

**Polsky v 145 Hudson St. Assoc. L.P.**

2013 NY Slip Op 33432(U)

November 22, 2013

Supreme Court, New York County

Docket Number: 107108/2011

Judge: Lucy Billings

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

**PRESENT:** LUCY BILLINGS  
J.S.C. Justice

**PART** 46

Index Number : 107108/2011  
POLSKY, JAMES  
vs.  
145 HUDSON STREET ASSOCIATES  
SEQUENCE NUMBER : 001  
DISM ACTION/INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 4, were read on this motion to/for dismiss claims

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3-4</u>
Replying Affidavits _____	No(s). _____

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

*The court grants the motion by defendant Rogus Marvel Architects, PLLC, to dismiss the action against this defendant and grants plaintiff's cross-motion to join a plaintiff and amend his complaint, pursuant to the accompanying decision. C.P.L.R. §§ 1001(a), 3025(b), 3211(a)(7).*

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

**FILED**

DEC 24 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 11/22/13

Lucy Billings, J.S.C.  
LUCY BILLINGS  
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

JAMES POLSKY,

Index No. 107108/2011

Plaintiff

- against -

DECISION AND ORDER

145 HUDSON STREET ASSOCIATES L.P.,  
HUDSON SQUARE MANAGEMENT CORPORATION,  
ROGERS MARVEL ARCHITECTS, PLLC, and  
JOSEPH PELL LOMBARDI,

Defendants

**FILED**

DEC 24 2013

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LUCY BILLINGS, J.S.C.:

COUNTY CLERK'S OFFICE  
NEW YORK

I. BACKGROUND

Plaintiff sues defendants to recover damages for breach of a contract and for fraudulent inducement in connection with his purchase of unit 13B in a residential condominium building at 145 Hudson Street, New York County, for which defendant 145 Hudson Street Associates L.P. was the sponsor. Defendant Hudson Square Management Corporation was 145 Hudson Street Associates' general partner. Defendants Rogers Marvel Architects, PLLC, and Lombardi provided architectural design services to the sponsor. 145 Hudson Street Associates and Hudson Square Management move to dismiss the complaint against them based on conclusive documentary evidence and failure to state a claim, C.P.L.R. § 3211(a)(1) and (7), and for attorneys' fees. Rogers Marvel Architects and Lombardi each separately move to dismiss the complaint against them based on its failure to state a claim and failure to include a necessary party. C.P.L.R. § 3211(a)(7) and

(10). Plaintiff cross-moves to join his wife as a plaintiff and to amend the complaint to add the same claims by her as by him, C.P.L.R. §§ 1001(a), 3025(b), and separately cross-moves to strike affirmations on behalf of Lombardi's three co-defendants supporting the motion to dismiss the action against Lombardi. See C.P.L.R. § 3024(b). For the reasons explained below, the court grants defendant architects' motions, grants the other defendants' motion to the extent set forth, grants plaintiff's cross-motion to join a plaintiff and amend the complaint, and grants his separate cross-motion to the extent set forth.

II. PLAINTIFF'S CROSS-MOTION TO JOIN ANOTHER PLAINTIFF AND AMEND THE COMPLAINT

Defendants do not oppose plaintiff James Polsky's cross-motion to join his wife Bernadette Polsky as a plaintiff and to amend the complaint to include the same claims by her as by her husband. As a signatory to the Purchase Agreement for the condominium unit and a party with an equitable interest in the unit, plaintiff's spouse is a necessary party to this action. Bonoff v. Troy, 187 A.D.2d 302, 304 (1st Dep't 1992); Loree v. Barnes, 59 A.D.3d 965 (4th Dep't 2009). See Mercaldo v. Navarro, 50 A.D.3d 980, 981 (2d Dep't 2008); Hitchcock v. Abbott, 9 A.D.3d 563, 566 (3d Dep't 2004). Since the court grants plaintiff's unopposed cross-motion, the motions by Rogers Marvel Architects and Lombardi to dismiss the complaint based on plaintiff's failure to join a necessary party, C.P.L.R. § 3211(a)(10), are moot. The court also applies defendants' motions to the proposed amended complaint. Ferguson v. Sherman Sq. Realty Corp., 30

A.D.3d 288 (1st Dep't 2006); Sage Realty Corp. v. Proskauer Rose, 251 A.D.2d 35, 38 (1st Dep't 1998).

### III. DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT'S CLAIMS

#### A. APPLICABLE STANDARDS

Upon defendants' motion to dismiss plaintiffs' claims pursuant to C.P.L.R. § 3211(a)(1), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence is in admissible documentary form, demonstrates the absence of any material dispute regarding those facts, and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012). Upon defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7), the court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiffs' favor. Walton v. New York State Dept. of Correctional Servs., 13 N.Y.3d 475, 484 (2009); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Wadiak v. Pond Mgt., LLC, 101 A.D.3d 474, 475 (1st Dep't 2012). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Frank v. DaimlerChrysler Corp., 292 A.D.2d

118, 121 (1st Dep't 2002).

B. PLAINTIFFS' CLAIMS

Plaintiffs principally claim they purchased a condominium unit that defendants represented would be completely customizable and have two entrances. Plaintiffs allege that defendants induced them to purchase the unit by concealing that a mechanical room, which was unalterable and eliminated one of the entrances, would be inside the unit.

1. Breach of Contract

To establish breach of a contract, plaintiffs must show a contract, that plaintiffs performed and defendants breached it, and that defendants' breach caused plaintiffs to sustain damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007). Plaintiffs must plead the specific terms of the agreement that defendant breached. Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003).

The parties do not dispute a contract in the form of the Purchase Agreement dated February 17, 2006, between plaintiffs and 145 Hudson Street Associates. Plaintiffs claim 145 Hudson Street Associates breached this contract of sale by providing plaintiffs a unit (1) with less than 4,120 square feet of floor space; (2) neither fully customizable nor a "white box," Aff. of Rishi Bhandari Ex. A (V. Am. Compl.) ¶ 87; (3) that necessarily

included a mechanical room; (4) that lacked two entrances; and (5) in which defective casement windows were installed.

Plaintiffs allege that defendants made their representations regarding the unit in the Condominium Offering Plan, in marketing materials' text and floor plans, and orally during plaintiffs' visits to the unit.

145 Hudson Street Associates and Hudson Square Management support their motion to dismiss the complaint with an affidavit by Stanley Scott, the president of Hudson Square Management. Scott's affidavit lays a foundation for the admissibility of other documents that these defendants rely on, but is not itself documentary evidence under C.P.L.R. § 3211(a)(1). Regini v. Board of Mgrs. of Loft Space Condominium, 107 A.D.3d 496, 497 (1st Dep't 2013); Flowers v. 73rd Townhouse LLC, 99 A.D.3d 431 (1st Dep't 2012); Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 651 (1st Dep't 2011). See Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 271 (1st Dep't 2004). The Purchase Agreement between plaintiffs and 145 Hudson Street Associates expressly adopts the Condominium Offering Plan. Aff. of Stanley Scott Ex. F, at 3.

In the Purchase Agreement § 2, plaintiffs acknowledge "having received and read the Plan and amendments First through Seventeen thereto (representing all of the current amendments to the Plan), filed with the Department of Law of the State of New York . . . , " id. at 2, and "having had full opportunity to examine all documents and investigate all statements made herein

and in the Plan (including the exhibits thereto)." Id. at 3.  
 Plaintiffs also agreed to abide by the Offering Plan's terms and  
 any amendments to it. Id.

In the Purchase Agreement § 21, plaintiffs acknowledge that  
 they have:

not relied upon any architect's plans, sales plans, selling  
 brochures, advertisements, representations, warranties,  
 statements, or estimates of any nature whatsoever, whether  
 written or oral, made by Sponsor or others, including, but  
 not limited to, any relating to the description or physical  
 condition of the Property, the Building, or the Unit, the  
 size or the dimensions of the Unit, the number of rooms  
 therein contained, or any other physical characteristics  
 thereof . . . .

Id. at 14. Section 25 provides that the "purchase agreement,  
 together with the Plan, as the Plan may be amended from time to  
 time, constitutes the entire agreement between the parties as to  
 the subject matter hereof and supersedes all prior understandings  
 and agreements." Id. at 16. These provisions of the Purchase  
 Agreement negate all plaintiffs' claimed breaches regarding  
 representations made outside the Purchase Agreement and Offering  
 Plan.

In Purchase Agreement § 19, the purchaser:

signifies acceptance of the condition of the Property,  
 including the Building, the Unit and all fixtures,  
 machinery, equipment, installations and other personal  
 property contained therein . . . as configured and shown on  
 the floor plans contained in the Plan and as detailed in the  
 Architect's Description of the Property, and . . . .  
 acknowledges having read, or having ample opportunity to  
 read, the Description of Property and Specifications set  
 forth in Part II of the Plan, which sets forth a description  
 of the then existing physical condition of the Property and  
 planned improvements.

Id. at 11-12. 145 Hudson Street Associates and Hudson Square

Management nonetheless present only the part of the Offering Plan that constitutes the Condominium By-Laws. By failing to present any other part of the Offering Plan, these defendants prevent the court from determining whether the plan's provisions negate plaintiffs' remaining claimed breaches.

Lombardi presents an Offering Plan that includes more parts, but it is not certified as a public record, and no witness on personal knowledge otherwise authenticates it as the complete and accurate plan and lays the foundation for its admissibility. Aff. of Robert Fitch Ex. L. Since the amended complaint refers to the Offering Plan, however, the court considers Lombardi's document for purposes of construing plaintiffs' allegations in their favor in the context of defendants' motions.

The Offering Plan includes floor plans. One, entitled "Typical Loft Unit B," depicts two entrances into the common hallway and does not show a mechanical room. Fitch Aff. Ex. L, at 199. This floor plan thus supports plaintiffs' breach of contract claim for two entrances and the absence of an unalterable mechanical room. Plaza PH2001, LLC v. Plaza Residential Owners LP, 79 A.D.3d 587 (1st Dep't 2010). This floor plan also includes measurements, however, which reveal a unit less than 4,000 square feet and thus negates plaintiffs' claim that defendants represented the unit's square footage as 4,120 square feet. Plaintiffs point to no other provisions of the Purchase Agreement or Offering Plan that represent a square footage of 4,120 or more square feet. Their Verified Amended

Complaint simply alleges that: "The B-line apartments were marketed as measuring approximately 4,120 square feet." Bhandari Aff. Ex. A ¶ 22.

Plaintiffs also claim defendants represented that plaintiffs' unit would be a "white box." Id. ¶ 59. In the Eighth Amendment to the Offering Plan dated May 24, 2004, 145 Hudson Street Associates specified that it would not finish plaintiffs' unit "with a high end kitchen and bath" and instead would offer plaintiffs' unit "in White Box condition." Fitch Aff. Ex. L, vol. 2, 8th Amend. at 1. Lombardi's addendum to the Offering Plan dated April 19, 2004, similarly specified that plaintiffs' unit would be "built out to a standard white box finish schedule." Id., 8th Amend., Ex. A. The Offering Plan's definition of "White Box" delineates that "Residential Units contain: a) partitions only for demising and fire safety walls, b) kitchens, c) bathrooms, d) bare concrete floors, and e) ceiling exposing structure, piping and ductwork." Fitch Aff. Ex. L, at 11.

Insofar as there is a partition for the mechanical room that is not a demising or fire safety wall in plaintiffs' unit, this definition of White Box supports their claim regarding the mechanical room. Beyond limiting the partitions and specifying that the floors will be bare concrete and the ceiling will expose structural elements, allowing customized partitions, floors, and ceilings, however, this definition specifies what will be included, not what will be excluded. Thus it does not

necessarily exclude a mechanical room and does not require a fully customizable unit, nor a minimum square footage or casement windows. Since plaintiffs do not allege that their unit lacked any of the features of a White Box as defined, the Offering plan negates plaintiffs' breach of contract claim based on defendants' failure to provide a White Box.

Plaintiffs fail to point to any other provisions of the Purchase Agreement or Offering Plan indicating plaintiffs' unit would be fully customizable or requiring installment of casement windows. In fact plaintiffs' allegations that their unit would be fully customizable and include "installed all-new casement windows" nowhere indicate that the claim is based on any written representations by defendants. Bhandari Aff. Ex. A ¶ 82. Therefore Purchase Agreement § 21, barring plaintiffs' reliance on any "advertisements, representations, warranties, statements, or estimates of any nature whatsoever, whether written or oral, made by Sponsor or others," negates plaintiffs' breach of contract claim based on defendants' failure to provide a fully customizable unit or casement windows. Scott Aff. Ex. F, at 14. See Giant Group v. Arthur Andersen LLP, 2 A.D.3d at 190; Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408; Trump on the Ocean v. State of New York, 79 A.D.3d 1325, 1326 (3d Dep't 2010); Woodhill Elec. v. Jeffrey Beamish, Inc., 73 A.D.3d 1421, 1422 (3d Dep't 2010).

## 2. Fraudulent Inducement

Plaintiffs claim defendants' dissemination of false information and concealment of facts fraudulently induced them to purchase the unit. Fraudulent inducement requires defendants to misrepresent or omit a material fact, knowing the misstatement or omission is false, to induce plaintiffs to rely on it; plaintiffs' justifiable reliance on the misrepresentation or omission; and damages to plaintiffs from their reliance. Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V., 17 N.Y.3d 269, 276 (2011); Gosmile, Inc. v. Levine, 81 A.D.3d 77, 81 (1st Dep't 2011); Braddock v. Braddock, 60 A.D.3d 84, 86 (1st Dep't 2009); Rivera v. JRJ Land Prop. Corp., 27 A.D.3d 361, 364 (1st Dep't 2006).

A fraudulent omission must be based on defendants' duty to disclose the omitted information to plaintiffs, Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 179 (2011), a duty that must arise independently of the parties' contract. Gosmile, Inc. v. Levine, 81 A.D.3d at 81; Non-Linear Trading Co. v. Braddis Assoc., 243 A.D.2d 107, 118 (1st Dep't 1998). To establish fraudulent concealment, plaintiffs must demonstrate that defendants made a material factual misrepresentation intended to mislead plaintiffs; that they reasonably relied on the misrepresentation and sustained damages from it, Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 178; and that defendants breached a duty to disclose the true facts. Id. at 179; IDT Corp. v. Morgan Stanley Dean Witter & Co., 63 A.D.3d 583, 586

(1st Dep't 2009); SNS Bank v. Citibank, 7 A.D.3d 352, 256 (1st Dep't 2004); P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V., 301 A.D.2d 373, 376 (1st Dep't 2003). Insofar as plaintiffs claim fraudulent concealment, however, they fail to allege that defendants owed a duty to disclose any information to plaintiffs or owed them any fiduciary duty. Therefore any claim of fraudulent concealment fails. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 179; Sebastian Holdings, Inc. v. Deutsche Bank AG., 78 A.D.3d 446, 447 (1st Dep't 2010); Sehera Food Servs. Inc. v. Empire State Bldg. Co. L.L.C., 74 A.D.3d 542, 543 (1st Dep't 2010).

The fraudulent misrepresentations must be pleaded with specificity. C.P.L.R. § 3016(b); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 178; MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 A.D.3d 287, 295 (1st Dep't 2011); Giant Group v. Arthur Andersen LLP, 2 A.D.3d at 190; P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V., 301 A.D.2d at 376. Similarly, the damages plaintiffs claim from the fraud must be separately delineated from the damages recoverable for breach of a contract. Mañas v. VMS Assoc., LLC, 53 A.D.3d 451, 454 (1st Dep't 2008); Teachers Ins. Annuity Assn. of Am. v. Cohen's Fashion Opt. of 485 Lexington Ave., Inc., 45 A.D.3d 317, 319 (1st Dep't 2007). See Gosmile, Inc. v. Levine, 81 A.D.3d at 81.

Plaintiffs plead the elements of fraudulent inducement with sufficient specificity in their complaint by detailing how and when defendants made their misrepresentations. MBIA Ins. Corp.

v. Countrywide Home Loans, Inc., 87 A.D.3d at 295. All defendants contend, however, that plaintiffs' fraud claims duplicate their breach of contract claims, and in any event the recorded documents regarding the building and unit negate plaintiffs' justifiable reliance. Rogers Marvel Architects and Lombardi further contend that they made no representations to plaintiffs on which a fraud claim may be based.

Plaintiffs' fraud claims duplicate their breach of contract claim against 145 Hudson Street Associates and Hudson Square Management insofar as plaintiffs claim these defendants failed to provide a condominium unit as described in the Purchase Agreement and Offering Plan adopted by the agreement. The alleged misrepresentations directly pertain to these defendants' nonperformance of provisions in the Purchase Agreement and Offering Plan, rather than to anything collateral to the agreement. Fairway Prime Estate Mgt., LLC v. First Am. Intl. Bank, 99 A.D.3d 554, 557 (1st Dep't 2012); Empire 33rd LLC v. Forward Assn. Inc., 87 A.D.3d 447, 449 (1st Dep't 2011); International Plaza Assoc., L.P. v. Lacher, 63 A.D.3d 527 (1st Dep't 2009); ESBE Holdings, Inc. v. Vanquish Acquisition Partners, LLC, 50 A.D.3d 397, 398 (1st Dep't 2008). See HSB Nordbank AG v. UBS AG, 95 A.D.3d 185, 189 (1st Dep't 2012); Verizon N.Y., Inc. v. Optical Communications Group, Inc., 91 A.D.3d 176, 179-80 (1st Dep't 2011); MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 A.D.3d at 293. The damages plaintiffs seek for the fraudulent inducement also are identical

to the recovery they seek for breach of contract, Financial Structures Ltd. v. UBS AG, 77 A.D.3d 417, 419 (1st Dep't 2010); Aerolineas Galapagos, S.A. v. Sundowner Alexandria, LLC, 74 A.D.3d 652, 653 (1st Dep't 2010); Mañas v. VMS Assoc., LLC, 53 A.D.3d at 454.

Regarding plaintiffs' fraud claim against Rogers Marvel Architects and Lombardi, plaintiffs' acknowledgment in Purchase Agreement § 21 also bars their reliance on the architects' misrepresentations outside the Purchase Agreement and Offering Plan. Plaza PH2001, LLC v. Plaza Residential Owners LP, 79 A.D.3d 587; Miller v. Icon Group LLC, 77 A.D.3d 586, 587 (1st Dep't 2010); International Plaza Assoc., L.P. v. Lacher, 63 A.D.3d at 528; Sorenson v. Bridge Capital Corp., 30 A.D.3d 1144, 1145 (1st Dep't 2006). The only identified architect's representation that plaintiffs claim is false and is within the Purchase Agreement or Offering Plan is Lombardi's floor plan for a Typical Loft B, in the Offering Plan, which as discussed above represents that plaintiffs' unit would include two entrances into the common hallway and no mechanical room. Thus plaintiffs' claim that this floor plan misrepresented the number of entrances and the absence of an unalterable mechanical room merely duplicates their breach of contract claim.

Regarding any fraud claim that does not duplicate the breach of contract, defendants contend that, since architectural plans were recorded that superseded Lombardi's original plans, plaintiffs' reliance on any prior representation by defendants

that was inconsistent with the later recorded plans was unjustifiable. On September 16, 2005, months before plaintiffs' purchase, 145 Hudson Street Associates recorded the condominium declaration's First Modification, which included a floor plan that depicted a mechanical room within unit 13B and eliminated one entrance to the unit. Scott Aff. Ex. C, at CP 10. 145 Hudson Street Associates specified that the configuration of air conditioners in the mechanical room would be such "that the space cannot be used for any purpose other than mechanical equipment." Id. Ex. C, at 2.

Defendants are not liable for misrepresentations of facts that were outside defendants' peculiar knowledge and that, with due diligence, were ascertainable by plaintiffs. DDJ Mgt., LLC v. Rhone Group L.L.C., 15 N.Y.3d 147, 154 (2010); HSB Nordbank AG v. UBS AG, 95 A.D.3d at 194; Miller v. Icon Group LLC, 77 A.D.3d at 587. The condominium declaration is an exhibit to the Offering Plan, which, in the Purchase Agreement, plaintiffs specifically acknowledged having received and reviewed, including the Offering Plan's amendments. The Purchase Agreement further acknowledged that plaintiffs were provided a full opportunity to examine the documents and to investigate the statements in the agreement and plan, including the exhibits. Therefore plaintiffs' reliance on representations that were inconsistent with the changes to the floor plans publicly recorded before their purchase of the unit was unreasonable. Wildenstein v. 5H&Co., Inc., 97 A.D.3d 488, 490 (1st Dep't 2012); Omansky v.

Whitacre, 55 A.D.3d 373, 374 (1st Dep't 2008); Auchincloss v. Allen, 211 A.D.2d 417 (1st Dep't 1995); Ryzuk v. Timber Ridge Homes at Woods, 179 A.D.2d 751 (2d Dep't 1992). See HSB Nordbank AG v. UBS AG, 95 A.D.3d at 196.

The Offering Plan also includes floor plans prepared by Rogers Marvel Architects, but depicting floors other than the floor of plaintiffs' unit. Rogers Marvel Architects did prepare a floor plan of plaintiffs' unit as part of the First Modification to the condominium declaration, but plaintiffs allege a lack of awareness of this new floor plan before purchasing their unit. Rogers Marvel Architects' floor plan thus is not a misrepresentation that induced plaintiffs to purchase the unit.

In sum, plaintiffs' fraudulent inducement claims fail for three principal reasons. Their reliance on misrepresentations outside the Purchase Agreement and Offering Plan was unjustified, given plaintiffs' acknowledgments in the Purchase Agreement. Their reliance on misrepresentations in the contract duplicates their contract claims or also was unjustified, given the publicly available information that the contract referred to. While plaintiffs may plead alternatively, C.P.L.R. § 3014; Citi Mgt. Group, Ltd. v. Highbridge House Ogden, LLC, 45 A.D.3d 487 (1st Dep't 2007), if the factual allegations demonstrate that a fraudulent inducement claim is indistinct from and merely duplicative of a breach of contract claim, the fraudulent inducement claim is subject to dismissal. See Fairway Prime

Estate Mgt., LLC v. First Am. Intl. Bank, 99 A.D.3d at 557;  
Verizon N.Y., Inc. v. Optical Communications Group, Inc., 91  
A.D.3d at 182; Town House Stock LLC v. Coby Hous. Corp., 36  
A.D.3d 509 (1st Dep't 2007).

C. DEFENDANTS' SUPPLEMENTAL REPLIES

Plaintiff objects to affirmations on behalf of Lombardi's three co-defendants ostensibly supporting the motion to dismiss the action against Lombardi, but in fact supplementing, without permission, those co-defendants' prior motions to dismiss the action, rather than supporting Lombardi's motion. Insofar as these affirmations included any points not already raised repeatedly in connection with the motions preceding Lombardi's motion, the court has disregarded any such new points. Gard Entertainment, Inc. v. Country in N.Y., LLC, 96 A.D.3d 683, 684 (1st Dep't 2012); Coleman v. Korn, 92 A.D.3d 595 (1st Dep't 2012). See Pena-Vazquez v. Beharry, 82 A.D.3d 649 (1st Dep't 2011).

IV. 145 HUDSON STREET ASSOCIATES' MOTION FOR ATTORNEYS' FEES

145 Hudson Street Associates moves to recover attorneys' fees from plaintiffs for their breach of an Alteration Agreement dated January 9, 2007, which treats a breach as a violation of the Condominium By-Laws. Scott Aff. Ex. H. ¶ 16. Scott attests that plaintiffs and their architect breached the Alteration Agreement by building in the mechanical space. The Condominium By-Laws § 9.4 allows 145 Hudson Street Associates to recover costs and expenses in connection with remedying plaintiffs'

violation of the by-laws. Id. Ex. K, at 52.

145 Hudson Street Associates, however, has yet to answer the complaint, let alone interpose a counterclaim to enforce the by-laws, recover damages for plaintiffs' breach of the Alteration Agreement, or to recover attorneys' fees. Moreover, the Alteration Agreement 145 Hudson Street Associates presents in support of its motion is not fully executed. Id. Ex. H at 8. Although the agreement is signed by one plaintiff unit owner, whom 145 Hudson Street Associates seeks to bind to his contractual obligation, the absence of other signatures raises questions whether the agreement was finalized and 145 Hudson Street Associates is in fact party to the agreement entitled to enforce it. Therefore the court denies 145 Hudson Street Associates' motion insofar as it seeks attorneys' fees.

#### V. DISPOSITION

The court grants plaintiff James Polsky's cross-motion to join a new plaintiff, his wife Bernadette Polsky, and amend his complaint to allege all claims against defendants in the original complaint by her as well as by him, without opposition. C.P.L.R. §§ 1001(a), 1002(a), 3025(b). The court considers the proposed amended complaint filed upon entry of this order and served upon service of this order with notice of entry.

This action shall bear the following caption:

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JAMES POLSKY and BERNADETTE POLSKY,

Plaintiffs

- against -

145 HUDSON STREET ASSOCIATES L.P.,  
HUDSON SQUARE MANAGEMENT CORPORATION,  
ROGERS MARVEL ARCHITECTS, PLLC, and  
JOSEPH PELL LOMBARDI,

Defendants

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The Clerk of Part 46 will provide this order to the County Clerk and the Trial Support Clerk of the Trial Support, who shall mark the court's records to reflect the additional plaintiff. The court grants plaintiff's separate cross-motion regarding co-defendants' support of the motion to dismiss the action against Lombardi to the extent specified above and otherwise denies this cross-motion.

The court also grants the separate motions by defendants Rogers Marvel Architects, PLLC, and Lombardi to dismiss plaintiffs' complaint against them. C.P.L.R. § 3211(a)(7). The court grants the motion by defendants 145 Hudson Street Associates L.P. and Hudson Square Management Corporation to the extent of dismissing plaintiffs' second claim for fraudulent inducement against them. The court also grants these two defendants' motion to dismiss plaintiffs' first claim for breach of contract insofar as this claim is based on providing plaintiffs a condominium unit (1) with less than 4,120 square feet of floor space, (2) neither fully customizable nor a White Box, and (3) in which defective casement windows were installed. The court otherwise denies these defendants' motion. The breach of contract claim based on providing plaintiffs a unit that

necessarily included a mechanical room and that lacked two entrances remains.

145 Hudson Street Associates L.P. and Hudson Square Management Corporation shall serve and file an answer to the amended complaint's remaining claims within 20 days after service of this order with notice of entry. See C.P.L.R. §§ 3012(a), 3025(d), 3211(f). This decision constitutes the court's order.

DATED: November 22, 2013



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

**FILED**

DEC 24 2013

COUNTY CLERK'S OFFICE  
NEW YORK