Board of Mgrs. of the 130 Fulton St. Condominium v Beway Realty, LLC
2013 NY Slip Op 30828(U)
April 16, 2013
Supreme Court, New York County
Docket Number: 101747/2012
Judge: Donna M. Mills

[* 1]

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

PRESENT : DONNA M. MILLS PART 58

DONNA M. MILLS, J.S.C. *Justice*

THE BOARD OF MANAGERS OF THE 130 FULTON STREET CONDOMINIUM,

Plaintiff,

-against-

BEWAY REALTY, LLC et al.,

Defendants.

INDEX NO. 101747/12

MOTION DATE

MOTION SEQ. NO. 01, 02, 03

MOTION CAL NO.

The following papers, numbered 1 to ____ were read on this motion for ____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	1-4
Answering Affidavits - Exhibits	5-9
Replying Affidavits	10-13

CROSS-MOTION: ____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/16/13

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

THE BOARD OF MANAGERS OF THE 130 FULTON STREET CONDOMINIUM,
Plaintiff,

-against-

BEWAY REALTY, LLC, KOEPPEL COMPANIES, LLC, ELLIOT VILKAS ARCHITECT, P.C., T/S ASSOCIATES MECHANICAL CONSULTANTS, A&E CONSULTANTS OF NEW YORK, LTD, DUBINSKY CONSULTING ENGINEER, P.C., F.J. SCIAME CONSTRUCTION CO., INC., SCIAME COMMUNITY BUILDERS LLC, SCIAME DEVELOPMENT INC., SCIAME INTERNATIONAL LLC, SCIAME GLOBAL LLC, SCIAME PARK AVENUE, LLC, SCIAME PARTNERS LLC and SCIAME ST. LUCIA LLC,
Defendants.

INDEX NUMBER 101747/2012
Mot. Seq. 001, 002 & 003
DECISION & ORDER

DONNA MILLS, J.:

Motions bearing the sequence numbers 001, 002 and 003 are hereby consolidated for decision. In this action alleging defective design and construction of the 130 Fulton Street Condominium (the Condominium), defendant T/S Associates Mechanical Consultants (T/S) moves, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint and all cross claims as against it (Mot. Seq. 001). Defendants Elliot Vilkas Architect, P.C. (EVA) and Dubinsky Consulting Engineer, P.C. (DCE) (together EVA/DCE) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint as against it (Mot. Seq. 002). T/S amended its motion to dismiss the complaint and all cross claims as against it, and was assigned another motion sequence number (Mot. Seq. 003), mooting its original motion. Additionally, T/S later withdrew its request for dismissal of all cross claims as against it, and that prong of its motion shall be disregarded. Therefore, only EVA/DCE's motion to dismiss the complaint (Mot. Seq. 002) and

T/S's latter motion (Mot. Seq. 003) to dismiss the complaint will be considered herein.

Background

The Condominium was sponsored by Beway Realty LLC (the Sponsor). It operates a building in New York County holding 21 residential units and two commercial units, as well as certain "common elements," such as, the underlying land and hallways. It is organized pursuant to an offering plan accepted for filing by the New York Attorney General on July 29, 2004. The first unit closed on June 20, 2006 (the Offering Plan). Plaintiff, the Board of Managers of the 130 Fulton Street Condominium, is the representative of the Condominium's unit owners. It assumed control of the Condominium from the Sponsor in December 2006. Defendant Koeppel Companies, LLC (Koeppel) is affiliated with the Sponsor and was the managing agent for the Condominium at the time of the offering. EVA, a professional architectural firm, prepared plans and specifications for the Condominium. T/S was the Condominium's mechanical consultant. Defendant A&E Consultants of New York, Ltd. (A&E) was the consultant for work done on the Condominium's exterior walls. DCE filed structural plans for the Condominium. Defendants F.J. Sciame Construction Co., Inc., Sciame Community Builders LLC, Sciame Development Inc., Sciame International LLC, Sciame Global LLC, Sciame Park Avenue, LLC, Sciame Partners LLC and Sciame St. Lucia LLC (Sciame Defendants) were the construction manager/general contractor for the Condominium.

The action commenced on September 6, 2012, asserting causes of action for: breach of contract against the Sponsor (first); breach of express warranty against the Sponsor (second); breach of implied warranty against the Sponsor (third); negligent construction and supervision against the Sponsor, Koeppel and Sciame Defendants (fourth); fraud, deceit and misrepresentation against the Sponsor and EVA (fifth); violation of the General Business Law (GBL) §§ 349 and 350 against the Sponsor (sixth); breach of contract against EVA, A&E, T/S, DCE and Sciame Defendants (seventh); negligence against EVA, A&E, T/S and DCE (eighth); breach of fiduciary duty against the Sponsor (ninth); and aiding and abetting breach of fiduciary

duty against Koeppel, EVA, A&E, T/S, DCE and Sciame Defendants (tenth). Mot. Seq. 002, Exhibit B. On September 25, 2012, plaintiff filed an amended complaint adding causes of action for an accounting against the Sponsor (eleventh) and inequitable apportionment of common charges against the Sponsor (twelfth). *Id.*, Exhibit C.

The amended complaint charges that the Condominium suffers from, among other deficiencies, defects in the windows, roof, elevators, plumbing, insulation and electrical systems. Plaintiff claims that the defendants "knew or should have known of the dangerous and defective conditions, as well as any design flaws in the Building as early as 2006." Amended Complaint, ¶ 63. Yet, they "signed off on filings with the DOB [Department of Buildings] that were either inaccurate, contained misrepresentations, and/or failed to disclose architectural and engineering defects in the Building that did not comply with codes, laws, regulations, and industry standards, all in an effort to enrich themselves and their companies herein." *Id.*, ¶ 66. Plaintiff asks for punitive damages with most of the causes of action.

EVA/DCE's Motion to Dismiss the Amended Complaint - Mot. Seq. 002

Three of the 12 causes of action in the amended complaint are raised against EVA/DCE – breach of contract (seventh), negligence (eighth), and aiding and abetting breach of fiduciary duty (tenth). The cause of action for fraud, deceit and misrepresentation (fifth) is raised against EVA alone. EVA/DCE's argument for dismissal of the amended complaint has several elements:

- The applicable statutes of limitations have run.[1]
- There is no private cause of action for violations of the Martin Act (GBL § 352 et seq).
- The necessary elements of fraud are not set forth.
- Plaintiff lacks privity with EVA or DCE.
- The negligence claim attempts to transform a breach of contract claim into a tort claim.
- Plaintiff is not an intended third-party beneficiary of EVA's or DCE's contract with the Sponsor.
- Plaintiff is not entitled to punitive damages.

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[1]The Notice of Motion does not mention CPLR 3211 (a) (5). However, plaintiff, in opposition, fully addresses the issue of statute of limitations, making it properly an element of this motion.

A cause of action may be dismissed because the applicable statute of limitations has run. CPLR 3211 (a) (5). EVA/DCE argue that, as design professionals, the statutes of limitation for breach of contract and negligence have run, pursuant to CPLR 214 (6).[2] *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 539-540 (2004) ("the purpose of the statute is best served by applying the three-year statute of limitations applicable to all nonmedical professional malpractice claims"). Defendants maintain that their services to the Sponsor ended on or by June 20, 2006, when the first residential unit was transferred to an owner. The three-year statute of limitations for contract or tort claims against them, therefore, would have lapsed on June 20, 2009, more than three years before the instant action commenced. *Brushton-Moira Cent. School Dist. v Fred H. Thomas Assoc.*, 91 NY2d 256, 261 (1998) ("a cause of action for defective design or construction accrues upon the actual completion of the work"); *Parsons Brinckerhoff Quade & Douglas v EnergyPro Constr. Partners*, 271 AD2d 233, 234 (1st Dept 2000) ("An owner's claim against a design professional accrues upon the termination of the professional relationship between the parties, when the designer completes its performance of significant [i.e., non-ministerial] duties under the parties' contract").

According to the amended complaint, "[t]he Sponsor was made aware of these substantial defects in the Building pursuant to the terms of the Offering Plan and . . . has also received several notices individually from Unit Owners subsequent to the First Unit Closing addressed to the Sponsor pursuant to the warranty defects notice in the Offering Plan." Amended Complaint, ¶¶ 36, 39. Additionally, the amended complaint claims that the defendants "knew or should have known of the dangerous and defective conditions, as well as any design flaws in the Building as early as 2006." *Id.*, ¶ 63. The transfer of the first unit to an owner occurred on June 20, 2006, and defendants allegedly had actual or constructive notice of defects in the Condominium by the end of 2006. It is, therefore, reasonable to conclude that

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[2]"The following actions must be commenced within three years: . . . an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort."

substantial defects in the Condominium were known by the end of 2006, when the running of the statute of limitations began.

Plaintiff contends that EVA and DCE continued working on the Condominium as recently as September 13, 2012, according to DOB records. Garcia Affirm., Mot. Seq. 002, Exhibits D and E. However, the DOB records themselves, and an affidavit by Elliot Vilkas, EVA's principal (Reply Memorandum of Law, Mot. Seq. 002, Exhibit1), show that EVA's recent work at the Condominium had no connection to the original project for the Sponsor. In one instance, EVA corrected the number of dwelling units and, in the other, EVA assisted with interior renovations of one unit. As for the DOB document dealing with DCE, it was filed on August 31, 1998, and approved on August 31, 2000. None of these records alter the finding that the statute of limitations on torts and contract claims against EVA/DCE began running between June 20, 2006 and December 31, 2006. The amended complaint's causes of action for breach of contract (seventh) and negligence (eighth) against EVA and DCE shall be dismissed pursuant to CPLR 3211 (a) (5).

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v Spano*, 13 NY3d 358, 373 (2009); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). EVA/DCE challenge the causes of action for fraud, deceit and misrepresentation (fifth) because there is no private cause of action for violations of the Martin Act. New York law limits prosecution of claims to the Attorney General predicated solely on alleged material omissions or false statements made in an offering plan. *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 239 (2009) ("a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated solely on alleged material omissions from the offering plan

amendments mandated by the Martin Act"). Therefore, the complaint's fifth cause of action for fraud, deceit and misrepresentation against EVA shall be dismissed to the extent that it relies on alleged material omissions in the Offering Plan.

EVA/DCE also requests dismissal of the fifth cause of action because the elements of fraud have not been adequately pled, "misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 (1st Dept 2006). The amended complaint asserts that

> "Elliot Vilkas, himself, made false representations and omissions of material fact to the Unit Owners in the Architect's Certification in the Offering Plan. . . . Material and equipment substituted by the Sponsor and approved by Elliot Vilkas were not of equal or better quality than originally specified . . . In the Architect's Report, Elliot Vilkas certified the veracity of the representations contained therein and made a part of the Offering Plan. . . . Elliot Vilkas knew, or should have known, such representations were false."

Amended Complaint, ¶¶ 110-113.

EVA/DCE argue that these allegations do not meet the requirement that a claim of fraud contain "a particularized factual assertion which supports the inference of scienter." *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97 (1st Dept 2003). At most, these allegations point to professional negligence, the subject of other causes of action in the amended complaint. *Ford v Sivilli*, 2 AD3d 773, 775 (2d Dept 2003) ("An allegation that repeats an assertion of negligence and adds a general claim of reckless disregard of the facts or actual knowledge is insufficient to plead scienter"). The amended complaint does not state a cause of action against EVA for fraud. The fifth cause of action, therefore, shall be dismissed.

EVA/DCE contend that the fifth and eighth causes of action, fraud, deceit and misrepresentation and negligence, also require privity of contract between the parties, or its functional equivalent, which is absent here. *Key Intl Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 450 (2d Dept 1988) ("the owner of a construction project may not recover compensation for economic damages caused by the negligence of an architect or engineer with whom it is not in

privity of contract"). However, "a cause of action [for negligent misrepresentation] requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity." *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 (1989).

While the Court of Appeals does not require the formality of contract to prosecute a cause of action for negligent misrepresentation, it insists that the complaint "allege that the misrepresentations were made with knowledge that [instant] plaintiffs would rely on them." *Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372 (2010). *Sykes* is particularly instructive to the case at hand. Plaintiffs purchased a unit in a condominium where defendant designed the heating, ventilation and air conditioning systems. The offering plan promised that these systems "were capable of maintaining certain indoor temperatures in hot and cold weather. Plaintiffs allege that these statements can be attributed to [defendant]; that [defendant] was negligent in making them; that the statements were false; and that plaintiffs relied on them in purchasing their apartment." 15 NY3d at 372. The cause of action for negligent misrepresentation was dismissed because "it is not even alleged that [defendant] knew or had the means of knowing that plaintiffs were possible purchasers of an apartment." *Id.* at 374. As articulated in *Credit Alliance Corp. v Arthur Andersen & Co.* (65 NY2d 536, 551 [1985]), there must be "a known party or parties" intending to rely on the professional's work. That was not the case in *Sykes*, nor is it here.

> "While [defendant] obviously knew in general that prospective purchasers of apartments would rely on the offering plan, there is no indication that it knew these plaintiffs would be among them, or indeed that [defendant] knew or had the means of knowing of plaintiffs' existence when it made the statements for which it is being sued."

Sykes, 15 NY3d at 373. The fifth and eighth causes of action, fraud, deceit and misrepresentation and negligence, therefore, are dismissed.

Plaintiff argues that it is the successor to the Sponsor,[3] and, thereby, has privity with EVA and DCE. Even if this were the case, the statute of limitations has expired on the eighth

cause of action for negligence, and it, therefore, shall be dismissed.

EVA/DCE also maintain that the cause of action for negligence (eighth) should be dismissed as it is essentially a restating of the breach of contract claim (seventh). In regard to negligence, the amended complaint charges that EVA and DCE "were careless and negligent in the design and drafting of drawings, plans and specifications, and were negligent in their inspection and management of the Project." Amended Complaint, ¶ 166. Plaintiff allegedly sustained and will continue to sustain damages, "including but not limited to, costs of professionals, labor and materials to repair, correct, and otherwise remediate the defective design and poor construction of the Building and the Units." *Id.*, ¶ 168.

The breach of contract claim states, that "[EVA] entered into an agreement with the Sponsor under which, among other things, [EVA] agreed to, and in fact did, prepare drawings and specifications for the construction of the Building, and undertook a responsibility to supervise the construction and inspection of the Building." *Id.*, ¶ 141. This is repeated for DCE. *Id.*, ¶ 145. The respective agreements with the Sponsor were breached because "the Building was not designed and constructed in accordance with industry standards, proper architectural practices, and in compliance with applicable codes, rules and ordinances, and [defendant] failed to properly inspect defects and deficiencies in the Building." *Id.*, ¶¶ 147, 150. As a result of the breaches of contract by EVA and DCE, the amended complaint states that plaintiff sustained and will continue to sustain damages, "including but not limited to, costs for professionals, labor and materials to repair, correct, and otherwise remediate the defective design and poor construction of the Building and the Units." *Id.*, ¶ 159. There is no difference in the causes of action for negligence and breach of contract, and nothing in the amended complaint gives rise to separate causes of action. "It is a well-established principle that a simple breach of contract is not to be

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[3]Plaintiff also maintains this position in arguing that it is a third-party beneficiary of the contracts with the Sponsor; see below.

considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987). The cause of action for negligence (eighth) is dismissed for the additional reason that it is duplicative.

EVA/DCE contest the cause of action for breach of contract (seventh) because plaintiff is not an intended third-party beneficiary of EVA's or DCE's contract with the Sponsor. "One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental." *Edge Mgt. Consulting, Inc. v Blank,* 25 AD3d 364, 368 (1st Dept 2006); *Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159, 162 (3d Dept 1987) ("construction contracts are not construed as conferring third-party beneficiary enforcement rights"). There are no fact-based allegations that the contracts between professionals, such as EVA or DCE, and the Sponsor were intended to benefit plaintiff, and, therefore, it is in no position to profess breach of contract.

Plaintiff argues that it is the successor to the Sponsor, because the Offering Plan provides, among other things, that the Board of Managers shall "maintain, care for, preserve and restore the Common Elements" of the Condominium, once it succeeds the Sponsor, which had this initial responsibility. Offering Plan at 67. As alleged successor, plaintiff contends that it is the third-party beneficiary to the design and engineering contracts between EVA/DCE and the Sponsor. As stated above, in order to be considered a contract's third-party beneficiary, there must be an intent to benefit the alleged third-party. Plaintiff has not offered fact-based allegations of any such intent. The seventh cause of action for breach of contract shall be dismissed.

The remaining cause of action asserted against EVA/DCE is aiding and abetting breach of fiduciary duty (tenth). "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach."

Kaufman v Cohen, 307 AD2d 113, 125 (1st Dept 2003). The amended complaint claims that EVA/DCE's "improper conduct . . . made possible the breach by the Sponsor of its fiduciary duties and obligations owed to Plaintiff." Amended Complaint, ¶ 181. However, there is no finding of improper conduct against EVA/DCE. The court, for the reasons stated above, is dismissing the causes of action for fraud, deceit and misrepresentation, breach of contract and negligence against EVA/DCE. Therefore, there is no basis for this cause of action against them for aiding and abetting breach of fiduciary duty, and it shall be dismissed.

Since all the causes of action asserted against EVA/DCE in the amended complaint are dismissed, the amended complaint shall be dismissed as against them.

T/S's Motion to Dismiss the Amended Complaint – Mot. Seq. 003[4]

Three of the amended complaint's 12 causes of action are asserted against T/S: breach of contract (seventh); negligence (eighth); and aiding and abetting breach of fiduciary duty (tenth). Plaintiff's allegations supporting these causes of actions against T/S are the same as for the co-defendants EVA/DCE.

T/S submits a copy of its contract with the Sponsor, dated July 6, 2000. Mot. Seq. 001, Exhibit J. Its work included the preparation of specifications and drawings, filing forms with municipal authorities, maintaining electrical and mechanical services to existing commercial occupants, and providing "for any non-residential space (such as retail and/or commercial spaces) . . . capped sanitary and water outlets for future tenants to connect to. Electric power available at meter area for tenant to connect to." Nothing in this agreement involves a relationship between T/S and plaintiff. There is no contract between these parties, nor is plaintiff a third-party beneficiary of the contract between T/S and the Sponsor. The cause of action for breach of contract against T/S (seventh), therefore, shall be dismissed.

The cause of action against T/S for negligence (eighth) shall be dismissed because the

[4]T/S's exhibits were annexed to Mot. Seq. 001, and referenced again in Mot. Seq. 003.

statute of limitations for negligence has run, as discussed above. Plaintiff is only able to offer the conclusory allegation that prospective discovery might disclose an agreement in which T/S offers a warranty to the Sponsor against defects that might extend to plaintiff as the successor to the sponsor, or as third-party beneficiary of the agreement. Sol Schwartz, a partner in T/S, submits an affidavit that states that the July 6, 2000 agreement with the Sponsor "is the only agreement that T/S ASSOCIATES MECHANICAL CONSULTANTS had with any party with respect to any type of work or services to be rendered with respect to those premises." Mot. Seq. 001, Exhibit I.

The remaining cause of action against T/S for aiding and abetting breach of fiduciary duty (tenth) shall be dismissed because, as with EVA/DCE, there is no legal basis to find T/S's conduct improper.[5] Even if the Sponsor had a fiduciary duty to plaintiff which was breached, T/S cannot be faulted for providing its lawful services to the Sponsor.

In sum, the three causes of action against T/S shall be dismissed, thereby dismissing the complaint as against T/S.

Accordingly, it is

ORDERED that defendants Elliot Vilkas Architect, P.C. and Dubinsky Consulting Engineer, P.C.'s motion to dismiss the complaint is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs (Mot. Seq. 002); and it is further

ORDERED that defendant T/S Associates Mechanical Consultants's motion is moot as a result of the filing of its subsequent motion (Mot. Seq. 001); and it is further

ORDERED that defendant T/S Associates Mechanical Consultants's motion is granted, and the complaint is dismissed with costs and disbursements to said defendant as taxed

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[5]Most definitions of aid and abet focus on criminal law. Here is a broader, more useful definition: "To order, encourage, facilitate, or to actively, knowingly, intentionally, or purposefully assist, or otherwise promote or attempt to promote the commission of a crime or a tort. Affirmative conduct is regarded; aiding and abetting cannot be established by omission or negative acquiescence." http://law.yourdictionary.com/aid-and-abet.

by the Clerk of the Court upon submission of an appropriate bill of costs (Mot. Seq. 003); and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: April 16, 2013

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.