

**Board of Mgrs. of the Number 5 Condominium v
44th St. Partners I, LLC**

2014 NY Slip Op 32699(U)

October 8, 2014

Suprem Court, New York County

Docket Number: 153192/2012

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

BOARD OF MANAGERS OF THE NUMBER 5 CONDOMINIUM,
Plaintiff,
-against-
44TH STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, TWP CAPITAL
PARTNERS 1, LLC, PHILIP JOHNSON/ALAN RITCHIE
ARCHITECTS P.C., ALAN RITCHIE, MARKO T. DASIGENIS,
WILLIAM Q. BROTHERS III ARCHITECT, P.C., WILLIAM Q.
BROTHERS III, T.C. SIDERIS, P.E.P.C., SIDERIS KEFALAS
ENGINEERS P.C., TERRY SIDERIS P.E., CHRIS SIDERIS, P.E.,
FILOLAOS KEFALAS P.E., DeNARDIS ENGINEERING, LLC.,
JOSEPH A. De NARDIS, P.E., CORE GROUP MARKETING, LLC,
ANLAR LLC, HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,
WILFORD & PASSEGGIO'S PLUMBING & HEATING, PASSEGGIO'S
PLUMBING & HEATING CORP., VIS INDUSTRIES, and
VISTA ARCHITECTURAL PRODUCTS, INC.,

INDEX NO. 153192/2012
MOTION DATE 10-01-2014
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

Defendants.

44TH STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, and TWP CAPITAL
PARTNERS I, LLC,

Third-Party Plaintiffs,

-against-

TABUBE PROPERTY MANAGEMENT, QUEST ELECTRICAL,
TRI-TECH ELECTRICAL, LYONS ROOFING, MARSAL ROOFING,
and APEX ARCHITECTURAL,

Third-Party Defendants.

VIS PLUMBING, HEATING, AND MECHANICAL CORP., d/b/a
VIS INDUSTRIES,

Second Third-Party Plaintiff,

-against-

CASCADE WATER SERVICES, INC.

Second Third-Party Defendant.

The following papers, numbered 1 to 15, were read on this motion to dismiss and for summary judgment, and cross motion to dismiss.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

1-6, 7-9

Answering Affidavits – Exhibits _____

10-13, 14,

Replying Affidavits _____

15

Cross-Motion: Yes No

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

Upon a reading of the foregoing cited papers, it is Ordered that the motion by defendants PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS P.C., ALAN RITCHIE, WILLIAM Q. BROTHERS III ARCHITECT, P.C., and WILLIAM Q. BROTHERS III for dismissal of all claims and cross claims as asserted against them is granted, the cross-motion by defendant HUDSON MERIDIAN CONSTRUCTION GROUP, LLC for dismissal of the claims asserted in the Complaint as against them for breach of contract and negligence, is granted.

The Board of Managers of the Number 5 Condominium (herein "Board") is an unincorporated association of the unit owners of the building located at 5 East 44th Street, New York, New York (herein "Building"), and was formed pursuant to a Declaration of Condominium (herein "Declaration") filed and recorded, in the New York County Office of the City Register of the City of New York on October 17, 2008.

The Building is a newly-constructed 22-story building containing 23 residential apartment units and one commercial unit. The Building was sponsored by defendants 44th Street Partners I, LLC, Isamu Suzuki, Patrick Thompson, Five East 44th LLC, and TWP Capital Partners I, LLC (herein "Sponsors") pursuant to the Building's offering plan. Defendant Core Group Marketing, LLC (herein "Core Group") was the selling agent of the Building's units.

Defendants Philip Johnson/Alan Ritchie Architects, P.C., Alan Ritchie, and Marko T. Dasigenis (herein "PJAR"), are the architects of record in connection with the design and construction of the Building. Defendants William Q. Brothers III Architect P.C. and William Q. Brothers III individually (herein "Brothers"), certified and signed the Building's offering plan, description of property, and specifications in the offering plan. PJAR and Brothers shall be collectively known as the "Architects."

Defendants De Nardis Engineering, LLC and Joseph A. De Nardis, P.E. (herein "De Nardis") were the engineers of record in connection with the design and construction of the Building. Defendants T.C. Sideris, P.E., P.C., Sideris Kefalas Engineers, P.C., Terry Sideris, P.E., Chris Sideris, P.E., and Filolaos Kefalas, P.E. (herein "Certifying Engineers") participated in preparing the Building's description of property for the offering plan. De Nardis and the Certifying Engineers shall be collectively known as the "Engineers."

Defendant Hudson Meridian Construction Group LLC (herein "Hudson") was the construction manager of record, but did not complete the project and defendant Anlar, LLC (herein "Anlar") took over as construction manager for the construction of the Building. Defendants Wilfred & Passeggio's Plumbing & Heating and Passeggio's Plumbing and Heating Corp. (herein "Passeggio") performed plumbing and heating subcontracting services in the construction of the Building. Defendant VIS Industries (herein "VIS") performed the installation of the Buildings heating, ventilation, and air conditioning system (herein "HVAC"). Defendant Vista Architectural Products, Inc. (herein "Vista") performed the installation of the Building's windows.

The Board alleges that the Building's offering plan, created by the Sponsors and used as a selling and marketing tool for the units by the Sponsors and Core Group, was misleading and not an accurate representation of the Building's condition after the construction was complete. Specifically, that the Building's conditions, features, and quality were not up to the standards promised in the offering plan and that the Building contained costly violations of applicable codes, rules, and regulations.

The Complaint asserts causes of action for breach of contract, breach of common law implied housing merchant warranty, fraud in the inducement, negligent misrepresentation, constructive fraudulent conveyance and intentional fraudulent conveyance, professional malpractice, aiding and abetting fraud, and violations of the General Business Law sections 349 and 350.

The defendants answered and asserted various cross-claims for contribution, common law indemnity, contractual indemnity, and breach of warranty against one another. The Sponsors commenced a Third-Party action against Taube Property Management, Quest Electrical, Tri-Tech Electrical, Lyons Roofing, and Marsal Roofing and Apex Architectural (herein "Third-Party Defendants"), followed by VIS commencing a Second Third-Party action against Cascade Water Services, Inc. (herein "Cascade").

The instant motion, brought by the Architects, seeks dismissal of the causes of action asserted in the complaint as against them pursuant to CPLR 3211(a)(5)&(7) and 3016(b), and summary judgment pursuant to CPLR 3212 dismissing all claims and cross-claims asserted as against them. Specifically, the Architects seek dismissal of the claims for breach of contract, fraud in the inducement, negligent misrepresentation, malpractice, negligence, and violations of GBL sections 349 and 350.

The Board opposed the motion only as to the Tenth cause of action alleging negligence, as against PJAR; the Seventh cause of action alleging fraud in the inducement as against Brothers; and the Fifth cause of action alleging breach of contract, as against Brothers. As such, the causes of action for negligent misrepresentation, malpractice, and violations of GBL sections 349 and 350 are severed and dismissed as to the Architects.

Brothers argues that the Fifth and Seventh causes of action are predicated solely on alleged violations of the Martin Act and should be dismissed as these allegations cannot form the basis of a private action. PJAR argues that it did not owe a contractual duty to the Board pursuant to the letter of agreement between PJAR and 44th St. Partners, LLC (herein "Agreement" - see Aff. In Opp., Alan Ritchie, Exhibit A), nor did it owe the Board a legal duty. As such, the Eight cause of action asserting negligence should be dismissed as against PJAR.

In order to dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The question is whether the complaint gives rise to a cognizable cause of action. The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept., 1983]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd. Dept., 2012]). The complaint must be liberally construed, the factual allegations deemed to be true, and the non-moving party granted the benefit of every possible favorable inference.

"General Business Law § 352-c prohibits various fraudulent and deceitful practices in the distribution, exchange, sale and purchase of securities," and does not create a private cause of action (CPC Intern. Inc. v. McKesson Corp., 70 N.Y.2d 268, 275-276, 519 N.Y.S.2d 804, 806-807, 514 N.E.2d 116, 118 [1987]), rather, " it authorizes the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State" (Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 12 N.Y.3d 236, 243, 879 N.Y.S.2d 17, 20-21, 906 N.E.2d 1049, 1052-1053 [2009]; see General Business Law §§ 352, 353).

A claim is not preempted by the Martin Act where the plaintiff alleges "not that [the] defendant omitted to disclose information required under the Martin Act but that it affirmatively misrepresented, as part of the offering plan, a material fact about the condominium" (Bhandari v. Ismael Leyva Architects, P.C., 84 AD3d 607, 923 N.Y.S.2d 484 [1st Dept., 2011]). However, "where the fraud and misrepresentation relies entirely on alleged omissions in filings required by the Martin Act," there is no private right of action (Berenger v. 261 W. LLC, 93 A.D.3d 175, 184, 940 N.Y.S.2d 4, 15-16 [1st Dept., 2012] citing to, Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc., 80 AD3d 293, 915 NYS2d 7 [1st Dept 2010]).

Here, the Complaint alleges that Brothers "signed the Certification By Sponsor's Engineer/Architect in the Offering Plan ... and prepared and signed the Description of Property Specifications in the Offering Plan ..." (see Complaint, Paragraph 31). The Board claims that the representations in these documents "were false at the time they were made to the unit owners in that [the certifications] contained untrue statements of material facts" (see Complaint, Paragraph 188), and that "neither of the Sponsors, however, amended the Offering Plan to reflect the

pervasive construction defects in the Building” (see Complaint, Paragraph 64). The Board’s causes of action against Brothers are based on services performed by Brothers in regard to the Description of Property and the Architect’s Certification. As such, the Seventh cause of action alleging fraud in the inducement and the Fifth cause of action alleging breach of contract as against Brothers are preempted by the Martin Act and are dismissed.

As to PJAR’s summary judgment motion dismissing the negligence cause of action, in order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

PJAR annexes an affidavit from Ritchie, the principal of PJAR and the Agreement as between 44th St. Partners, LLC and PJAR. Ritchie states that the scope of PJAR’s services was limited to “design, design development, the preparation of construction documents, assistance during the bidding/negotiation phase, and construction administration services,” but services such as the “supervision, direction, or control of the Sponsor’s contractor” were explicitly excluded. The Board was not a party to the Agreement, nor does the Agreement state that the Board was an intended beneficiary to the Agreement.

“To establish a prima facie case for negligence, a plaintiff must prove that (1) defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Evans v. 141 Condominium Corp.*, 258 A.D.2d 293, 295, 685 N.Y.S.2d 191 [1st Dept., 1999]). “A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated,” and “this legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*Clemens Realty, LLC v. New York City Dept. of Educ.*, 47 A.D.3d 666, 667, 850 N.Y.S.2d 172, 173 [2nd Dept., 2008]). “Simply alleging a duty of due care does not transform a breach of contract action into a tort claim” (*Id.*, citing to *Briar Contracting Corp. v. City of New York*, 156 A.D.2d 628, 550 N.Y.S.2d 717 [2nd Dept., 1989]).

Absent privity of contract, or the functional equivalent, and absent a legal duty to the Board, the negligence claim should be dismissed (see *Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng’g, PLLC*, 104 A.D.3d 613, 962 N.Y.S.2d 118, 120 [1st Dept., 2013]; *Board of Mgrs. of the A Bldg. Condominium v. 13th & 14th Street Realty, LLC, et al.*, 2014 NY Slip Op 06680, 2014 N.Y. App. Div. LEXIS 6630 [1st Dept., 2014]; *Residential Bd. of Mgrs. of Zeckendorf Towers v. Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637, 594 N.Y.S.2d 161 [1st Dept., 1993]).

Here, there is no privity of contract or its functional equivalent between the Board and PJAR, nor did PJAR owe a legal duty to the Board. As such, PJAR’s motion dismissing the negligence cause of action asserted in the Complaint as against it, is granted.

Defendant Hudson cross-moves for summary judgment as to the Board’s breach of contract claim against Hudson and to dismiss the Board’s negligence claim pursuant to CPLR 3211(a)(17), arguing that the Board has no contractual rights against Hudson and the Board’s negligence claim alleges a claim for purely economic loss which does not give rise to a tort claim. In the alternative, in opposition to the Architect’s motion to dismiss Hudson’s cross-claims for contribution, Hudson argues that if the Board’s claim for negligence as against Hudson is allowed to stand, then Hudson’s contribution claim against the Architects must also stand.

Here, there is no privity of contract or function equivalent between Hudson and the Board. The Board has no contractual rights as against Hudson, and as such, the Board’s Seventeenth cause of action for breach of contract as against Hudson is dismissed.

As to the Board's negligence claim as against Hudson, "As a general rule, a contractor does not owe a duty of care to a noncontracting third party," (Board of Mgrs. of the A Bldg. Condominium v. 13th & 14th Street Realty, LLC, et al., 2014 NY Slip Op 06680, 2014 N.Y. App. Div. LEXIS 6630 [1st Dept., 2014]), unless the contractor, "while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk;" "where the plaintiff has suffered injury as a result of reasonable reliance upon the [contractor's] continuing performance of a contractual obligation;" or "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Powell v. HIS Contrs., Inc., 75 A.D.3d 463, 464, 905 N.Y.S.2d 161, 163 [1st Dept., 2010]).

The Board did not contract with Hudson for any services, nor do the exceptions to the general rule apply here. As such, the Board's Eighteenth cause of action for negligence as against Hudson is dismissed.

As to the Architect's motion to dismiss all claims and cross-claims, only Hudson opposed the motion and only as to the dismissal of Hudson's cross-claim for contribution. The negligence cause of action is dismissed and so is Hudson's cross-claim for contribution. All remaining claims and cross-claims as against the Architects are severed and dismissed, on default.

Accordingly, it is ORDERED, that the motion by defendants PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS P.C., ALAN RITCHIE, WILLIAM Q. BROTHERS III ARCHITECT, P.C., and WILLIAM Q. BROTHERS III for dismissal of all claims and cross claims as asserted against them is granted, and it is further,

ORDERED, that all claims and cross-claims against PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS P.C., ALAN RITCHIE, WILLIAM Q. BROTHERS III ARCHITECT, P.C., and WILLIAM Q. BROTHERS III are hereby severed and dismissed, and it is further,

ORDERED, that the cross-motion brought by HUDSON MERIDIAN CONSTRUCTION GROUP, LLC dismissing the causes of action asserted in the Complaint as against Hudson for breach of contract and negligence, is granted, and it is further,

ORDERED, that the Seventeenth and Eighteenth causes of action in the Complaint are severed, and dismissed, and it is further,

ORDERED, that the caption in this action is amended as follows:

BOARD OF MANAGERS OF THE NUMBER 5 CONDOMINIUM,

Plaintiff,

-against-

44TH STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, TWP CAPITAL
PARTNERS 1, LLC, MARKO T. DASIGENIS, T.C. SIDERIS, P.E.P.C.,
SIDERIS KEFALAS ENGINEERS P.C., TERRY SIDERIS P.E.,
CHRIS SIDERIS, P.E., FILOLAOS KEFALAS P.E., DeNARDIS
ENGINEERING, LLC., JOSEPH A. De NARDIS, P.E.,
CORE GROUP MARKETING, LLC, ANLAR LLC, HUDSON MERIDIAN
CONSTRUCTION GROUP, LLC, WILFORD & PASSEGGIO'S PLUMBING &
HEATING, PASSEGGIO'S PLUMBING & HEATING CORP.,
VIS INDUSTRIES, and VISTA ARCHITECTURAL PRODUCTS, INC.,

Defendants.

44th STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, and TWP CAPITAL
PARTNERS I, LLC,

Third-Party Plaintiffs,

-against-

TABUBE PROPERTY MANAGEMENT, QUEST ELECTRICAL,
TRI-TECH ELECTRICAL, LYONS ROOFING, MARSAL ROOFING,
and APEX ARCHITECTURAL,

Third-Party Defendants.

VIS PLUMBING, HEATING, AND MECHANICAL CORP., d/b/a
VIS INDUSTRIES,

Second Third-Party Plaintiff,

-against-

CASCADE WATER SERVICES, INC.

Second Third-Party Defendant.

44th STREET PARTNERS I, LLC, FIVE EAST 44TH LLC,
ISAMU SUZUKI, PATRICK THOMPSON, and TWP CAPITAL
PARTNERS I, LLC,

Third Third-Party Plaintiffs,

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP, LLC,

Third Third-Party Defendant.

and it is further,


ORDERED, that defendants PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS P.C., ALAN
RITCHIE, WILLIAM Q. BROTHERS III ARCHITECT, P.C., and WILLIAM Q. BROTHERS III, serve a
copy of this Order with Notice of Entry upon the General Clerk's Office (Room 119) and the
County Clerk (Room 141B) within 30 days from the date of this Order, who is Directed to amend
their records accordingly, and it is further,

ORDERED, that the parties appear for a Conference in IAS Part 13 located at 71 Thomas
Street, Room 210, New York, New York on December 17, 2014 at 9:30AM.

MANUEL J. MENDEZ
J.S.C.

ENTER:

Dated: October 8, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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