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SHORT FORM ORDER

INDEX
NO.: 12729-05

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 6-14-12; 7-12-12
SUBMITTED: 9-20-12
MOTION NO.: 001-MOT D
002-MOT D

THE WATERWAYS AT BAY POINTE HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

-against-

WATERWAYS DEVELOPMENT CORP. THE KLAR ORGANIZATION, and STEVEN A. KLAR INDIVIDUALLY,

Defendants.

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Upon the following papers numbered 1-157 read on this motion and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-95 ; Notice of Cross Motion and supporting papers 96-114 ; Answering Affidavits and supporting papers 115-145 ; Replying Affidavits and supporting papers 146-156 ; Other 157 ; it is,

ORDERED that the motion by the plaintiff and the cross motion by the defendants for partial summary judgment are determined as follows:

The Waterways at Bay Pointe is an age-restricted retirement community located in Moriches, New York. It consists of fee-simple homes and six separate condominiums, the Waterways at Bay Pointe Condominiums I, II, III, and IV and the Waterways at Moriches Condominiums I and II. The original sponsor, Bay Pointe Associates, filed the first offering plan for the project in 1985 and built a substantial number of units before filing for bankruptcy in 1993. The units built by the original sponsor are referred to as the "Bregman" units because one of the general partners of Bay Pointe Associates was Bregman Development Corp. The Bregman units include the fee-simple homes and the Waterways at Bay Pointe Condominiums I, II, III, and IV. The plaintiff homeowners association was formed by the original sponsor to own, maintain, and operate the common areas of the Waterways at Bay Pointe, including the recreational facilities, and to repair and maintain the homes constructed on the property. In 1997, the

defendant Waterways Development Corp., of which the defendant Steven Klar is the president, purchased the right to build additional units that had already been approved by the Town of Brookhaven. Waterways Development Corp. subsequently built the Waterways at Moriches Condominiums I and II.

On December 30, 1997, Waterways Development Corp. (the "sponsor") entered into an agreement with the plaintiff homeowners association (the "HOA"), the terms of which are the subject of this action. The plaintiff claims, inter alia, that the sponsor breached that agreement by failing to pay deficiencies in the HOA's budget for the years 2000, 2001, 2004, 2005, 2007, 2009, and 2010 (the "deficiency claim") and by failing to construct two additional tennis courts on the property (the "tennis-court claim"). The sponsor counterclaims, inter alia, that the plaintiff breached the agreement by participating in public hearings about the construction of three additional buildings on the property (the "non-participation claim"). Both sides move for summary judgment on the deficiency claim, the non-participation claim, and the tennis-court claim, among other things.

The Deficiency Claim

The 1997 agreement between the HOA and the sponsor provides, in pertinent part, as follows:

> The [HOA] acknowledges that in accordance with the Declaration and By-Laws of the [HOA], that the SPONSOR at the present time has no legal obligation to contribute to any regular or special assessments that the [HOA] now imposes or may impose upon its members. Notwithstanding same, however, simultaneously upon execution of this Agreement, the SPONSOR shall deliver to the [HOA] a check in the amount of ten thousand ($10,000.00) dollars...In addition, SPONSOR shall pay to the [HOA] the sum of one thousand ($1,000.00) dollars commencing on the first day of the month following the execution of this Agreement and monthly thereafter..., which monthly payment shall cease upon the filing of a supplementary declaration and/or the filing of a condominium declaration adding additional members to the [HOA], at which time the SPONSOR's obligation to contribute to the assessments of the [HOA] shall revert to the formula as set forth in the Declaration and By-Laws of the [HOA] and as disclosed in the Offering Plan of the [HOA].

The HOA's By-Laws refer to the Declaration, which provides, in pertinent part, as follows:

> The [HOA's] Board of Directors shall, from time to time, but at

> least annually, fix and determine the budget representing the sum or sums necessary and adequate for the continued operation of the [HOA]....The Board shall determine the total amount required, including the operational items such as insurance, repairs, reserves, maintenance and other operating expenses, as well as charges to cover any deficits from prior years and capital improvements approved by the Board. The total annual requirements and any supplemental requirements shall be allocated between, assessed to and paid by the Members as follows:
>
> Each Member shall pay a portion of said requirements the numerator of which shall be one (1) and the denominator of which shall be equal to the number of Homes on the Properties subject to this Declaration....The [Sponsor's] obligation for such assessments on unsold Homes subject to this Declaration will be limited to the difference between the actual operating costs of the [HOA], including reserves on the Common Properties and on Homes to which title has been conveyed[,] and the assessments levied on owners who have closed title on their Homes. In no event, however, will the [Sponsor] be required to make a deficiency contribution in an amount greater than it would otherwise be liable for if it were paying assessments on unsold Homes.

The HOA's Offering Plan also provides that the sponsor's obligation for assessments on unsold homes is limited to the difference between the actual operating costs of the HOA and the assessments levied on owners who have closed title on their homes, but in no event will the sponsor be required to make a deficiency contribution in an amount greater than it would otherwise be liable for if it were paying assessments on unsold homes.

In 1999, the HOA incurred a budget deficit in the amount of $31,463.00, which the sponsor paid under protest. In 2000, the deficit was $201,057.00, and the sponsor's maximum liability therefor was $182,148.00. Between 2000 and 2001, a substantial number of units closed, leaving the sponsor with only 4 unsold units after March 13, 2001. Thus, the sponsor's liability for the HOA's budget deficits was limited to $19,105.27 in 2001; $15,984.00 in 2004; $16,464.00 in 2005; $5,941.00 in 2007; $18,708.00 in 2009; and $21,264.00 in 2010. It is undisputed that the sponsor has not paid any budget deficiencies since 1999.

The deficiency claim is the subject of the plaintiff's first, fourth, and fifth causes of action and the defendants' second and third counterclaims. The plaintiff's first cause of action alleges that the defendants breached the terms of the HOA's offering plan, inter alia, by failing to pay the aforementioned budget deficits. The plaintiff's fourth cause of action alleges that the defendants breached the 1997 agreement between the HOA and the sponsor by failing to pay the aforementioned budget deficits. The plaintiff's fifth cause of action alleges, inter alia, that the

defendants fraudulently represented in the offering plan and in the 1997 agreement that they would pay their share of assessments and/or deficits levied by the HOA. The defendants' second counterclaim alleges that the HOA breached its fiduciary duty to the sponsor by intentionally inflating its expenses to maximize the budget deficiencies for the years in question. The defendants' third counterclaim alleges that the HOA's budgets for the years in question were false and made with intent to deceive the sponsor and induce it to pay budget deficits that were intentionally inflated by the HOA. The plaintiff moves, inter alia, for partial summary judgment on its first and fifth causes of action insofar as they relate to the deficiency claim, for summary judgment on its fourth cause of action, and for summary judgment dismissing the defendants' second and third counterclaims. The defendants cross move, inter alia, for summary judgment on their second and third counterclaims, for summary judgment dismissing the plaintiff's fourth cause of action, and for partial summary judgment dismissing the plaintiff's first and fifth causes of action insofar as they relate to the deficiency claim.

The plaintiff's fifth cause of action for fraud is duplicative of the first and fourth causes of action for breach of contract. A cause of action to recover damages for fraud may not be maintained when the only fraud alleged relates to a breach of contract (**Lee v Matarrese**, 17 AD3d 539, 540). A cause of action will be found to sound in tort rather than in contract only when the legal relations binding the parties are created by the utterance of a falsehood, with fraudulent intent and reliance thereon, and the cause of action is entirely independent of the contractual relations between the parties (**Id.**). The plaintiff does not allege that the defendants made a material representation concerning an intention to perform a duty that was collateral or extraneous to either the 1997 agreement or the offering plan. Accordingly, the fifth cause of action for fraud is dismissed insofar as it relates to the deficiency claim.

The defendants' third counterclaim also sounds in fraud. In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or material omission of fact that was false and known to be false by the defendant, that was made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance, and injury or damages (**Lama Holding Co. v Smith Barney, Inc.**, 88 NY2d 413, 421). It is undisputed that the sponsor has not paid the budget deficiencies for the years 2000, 2001, 2004, 2005, 2007, 2009, and 2010. The defendants, therefore, have not established that they relied on the HOA's budgets for those years or that they suffered damages as a result thereof. In the absence of an actual pecuniary loss sustained as a direct result of the wrong, there is no actionable fraud or misrepresentation (**Id.** at 421-422). Accordingly, the third counterclaim is dismissed.

The defendants' second counterclaim is for breach of fiduciary duty. A fiduciary, in the context of condominium management, is one who transacts business or handles money or property, which is not his own or for his own benefit, but for the benefit of another person with whom he stands in a relation implying and necessitating great confidence and trust and a high degree of good faith (*see*, **Caprer v Nussbaum**, 36 AD3d 176, 192, citing **Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills**, 193 AD2d 322, 325). Thus, the board of managers of a condominium complex owes a fiduciary duty to its unit owners (*see*,

Mishkin v Board of Mgrs. of the 155 Condominium, Sup Ct, NY County, Dec. 2, 2005, Tolub, J. [2005 WL 6050951] at 4; *see also*, **Caprer v Nussbaum**, *supra* at 193; **Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills**, *supra* at 324-327). However, there is no fiduciary relationship between the sponsor and the condominium (**Caprer v Nussbaum**, *supra* at 191).

Assuming that the HOA, as the manager of the Waterways condominiums, owes a fiduciary duty to the sponsor as a unit owner, the court finds that the plaintiff has failed to establish a breach of that duty. The proponent of a claim for breach of a fiduciary duty must, at minimum, establish that the offending parties' actions were a substantial factor in causing an identifiable loss (*see*, **Schneider v Wien & Malkin LLP**, 5 Misc 3d 1011[A] at *17 [and cases cited therein]). Thus, the plaintiff must demonstrate that the breach was a substantial factor in causing the defendant to sustain actual damages (**Id.** at *18-*20). The defendants allege that the HOA breached its fiduciary duty to the sponsor by inflating the HOA's expenses for the years 2000, 2001, 2004, 2005, 2007, 2009, and 2010, which maximized the budget deficits for which the sponsor is liable for those years. As previously discussed, it is undisputed that the sponsor did not pay the budget deficiencies for the years in question. Thus, the defendants have not demonstrated that they sustained actual damages as a result of the purported breach of fiduciary duty. Accordingly, the second counterclaim is dismissed. The defendants may, however, assert breach of fiduciary duty as a defense to the plaintiff's first and fourth causes of action for breach of contract insofar as they relate to the plaintiff's deficiency claim.

The court finds that the plaintiff has established, prima facie, its entitlement to judgment as a matter of law on its first and fourth causes of action for breach of contract. In opposition thereto and in support of their cross motion for summary judgment, the defendants contend, inter alia, that the HOA's budgets for the years in question were not in accordance with the governing documents, that they violated basic accounting principles, and that they were a bad-faith and discriminatory attempt to "soak the sponsor." The defendants contend that the HOA embarked on a massive capital improvement campaign for the Bregman units and incurred other extraordinary expenses without ensuring that sufficient funds were available, creating a budget deficit for which it seeks to hold the sponsor liable. For example, between 1999 and 2004, the HOA replaced all of the leaders, gutters, and soffits on the Bregman units, as well as the roofs. The defendants also contend that the 1997 agreement relieves the sponsor of any liability for the Bregman units. Paragraph 7 of the 1997 agreement provides, in pertinent part, as follows:

> The [HOA] acknowledges that the SPONSOR has no responsibility for any of the previous actions of any prior SPONSOR to date. Accordingly, the SPONSOR has no obligation or liability with respect to any of the prior construction of the PROJECT, whether same be of the individual homes, the common areas, the public improvements, the recreational facilities, the marina, etc., etc. The [HOA] hereby agrees to indemnify and hold

> harmless the SPONSOR from any and all causes of action that may be brought by the [HOA] with respect to same.

In opposition to the cross motion and in further support of its motion for summary judgment, the plaintiff contends, inter alia, that the HOA's budgetary decisions are protected by the business judgment rule and that, pursuant to the HOA's by-laws, the HOA has full discretion to make any additions, alterations, or improvements to the homes more than 7 years after the closing of the first unit.[2]

The court finds that the defendants' interpretation of paragraph 7 of the 1997 agreement conflicts with the other provisions of that agreement and the Declaration, which obligate the sponsor to pay its share of the annual assessments fixed by the HOA. No exception to the sponsor's obligation is carved out for the Bregman units. In fact, in a letter to a homeowner dated September 22, 2000, the sponsor acknowledged that the HOA's assessments may properly include the cost of maintaining and repairing the Bregman units. In that letter, Steven Klar states, in pertinent part, as follows:

> The Offering Plan specifically provides that the maintenance of the units is the responsibility of the Homeowners Association. In fact, if you look at the budgets of the individual condominiums, the only substantive budget line item is insurance. Virtually all other costs of maintaining the community are passed through the Homeowners Association. You are apparently objecting to a portion of your Homeowners Association assessments being used to maintain buildings that are 13 years old. Not only is this the proper procedure by the Homeowners Association, but any attempt to specifically charge only those homeowners of the older units for these repairs would be a violation of law.
>
> Several homeowners inquired when they purchased homes from us if they were in fact to some extent subsidizing the repair of the older homes through a portion of their Homeowners Association assessments. We always answered in the affirmative and the budgets showing these items were clearly disclosed in our Offering Plans. This situation is not as unusual as you may think and occurs frequently when a portion of a project is constructed several years prior to the final completion of the project and there is one Association responsible for overall maintenance.

As the plaintiff correctly contends, the business judgment rule prohibits judicial inquiry into decisions by cooperative and condominium governing boards that are made in good

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[2]The parties agree that the first closing occurred more than 7 years before 2000.

faith and in the exercise of honest judgment (*see*, **Hochman v 35 Park West Corp.**, 293 AD2d 650, 651, citing **Matter of Levandusky v One Fifth Ave. Apt. Corp.**, 75 NY2d 530, 538). Such decisions include the manner and extent of repairs (*see*, **Berenger v 261 West LLC**, 93 AD3d 175, 184), as well as the board's adoption of a budget (*see*, **Levine v Greene**, 57 AD3d 627, 628). As long as the board acts for the purposes of the condominium, within the scope of its authority and in good faith, the court will not substitute its judgment for the board's (**Matter of Vacca v Board of Mgrs. of Primrose Lane Condominium**, 251 AD2d 674, 675, citing **Matter of Levandusky**, *supra*). Absent evidence of bad faith, fraud, self-dealing, or other misconduct on the part of the board, judicial review of the reasonableness of the board's action is foreclosed (**Id.**). Thus, the business judgment rule protects the board's decisions from indiscriminate attack, but at the same time permits review of improper decisions, such as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the condominium, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority (*see*, **Matter of Levandusky**, *supra* at 540).

The court finds that there is a question of fact as to whether the HOA deliberately singled out the sponsor for harmful treatment and acted in bad faith when it adopted budgets for the years 2000, 2001, and 2004. The record reflects that, during those years, the HOA made capital improvements to the Bregman units, among other things, substantially increasing the amount spent, but not budgeted, thereby increasing the budget deficiency for which the sponsor may be liable. If, as the defendants contend, this was done in bad faith in order to "soak the sponsor," the HOA's budgetary decisions for those years are not shielded from judicial scrutiny under the business judgment rule. Accordingly, the motion and cross motion are denied insofar as they seek summary judgment on the deficiency claim in the first and fourth causes of action for the years 2000, 2001, and 2004.

The defendants have failed to establish their entitlement to judgment as a matter of law or to raise a triable issue of fact with respect to the remaining years. The defendants' conclusory assertions regarding those years are insufficient to preclude application of the business judgment rule. Accordingly, the plaintiff is granted, and the defendants are denied, partial summary judgment on the first and fourth causes of action for breach of contract insofar as they relate to the plaintiff's deficiency claims for the years 2005, 2007, 2009, and 2010. The plaintiff is awarded damages on those claims in the principal amount of $16,464.00 with interest from December 31, 2005; $5,941.00 with interest from December 31, 2007; $18,708.00 with interest from December 31, 2009; and $21,264.00 with interest from December 31, 2010. Entry of a judgment thereon is held in abeyance pending determination of the remaining claims and counterclaims (*see*, CPLR 3212 [e] [2]).

The Non-Interference Claim

The following facts have been taken from the memorandum decision of this court (Spinner, J.) in **Matter of Waterways Development Corp. v Town of Brookhaven Zoning**

Board of Appeals and the Town of Brookhaven (Index No. 41985-09):

In 1987, the Planning Board of the Town of Brookhaven approved a site plan submitted by Bay Pointe Associates to construct the Waterways at Bay Pointe. Three years earlier, the Town of Brookhaven Board of Zoning Appeals had granted an application by Bay Pointe Associates for a height variance, enabling it to build three three-story buildings, referred to as "mid-rises," for the development. At the time the variance was issued, the Brookhaven Town Code provided that the variances would lapse unless a building permit were issued and construction started within one year. In 1985, Bay Pointe Associates filed an application to extend the duration of the variance to six years on the ground that, due to the size of the project, construction would not commence within one year. After a one-year extension was granted, Bay Pointe Associates applied for a rehearing, which was also granted. On January 9, 1986, the Zoning Board approved the height variance "for the life of the job."

Waterways Development Corp. ("Waterways") took over in 1997, after Bay Pointe Associates' bankruptcy. In March 2001, the Building Department denied Waterways' applications for building permits to construct the three mid-rises. In 2003 and 2006, Waterways commenced separate actions for a judgment declaring that the height variance for the mid-rises was valid for the life of the project and that Waterways could proceed with construction without further approval from the Town. Both actions were dismissed. Following dismissal of the second action in 2008, Waterways again filed applications for building permits to construct the three mid-rises for which site-plan approval had been granted in 1987. Those applications were denied on the ground that height variances were required. Waterways then filed four applications with the Zoning Board, one challenging the Building Department's determination that height variances were required for the mid-rises and the other three requesting such variances. Public hearings were held in April, May, June, and July of 2009. They were attended by hundreds of residents from the Waterways community, the Peconic Baykeeper, and representatives and members of local civic groups, who voiced their opposition to the project. By a decision dated September 16, 2009, the Zoning Board denied Waterways' application challenging the Building Department's determination that height variances were required for the mid-rises, finding that the height variance granted to Bay Pointe Associates in 1986 had expired. The Zoning Board also denied the other three applications for such variances.

Waterways commenced a hybrid declaratory judgment action and CPLR article 78 proceeding to annul the Zoning Board's September 16, 2009, determination. In a memorandum decision dated December 3, 2012, this court (Spinner, J.) found that the Zoning Board's determination was arbitrary and irrational. The court agreed with Waterways that the particular variance granted to Bay Pointe Associates in 1986 was limited by its express terms to the "life of the job." Accordingly, the court declared the height variance issued on January 9, 1986, valid and in full force; annulled the September 16, 2009, determination of the Zoning Board that Waterways must obtain a height variance for the three mid-rises; and remitted the matter back to the Town for the issuance of building permits for the mid-rises.

Paragraph 2 of the 1997 agreement between the HOA and the sponsor provides as follows:

> The [HOA] recognizes that the SPONSOR has the right to complete construction of the PROJECT in accordance with the approved site plan on file with the Town of Brookhaven and shall subject to the conditions herein described not interfere or otherwise impede and/or disrupt the SPONSOR's activities with respect to same.

The defendants' first counterclaim for breach of contract alleges that the HOA breached paragraph 2 of the 1997 agreement by embarking on a course of conduct aimed at impairing and disrupting Waterways' construction of the three mid-rises. Specifically, the defendants contend that the HOA allowed its facilities to be used for meetings to organize opposition to Waterways' construction of the mid-rises, that the HOA sent letters to homeowners encouraging them to write to officials opposing construction of the mid-rises, that the HOA allowed its property to be used for the posting of signs or leaflets opposing construction of the mid-rises, and that the HOA retained an attorney to appear before the Zoning Board to oppose approval of the variances for construction of the mid-rises. The record reflects, inter alia, that Marc Schnieder, Esq., of Schnider Mitola LLP appeared at the Zoning Board's public hearing on April 29, 2009, on behalf of the HOA and testified in opposition to Waterways' applications. In fact, some of his objections are reflected in the Zoning Board's September 16, 2009, decision.

The plaintiff's seventh cause of action alleges that the defendants' first counterclaim is a SLAPP suit under Civil Rights Law § 76-a, which was commenced for the purpose of intimidating, punishing or otherwise maliciously inhibiting the HOA's free-speech, petition, and association rights, and that the HOA is entitled to damages pursuant to Civil Rights Law § 70-a. The plaintiff moves for summary judgment on its seventh cause of action and for dismissal of the defendants' first counterclaim. The defendants cross move for summary judgment on their first counterclaim and for dismissal of the plaintiff's seventh cause of action.

A SLAPP suit, or strategic lawsuit against public participation, is defined in Civil Right Law § 76-a (1) (a) as an action, claim, cross claim, or counterclaim for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose such application or permission (**Guerrero v Carva**, 10 AD3d 105, 116). The anti-SLAPP provisions of Civil Rights Law §§ 70-a and 76-a were enacted to protect citizen activists from lawsuits commenced by well-financed public permit holders in retaliation for their public advocacy (**Id.**) A finding that an action is a SLAPP suit entails serious consequences to the plaintiff. A heightened standard of proof is imposed upon the plaintiff to avoid dismissal of the action (**Id.**), and summary judgment will be granted unless the plaintiff can demonstrate that the cause of action has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification, or reversal of existing law (CPLR 3212 [h]). Moreover, defendants in SLAPP suits are given a

statutory right of action to recover damages, including costs and attorneys' fees, if the action is without a substantial basis in fact and law and could not be supported by an argument for a change in the law (Civil Rights Law § 70-a [1] [a]; **Guerrero v Carva**, *supra*). Defendants may recover other compensatory damages upon an additional showing that the action was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of speech, petition, or association rights (Civil Rights Law § 70-a [1] [b]), and punitive damages if the action was commenced or continued for the sole purpose of harassing or intimidating (Civil Rights Law § 70-a [1] [c]; **Harfenes v Sea Gate Assn.**, 167 Misc 2d 647, 651).

The court finds that the defendants' first counterclaim is a SLAPP suit within the meaning of Civil Right Law § 76-a (1) (a). The court also finds that the defendants have met their burden of demonstrating that the first counterclaim has a substantial basis in fact and law. The defendants have established that the HOA agreed not to interfere with or otherwise impede or disrupt the sponsor's activities to complete construction of the project in accordance with the approved site plan on file with the Town of Brookhaven and that the HOA breached that agreement by, inter alia, sending their attorney to a public hearing to testify against the variances that were needed for completion of the project. Moreover, the plaintiff's conclusory assertions of malice are insufficient to establish that the defendants' first counterclaim was commenced or continued for the purpose of harassing, intimidating, or punishing the HOA. Accordingly, the branch of the plaintiff's motion which is for summary judgment on its seventh cause of action and dismissing the defendants' first counterclaim is denied, and the branch of the defendants' cross motion which is for summary judgment dismissing the plaintiff's seventh cause of action is granted.

The court also finds that the defendants' have established their entitlement to judgment as a matter of law on the first counterclaim for breach of paragraph 2 of the 1997 agreement. In opposition, the plaintiffs raise a myriad of issues, only one of which raises a triable issue of fact. Contrary to the plaintiff's contentions, the defendants do not seek to enforce paragraph 2 against any of the individual members of the HOA, and the agreement itself clearly indicates that it was duly adopted and ratified by the HOA. It is, therefore, binding upon the HOA and the members of its board, including future members. The purported unlimited duration of the 1997 agreement does not affect its enforceability since the agreement is in writing (*see*, General Obligations Law § 5-701 [a] [1]). The plaintiff's reliance on the indemnification provisions of the 1997 agreement and the offering plans is misplaced. Those provisions neither define nor limit the term "sponsor's activities" found in paragraph 2. The plaintiff's claim that the delay in constructing the mid-rises is solely attributable to the sponsor and the Town is belied by the record, which clearly reflects that the delay was caused, at least in part, by the HOA's opposition to the project. The 1986 variance was ultimately found to be valid and in full force. Therefore, the plaintiff's reliance on its invalidity is unavailing.

The plaintiff misreads Civil Rights Law § 70-a (2), which provides that **the right to bring an action** thereunder can be waived only if it is waived specifically. Moreover, the

sponsor did not waive its right to enforce paragraph 2 by failing to seek injunctive relief. Waiver is defined as the voluntary and intentional abandonment of a known right (*see*, **Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC,** 78 AD3d 746; 750). It may arise by either an express agreement or by conduct or a failure to act evincing an intent not to claim the purported advantage (*see*, **Golfo v Kycia Assocs., Inc.**, 45 AD3d 531, 533). A waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence (**Id.**). The court finds that the sponsor's failure to seek injunctive relief, without more, is insufficient to warrant the conclusion that the sponsor intentionally abandoned any of its contractual rights, including the right to sue for breach of contract.

The plaintiff contends that the 1997 agreement is unconscionable. In general, an unconscionable contract has been defined as one that is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party (**Simar Holding Corp. v GSC**, 87 AD3d 688, 689). This definition reveals two major elements that have been labeled by commentators as procedural and substantive unconscionability (**Id.**). The procedural element concerns the contract-formation process and the alleged lack of meaningful choice. The substantive element looks to the content of the contract per se (**Id.**). Unconscionability has little applicability in the commercial setting because it is presumed that businessmen deal at arm's length with relative equality of bargaining power. The doctrine is primarily a means with which to protect the commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor or finance company (**Master Lease Corp. v Manhattan Limousine, Ltd.**, 177 AD2d 85, 90).

The plaintiff has produced no evidence regarding the contract-formation process, although the record reflects that the HOA was represented by counsel in connection with the negotiation and execution of the 1997 agreement. While the substantive element alone may be sufficient to render the terms of a contract unenforceable in some extreme cases, such cases are the exception (*see*, **Gillman v Chase Manhattan Bank,** 73 NY2d 1, 2; **Master Lease Corp. v Manhattan Limousine, Ltd.**, *supra* at 89). The court finds that, considering its commercial context, paragraph 2 of the 1997 agreement is not so outrageous and oppressive as to warrant a finding of unconscionability irrespective of the contract-formation process (*see*, **Gillman v Chase Manhattan Bank,** *supra* at 12; **Master Lease Corp. v Manhattan Limousine, Ltd.**, *supra*).

The plaintiff contends that the sponsor's breaches of the 1997 agreement relieved the HOA of its obligation not to interfere with the sponsor's completion of the project under paragraph 2. The plaintiff contends that the sponsor breached the 1997 agreement by failing to pay the HOA's deficiency claims and by failing to build two additional tennis courts (*infra*). The defendants contend in opposition that the HOA breached the 1997 agreement as early as 2001 and that the plaintiff has failed to establish the materiality of the sponsor's purported breaches.

When a party has breached a contract, that breach may excuse the non-breaching

party from further performance if the breach is material. In such a case, the non-breaching party is discharged from performing any further obligations under the contract and may elect to terminate the contract and sue for damages (**Casita, LP v Maplewood Equity Partners (Offshore) Ltd.**, 17 Misc 3d 1137[A] at *7 [and cases cited therein]). Thus, the non-performing party is liable for any breach of contract, but the other party is discharged from further performance and is entitled to damages only when there is a material breach (**Metropolitan Natl. Bank v Adelphi Academy**, 23 Misc 3d 1132 [A] at *3). For a breach to be material, it must be so substantial that it defeats the object of the parties in making the contract. The breach must go to the root of the agreement between the parties (**Id.** at *4 [and cases cited therein]). The determination whether a material breach has occurred is generally a question of fact (**Id.** at *3, citing Restatement (Second) of Contracts § 241). In many disputes over failure of performance, both parties fail to finish performance and the question is whether one of them is justified in doing so by the other party's failure. Thus, the central problem is in determining which party is chargeable with the first uncured, material failure of performance (Restatement [Second] of Contracts § 237, Comment *b*).

In order for the defendants to prevail on the branch of their cross motion which is for summary judgment on the first counterclaim, it must be clear that the HOA breached the 1997 agreement before the sponsor did and that the HOA's breach rose to the appropriate level of materiality to justify termination of the agreement (*cf.*, **Bear Stearns Funding, Inc. v Interface Group-Nevada, Inc.**, 361 F Supp 2d 283, 291). The court finds that there are triable issues of fact as to who breached the 1997 agreement first and whether that breach was material. Accordingly, the branch of the defendants' cross motion which is for summary judgment on the first counterclaim is denied.

The Tennis-Court Claim

Paragraph 7 of the 1997 agreement provides, in pertinent part, as follows:

> [T]he SPONSOR agrees to install subsequent to the closing of its 60th unit two additional tennis courts in the location and in accordance with the specifications set forth in Amendment 5 to the Offering Plan.

The plaintiff's third cause of action alleges that the sponsor failed to build the aforementioned tennis courts, thereby breaching the 1997 agreement. The plaintiff moves for partial summary judgment on the issue of liability alleging that, although the 60th unit closed in 2000, the two additional tennis courts still have not been built. In opposition, the defendants have raised a triable issue of fact. They acknowledge the obligation to build the two additional tennis courts, but contend that they cannot lawfully do so until an amended site plan is approved by the Town, which has been frustrated by the HOA's opposition to the mid-rises. Accordingly, the branch of the plaintiff's motion which is for partial summary judgment on the third cause of action is denied.

Steven Klar and the Klar Organization

The defendants seek summary judgment dismissing the complaint insofar as it is asserted against Steven Klar, individually, and the Klar Organization on the ground that the record does not support a claim for piercing the corporate veil. In opposition, the plaintiff argues that Steven Klar made false certifications in the offering plans, which do not require a piercing of the corporate veil. Specifically, the plaintiff contends that Klar's certifications failed to disclose the budget deficiencies that the sponsor owed to the HOA.

One of the primary and completely legitimate purposes of incorporating is to limit or eliminate the personal liability of the corporate principals (*see*, **Matter of Goldman v Chapman**, 44 AD3d 938, 939). Something more than the mere status of corporate officer must exist before individual liability can attach (*see*, **Worthy v New York City Housing Auth.**, 21 AD3d 284, 288 [Tom, J.P., and Saxe, J., concurring]). The record does not reflect that Steven Klar was using Waterways Development Corp. for the transaction of his personal business, without regard to formality, for purely personal rather than corporate ends (**Id.** at 287; **Retropolis v 14th St. Dev. LLC**, 17 AD3d 209, 210). Moreover, contrary to the plaintiff's contentions, Klar's purported omissions from disclosures required by the Martin Act and the Attorney General's implementing regulations cannot form the basis for common-law causes of action against the sponsor, its members and principals (*see*, **Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership**, 12 NY3d 236, 245; *see also*, **Hamlet on Olde Oyster Bay Home Owners Assoc., Inc. v Holiday Org., Inc.**, 65 AD3d 1284, 1287). The Attorney General bears sole responsibility for implementing and enforcing the Martin Act, and there is no private right of action thereunder (**Kerusa** at 244). Accordingly, the complaint is dismissed insofar as it is asserted against Steven Klar.

The record reflects that the Klar Organization is merely a trade name, which has no separate jural existence and can neither sue nor be sued independently of its owner (*see*, **Anastasuou v Fulton Street Pub**, 133 AD2d 796, 797; **Provsty v Lydia E. Hall Hosp.**, 91 AD2d 658, 659, *affd* 59 NY2d 812). Thus, the plaintiff may not maintain an action against it, and the complaint is dismissed insofar as asserted against the Klar Organization.

Declaratory Judgement

Both parties seeks summary judgment on the eighth cause of action for declaratory relief. The eighth cause of action is duplicative of the fourth cause of action for breach of the 1997 agreement and the seventh cause of action for damages under Civil Rights Law § 70-a.

As a general rule, a court should not entertain an action for declaratory judgment when there is no necessity for doing so (**Holtzman v Supreme Court of the State of New York**, 152 AD2d 724, 725). A declaratory-judgment action is generally appropriate only when a conventional form of remedy is not available. When alternative conventional forms of remedy

are available, resort to an action for declaratory relief is generally unnecessary and should not be encouraged. It is unnecessary when an action at law for damages will suffice (*see*, **Bartley v Walentas**, 78 AD2d 310, 312; *see also*, **Olsen v New York State Dept. of Envtl. Conservation,** 307 AD2d 595, 596).

The essential nature of the plaintiff's claims under the 1997 agreement and Civil Rights Law § 70-a is the recovery of monetary damages. The declaratory relief requested in the eighth cause of action is clearly incidential to the monetary relief requested in the fourth and seventh causes of action (**Id.**). Since neither party is entitled to declaratory relief, the branches of the motion and cross motion which are for summary judgment declaring the rights of the parties are denied, and the eighth cause of action is dismissed.

Legal Fees

The 1997 agreement provides that, in the event of any litigation in conjunction therewith, the prevailing party shall be entitled to recover its reasonable attorneys' fees against the other party. The sixth cause of action and the fourth counterclaim seek to recover attorneys' fees pursuant to the 1997 agreement. The plaintiff moves for summary judgment on its sixth cause of action and for dismissal of the defendants' fourth counterclaim. The defendants cross move for summary judgment on their fourth counterclaim and for dismissal of the plaintiff's sixth cause of action.

Since neither party has prevailed on the breach-of-contract claims under the 1997 agreement, the court declines to award summary judgment to either on the issue of legal fees. Accordingly, the branches of the motion and cross motion which are for summary judgment on the sixth cause of action and the fourth counterclaim are denied.

Conclusion

The motion and cross motion are denied insofar as they seek summary judgment on the deficiency claim in the first and fourth causes of action for the years 2000, 2001, and 2004. The plaintiff is granted, and the defendants are denied, partial summary judgment on the first and fourth causes of action for breach of contract insofar as they relate to the plaintiff's deficiency claims for the years 2005, 2007, 2009, and 2010. The plaintiff is awarded damages on those claims in the principal amount of $16,464.00 with interest from December 31, 2005; $5,941.00 with interest from December 31, 2007; $18,708.00 with interest from December 31, 2009; and $21,264.00 with interest from December 31, 2010. Entry of a judgment thereon is held in abeyance pending determination of the remaining claims and counterclaims (*see*, CPLR 3212 [e] [2]).

The branch of the plaintiff's motion which is for partial summary judgment on the third cause of action for breach of contract for failing to build two additional tennis courts is denied.

The branch of the plaintiff's motion which is for partial summary judgment on the fifth cause of action for fraud insofar as it relates to the deficiency claim is denied, and the branch of the defendant's cross motion which is for partial summary judgment dismissing the fifth cause of action insofar as it relates to the deficiency claim is granted.

The motion and cross motion are denied insofar as they seek summary judgment on the sixth cause of action and the fourth counterclaim for attorneys' fees.

The branch of the plaintiff's motion which is for summary judgment on its seventh cause of action for damages under Civil Rights Law § 70-a is denied, and the branch of the defendants' cross motion which is for summary judgment dismissing the seventh cause of action is granted.

The motion and cross motion are denied insofar as they seek summary judgment on the eighth cause of action for a declaratory judgment, and the eighth cause of action is dismissed on the court's own motion.

The motion and cross motion are denied insofar as they seek summary judgment on the first counterclaim for breach of the non-interference clause of the 1997 agreement.

The branch of the defendants' cross motion which is for summary judgment on the second counterclaim for breach of fiduciary duty is denied, and the branch of the plaintiff's motion which is for summary judgment dismissing the second counterclaim is granted.

The branch of the defendants' cross motion which is for summary judgment on the third counterclaim for fraud is denied, and the branch of the plaintiff's motion which is for summary judgment dismissing the third counterclaim is granted.

The branch of the defendants' cross motion which is for summary judgment dismissing the complaint insofar as it is asserted against Steven Klar and the Klar Organization is granted.

Dated: **February 25, 2013**

HON. ELIZABETH HAZLITT EMERSON

J.S.C.