the fifth cause of action for negligence, the sixth cause of action for common law fraud, the seventh cause of action for negligent misrepresentation, the eighth cause of action for breach of contract, the ninth cause of action for professional malpractice, and the tenth cause of action for violation of the General Business Law 349 and 350.

### **Background**

Plaintiffs allege that the Sponsor filed an Offering Plan on or about July 15, 2004 and commissioned various marketing materials that the Sponsor made available to attract potential unit owners. Plaintiffs further allege in their complaint that the Offering Plan contained representations made by Mr. Pisani which certified that the Description of Property (i) set forth in narrative form the physical condition of the entire property as it would exist upon completion

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<sup>1</sup> Other co-defendants, who are not parties to this motion, include 15 Broad Street, LLC, the sponsor of the conversion of the building at 15 Broad Street to condominium ownership ("Sponsor"); 15 Broad Street Managers, LLC, the alleged sole member of the Sponsor; AI Properties and Development (USA) Corp. and Boymelgreen Family LLC, the alleged members of 15 Broad Street Managers; Yeshayahu Boymelgreen and Pinchas Cohen, the alleged principals of Sponsor who signed the certifications in the condominium Offering Plan ("Offering Plan"); Africa Israel International Investments 1997 Limited and Africa Israel Investments Limited, alleged to have signed the Sponsor's Certification page in the Offering Plan; HF 15 Broad Street Owners, LLC, alleged to have assumed certain duties of Sponsor after issuance of the Offering Plan; Alisa Construction Co., who allegedly performed construction services at 15 Broad Street; and Damien Stein, Andrew Faulds, Andrew Ashwal, Eugene Zlatopolsky, and Jona Rechnitz, five individuals who allegedly were or had been Sponsor-designated members of the condominium's board of managers. Plaintiffs' complaint asserts a total of fifteen causes of action among the various defendants.

of construction, provided that the construction was in accordance with the plans and specifications he examined; (ii) in his professional opinion, afforded potential investors, purchasers and participants an adequate basis upon which to found their judgment concerning the physical condition of the property as it would exist upon completion of construction, provided that construction was in accordance with the plans and specifications he examined; (iii) did not omit any material fact; (iv) did not contain any untrue statement of a material fact; (v) did not contain any fraud, deception, concealment, or suppression; (vi) did not contain any promise or representation as to the future which was beyond reasonable expectation or unwarranted by existing circumstances; and (vii) did not contain any representation or statement which was false where he knew the truth, or where he could have known the truth with reasonable effort in circumstances where he did not have knowledge concerning the representation or statement made.

The first unit closed on March 27, 2006.

Plaintiffs allege that the actual conditions at 15 Broad Street did not correspond with the representations set forth in the Offering Plan. Specifically, plaintiffs point to over 150 construction-related defects. These include multiple Building and Fire Code violations, leaks, cracks, faulty insulation, and mold-like substances found throughout various areas of the building, including the basement, roof, and individual resident floors.

### **Discussion**

CPLR 3211(a) provides, in pertinent part, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that (7) the pleading fails to state a cause of action . . . .”

Courts are instructed to construe a complaint liberally when determining if it withstands a motion to dismiss under CPLR 3211(a)(7), accepting all allegations as true and giving the plaintiff the benefit of every favorable inference. *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). “[T]he sole criterion is whether the pleading states a cause of action.” *Weiss v Cuddy & Feder*, 200 AD2d 665, 666-67 (2d Dept 1994) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). If allegations are discerned from the four corners of the complaint which, taken as a whole, state *any* cause of action recognized by law, a motion to dismiss under CPLR 3211(a)(7) must be denied. *Id.*, 200 AD2d at 667; *Cooper v 620 Prop. Assoc.*, 242 AD2d 359, 360 (2d Dep’t 1997).

#### Statute of Limitations

The Architect Defendants argue that the fifth, seventh, eighth, and ninth causes of action should be dismissed on the ground that the plaintiffs’ claims are time barred. They argue that, according to CPLR 214 (6), this suit is governed by a three-year statute of limitations. CPLR 214 (6) imposes a three-year statute of limitations for “an action to recover damages for malpractice, other than medical, dental, or podiatric malpractice.” Based on the legislative history of CPLR 214 (6), where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years, regardless of whether the theory is based in tort or in a breach of contract. *In the Matter of the Arbitration Between Kliment & Halsband & McKinsey & Co.*, 3 NY3d 538, 541-42 (2004). It is well established that the three-year statute of limitations controls in a negligence action against a professional, such as an architect. *Ackerman v Price Waterhouse*, 84 NY2d 535 (1994).

The Architect Defendants argue that, in this case, the cause of action accrues upon the termination of the professional relationship between the parties, particularly, when the designer completes its performance of significant duties under the parties' contract. Conversely, the plaintiffs argue that the cause of action accrues on the date of injury. Based on the First Department's reasoning in *IFD Constr. Corp. v Corddry Carpenter Dietz and Zack*, 253 AD2d 89, 92 (1999), the court's opinion is that the cause of action, in this case, accrued on the date of injury. ("In a negligence action based upon reliance on a design professional's allegedly defective work product, such as contract documents upon which a contractor's bid decisions are based, the cause of action can not accrue until the date that the work product is received, since that is the earliest date on which the injured party, who did not retain the professional, could have relied upon it.")

Specifically, in this case, the cause of action accrued when each prospective unit owner relied on the Architect Defendant's representations in the Offering Plan. However, the Architect Defendants (or, for that matter, the plaintiffs) have not specified each prospective unit owner's respective date of reliance, i.e., the date that each unit owner signed his purchase agreement. In sum, the Architect Defendants have not plead an essential element of their defense – the relevant date which starts the running of the statute of limitations. As such, the Architect Defendants' motion to dismiss the fifth, seventh, eighth, and ninth causes of action on the grounds that they were untimely, must be denied.

The Architect Defendants further argue that the tenth cause of action should be dismissed on the grounds that the plaintiffs' claim is time barred. The statute of limitations for violations of the General Business Law 349 – 350 is three years. *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 (2001). In *Gaidon*, the New York Court of Appeals held that "in an action to

recover for a liability created or imposed by a statute, the statutory language determines the elements of the claim which must exist before the action accrues.” *Id.*

General Business Law 349 prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in the state of New York, while General Business Law 350 bars “false advertising in the conduct of any business.” The cause of action for a violation of General Business Law 349 – 350, respectively, accrues when a plaintiff has been injured either as a result of a deceptive act or practice, or false advertising. *Gaidon*, 96 NY2d at 211. The plaintiff, representing prospective unit owners, was injured when each owner relied on the Architect Defendants’ representations contained in the Offering Plan. As the Architect Defendants have not specified each prospective unit owner’s respective date of reliance, i.e., the date that each unit owner signed his purchase agreement, the Architect Defendants’ motion to dismiss the tenth cause of action on the ground that it was untimely, must, based on the reasoning set forth above, be denied.

#### Sixth and Seventh Causes of Action for Fraud and Negligent Misrepresentation

The Architect Defendants argue that the sixth and seventh causes of action, sounding in fraud and negligent misrepresentation, must be dismissed because they are precluded by the Martin Act.

The Martin Act “makes it illegal for a person to make or take part in a public offering of securities consisting of participation interests in real estate unless an offering statement is filed with the Attorney General.” *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 906 NE2d 1049, 1053 (2009). The disclosure regulations contain numerous requirements, including the content, filings and word for word representations and certifications that must be made by an architect as part of the sponsor’s offering plan. *Id.* The Attorney General is given the sole

authority to enforce the Martin Act's provisions and implement its regulations. *Id.* at 1054. Accordingly, there is no private right of action under the statute. *Id.*

To survive the Architect Defendants' motion to dismiss in this case, the plaintiffs must have plead common law claims, separate and distinct from a claim under the Martin Act. The plaintiffs did not do so and, therefore, the sixth and seventh causes of action against the Architect Defendants must be dismissed.

Both the sixth and seventh causes of action are based entirely upon representations that the Architect Defendants made in the Offering Plan. The Offering Plan is a requirement under the Martin Act; without the Martin Act, the Architect Defendants are under no obligation to make these disclosures and representations. As the New York Court of Appeals recognized in *Kerusa*, "to accept [the] pleading as valid would invite a backdoor private cause of action to enforce the Martin Act in contradiction to our holding [] that no private right to enforce that statute exists." *Id.* As the Attorney General has the exclusive right to enforce such actions, the plaintiffs cannot be permitted to maintain either the sixth or seventh causes of action.

#### Fifth and Ninth Causes of Action for Negligence and Malpractice

The Architect Defendants argue that the fifth cause of action for negligence and the ninth cause of action for malpractice must be dismissed because they are duplicative of the plaintiffs' breach of contract claim. Conversely, the plaintiffs argue that these claims are not duplicative, because the allegations of negligence and malpractice are separate and distinct from any contractual duty owed by the Architect Defendants.

New York law establishes the general rule that a breach of contract does not give rise to a tort claim unless a legal duty independent of the contract has been violated. *See Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987). Further, a contracting party

seeking only a benefit of the bargain recovery, i.e., economic loss under the contract, may not sue in tort notwithstanding the use of familiar tort language in its pleadings. *See Sommer v Fed. Signal Corp.*, 79 NY2d 540 (1992).

In claims against professionals, however, “[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties’ relationship. Professionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties.” *See id.* at 551. In *17 Vista Fee Assocs.*, the plaintiff alleged that an engineer had “failed to exercise the skill and judgment required of members of the engineering profession when it designed a faulty smoke purge system, and that such failure resulted in its liability [] for the cost of repairing the system.” *17 Vista Fee Assocs. v Teachers Ins. and Annuity Assoc. of Am.*, 259 AD2d 75, 80 (1st Dep’t 1999). The court held that this allegation is “separate and distinct from [the engineer’s] contractual duties, and state[s] a viable claim for professional malpractice.” *Id.*

Applying the reasoning in *17 Vista Fee Associates* to this case, the court’s opinion is that the plaintiffs’ claims cannot be dismissed at this stage of the litigation. The plaintiffs allege that the Architect Defendants accepted and undertook to perform the architectural services with reasonable care and in good and workmanlike manner, and pursuant to and in accordance with accepted practices and standards of the architectural profession, so that the construction of 15 Broad Street would be accomplished with reasonable care and in a good and workmanlike manner and free of material defects. In addition, the plaintiffs allege that the Architect Defendants failed to exercise reasonable care in the performance of the architectural services and instead, performed their services carelessly, negligently, and contrary to accepted practices and standards of the architectural profession. These allegations, if construed in the light most

favorable to the plaintiffs and taken to be true, state causes of action for negligence and malpractice distinct from their breach of contract claim. Accordingly, the court denies the Architect Defendants' motion to dismiss the fifth and ninth causes of action.

#### Eighth Cause of Action for Breach of Contract

The Architect Defendants argue that the eighth cause of action for breach of contract, based on a third-party beneficiary theory, must be dismissed because the plaintiffs are not intended third party beneficiaries to the Architect Defendants' contract. Conversely, the plaintiffs argue that an explicit provision in the contract between the Architect Defendants and the Sponsor is evidence that the plaintiffs are beneficiaries thereof.

New York law requires that three elements are satisfied before finding an intended third-party beneficiary relationship. Specifically, the plaintiff must establish the existence of a valid and binding contract between other parties; that the contract was intended for his benefit; and that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost. *State of Cal. Pub. Empl. Retirement System v Shearman & Sterling*, 95 NY2d 427 (2000). The First Department has held that condominium unit owners are incidental beneficiaries to professional's contracts, rather than intended beneficiaries, and thus can not recover for breach of contract. *Kerusa Co. LLC, v W10Z/515 Real Estate Ltd Partnership et al.*, 50 AD3d 503 (2008). Under New York law, all three elements establishing a third-party beneficiary relationship must be satisfied. By failing one element, the plaintiffs necessarily fail to establish third-party beneficiary status.

Plaintiffs, however, argue that an explicit contractual provision establishes that they are successors of the Architect Defendants' contract, thereby conferring on them third-party

beneficiary status. The operative clause states that the Architect Defendants' contract "shall inure to the benefit of and be binding upon the heirs, executors, and administrators and successors of the respective parties hereto." This court's opinion is that, for the following reasons, the plaintiffs are not successors to the contract.

First, this clause represents boilerplate language that commonly can be found in contracts relating to professional services to be performed in real estate projects. Second, Black's Law definition for "successor" with respect to corporations is a "corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with rights and duties of an earlier corporation." Black's Law Dictionary (9th ed. 2009). A "successor," as understood in this context, is the corporate successor to either the Sponsor or the Architect Defendants so that if one of the parties merges with another company, or is purchased by another company, each successor remains bound by the obligations under the contract. By this definition, the court finds that the plaintiffs are not "successors."

Further, this court distinguishes the First Department's decision in *The Board of Mgrs. of the Alfred Condominium v Carol Mgt. Inc.*, 214 AD2d 380, 382 (1995). That case held that, under its particular circumstances, the board of managers was a successor to the sponsor. However, the First Department focused on an explicit contract provision that referred to unit holders as third-party beneficiaries. ("[T]he rider to the HRH contract explicitly refers to the unit owners as beneficiary parties to that agreement.") There is no such provision in the Architect Defendants' contract.

This court is of the opinion that the boilerplate clause cited above does not confer successor status on the plaintiffs, particularly in light of the fact that if it did, the obligations of the Sponsor would be binding on the unit owners, making them responsible for indemnifying the

Architect Defendants. It is clear beyond any doubt whatsoever that this was not the intent of the contract's drafters. Accordingly, the eighth cause of action for breach of contract, based on a third-party beneficiary theory, is dismissed.

Tenth Cause of Action Under the General Business Law 349-350

The Architect Defendants argue that the tenth cause of action for violation of the General Business Law 349 for deceptive business practices, and the General Business Law 350 for false advertising, must be dismissed because, *inter alia*, the promotional materials disseminated in connection with Sponsor's conversion of 15 Broad Street to condominium ownership did not have a broad impact on consumers at large. The plaintiffs attempt to minimize the precedential value of the cases on which the Architect Defendants rely.

To maintain a viable claim under the General Business Law 349-350, plaintiffs must meet the threshold requirement of showing that the alleged deceptive acts, if permitted to continue, would have a broad impact on consumers at large. *See Thompson v Parkchester Apts. Co.*, 271 AD2d 311 (2000). The First Department has held that promotional materials distributed to prospective unit owners are unique to the parties at the particular complex and therefore, do not fall within the statute. *See id.* Private transactions without consequences for the public at large are not the proper subject of a claim for violation of the General Business Law 349-350. *See Canario v Gunn*, 300 AD2d 322 (2002).

The plaintiffs argue that because the promotional materials were disseminated via the Internet and other media, these materials had a broad impact on consumers. This is not sufficient to overcome the threshold requirement established under New York law and the learning of *Thompson*. Accordingly, the Architect Defendants' motion to dismiss the tenth cause of action is granted.

### Claims Against Francis Pisani II

The Architect Defendants argue that the individual claims against Mr. Pisani must be dismissed because Mr. Pisani is not alleged to have (i) entered into a contract with any entity to render services for this project; (ii) signed and sealed drawings for this project; or (iii) have done anything else individually that would make him responsible for the plaintiff's various allegations.

This court's opinion is that there are no specific allegations in the complaint against Mr. Pisani, unless the term Architect, in paragraph 72 of the complaint, is meant to refer to Mr. Pisani in his individual capacity. However, the word Architect is not a defined term in the complaint and Mr. Pisani is nowhere defined, except collectively as one of the Architect Defendants. Consequently, the complaint does not plead a cause of action against Mr. Pisani.<sup>2</sup> However, the court will permit the plaintiffs to amend its complaint to specifically name Mr. Pisani in his individual capacity, if the plaintiffs believe that such claims are meritorious.

### Claim for Punitive Damages

Plaintiffs seek punitive damages only with respect to the sixth cause of action, sounding in fraud, and the tenth cause of action, for violation of the General Business Law 349 – 350. As both of these claims have been dismissed, it necessarily follows that the requests for punitive damages are also dismissed.

Accordingly, it is

ORDERED that the Architect Defendants' motion to dismiss the sixth, seventh, eighth, and tenth causes of action is granted; and it is further

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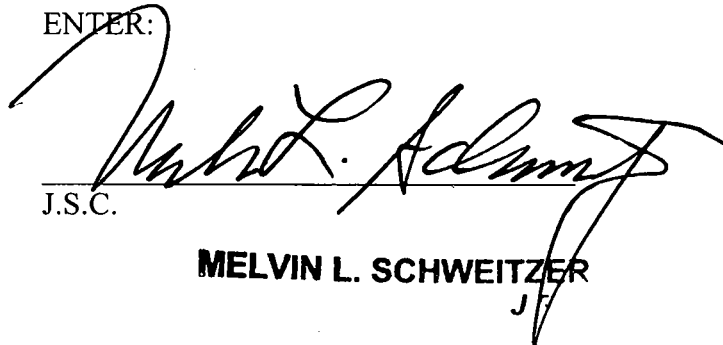
<sup>2</sup> The plaintiffs argue that Mr. Pisani signed the Description of Property in the Offering Plan, attached as an Exhibit to the Orel Affirmation. However, upon review of the Orel Affirmation and the cited Exhibit, it contained an unrelated set of financial statements.

ORDERED that the Architect Defendants' motion to dismiss the fifth and ninth causes of action is denied; and it is further

ORDERED that plaintiffs are is granted leave to amend the complaint to name Mr. Pisani as a defendant..

Dated: November 14, 2011

ENTER:



J.S.C.

**MELVIN L. SCHWEITZER**  
Jr.