

**Board of Mgrs. of the Mirmar Condominium v Terra
Nova LLC**

2013 NY Slip Op 33298(U)

July 9, 2013

Sup Ct, Queens County

Docket Number: 702712/2012

Judge: Orin R. Kitzes

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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THE BOARD OF MANAGERS OF THE MIRMAR CONDOMINIUM, SUING ON BEHALF OF IT'S CONSTITUENT UNIT OWNERS, Number 702712/ 2012

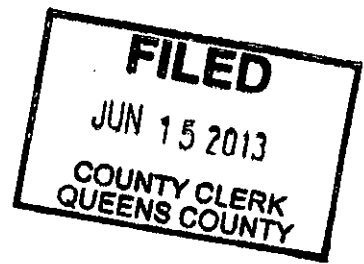
Plaintiffs, Motion Date February 21, 2013

-against-

Motion Seq. No. 1

TERRA NOVA LLC, PETER BALKHEIMER, TRUSTEE OF THE PETER BALKHEIMER CHARITABLE REMAINDER UNI TRUST, MEI HUNG, TRUSTEE OF THE PETER BALKHEIMER CHARITABLE REMAINDER UNI TRUST, PETER BALKHEIMER, CHRISTINE BALKHEIMER, CARLOS TELLERIA, MEI HUNG, PETER CASINI, HOST CARRERA INC AND COMPTE CONSULTING SERVICES, INC.,

Defendants.



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The following papers numbered E3 to E15 read on this motion by defendants Terra Nova LLC (Terra Nova), Peter Balkheimer, as trustee of the Peter Balkheimer Charitable Remainder Uni Trust (the Trust), Mei Hung, as trustee of the Trust, Peter Balkheimer individually, Christine Balkheimer, individually, Mei Hung individually and Host Carrera, Inc. (Host Carrera) (collectively the movants) pursuant to CPLR 3211(a)(1), (3), (5), and (7) to dismiss the complaint, including the claims for punitive damages.

Papers
Numbered
Notice of Motion - Affidavits - Exhibits..... E3-E10
Answering Affidavits - Exhibits E13-E15

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Board of Managers of the Miramar Condominium commenced this action on November 6, 2012, on behalf of its

constituent owners against defendants for alleged construction defects, hazardous conditions, deviations from the offering plan, failure to abide by industry standards and improper management of the condominium known as the Miramar Condominium (the Condominium) located at 81-14/18 Queens Boulevard, Elmhurst, New York. It is alleged that Terra Nova and the Trust were the co-sponsors of the condominium offering plan. In lieu of answering, the movants seek to dismiss the complaint asserted against them.

That branch of the motion to dismiss the first cause of action for breach of contract against Terra Nova, and Peter Balkheimer and Mei Hung, as trustees for the Trust, is denied. Under CPLR 3013, the allegations in a complaint must be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved, and the material elements of the cause of action. Contrary to the assertion of the movants, the contract itself need not be annexed to the complaint to state a cause of action for breach of contract (see *Berdych v Bell Aerospace Corp.*, 19 AD2d 582 [4th Dept 1963]). Rather, it is permissible to allege the provisions of the contract upon which the claim is based (see *Stabulas v Brooks Piece Dye Works Corp.*, 111 AD2d 803 [2d Dept 1985]).

The allegations asserted in the first cause of action in the complaint are sufficiently particular to meet the requirements of CPLR 3013, and set forth so much of the terms or provisions of the offering plan which plaintiff alleges defendants breached to give fair notice thereof. Plaintiff alleges that pursuant to the offering plan, as incorporated into purchase agreements entered into between Terra Nova and the Trust (the co-sponsors) and each unit owner, the co-sponsors represented, agreed, and promised to construct the buildings and the units, including the materials, equipment, and fixtures to be installed therein, substantially in accordance with the offering plan and the building plans and specifications. Plaintiff also alleges that the co-sponsors breached the purchase agreements because they failed to construct the buildings and units substantially in accordance with the offering plan and the building plans and specifications, and failed to maintain the building and units and pay the expenses pursuant to the offering plan. Plaintiff further alleges that the Condominium and the unit owners have been injured as a result of the alleged breaches. To the extent the movants seek to secure amplification of the claim, they may serve a demand for a bill of particulars.

With respect to that branch of the motion to dismiss the second and third causes of action asserted against Terra Nova, and Peter Balkheimer and Mei Hung, in their capacity as trustees of the Trust, the movants assert that the purchase agreements specifically

excluded all express and implied warranties except a limited warranty set forth in the offering plan, and that under such warranty, plaintiff was required to give the co-sponsors written notice of their breach of warranty claim within one year from the issuance of the certificate of occupancy as to defects in common elements or of the closing of title as to defects in units. According to the movants, plaintiff did not provide any notice to the co-sponsors of their breach of warranty claims prior to the commencement of this action. The movants additionally argue that the express warranty cause of action is duplicative of the breach of contract claim.

Under New York General Business Law article 36-B, a builder-vendor may exclude or modify all express and implied warranties, including the housing merchant implied warranty created by the statute or by common law provided that the purchase agreement contains a limited warranty in accordance with the provisions of General Business Law § 777-b (see General Business Law § 777-a; see also *Fumarelli v Marsam Development, Inc.*, 238 AD2d 470 [2d Dept 1997]). The movants have failed to demonstrate that the limited warranty afforded in the purchase agreement complies with General Business Law § 777-b, insofar as it merely references the limited warranty in the offering plan, and the offering plan does not have the words "limited warranty" captioned at the beginning of the "warranty document," and fails to identify the names and address of all warrantors, the identification of the party or parties to whom the warranty was extended, and whether it extended to subsequent owners (see General Business Law § 777-b[4] [a], [b], [c]). In addition, the movants have failed to demonstrate that the action was commenced more than six years after the warranty date, i.e., the date of the passing of title to the first owner for occupancy by such owner or such owner's family as a residence, or the date of first occupancy of the home as a residence, whichever first occurred (see General Business Law §§ 777[8]; 777-a[1][c]), and therefore, the claim based upon the housing merchant implied warranty is not barred by the statute of limitations.

To the extent the cause of action for breach of express warranty is based upon the alleged warranty that the co-sponsors "will diligently, expeditiously complete construction of the Condominium and all the Units at its own cost and expense, in accordance with the plans and specifications referred to herein," such promise does not constitute a warranty as to the manner of construction to be used, the physical condition of the property to be delivered at closing or any future performance after completion of the construction (see *222 Bloomingdale Road Associates v NYNEX Properties Co.*, 278 AD2d 314 [2d Dept 2000], *lv dismissed*, 96 NY2d

754 [2001])). Rather, it is in the nature of a contractual obligation which is duplicative of the breach of contract claim.

That branch of the motion to dismiss the second cause of action against Terra Nova, and Peter Balkheimer and Mei Hung, in their capacity as trustees of the Trust, based upon breach of express warranty is granted. That branch of the motion to dismiss the third cause of action against Terra Nova, and Peter Balkheimer and Mei Hung, in their capacity as trustees of the Trust, based upon breach of the housing merchant implied warranty is denied.

With respect to the fourth cause of action for fraud, deceit and misrepresentation as against Terra Nova, Peter Balkheimer and Mei Hung, as trustees for the Trust and in their individual capacities, and Christine Balkheimer individually, it is alleged that such defendants, in the offering plan, as incorporated into the purchase agreements, made false representations and omissions of material fact regarding the manner in which the Condominium would be constructed and the quality of materials and equipment to be used in the units and building. Plaintiff alleges the unit owners justifiably relied upon such representations and were fraudulently induced into purchasing units in the building, and have been injured as a result of the defective design and construction.

To the extent the claim of fraud against Terra Nova, and Peter Balkheimer and Mei Hung, in their individual and representative capacities, and Christine Balkheimer is predicated on alleged material omissions from the offering plan or other filings required by the Martin Act (General Business Law art. 23-A) and the Attorney General's implementing regulations, it fails to state a claim against them (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). To the extent it is based upon the alleged fraud and material misrepresentations contained in the offering plan and purchase agreements, such claim arises from the same provisions alleged to have been breached in the contract cause of action and seek the same damages. Under such circumstances, it is duplicative of the contract claim (*see Tiffany at Westbury Condominium By Its Bd. of Managers v Marelli Development Corp.*, 40 AD3d 1073 [2d Dept 2007]). That branch of the motion to dismiss the fourth cause of action asserted against Terra Nova, Peter Balkheimer and Mei Hung, in their individual and representative capacities, and Christine Balkheimer is granted.

The fifth cause of action against Terra Nova, Peter Balkheimer and Mei Hung, in their representative and individual capacities, and Christine Balkheimer is based upon claimed violations of General Business Law §§ 349 and 350. Such cause of action,

alleging deceptive trade practices pursuant to General Business Law § 349 and false advertising pursuant to General Business Law § 350, fails as a matter of law because the claimed violations do not have "a broad impact on consumers at large" (see *Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311 [1st Dept 2000]; *Yellow Book Sales and Distribution Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d 663 [2d Dept 2012]; *Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89 [1st Dept 2012]; *Canario v Gunn*, 300 AD2d 332 [2d Dept 2002]). That branch of the motion to dismiss the fifth cause of action asserted in the complaint against Terra Nova, Peter Balkheimer and Mei Hung, in their individual and representative capacities, and Christine Balkheimer is granted.

The seventh cause of action is based upon alleged breach of fiduciary duty and waste by Peter Balkheimer, Carlos Tellaria and Mei Hung. Plaintiff alleges that Peter Balkheimer, Carlos Tellaria and Mei Hung were the only members of the board of managers prior to April 22, 2009. Plaintiff alleges that Peter Balkheimer, Carlos Tellaria, and Mei Hung breached their fiduciary duties as board members to the Condominium by failing to take steps during their respective tenures on the board to investigate, disclose and remedy defects and deficiencies in the building of which they had notice, choose and supervise an appropriate managing agent, and keep, account for, produce or turn over the minutes of board meetings which were held during their term to the incoming board of managers, or to demand the minutes of the previous board. In the eighth cause of action plaintiff alleges that Peter Balkheimer and Carlos Tellaria, continued to breach their fiduciary duties as board members to the Condominium by failing to take such steps during their term on the board from April 23, 2009 to the summer of 2011. Plaintiff further alleges that Peter Balkheimer, Carlos Tellaria, and Mei Hung elevated their own financial interest and the interest of their co-sponsor entities above that of the Condominium and individual unit owners. It is alleged that as a result of the breaches of the fiduciary duties by Peter Balkheimer, Carlos Tellaria and Mei Hung, damages have been caused to the Condominium building and units due to the failure to perform proper maintenance.

The movants claim that the seventh and eighth causes of action fail to allege any specific breach of fiduciary duty or waste against Peter Balkheimer and Mei Hung, and the seventh cause of action is time-barred because plaintiff's claim of breach of fiduciary duty is subject to the three-year statute of limitations in CPLR 214(4). They also assert that the eighth cause of action is duplicative of the seventh cause of action.

To the extent the eighth cause of action for breach of fiduciary duty and waste asserted against Peter Balkheimer is based upon his alleged failure to maintain or turn over board minutes before April 22, 2009, when the composition of the board changed, it is duplicative of the seventh cause of action asserted against him and must be dismissed.

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (see *Smallwood v Lupoli*, - AD3d -, 2013 WL 2501289, 2013 NY App Div LEXIS 4236 [2d Dept 2013]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011]). Failing to take steps to repair property, and taking affirmative steps to destroy property, may constitute waste (see *Staropoli v Staropoli*, 180 AD2d 727 [2d Dept 1992]; *Watner v P & C Food Markets, Inc.*, 138 AD2d 959 [4th Dept 1988]).

As a general matter, courts are prohibited from inquiring into the propriety of actions taken by a member of a board of managers on behalf of a condominium (see *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]; *Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012] ["[t]he business judgment rule protects individual board members from being held liable for decisions . . . that were within the scope of their authority"]). However, a current board of managers of a condominium may seek recovery from the members of the initial or prior board of managers for the breach of fiduciary duties owed to the condominium and its unit owners (see *Board of Managers of Acorn Ponds at North Hills Condominium I v Long Pond Investors, Inc.*, 233 AD2d 472 [2d Dept 1996]; *Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322 [2d Dept 1993]).

Plaintiff's complaint lacks specific allegations of fraud, self-dealing or other wrongdoing to support a finding of individual liability for breach of fiduciary duty against Peter Balkheimer and Mei Hung relative to the decisions made by the board regarding whether to remedy defects of construction or make repairs, or in the selection or supervision of the managing agent. Plaintiff furthermore makes no allegations that Mei Hung was a principal of the co-sponsors or shared in the co-sponsors' profits, by failing to act in a way that would have caused the co-sponsors to remedy defects or make repairs, or by selecting and supervising the managing agent (cf. *Sunken Pond Estates Homeowners Assn., Inc. v Sunken Pond Estates, Inc.*, 36 Misc 3d 1209[A] [NY Sup 2012]).

The allegation in the complaint that defendants brought a foreclosure action against a unit owner for nonpayment of carrying charges also does not suffice to base a claim of fiduciary duty and waste against Peter Balkheimer and Mei Hung as board members. Although plaintiff claims the prior board members acted in bad faith or out of self interest in doing so, it makes no allegation that the unit owner in fact paid the charges or the board members wrongfully refused her payments to put her in default. In the absence of such a claim, the challenged act is protected by the business judgment rule (see *Matter of Levandusky*, 75 NY2d at 537-540). To the extent, however, plaintiff alleges that Peter Balkheimer and Mei Hung failed to keep accurate books and records and turn them over to the incoming board, such allegation is sufficient to state a cause of action for breach of fiduciary duty (see *Board of Mgrs. of the 231 Norman Ave. Condominium v 231 Norman Ave. Prop. Dev.*, 36 Misc 3d 1232[A] [NY Sup 2012]).

To the extent the movants assert that the claims of breach of fiduciary duty are barred by the statute of limitations, the statute of limitations for a breach of fiduciary duty cause of action depends on the substantive remedy sought by plaintiff (see *Scott v Fields*, 85 AD3d 756, 759 [2d Dept 2011]). Where the relief sought is monetary in nature, the statute of limitations is three years (see *id.*; *Monaghan v Ford Motor Co.*, 71 AD3d 848, 849-850 [2d Dept 2010]). However, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts will apply the six-year statute of limitations applicable to fraud under CPLR 213(8) (see *Monaghan v Ford Motor Co.*, 71 AD3d at 85; see also *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]; *Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). A claim for breach of fiduciary duty accrues, and the statute of limitations begins to run, upon the date of the alleged breach.

In this instance, plaintiff seeks money damages, but alleges that Peter Balkheimer and Mei Hung, while serving as board members, intentionally failed to keep minutes and to turn them over to incoming boards to conceal the true condition of the building from the unit owners. Under such circumstances, the applicable statute of limitations with respect to the seventh cause of action for breach of fiduciary duty based upon failure to maintain board minutes and turn over the board minutes to the incoming board is six years. Thus, the claim by plaintiff for breach of fiduciary duty by Peter Balkheimer and Mei Hung based upon their alleged failure to maintain board minutes during their tenures on the board or to turn over minutes to an incoming board prior to November 6, 2006 is barred by the applicable statute of limitations.

That branch of the motion to dismiss the seventh cause of action against Peter Balkheimer and Mei Hung in their individual capacities for waste is granted. That branch of the motion to dismiss the seventh cause of action against Peter Balkheimer and Mei Hung in their individual capacities for breach of fiduciary duty is granted, except to the extent it is based upon breach of fiduciary duty for their alleged failure to maintain the books, records and minutes of the board on or after November 7, 2006 through April 22, 2009, or to turn over board minutes to the incoming board on April 22, 2009. That branch of the motion to dismiss the eighth cause of action against Peter Balkheimer in his individual capacity for breach of fiduciary duty is granted, except to the extent it is based upon breach of fiduciary duty for his alleged failure to maintain the books, records and minutes of the board or turn over the board minutes to the incoming board after April 22, 2009 through the summer of 2011.

Plaintiff asserts causes of action for aiding and abetting breach of fiduciary duty against Host Carrera, Terra Nova, and Peter Balkheimer and Mei Hung, in their capacities as trustees of the Trust. 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 [2003] [citations omitted]). A plaintiff also must allege "substantial assistance" on the part of the alleged aider and abetter to the primary violator (*Id.* at 126). Because the only viable claims for breach of fiduciary duty are predicated upon the alleged failure by Peter Balkheimer and Mei Hung in their individual capacities to maintain and turn over board minutes, plaintiff has failed to allege the manner in which Terra Nova, Peter Balkheimer and Mei Hung in their capacities as trustees of the Trust or Host Carrera provided substantial assistance to such alleged breach. That branch of the motion to dismiss the tenth cause of action asserted against Host Carrera and the eleventh cause of action against Terra Nova, and Peter Balkheimer and Mei Hung in their representative capacities, is granted.

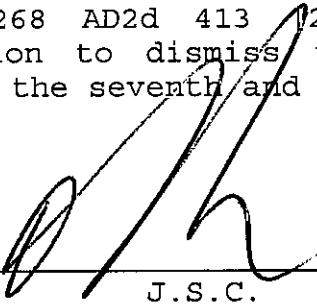
Plaintiff alleges as a ninth cause of action against Host Carrera that it contracted with Host Carrera to manage the affairs of the Condominium, but that Host Carrera breached the contract by improperly managing the building and committing waste, causing it and the unit owners to suffer injuries. Plaintiff also alleges that it and the unit owners are the third-party beneficiaries of the contract. Plaintiff, however, has failed to annex a copy of the management agreement with Host Carrera, or to set forth the terms or provisions of the agreement which plaintiff alleges Host

Carrera breached so as to give proper notice to Host Carrera of the nature of the breach. Under such circumstances, the ninth cause of action fails to state a claim against Host Carrera. That branch of the motion to dismiss the ninth cause of action against Host Carrera is granted.

To the extent plaintiff seeks punitive damages with respect to the remaining viable claims against Peter Balkheimer and Mei Hung for breach of fiduciary duty, the complaint fails to allege facts sufficient to show that by failing to maintain or turn over board minutes, they engaged in conduct which rose to the high level of moral culpability necessary or was part of a pattern of similar, publicly-directed misconduct to support a claim for punitive damages (see *Leppard v Parisi*, 271 AD2d 412 [2d Dept 2000]; *Norwalk v J.P. Morgan & Co., Inc.*, 268 AD2d 413 [2d Dept 2000]). Therefore, that branch of motion to dismiss the request for punitive damages with respect to the seventh and eighth causes of action is granted.

Dated:

7/9/13



J.S.C.