

**Board of Mgrs. of 136 St. Marks Place Condominium  
v St. Marks Place Condominiums II, LLC**

2014 NY Slip Op 30943(U)

April 3, 2014

Sup Ct, Kings County

Docket Number: 503989/2013

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5<sup>th</sup> day of March, 2014

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

BOARD OF MANAGERS OF 136 ST. MARKS PLACE CONDOMINIUM,

Plaintiff,

- against -

Index No.: 503989/13

ST. MARKS PLACE CONDOMINIUMS II, LLC,  
JOSEPH BABBAH AND BUILDERS BANK,

Defendants.

-----X

The following papers numbered 1 to 5 read on this motion:

- Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_
- Opposing Affidavits (Affirmations) \_\_\_\_\_
- Reply Affidavits (Affirmations) \_\_\_\_\_
- \_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_
- Other Papers \_\_\_\_\_

Papers Numbered

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
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- \_\_\_\_\_

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Defendant Builders Bank (Bank) moves to dismiss counts seven and eight of the complaint.

Plaintiff's cross motion for a default judgment against defendants St. Marks Place Condominiums II LLC and Joseph Dabbah (Sponsor) was resolved by order of this court dated January 31, 2014.

Plaintiff alleges in its first six causes of action of its complaint that Sponsor failed to construct the building in accordance with the relevant plans and specifications and the Building Code, thus constituting a breach of the Offering Plan; Sponsor's breach of express warranty; Sponsor's breach of limited warranty; Sponsor was careless and negligent in constructing the building; Sponsor's breach of General Business Law; and Dabbah should be personally liable. The seventh cause of action alleges that upon Sponsor's default on its mortgage obligations, the Bank stepped into Sponsor's position, and Bank was therefore under a duty to construct the building in accordance with the plans. Bank was careless and negligent in its obligations causing owners to sustain damages. The eighth cause of action seeks a declaration that Bank is obligated to finish repairing the building at its sole cost and expense.

In this motion, Bank seeks to dismiss the seventh cause of action because it is essentially a contract claim, and where the gravamen of the claim is that the work performed under the contract was performed in a less than skillful manner, the claim sounds in breach of contract, not negligence. And, since there is no contract between Bank and plaintiff, there can be no contract claim either. In addition, the claim is allegedly barred by the economic loss doctrine.

As for the eighth cause of action, the Bank alleges that the purpose of a declaratory judgment is to adjudicate the parties' rights before a wrong occurs, whereas here the wrong has already occurred.

In opposition, plaintiff argues that Bank would be right if the complaint alleged claims for breach of contract and negligence against Bank, but that is not the case here. Plaintiff here asserts

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only a cause of action for negligence against Bank. Nor is there a problem with economic loss, since plaintiff is seeking to recover damages arising from Bank's alleged negligence. Nor is there merit to the branch of the motion seeking to dismiss the eighth cause of action, since Bank has set forth a justiciable controversy that is ripe for declaratory relief.

The gravamen of a claim that the work performed under a contract was performed in a less than skillful and workmanlike manner sounds in breach of contract not negligence (*see Park Edge Condominiums v Midwood*, 109 AD3d 890 [2d Dept. 2013][Plaintiff's allegations of negligence were merely a restatement of the contractual obligations asserted in the causes of action for breach of contract]; *Corrado v East End*, 69 AD3d 900 [2d Dept 2010]; *Staten Island New York CVS, Inc. v Gordon Retail Development, LLC*, 57 AD3d 760 [2d Dept. 2008][CVS's allegations of negligence were merely a restatement of the contractual obligations asserted in the claim for breach of contract against those defendants]).

Pursuant to CPLR 3001, the court may render a declaratory judgment as to the rights and other legal relations of the parties to a justiciable controversy. To constitute such a controversy, there must be a real dispute between adverse parties involving substantial legal interests for which a declaration of rights will have some practical effect (CPLR 3001; *Village of Woodbury v Brach*, 99 AD3d 696 [2d Dept. 2012][Where a cause of action is sufficient to invoke a court's power to render a declaratory judgment as to the rights and legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied]; *Chanos v MADAC, LLC*, 74 AD3d

2010][“The primary purpose of a declaratory judgment is to stabilize an uncertain or disputed jural relationship with respect to present or prospective obligations)].

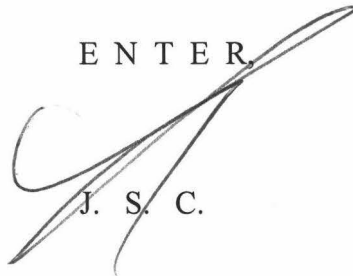
Here, the branch of the motion to dismiss the seventh cause of action is denied. Had plaintiff asserted a cause of action against Bank for breach of contract, Bank would be correct in moving for the dismissal of a cause of action sounding in negligence. But that is not the case here, where only the negligence claim is raised against Bank, and Bank itself acknowledges that there is no contract between it and plaintiff.

Similarly, the branch to dismiss the eighth cause of action is denied, since a prima facie claim to stabilize a disputed jural relationship with respect to present or prospective obligations has been adequately alleged.

Accordingly, Bank’s motion to dismiss the seventh and eighth causes of action is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL  
SUPREME COURT JUSTICE

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