Board of Mgrs. of the 129 St. Condominium v 129 Lafayette St., LLC
2012 NY Slip Op 33349(U)
July 12, 2012
Supreme Court, New York County
Docket Number: 150397/2011E
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN **PART** 12

Justice

Index Number : 150397/2011
BOARD OF MANAGERS OF THE 129
vs.
129 LAFAYETTE STREET, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

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

Dated: JUL 12 2012

_____, J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
   ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

BOARD OF MANAGERS OF THE 129 STREET CONDOMINIUM,

Plaintiff,

-against-

129 LAFAYETTE STREET, LLC; WILLIAM FEGAN; JAMES MOONEY; ADRIAN STROIE; BERG + FLYNN ARCHITECTURE PC; CHRISTOPHER BERG; MARINO GERAZOUNIC & JAFFE ASSOCIATES, INC.; GILSANZ, MURRAY, STEFICEK, LLP; MORGAN CONSTRUCTION NY INC.; TRIBEACH HOLDINGS, INC.; ETNA CONSULTING STRUCTURAL ENGINEERING P.C.; and EDY ZINGHER,

Defendants.

----------X

Index Number 150397/2011E
Mot. Seq. Nos. 001, 004 & 005

DECISION AND ORDER

Appearances:

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E-filed papers considered in review of these motions:	**E-filing Document Numbers**:
Motion Seq. No. 001:	
Notice of motion, Fegan affidavit and annexed exhibit A, Wrobel affirmation and annexed exhibits A - D, and memorandum of law	11 - 25
Welch affidavit in opposition and annexed exhibits 1 - 11, Rosabianca affirmation, and Panzella memorandum of law	31 - 33
Defendants' reply memorandum of law in further support	40
Transcript of oral argument	109
Motion Seq. No. 004:	
Notice of motion, Wrobel affirmation and annexed exhibits A - E, memorandum of law, Berg affidavit, Fegan affidavit and annexed exhibit A	49 - 56
Welch affidavit in opposition and annexed exhibits 1 - 11, Rosabianca affirmation, and memorandum of law	89 - 91
Defendants' reply memorandum of law	96
Plaintiffs' sur-reply letter, dated June 4, 2012	128
Defendants' sur-reply letter, dated June 5, 2012	129
Motion Seq. No. 005:	
Notice of motion, Sherman affirmation and annexed exhibits A - E, memorandum of law and Fegan affidavit and annexed exhibit A	110 - 116
Welch affidavit in opposition and annexed exhibits 1 - 11, Rosabianca affirmation, and memorandum of law	117 - 119
Defendants' reply memorandum of law	123

PAUL G. FEINMAN, J.:

The motions filed under sequence numbers 001, 004 and 005 are joined for purposes of disposition.

In motion sequence number 001, defendants 129 Lafayette Street, LLC, Berg + Flynn Architecture PC, and TriBeach Holdings, LLC, move pursuant to CPLR 3211 (a) (1), (3), (5) and (7) and CPLR 214-d to dismiss the complaint, and for costs and sanctions against plaintiff's attorney, pursuant to 22 NYCRR 130-1.1. Plaintiff, the Board of Managers of the 129 Street Condominium, oppose.

Under motion sequence number 004, defendants Christopher Berg and Adrian Stroie move for the same relief as the defendants in motion sequence number 001. The same relief is also sought by defendants William Fegan and James Mooney under sequence number 005. Plaintiff opposes both motions.

For the reasons set forth below, the three motions are granted except to the extent they seek to impose sanctions against plaintiff's attorney under 22 NYCRR 130-1.1.

BACKGROUND

This action arises out of the construction, renovation and rehabilitation of the building located at 129 Lafayette Street, New York, New York. Plaintiff is the Board of Managers (the "Board") of the condominium association (the "Condominium") that owns the building. According to the complaint, defendant 129 Lafayette Street LLC (the "Sponsor") is the building's sponsor and defendants William Fegan, Adrian Stroie and James Mooney are Sponsor's principals (the "Individual Sponsor Defendants"), and Fegan and Berg are also principals of defendant Berg + Fegan Architecture, P.C., the architect engaged by the Sponsor for the design, construction and certification of the building. The complaint alleges that

defendant TriBeach Holdings, LLC "was also an owner, Sponsor and/or Developer for the design and construction of the Condominium, or at minimum, advertised and held itself out to the public as same ..." (Doc. 21, ex. A, Ver. compl. at ¶ 21). Adrian Stroie is alleged to be a principal of both Sponsor and TriBeach. In all, the complaint asserts 24 causes of action against the various defendants.

This is not the first action to be commenced by plaintiff arising out of purported construction defects of the Condominium building. A prior action was commenced against the Sponsor, the Individual Sponsor Defendants and Stribling Marketing Associates, LLC, Sponsor's sales agent ("Action 1"). There, the complaint asserted six causes of action: (1) specific performance of defendants' obligations under the Condominium's Offering Plan to obtain a Permanent Certificate of Occupancy; (2) specific performance of defendants' obligations under the Offering Plan to cure certain alleged deficiencies in the building's construction; (3) breach of contract based on defendants' alleged failure to obtain a Permanent Certificate of Occupancy; (4) breach of contract based on defendants' alleged failure to complete construction and cure the alleged deficiencies in the common areas and individual units; (5) fraud, deceit and misrepresentation based on allegedly false representations made by Sponsor that it would be able to obtain a Permanent Certificate of Occupancy; and (6) deceptive trade practices under General Business Law § 349 against Sponsor based on allegedly misleading representations contained in the Offering Plan (Doc. 22, ex. B, Prior compl.). By decision and order dated May 29, 2009, the justice assigned to Action 1 dismissed all claims against the Individual Sponsor Defendants and Stribling (*Bd. of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafayette St. LLC, et. al.*, Sup Ct, NY County, May 29, 2009, York, J., index no. 103032/2008). The claims against Sponsor were also dismissed with the exception of the second and fourth causes of action relating to construction defects. Plaintiff did not appeal the

dismissal.

Throughout discovery in Action 1, plaintiff repeatedly missed deadlines and failed to comply with court orders (*see Bd. of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafayette St. LLC, et. al.*, Sup Ct, NY County, Nov. 16, 2011, York, J., index no. 103032/2008, seq. nos. 002, 003). Plaintiff missed the court-ordered February 28, 2011, deadline for filing the Note of Issue. After months of inactivity, the court scheduled a status conference with the parties on July 20, 2011. Thereafter, as a result of plaintiff's continued and repeated failures to adhere to the court's discovery orders, the court directed that unless the Note of Issue was filed by August 5, 2011, the action would be dismissed pursuant to CPLR 3126. On August 4, 2011, rather than filing the Note of Issue, plaintiff moved for an extension of the time to file. On August 11, 2011, the court dismissed the action based on plaintiff's failure to comply with the terms of the July 20, 2011 conditional order. Plaintiff moved to vacate the order of dismissal.

The court in Action 1 denied plaintiff's motion to extend the time for filing the Note of Issue, noting the multiple extensions previously granted to plaintiff and plaintiff's continued and willful failure to follow the discovery orders of the court (*Bd. of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafayette St. LLC, et. al.*, Sup Ct, NY County, Nov. 16, 2011, York, J., index no. 103032/2008, seq. nos. 002, 003). Plaintiff's motion to vacate was denied because plaintiff "failed to give any reasonable excuse or even an explanation for its repeated failure to obey the orders of th[e] Court ..." (*Bd. of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafayette St. LLC, et. al.*, Sup Ct, NY County, Nov. 16, 2011, York, J., index no. 103032/2008, seq. nos. 002, 003). While recognizing that dismissal under CPLR 3126 was a drastic remedy, the court emphasized that "plaintiff's continued and unexplained pattern of ignoring the orders of this Court [was] completely unacceptable" (*id.* at *4). Plaintiff's motion to vacate was initially denied on the record on October 5, 2011, but a written decision was not issued until

November 16, 2011. The instant action was commenced by plaintiff October 7, 2011 – just two days after plaintiff's motion to vacate was orally denied.

The complaint in this action asserts 24 causes of action sounding in breach of contract, gross negligence, fraud, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing and deceptive business practices. Plaintiff names as defendants all of the defendants from Action 1 with the exception of Stribling. Plaintiff also adds eight new defendants. Since the filing of the instant motions, this court has granted motions to dismiss filed on behalf of Gilsanz, Murray & Steficek, LLP (Doc. 125) and Marino Gerazounis & Jaffe Associates, Inc. (Doc. 124). Defendants Morgan Construction NY Inc., Etna Consulting Structural Engineering P.C. and Edy Zingher has each answered the complaint.

ANALYSIS

1. Motion to Dismiss – Res Judicata

"On a motion to dismiss pursuant to CPLR 3211 motion to dismiss, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; citing CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88; citing *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). Dismissal may be granted under CPLR 3211 (a) (5) where the "cause of action may not be maintained because ...[of] res judicata ...." Under the doctrine of res judicata, or claim preclusion, "a valid final judgment bars future actions between the same parties on the same cause of action" (*Landau, P.C. v Larossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008]; quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]). Thus, "[a]s a general rule, 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" (*id.* at 12-13). "The primary purposes of res judicata are grounded in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy" (*Chen v Fischer*, 6 NY3d 94, 100 [2005]; citing *Matter of Hodes v Axelrod*, 70 NY2d 364, 372 [1987]; *Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]). Here, Sponsor and the Individual Sponsor Defendants argue that res judicata requires dismissal of the claims against them.

a. *Final determination on the merits*

A necessary element of res judicata is that the prior judgment be a "final determination on the merits" (*Landua P.C.*, 11 NY3d at 13). CPLR 5013 does not require that the prior judgment contain the words "on the merits" in order to be given res judicata effect; "it suffices that it appears from the judgment that the dismissal was on the merits" (*Strange v Montefiore Hosp. & Med. Center*, 59 NY2d 737, 739 [1983]). Generally, a dismissal based on pleading deficiencies is not considered "on the merits" for purposes of res judicata (*Komolov v Segal*, __AD3d__, 2012 NY Slip Op 04690 [1st Dept 2012]; citing *Avins v Federation Employment and Guidance Svc., Inc.*, 67 AD3d 505, 506 [1st Dept 2009]). Thus, where the prior action is dismissed with "no indication that the dismissal was without prejudice or not on the merits," it will not have a res judicata effect on a subsequently filed, timely action (*id.*). However, "[e]ven where an order does not explicitly so state, a dismissal is one on the merits for res judicata purposes if the order addressed the merits and was not issued purely on account of technical pleading deficiencies" (*Plaza PH2001 LLC v Plaza Res. Owner LP*, __AD3d__, 2012 NY Slip Op 05119 [1st Dept 2012] [rejecting plaintiff's argument that res judicata did not apply because "with prejudice" was deleted from the form of the dismissal order]).

The violation of a conditional preclusion order or conditional order of dismissal is viewed as a determination on the merits (*see Santoli v 475 Ninth Ave. Assocs., LLC*, 38 AD3d

411, 417 [1st Dept 2007]; citing *Tejeda v 750 Gerard Props. Corp.*, 272 AD2d 124, 125 [1st Dept 2000]; *see also Cruz v Kamlis Dresses & Sportswear Co.*, 238 AD2d 103, 104 [1st Dept 1997]; citing *Strange*, 59 NY2d at 739 [judgment based on violation of preclusion order is an award on the merits and a party's "failure to prosecute an appeal bars further litigation of the same facts raised in the prior proceeding"]; *see also Yates v Roco Co.*, 48 AD3d 800, 800 [2d Dept 2008] [although dismissal in prior action based upon a preclusion order because of plaintiff's repeated failures to appear for an independent medical examination did not specifically recite that such dismissal was "on the merits," it nonetheless should have been accorded res judicata effect in order to prevent plaintiff from "circumventing the preclusion decree"]; citing *Kalinka v St. Francis Hosp.*, 34 AD3d 742, 744 [2d Dept 2006] [dismissal upon the grant of an order of preclusion after determining party had willfully and contumaciously failed to comply with disclosure given res judicata effect in subsequent action]). However, a dismissal based solely on a party's nonappearance, in absence of a conditional order of dismissal or a finding of willful and contumacious conduct, may not be treated as a dismissal "on the merits" (*see Hernandez v St. Barnabas Hosp.*, 89 AD3d 457, 458 [1st Dept 2011] [prior action dismissed for plaintiff's counsel's failure to attend a calendar call has no res judicata effect]; *see also Brooks v Haidt*, 59 AD3d 233, 234 [1st Dept 2009] [plaintiff not barred by res judicata where plaintiff's prior action involving same claims was dismissed under 22 NYCRR 202.27 (b) in an order that was without prejudice to a motion to have the matter restored and did not otherwise indicate intention to dismiss on the merits]; citing *Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326, 328 [1st Dept 2006] [second action not barred by res judicata where prior action was dismissed based upon plaintiff's failure to appear at a scheduled conference, even though plaintiff did not attempt to vacate her default in prior action]).

Here, there are two separate "judgments" from Action 1 which could possibly have a res

judicata effect on the instant action. The first is the decision and order dated May 29, 2009, which was reduced to a judgment filed July 20, 2009, (the "2009 Judgment"), which dismissed all causes of actions against all defendants therein, except the second and fourth causes of action against the Sponsor (*Bd. of Mgrs. of the 129 Lafayette St. Condominium*, Sup Ct, NY County, May 29, 2009, York, J., index no. 103032/2008, mot. seq. no. 001). The second "judgment" dismissed the remaining claims against the Sponsor based on plaintiff's failure to comply with a July 20, 2011 conditional order providing that the action would be dismissed if plaintiff failed to file the Note of Issue by August 5, 2011 ("2011 Judgment"). Plaintiff's motion to vacate the order of dismissal was denied by decision and order dated November 16, 2011, in which the court found dismissal warranted under CPLR 3126 because of plaintiff's "continued and unexplained pattern of ignoring the orders of this Court," and found that plaintiff failed to "give any reasonable excuse for ignoring the Court's orders" (Doc. 110-6, *Bd. of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafeyette Street LLC, et. al.*, Sup Ct, NY County, Nov. 16, 2011, York, J., index no. 103032/2008, mot. seq. nos. 002, 003).

The 2009 Judgment granted, in part, a motion by all defendants for dismissal pursuant to CPLR 3211 (a) (1), (3), and (7). As to the first and third causes of action as against all defendants, each arising out of defendants' alleged failure to secure to a permanent certificate of occupancy for the Condominium building, were dismissed because "were [the court] to issue the requested judgment, it would be an exercise in futility," since defendants could not themselves issue any certificate of occupancy for the building (*Bd. of Mgrs. of the 129 Lafayette St. Condominium*, Sup Ct, NY County, May 29, 2009, York, J., at *8). Moreover, the court held that these two causes of action would require the "rewriting of a carefully drawn document," since the Condominium's Offering Plan did not require the sponsor to obtain a permanent certificate of occupancy within a reasonable period of time (*id.* at *9). The court dismissed the

fifth and sixth causes of action, sounding in fraud and deceptive business practices, as being barred by the Court of Appeals's decision in *Kerusa Co. LLC v W10Z/515 Real Estate LP*, 12 NY3d 236 (2009). Finally, the court dismissed the second and fourth claims, arising out of defendants' alleged failure to construct the Condominium building free of defects, but only as against the individual defendants and Stribling, since neither was a party to the contract with plaintiffs.

Although the 2009 Judgment does not explicitly state that it was "with prejudice" or "on the merits," contrary to plaintiff's contention, it was "not issued purely on account of technical pleading deficiencies" (*Plaza PH2001 LLC*, 2012 NY Slip 05119, at *6). Rather, examination of the court's ruling clearly demonstrates that the claims were dismissed on the merits. The mere fact that defendants' motion was pursuant to CPLR 3211 (a) (1) and (7) does not render it procedural, and plaintiff fails to convince the court otherwise (*see Heritage Realty Advisors, LLC v Mohegan Hill Dev., LLC*, 58 AD3d 435, 436 [1st Dept 2009]). The 2011 Judgment is also "on the merits," since it was based on plaintiff's violation of a conditional order of preclusion and the court's finding that dismissal was warranted due to plaintiff's continued and unexplained pattern of ignoring the court's orders (*see Santoli*, 38 AD3d at 417; *Tejeda*, 272 AD2d at 125; *cf. Espinoza*, 32 AD3d at 328). Accordingly, dismissal in the Prior Action in the 2009 and 2011 Judgments should be treated as "on the merits" for res judicata purposes.

b. *Same Parties*

Res judicata applies to the parties to a prior litigation and those in privity with them (*see UBS Securities LLC v Highland Capital Mgmt., LP*, 86 AD3d 469, 473-474 [1st Dept 2011]). The only defendants in the prior action that have also been named as defendants in the instant action are Sponsor and its three principals, Fegan, Stroie, and Mooney (the "Individual Sponsor Defendants"). Defendants only seek to apply res judicata as to these four defendants.

c. *Same Transactions*

"[O]nce 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" (*Chen*, 6 NY3d at 100; quoting *O'Brien v City of Syracuse*, 54 NY2d 353 [1981]). In determining whether particular claims are part of the same transaction for res judicata purposes, a "pragmatic test has been applied ... analyzing 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage'" (*id.* at 100-101; quoting Restatement [Second] of Judgments § 24 [2]). The "rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]; citing *O'Connell v Corcoran*, 1 NY3d 179, 184-185 [2003]).

In opposition, plaintiff argues that claim preclusion would be "erroneous, since, the causes of action brought in the instant complaint are diverse from those in the prior action" (Doc. 91, Plaintiff's opp. memo. at 13). Plaintiff contends that the only two types of claims in this action that are similar to the claims brought in Action 1 are those sounding in breach of contract and fraud, but "the claims contained in the present [c]omplaint could not have been raised in the complaint in the prior action, as the facts necessary to state them were not fully known at that time" (*id.* at 14). Specifically, plaintiff alleges that the present complaint is based on an engineer's "discovery of, *inter alia*, inadequate fire protection, fraudulent concealment of exterior facade defects and insufficiently secured brick work, and unwarrantable window and roofing work - all of which are either in violation of the Building Code or the Offering Plan" (*id.* at 14). These "egregious defects" were allegedly illustrated in reports compiled by FSI

Architecture between 2009 and 2011, which plaintiff describes as "alleg[ing] active concealment of substantial construction defects, falsification of construction documents filed with the New York City Department of Buildings, affirmative misrepresentations in the Offering Plan, and negligence in the construction of the Building" (*id.* at 14). Plaintiff submits an affidavit of Jamie Welch, President of the Condominium's Board, in which he describes alleged defects in the building's construction that were discovered as early as 2006, and others that remained "concealed and latent" until as recently as November 2011.

Plaintiff's attempt to avoid the preclusive effect of the judgments entered in Action 1 is unavailing. Both the present action and Action 1 arise out of the same transaction or series of transactions. All causes of action asserted in both complaints pertain to alleged defects in the construction and design of the building, the departure from the plans set forth in the Offering Plan, and defendants' alleged misrepresentations and/or concealment of these defects and departures of which plaintiff's individual unit owners allegedly relied upon in purchasing their respective condominium units. While new theories of liability are alleged in the present complaint that were not alleged in Action 1, they nonetheless arise out of the "same transaction or series of transactions" - the construction and sale of the Condominium and the individual units (*Chen*, 6 NY3d at 100). The facts alleged in both actions are related in "time, space [and] origin," form a "convenient trial unit," and "it can hardly be said that the claims in the two actions are so unrelated that reasonable business people, not to mention the parties themselves, would have expected them to be tried separately" (*UBS Securities LLC*, 86 AD3d at 475).

Accordingly, Sponsor and the Individual Sponsor Defendants are entitled to dismissal of all claims as against them under the doctrine of res judicata and CPLR 3211 (a) (5).

2. Motion to Dismiss - Application to Particular Defendants

a. *Christopher Berg*

The complaint alleges that Christopher Berg was a principal of defendant Berg + Flynn Architecture, PC, and the architect who personally "signed the architect certifications for the [b]uilding in connection with the construction, and particularly, for the Certificate of Occupancy" (Doc. 110-2, Compl. at ¶ 13). The complaint's twelfth cause of action alleges that Berg, as well as defendants Fegan and Berg + Flynn, as the architect of record for the Condominium's construction, "owed a duty of care to [p]laintiff and other unit owners to cause and ensure that the Building was designed, constructed and completed in a competent and workmanlike manner, in accordance with the Building Plans and Specifications and proper design, engineering and construction standards ..." (*id.* at ¶ 221). It further alleges that these defendants were "grossly negligent" and breached their duties to plaintiff in that the "Building was improperly and inadequately constructed and completed in an incompetent and un-workmanlike manner, with material design and construction defects ... and not in accordance with the Construction Documents ..." (*id.* at ¶ 222). It claims these defendants "failed to exercise due care in the discharge of their professional duties, in that they signed certifications and submitted Construction Documents containing materially false representations and statements of fact, either knowingly, or with a gross negligence ..." (*id.* at ¶ 224). The complaint alleges plaintiff has suffered "and is at risk to suffer further damage, to itself and to its property ...," by reason of defendants' purported negligence, but does not provide any details as to the nature of these damages (*id.* at ¶ 225).

The eighteenth cause of action, labeled as a fraud claim, is asserted against Berg and Fegan, individually, and Berg + Flynn. The complaint alleges that the architect's certification signed by Berg and incorporated into the Offering Plan was knowingly based on false representations (*id.* at ¶ 307). Plaintiff contends that Berg knew that potential purchasers "including the Plaintiff would rely upon same," quoting an excerpt of this certificate in which

Berg says that the "certification is made for the benefit of all persons to whom the offer is made" (*id.* at ¶ 308). These representations were allegedly known to Berg to be false by virtue of Berg's partnership with Fegan, who as a member of the Condominium's initial Board, had "actual knowledge of, and/or had reason to know of, the material design and construction defects in the Building ..."(*id.* at ¶ 314). The complaint alleges Berg made knowingly false statements and omissions for the "purpose of deceiving and defrauding Plaintiff and other unit owners and inducing them to rely thereon in purchasing units in the Condominium" (*id.* at ¶ 313). Plaintiff claims that it has "suffered extensive damages due to Berg and Fegan's fraud, both in the loss of value of their Units, the monetary damages arising from their retention of professionals to attempt to remedy the numerous design and construction defects, and other consequential defects" (*id.* at ¶ 319).

The nineteenth cause of action sounds in negligent misrepresentation and essentially is based on the same allegations as the eighteenth cause of action, adding that defendants, "by preparing and signing the Certificate and [] Report, had a duty to the [p]laintiff to make statements and representations that were accurate regarding the material construction defects ..." (*id.* at ¶ 330).

(i) Twelfth Cause of Action Against Berg - Gross Negligence

As to the twelfth cause of action, sounding in "gross negligence," to state a cause of action premised upon negligence, plaintiff must plead that "defendant owed plaintiff a duty, that defendant, by act or omission, breached such duty, that such breach was the proximate cause of plaintiff's injuries, and that plaintiff sustained damages" (*Salvador v New York Botanical Garden*, 71 AD3d 422, 423 [1st Dept 2010]; *Febesh v Elcejay Inn Corp.*, 157 AD2d 102 [1st Dept 1990]). Gross negligence "differs in kind, not only degree, from claims of ordinary negligence" (*Colnaghi, USA, Ltd. v Jewelers Protection Svcs., Ltd.*, 81 NY2d 821, 823 [1993]). It involves

"conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*id.* at 823-824; citing *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554 [1992]). The conduct must evince a "conscious disregard for the rights of others or [was] so reckless so as to amount to such disregard" (*11 Essex St. Corp. v Tower Ins. Co. of NY*, __AD3d__, 2011 NY Slip Op 01127 [1st Dept 2011]; citing *Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC*, 71 AD3d 537, 538 [1st Dept 2010]).

In support of the instant motion to dismiss, defendants submit a copy of the Offering Plan. The Offering Plan identifies "Fegan/Berg/Architects PC" as Sponsor's licensed project architect for the Condominium Project, and notes that Berg prepared the "Report of Property and Specifications contained in Part II of the Plan" (Doc. 55, ex. A, part 2, Offering Plan at 118). That report is annexed to the Offering Plan and is dated September 3, 2003 (*id.* at 125). The form Purchasing Agreement is also incorporated into the Offering Plan. It provides that the purchaser agrees that there will be no liability "if there is a minor error or inaccuracy in the layout or dimensions of the Unit or the Commons Elements of the Condominium as shown on the Floor Plans certified by the Sponsor's Consulting Architect ..." (*id.* at 171-172). Moreover, it contains a "No Representations" clause providing that each purchaser "acknowledges that Purchaser has not relied upon any architect's plans, ... including but not limited to, any relating to the description or physical condition of the Property, the Building or the Unit, or the size or the dimensions o[f] the Unit or the rooms therein contained or any other physical characteristics thereof ..." (*id.* at 174, ¶ 24).

Also attached to the Offering Plan is the "Certification by Sponsor's Engineer or Architect Pursuant to 13 NYCRR 20.4 (C)," signed by Berg, indicating that he "visually inspected the property on several occasions, most recently August 18, 2003, inspected the plans and specifications prepared by Fegan/Berg/Architects, PC, dated February 14, 2003, and

prepared the Report dated September 3, 2003, a copy of which is intended to be incorporated into the offering plan so that prospective purchasers may rely on the Report" (*id.* at 353). However, defendant emphasizes that Berg also states in the certification that "[t]his statement is not intended as a guarantee or warranty of the physical condition of the property" (*id.* at 354).

Defendants also argue that Berg is not personally liable for work performed in his capacity as a principal of a professional corporation, citing the general principle that there is no individual liability for principals of a corporation for actions taken in furtherance of the corporation's business (Doc. 50, Berg memo. at 8-9; citing *Worthy v New York City Hous. Auth.*, 21 AD3d 276, 284 [1st Dept 2005]). Berg submits an affidavit stating that he did not personally enter into any agreements or contracts related to the Condominium and any work he performed was in his capacity as principal of Berg/Flynn. Finally, defendants argue that plaintiff's gross negligence, fraud and negligent misrepresentation claims are each duplicative of the breach of contract claims and, therefore, must be dismissed (*id.* at 10; citing *Matlinpatterson ATA Holdings LLC v. Federal Express Corp.*, 87 AD3d 836 [1st Dept 2011]).

In opposition, plaintiff argues that the complaint states valid claims against Berg because he signed the certification annexed to the Offering Plan in his individual capacity, and that Berg had legal obligations under the Offering Plan, separate and distinct from his role as a principal of Berg + Flynn (Doc. 91, Plaintiff's opp. memo. at 32). Although the complaint alleges that Berg and Berg + Flynn "failed to exercise due care in the discharge of their professional duties ...," plaintiff disavows that its gross negligence claim is one of professional malpractice. Plaintiff emphasizes that there is no allegation that Berg was "retained by, hired by, or worked for the Plaintiff," or an allegation of "any client-architect relationship" (*id.* at 34).

Notwithstanding plaintiff's contention to the contrary, "[a]n allegation that a party failed in the proper performance of services related primarily to its profession is a claim of professional

malpractice" (*Travelers Indemnity Co. v Zeff Design*, 60 AD3d 453, 455 [1st Dept 2009]). While plaintiff now attempts to cast in contract and fraud, the allegations in the complaint essentially are that Berg and the other architecture defendants "failed to perform services in a professional, nonnegligent manner" (*Boslow Family LP v Kaplan & Kaplan, PLLC*, 52 AD3d 417, 417 [1st Dept 2008]). Since plaintiff has disavowed any such claim and has alleged no other facts which would give rise to a duty running to the plaintiff, it fails to state a cause of action for "gross negligence."

To the extent plaintiff seems to be asserting "gross negligence" in Berg's performance of its contractual duties to perform professional services, a claim for negligent performance of a contract is not cognizable (*see Bd. of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assocs.*, 73 AD3d 581, 582 [1st Dept 2010]). Moreover, the conclusory allegation that Berg breached his duty to ensure that the Condominium was properly and adequately constructed free of defects is not presumed to be true, since the existence of such duty is "flatly contradicted by the documentary evidence" (*Rivietz v Wolohojian*, 38 AD3d 301, 301 [1st Dept 2007]; *see also Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006] [court not required to accept on motion to dismiss "legal conclusions that are unsupportable in the face of undisputed facts"]; *see also NYP Holdings, Inc. v McClier Corp.*, 83 AD3d 426, 428 [1st Dept 2011] ["conclusory allegations are insufficient"]). Under the Offering Plan, the only party vested with any responsibility for ensuring that the Condominium was constructed in a manner substantially complying with the Offering Plan and Plan and Specifications defined therein, or required to cure any defects in the construction of the Condominium, is the Sponsor (*see e.g.*, Doc. 55, ex. A, part 2, Offering Plan at 172, ¶ 14). In fact, the plain terms of the Purchasing Agreement expressly forbid any purchaser from claiming reliance on the architect's plans relating to the description or physical condition of the property (*id.* at 174, ¶ 24).

Furthermore, in this context, plaintiff's "gross negligence" claim is really just another way of describing its nineteenth cause of action sounding in negligent misrepresentation (*see Sykes v RFD Third Ave.*, 15 NY3d 370, 372 [2010] [claim that engineer designed heating and cooling systems negligently, and that statements about these systems made in the offering plan attributed to the engineer were negligently made treated as negligent misrepresentation claim]). For this reason, dismissal of the twelfth cause of action is warranted (*see Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 581 [dismissing certain claims as duplicative]).

In addition, the allegations are insufficient to establish a duty running from Berg directly to plaintiff. It not alleged that Berg knew or had the means of knowing that the individuals whose claims are being asserted by plaintiff were possible purchasers of a Condominium unit (*Sykes*, 15 NY3d at 374). Since Berg did not know "the identity of the specific nonprivy party who would be relying," the complaint fails to state a cause of action rooted in negligence (*id.* at 374; quoting *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]).

Accordingly, the branch of defendant's motion seeking dismissal of the twelfth cause of action as against Berg is granted pursuant to CPLR 3211 (a) (1) and (a) (7).

(ii) Eighteenth Cause of Action Against Berg - Fraud

As mentioned above, the complaint's eighteenth cause of action as against Berg is based on alleged false statements in documents he signed which were incorporated with the Condominium's Offering Plan. Plaintiff and individual unit owners allegedly relied on Berg's statements in purchasing units in the Condominium. The essential elements of a cause of action for fraud are "representation of a material existing fact, falsity, *scienter*, deception and injury" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; quoting *Channel Master Corp. v Aluminium Ltd. Sales Corp.*, 4 NY2d 403, 407 [1958]). There is no private right of action where the alleged "fraud and misrepresentation relies entirely on alleged omissions in

filings required by the Martin Act" (*Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]; citing *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 247 [2009]). However, a private action may still be maintained "where the claim alleges a basis for fraud that is distinct from the Martin Act" (*id.* [*internal citation omitted*]). In other words, a "private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute" (*Assured Guaranty (UK) Ltd. v J.P. Morgan Investment Mgmt. Inc.*, 18 NY3d 341, 353 [2011]).

The certification incorporated into the Offering Plan and signed by Berg explicitly states that it was being provided to comply with the requirements set forth in 13 NYCRR Part 20. The regulations found in 13 NYCRR Part 20 were promulgated by the Attorney General pursuant to General Business Law § 352-e (6) of the Martin Act (*see Kerusa Co. LLC v W10Z/515 Real Estate LP*, 12 NY3d 236, 244 [2006]). These regulations detail the format and content of offering plans and filings, including the word-for-word representations that must be made in the certifications signed by an engineer or architect (13 NYCRR 20.4 [c]). Berg's certification is nothing more than a verbatim recitation of the form certification set out in the Attorney General's regulation. But for the Martin Act and the Attorney General's implementing regulations, Berg did not have to make the disclosures in the certification (*see Kerusa Co. LLC*, 12 NY3d at 245). Thus, a fraud claim predicated on this certification is entirely dependent on a violation of the Martin Act, and is therefore barred. "[T]o accept [plaintiff's] pleading as valid would invite a backdoor private cause of action to enforce the Martin Act in contradiction to [the Court of Appeals'] holding in *CPC Intl.* that no private right to enforce that statute exists" (*Assured Guaranty (UK) Ltd.*, 18 NY3d at 353; quoting *Kerusa Co. LLC*, 12 NY3d at 245; citing *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 276-277 [1987]). Similarly, the complaint refers to

representations made in a report issued by Berg + Flynn and incorporated into the Offering Plan, but this too is a report only required by virtue of the Martin Act and the Attorney General's implementing regulations (*see* 13 NYCRR 20.2 [c] [iii]; 13 NYCRR 20.7).

The complaint attempts to avoid preclusion of its fraud claim by the Martin Act by alleging that separate from the claimed misrepresentations in the Offering Plan, "Fegan/Berg and its principals[] purposefully and intentionally and actively concealed from Plaintiff and other unit owners the material construction defects more fully described herein ..." (Doc. 110-2, Compl. at ¶ 316). There are no specific allegations of the details of how and when Berg actively concealed purported defects from any particular prospective unit purchaser. As such, this aspect of plaintiff's claim fails to meet the particularity requirement of CPLR 3016 (b).

Assuming this allegation is enough to take plaintiff's fraud claim outside the scope of the Martin Act, to the extent it is based on Berg's omissions or concealment, plaintiff would need to allege sufficient facts supporting the existence of a confidential or fiduciary relationship giving rise to a duty to disclose the information at issue (*see Douglas Elliman LLC v Corcoran Group Mktg.*, 93 AD3d 539, 540 [1st Dept 2012]; *see also China Dev. Industrial Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435, 436 [1st Dept 2011]). No such duty can be inferred from the allegations asserted in the complaint and plaintiff's opposition papers. As mentioned above, plaintiff disavows the existence of an client-architect relationship between Berg and any particular prospective until purchaser. Berg's only connection to plaintiff was through his relationship to the Sponsor, and Sponsor's contractual relationship to plaintiff. However, since there is no authority for imposing a fiduciary duty on Sponsor for the benefit of potential unit purchasers, (*Burry v Madison Park Owner, LLC*, 84 AD3d 699, 700 [1st Dept 2011]), there is no authority for imposing a derivative duty on Berg. Because plaintiff fails to allege that a confidential or fiduciary relationship existed between Berg and plaintiff, Berg was under no duty

to disclose (*see Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 582).

In addition, the documentary evidence submitted by defendant conclusively establishes that plaintiff cannot meet the reliance element to state a cause of action for fraud. The Purchasing Agreement, which is incorporated with the Offering Plan and would have been executed by each individual unit owner, includes a "No Representations" clause in which each purchaser acknowledges that it has "not relied upon any architect's plans ... whether written or oral, ... relating to the description or physical condition of the Property, the Building or the Unit, or the size or the dimensions o[f] the Unit ... or any other physical characteristics thereof ..." (Doc. 54, ex. A, part 2, Purchasing Agreement at 174, ¶ 24). Plaintiff could not have relied on Berg to ensure that the Condominium was free of defects, since the agreement states that "the correction of any defects in construction to the extent required under the Plan [is] the sole responsibility of Sponsor" (*id.* at 172, ¶ 14.2). Furthermore, plaintiff's reliance is foreclosed by the Purchasing Agreement's provision permitting plaintiff to retain an expert to inspection the premises prior to the closing date (*id.* at 173, ¶ 15; *see Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 581; *see also Rivietz*, 38 AD3d at 301 [no reliance where plaintiff given opportunity to inspect]).

Accordingly, the complaint's eighteenth cause of action, sounding in fraud, is dismissed as against Berg pursuant to CPLR 3211 (a) (1), based on the terms of the Offering Plan and Purchasing Agreement, and CPLR 3211 (a) (7), for failing to state a cause of action.

(iii) Nineteenth Cause of Action Against Berg - Negligent Misrepresentation

The same reasons discussed above in connection with plaintiff's fraud claim apply to plaintiff's negligent misrepresentation claim. Moreover, plaintiff's failure to allege that, at the time Berg issued the report and certification which was incorporated into the Offering Plan, plaintiff was a "known party that could be expected to rely on defendants' representations or

omissions" (*Oxbow Calcining USA Inc. v American Indus. Partners*, __AD3d__, 2012 NY Slip Op 05114 [1st Dept 2012]; citing *Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370 [2010]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept 1996]). In opposition, plaintiff argues that defendants are "so plainly erroneous, one may be taken aback," when they claim that the relevant case law requires a party asserting a negligent misrepresentation claim to plead privity of contract, or a relationship so close as to approach privity (Doc. 91, Plaintiff's opp. memo. at 40). Contrary to plaintiff's contention, the Court of Appeals has expressly held that "[i]t has long been the law in New York that a plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship 'so close as to approach that of privity'" (*Sykes*, 15 NY3d at 372). Thus, plaintiff fails to allege a relationship with Berg of the kind necessary to support a negligent misrepresentation claim requires dismissal under CPLR 3211 (a) (7). Moreover, for the reasons stated in the prior section, any claim of reasonable reliance is foreclosed by the terms of the Offering Plan and Purchasing Agreement.

In summary, Berg is entitled to dismissal of the three causes of action asserted against it.

b. *Berg + Flynn Architecture, PC*

(i) Twelfth, Eighteenth and Nineteenth Causes of Action

The twelfth, eighteenth and nineteenth causes of action, discussed in the preceding section as against Berg, were also asserted against Berg + Flynn. There are no material additional allegations specifically pertaining to Berg + Flynn. As such, the same reasoning adopted above in addressing the claims against Berg is applicable to the same claims as asserted against Berg + Flynn. Accordingly, defendants' motion to dismiss is granted and the twelfth, eighteenth and nineteenth causes of action against Berg + Flynn are dismissed.

(ii) Third Cause of Action

However, an additional claim, the third cause of action sounding in breach of contract, is asserted only against Berg + Flynn. There, the complaint alleges that plaintiff and other unit owners are third-party beneficiaries of a purported contract between Berg + Flynn and the Sponsor providing that Berg + Flynn would be the "architect of record for the Project, and undertake responsibility for the design of the Building, to prepare drawings, Plans and Specifications for the Project, to inspect the work, to supervise the various tradesmen and subcontractors, and to render reports and certificates to Sponsor ..." (Doc. 110-2, Compl. at ¶¶ 116-119). In support of the contention that plaintiff and other unit owners were third-party beneficiaries, the complaint refers to the Offering Plan and the report and certification by Berg which were incorporated therein (*id.* at ¶ 119). Plaintiff quotes a specific excerpt from the certification stating that it was being given for the "benefit of all persons to whom this offer is made" (*id.* at ¶ 120). The complaint alleges that Berg + Flynn breached its contractual obligations to Sponsor and thus to plaintiff, in that the building was "improperly and inadequately designed and contracted and completed in an incompetent and un-workmanlike manner, with material design and construction defects ..." (*id.* at ¶ 125). Also, it alleges without further elaboration that defendants breached their contractual obligations to the Sponsor by failing to ensure actual construction was in compliance with the Plans and Specifications, intentionally ignoring defects, taking no remedial measures and employing methods to conceal and disguise these defects.

Absent privity of contract, plaintiff has no right to recover from Berg + Flynn for breach of contract (*see Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assocs.*, 190 AD2d 636, 637 [1st Dept 1993]). The architectural report and certification annexed to the Offering Plan are "not a contract of any kind" (*Leonard v Gateway II, LLC*, 68 AD3d 408, 409 [1st Dept 2009] [architectural drawings prepared by defendant and annexed to purchasing

agreement held not to be a contract between architect and the purchaser]). Although the certification includes language that it was being made for the benefit of prospective purchasers - language that is mandatory under the Attorney General's regulations (13 NYCRR Part 20) - it cannot be said that by having its principal sign the certification, Berg + Flynn agreed to assume all of Sponsor's obligations under the Purchase Agreements and Offering Plan (*id.* at 409). Rather, it explicitly says that "[t]his statement is not intended as a guarantee or warranty of the physical condition of the property" (Doc. 116, ex. A, part 4, Certification at 354).

Moreover, this cause of action must fail because the possible purchasers of the condominium units were unknown to Berg + Flynn both at the time they entered into any contract with Sponsor or execution the architect's certification of the Offering Plan (*see Sykes*, 15 NY3d at 374 [criticizing *Bd. of Mgrs. of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488 (1st Dept 1992), which allowed purchasers of condominium units to proceed with breach of contract claims against engineering and design professionals as intended beneficiaries of contracts with the sponsor, as inconsistent with *Credit Alliance Corp.*, 65 NY2d at 554; quoting *Westpac Banking Corp. v Deschamps*, 66 NY2d 16 [1985] [plaintiff, one of a class of potential lenders to third-party, could not recover from defendant based on its certification of third-party's financial statements]). Plaintiff cannot avoid meeting the requirements set forth in *Sykes* by the Court of Appeals by framing this cause of action as one for breach of contract. Accordingly, Berg + Flynn's motion to dismiss the third cause of action is granted pursuant to CPLR 3211 (a) (1) and (a) (7).

c. *Tribeach Holdings, LLC*

(i) Seventh cause of action

The seventh cause of action is for breach of contract against TriBeach, the alleged general contractor or construction manager for the Sponsor. The complaint alleges, upon

information and belief, that an express contract between Sponsor and TriBeach exists in which plaintiff and each individual unit owner is expressly made a third-party beneficiary. It further alleges that under the Offering Plan, Sponsor was contractually obligated to assign all express warranties to the Board of Managers upon the recording of the Declaration (Doc. 110-2, Compl. at ¶¶ 170-171). TriBeach purportedly breached its contractual obligations to Sponsor, and thus plaintiff, by improperly and inadequately designing and constructing the building. Alternatively, the complaint alleges that if TriBeach was not a contractor, general contractor or construction manager, then it "was either the owner and developer of the Building, or a co-owner and co-developer of the Building together with Defendant Sponsor, and was equally responsible for all representations, certifications and contractual obligations required by the Purchase Agreements and the [Offering] Plan ..." (*id.* at ¶ 176).

The documentary evidence submitted by TriBeach shows that it is not a named party to any contract with plaintiff. TriBeach is mentioned in the Offering Plan in the section titled "Identity of Parties," in describing the experience of defendant Adrian Stroie, one of Sponsor's principals (Doc. 54, ex. A, part 2, Offering Plan at 118). The Plan indicates that Stroie has been a construction manager in New York City for eight years, and is currently the Operating Manager of TriBeach Holdings, LLC (*id.*). This appears to be the only place in the Offering Plan that TriBeach's name is even mentioned. There is no mention of TriBeach in the Purchasing Agreement.

In opposition to the instant motion, plaintiff submits an affidavit of Jamie Welch, the Board's President, alleging that Tribeach "is a company which held [] itself out to the public as being the owner and developer of the Condominium/Building, and upon information and belief, was involved in the retaining, hiring and contracting of several of the [] professionals/firms" (Doc. 31, Welch affid. at ¶ 18). He references a Technical Report filed with the City of New

York in February 2002 which contains a cover sheet identifying the owner of 129 Lafayette Street as Adrian Stroie, with a business name of "129 Lafayette St Assoc. c/o TriBeach Holdings LLC" (Doc. 31-6, ex. 6, Technical Report). This report, however, expressly identifies the owner as "129 Lafayette St. Associates," listing the "principal officer" as Adrian Stroie of TriBeach Holdings LLC. Thus, on its face, this document treats TriBeach and Sponsor as two separate legal entities.

While in the context of a pre-answer motion to dismiss the court must accept all of the allegations in the complaint as true, dismissal may nonetheless be warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*US Express Leasing, Inc. v Elite Technology (NY), Inc.*, 87 AD3d 494, 496 [1st Dept 2011]; quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, the Offering Plan and incorporated Purchasing Agreement contradict plaintiff's allegations that TriBeach is either a general contractor, construction manager, sponsor or co-sponsor of the Condominium. Even the Technical Report submitted by plaintiff does not identify TriBeach as holding any of these positions, and only mentions it by virtue of its affiliation with Adrian Stroie.

As such, the documentary evidence conclusively establishes that plaintiff is not in contractual privity with TriBeach. While plaintiff submits an illegible copy of a print-out said to be from TriBeach's website indicating that TriBeach had a relationship to the Condominium or construction project, this does not change the fact that the only party to the Offering Plan and Purchasing Agreement was Sponsor. Moreover, under the "No Representations" clause of the Purchasing Agreement, plaintiff cannot rely on any statements made by TriBeach or any other nonparty. To the extent plaintiff claims to be an intended third-party beneficiary of a purported contract between TriBeach and Sponsor, not only does plaintiff fail to set forth the relevant provisions of said contract, it also fails to allege that any particular prospective unit owner was

known to TriBeach (*see Sykes*, 15 NY3d at 374).

Plaintiff also alleges in its opposition that "TriBeach's near privity with the [p]laintiff is further underscored by the fact that they shared common principals with the Sponsor (including Fegan himself), and signed Certifications in the Offering Plan as both Sponsor and Architect, admitting that it was know that the Plaintiff/Purchasers would rely upon those Certifications" (Doc. 33, Plaintiff's memo. at 42). These allegations are flatly contradicted by the documentary evidence as TriBeach did not sign any certifications or other documents in the Offering Plan. Furthermore, it does not avail plaintiff to establish privity between Sponsor and TriBeach, as this would only mean that plaintiff is barred from asserting any claims against TriBeach by res judicata (*see UBS Securities LLC*, 86 AD3d at 473-474 [doctrine applies to the parties to a litigation and those in privity with them]; CPLR 3211 [a] [5]).

Accordingly, whether under CPLR 3211 (a) (1), (a) (5), or (a) (7), TriBeach's motion to dismiss the seventh cause of action is must be granted.

(ii) Thirteenth Cause of Action

The complaint's thirteenth cause of action, sounding in "gross negligence," seeks to hold TriBeach liable based on the allegation that it was a co-owner or co-developer of the Condominium with Sponsor and was equally responsible for all representations, certifications and contractual obligations required by the Purchase Agreements and the Offering Plan (Doc. 110-2, ex. A, Compl. at ¶ 229). Contrary to plaintiff's contention in opposition, this claim arises from the same contractual obligations said to have been breached in the seventh cause of action for breach of contract and seeks the same damages, and thus "merely duplicate[s] the insufficient contract claims" (*Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 581). Moreover, a claim for grossly negligent performance of a contract is not cognizable (*id.* at 582).

(iii) Twentieth Cause of Action

The twentieth cause of action, sounding in fraud, alleges that TriBeach held itself out to the public as an owner or sponsor for the design and construction of the Condominium and therefore was equally responsible for Sponsor's obligations under the Offering Plan to prospective purchasers (Doc. 110-2, ex. A, Compl. at ¶ 338). It further alleges that TriBeach made false statements, representations and omissions in the Offering Plan and other materials distributed to the public regarding the quality of the construction as part of a "scheme to deceive and defraud Plaintiff/Unit Owners by means of false and fraudulent representations and material omissions" (*id.* at ¶ 342). It claims that TriBeach filed a certificate stating that the Offering Plan did not knowingly omit any material fact or contain any untrue statement of any material fact. Finally, the complaint alleges that TriBeach had knowledge that the statements it made were false because it knew that the Condominium was improperly and inadequately designed and constructed, and that "Sponsor, and its principals, purposefully and intentionally and actively concealed from Plaintiff and other unit owners the material construction defects ..., separate from its concurrent misrepresentations made in the [Offering] Plan" (*id.* at ¶¶ 344-348).

The allegations asserted in connection with the twentieth cause of action are flatly contradicted by the documentary evidence submitted by TriBeach in that the Offering Plan and Purchasing Agreement identify Sponsor, and not TriBeach, as the owner and sponsor of the building. Even assuming the truth of plaintiff's allegation that TriBeach held itself out to the public as an owner or sponsor, plaintiff or any individual unit owner could not have reasonably relied on those representations in light of the express statements found in the Offering Plan and Purchasing Agreement. As such, TriBeach is entitled to dismissal of the twentieth cause of action under CPLR 3211 (a) (1). Moreover, were the court to accept plaintiff's suggestion that TriBeach was in privity with Sponsor such that TriBeach would be equally required to perform all of Sponsor's obligations under the Purchasing Agreement and Offering Plan, such privity

would require dismissal of the claims against TriBeach under res judicata principles pursuant to CPLR 3211 (a) (5). Additionally, the complaint only alleges that Sponsor and its principals actively concealed from plaintiff and other unit owners material construction defects, and makes no specific allegation as against TriBeach. Even if it had, plaintiff fails to include "specific and detailed allegations of fact" in the complaint pertaining to the purported active concealment (*Accurate Copy Service of America, Inc. v Fisk Building Assoc., LLC*, 72 AD3d 456, 456 [1st Dept 2010]; citing CPLR 3016 [b]). Absent particularized allegations of fraud beyond the alleged misrepresentations and omissions in the Offering Plan, plaintiff's fraud claim against TriBeach is barred as there is no private cause of action to enforce the provisions of the Martin Act (*see Assured Guaranty (UK) Ltd.*, 18 NY3d at 353; *Kerusa Co. LLC*, 12 NY3d at 245). To the extent this cause of action is based on fraudulent concealment or omissions, plaintiff cites no authority for imposing a fiduciary duty to disclose upon a condominium sponsor for the benefit of potential unit purchasers (*see Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011]). Finally, plaintiff is foreclosed from establishing reliance based on the express terms of the Purchasing Agreement and by conducting their own inspection of the property prior to purchasing a condominium unit (*see Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 581). Accordingly, dismissal of the twentieth cause of action is also warranted under CPLR 3211 (a) (7).

(iv) Twenty-First Cause of Action

The twenty-first cause of action alleges negligent misrepresentation against TriBeach based in part on the claim that TriBeach and its principal, Stroie, signed a certificate certifying the facts contained in the Offering Plan. This cause of action is duplicative of the causes of action against TriBeach, as described above, and therefore is dismissed. Furthermore, the allegation that TriBeach signed any certification is flatly contradicted by the documentary

evidence showing the execution by Stroie in his capacity as manager of Sponsor. If the court deemed this signature to be on behalf on TriBeach based on Stroie's relationship to that entity, notwithstanding the lack of any reference to TriBeach, then it would follow that res judicata would require dismissal of the claims against it. Accordingly, the twenty-first cause of action must be dismissed as against TriBeach.

d. *Sponsor*

(i) First and Ninth Causes of Action

Even if plaintiff's claims against Sponsor were not barred by res judicata, plaintiff's recovery for breach of contract in its first cause of action would be limited by the terms of the Purchasing Agreement and Offering Plan, particularly the section of the Offering Plan titled "Rights and Obligations of Sponsor" (Doc. 16, ex. A, part 1, Offering Plan at 84). Plaintiff's ninth cause of action, sounding in breach of express warranty against Sponsor, alleges that Sponsor expressly warranted to plaintiff that the Condominium building would be constructed in a skillful and workmanlike manner, free of material, latent and design and structural defects. This claim is duplicative of the first cause of action for breach of contract, as it is based on the same general allegations and seeks the same damages. The Offering Plan specifically provides that except for the express warranties and undertaking with respect to the construction and completion of the building made therein, no other warranties or undertakings could be implied (*id.* at 92). It further provides that Sponsor makes no warranties, express or implied, other than those specified in the Offering Plan (*id.* at 90-92). As such, any claim for breach of warranty would be encompassed within a claim for breach of contract. As such, the ninth cause of action is dismissed.

(ii) Tenth Cause of Action

The complaint's tenth cause of action, sounding in breach of the implied covenant of

good faith and fair dealing against Sponsor, is dismissed as duplicative of the first cause of action for breach of contract (*see Plaza PH2001 LLC*, 2012 NY Slip Op 05119; citing *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]).

(ii) Eleventh Cause of Action

Similarly, the eleventh cause of action, alleging gross negligence against Sponsor, is duplicative of the breach of contract claim (*see Cherokee Owners Corp. v DNA Contr., LLC*, __AD3d__, 2012 NY Slip Op 04411 [1st Dept 2012] [negligence claim duplicative of contract claim]). The allegations made in support of the eleventh cause of action are the same as those asserted in the first cause of action. Moreover, a claim for negligent performance of a contract is not cognizable (*see Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 581), and plaintiff has not made any allegations that would give rise to an inference of "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, USA, Ltd. v Jewelers Protection Svcs., Ltd.*, 81 NY2d 821, 823 [1993]). Accordingly, dismissal of the eleventh cause of action is warranted under CPLR 3211 (a) (7).

(iii) Fourteenth Cause of Action

The fourteenth cause of action, sounding in fraud against Sponsor, alleges that Sponsor falsely represented, orally and in brochures and advertisements, that the building would be properly and adequately designed and constructed in accordance with the building's Plans and Specifications and the design, engineering and construction standards applicable to a luxury condominium in Manhattan. The complaint further references the certification executed by Sponsor enclosed with the Offering Plan pursuant to law, and alleges that Sponsor actively concealed material construction defects "separate from its concurrent misrepresentations made in the [Offering] Plan" (Doc. 110-2, ex. A, Compl. at ¶ 246). Plaintiff and individual unit owners allegedly relied on these representations and omissions in believing they were buying into a

building free of defects.

The fraud claim, which essentially arises from the same facts, without alleging a breach of duty collateral to or independent of the parties' agreements, is redundant of the contract claim (*Havell Capital Enhanced Municipal Income Fund, LP v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011]; citing *Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]). The complaint fails to specify the particular misrepresentations and omissions or allegedly defective conditions in connection with the fraud cause of action, and instead incorporates the same claims alleged in connection with the breach of contract action. Furthermore, plaintiff fails to allege any confidential or fiduciary relationship with Sponsor which would give rise to a duty to disclose (*id.* at 589; citing *Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 582; *see also Burry*, 84 AD3d at 700 [no authority for imposing a fiduciary duty upon condominium sponsor for the benefit of potential unit purchasers]). To the extent this cause of action is based on omissions from Sponsor's disclosures in the Offering Plan and accompanying certification, absent a legal basis independent of the statute, the fraud claim would be barred by the Martin Act (*see Berenger*, 93 AD3d at 184; citing *Kerusa Co.*, 12 NY3d at 247). Even assuming plaintiff had sufficiently plead active concealment and affirmative misstatements outside of the disclosure required of Sponsor by the Martin Act and implementing regulations, plaintiff is precluded from relying on any such statements by the "No Representations" provision of the Purchasing Agreements (*see Plaza PH2001, LLC v Plaza Residential Owners LP*, 79 AD3d 587, 587 [1st Dept 2010] [holding that "(s)uch a specific disclaimer destroys the allegations in (the) complaint that the agreement was executed in reliance upon (defendants') contrary oral representations"]; quoting *Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]). Moreover, reliance is precluded by the provision in the Offering Plan and Purchasing Agreement requiring any purchaser to undertake their own investigation, and the "as-is" clause and related

disclaimer provisions of those documents (*Bd. of Mgrs. of the Chelsea 19 Condominium*, 73 AD3d at 582). Accordingly, even if res judicata was not applicable, dismissal of this cause of action is warranted based on the documentary evidence (CPLR 3211 [a] [1]) and for failure to state a cause of action (CPLR 3211 [a] [7]).

(iv) Fifteenth Cause of Action

The fifteenth cause of action, sounding in negligent misrepresentation, also fails for the same reasons as the fraud cause of action against Sponsor, and, accordingly, is dismissed.

(v) Twenty-Fourth Cause of Action

Finally, the twenty-fourth cause of action sounds in deceptive trade practices under General Business Law § 349 against Sponsor. The complaint alleges that Sponsor, in accordance with the Attorney General's regulations, disseminated copies of the Offering Plan to the public and potential purchasers of condominiums knowing that the representations made therein were misleading. It further alleges that Sponsor or its representatives verbally ratified the allegedly false or misleading statements found in the Offering Plan. The complaint claims that unit owners, as consumers, and plaintiff, the Board, have incurred "substantial financial damages ... to have the deficient, defective and egregiously poor conditions of the Building caused by the Defendants' actions to be addressed, repaired, remedied and rectified" (Doc. 110-2, ex. A, Compl. at ¶ 409).

Yet again, the twenty-fourth cause of action rests on the same factual allegations as each of the other causes of action against Sponsor. The elements of a cause of action under General Business Law § 349 "are that: (1) the challenged transaction was 'consumer-oriented'; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct" (*Denenberg v Rosen*, 71 AD3d 187, 194 [1st Dept 2010]; citing *Oswego Laborers' Local 214 Pension Fund v Marine*

Midland Bank, 85 NY2d 20, 25 [1995]). The allegedly deceptive acts at issue stemmed from a private contractual dispute between the Board and its individual unit owners and Sponsor, without ramification for the public at large (*Merin v Precinct Dev. LLC*, 74 AD3d 688, 689 [1st Dept 2010]; *see also 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244, 247 [1st Dept 2001] [an "offering plan is a contract between the sponsor and the unit purchasers"]). "To the extent the offering can be construed as directed at the public, the section 349 claim is preempted by the Martin Act" (*id.* at 689; citing *511 W. 232nd Owners Corp.*, 285 AD2d at 248). Accordingly, the twenty-fourth cause of action fails to state a claim (CPLR 3211 [a] [7]).

e. *Individual Sponsor Defendants*

(i) Second, Sixteenth and Seventeenth Causes of Action

The same allegations asserted in the first (breach of contract), fourteenth (fraud) and fifteenth (negligent misrepresentation) causes of action against Sponsor are alleged in support of the complaint's second (breach of contract), sixteenth (fraud) and seventeenth (negligent misrepresentation) causes of action against the Individual Sponsor Defendants. For the same reasons stated above with respect to the claims against Sponsor, the fraud and negligent misrepresentation claims against the Individual Sponsor Defendants must be dismissed pursuant to CPLR 3211 (a) (1) and (a) (7). However, whereas, setting aside res judicata or statute of limitation issues, a breach of contract claim has been stated against Sponsor, no such claim lies as against the Individual Sponsor Defendants, who were not individually named as a party to any agreement with plaintiff. Plaintiff's allegation that the Individual Sponsor Defendants made certain representations in their individual capacity is flatly contradicted by the documentary evidence submitted by defendants, including the Purchasing Agreement in which the only party listed as the "Seller" is Sponsor (Doc. 17, ex. A, part 2, Purchasing Agreement at 179). Although each of the three Individual Sponsor Defendants executed a certification of the

statements made in the Offering Plan, as required by the Martin Act and the Attorney General's regulations, they did not thereby manifest the intent to be personally liable for Sponsor's contractual obligations. An individual cannot be held personally liable for a limited liability company's obligations by virtue or his or her status as a member thereof (*see Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]; citing Limited Liability Company Law §§ 609, 610). Accordingly, even if plaintiff's claims against the Individual Sponsor Defendants are not barred by res judicata, dismissal is still warranted under CPLR 3211 (a) (1) or (a) (7).

3. Statute of Limitations:

Having determined that defendants are entitled to dismissal of all claims against them either under res judicata principles or pursuant to CPLR 3211 (a) (1) or (a) (7), the court need not reach defendants' contentions that various claims were not timely commenced. Accordingly, the branches of the three pending motions seeking dismissal on this basis are denied as academic.

4. Sanctions:

Defendants argue that sanctions are warranted under 22 NYCRR 130-1.1 "[b]ased on the frivolous nature of plaintiff's [c]omplaint," without further elaboration. Because defendants fail to articulate the basis for imposing sanctions, this branch of defendants' motions is denied without further discussion.

CONCLUSION

Accordingly, it is

ORDERED that the branch of each motion filed under sequence numbers 001, 004 and 005 seeking sanctions pursuant to 22 NYCRR 130-1.1 is denied; and it is further

ORDERED that the branch of motion sequence number 001, seeking dismissal pursuant to CPLR 3211 (a) (1) (5) and (7) of all causes of action asserted against defendants 129

Lafayette Street, LLC, Berg + Flynn Architecture PC and TriBeach Holdings, LLC, is granted in its entirety; and it is further

ORDERED that the branch of motion sequence number 004, seeking dismissal pursuant to CPLR 3211 (a) (1) (5) and (7) of all causes of action asserted against defendants Adrian Stroie and Christopher Berg, is granted in its entirety; and it is further

ORDERED that the branch of motion sequence number 005, seeking dismissal pursuant to CPLR 3211 (a) (1) (5) and (7) of all causes of action asserted against defendants William Fegan and James Mooney, is granted in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants 129 Lafayette Street, LLC, Berg + Flynn Architecture PC and TriBeach Holdings, LLC, Adrian Stroie, Christopher Berg. William Fegan and James Mooney dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the court.

Dated: July 12, 2012
New York, New York

Paul G. Feinman
J.S.C

(2012 Pt 12_150397_2011_001_004_005_daz[m2d_a1_a5_a7])