Board of Mgrs. of Olive Park Condominium v Maspeth Props. LLC
2014 NY Slip Op 33012(U)
October 27, 2014
Sup Ct, Kings County
Docket Number: 502349/13
Judge: Karen B. Rothenberg

At an IAS Term, Part 35 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 27th day of October, 2014

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

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THE BOARD OF MANAGERS OF OLIVE PARK CONDOMINIUM, on its own behalf and on behalf of individual unit owners,

Plaintiff,

- against -

Index No. 502349/13

MASPETH PROPERTIES LLC, et al.,

Defendants.

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The following papers numbered 1 to 27 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5, 6-8, 9-12
Opposing Affidavits (Affirmations)	13-15, 16-19, 20-21
Reply Affidavits (Affirmations)	22-23, 24-26, 27
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants TSF Engineering, P.C. (TSF) and Nicholas P. Tucci, P.E. move for an order, pursuant to CPLR 3211 (a)(1) & (7) and CPLR 214 (6), dismissing the complaint against TSF and Tucci. Defendants Maspeth Properties LLC (Maspeth), Aron Deutsch, Superior Construction Management Inc. d/b/a Superior

Construction Consulting Corp. (Superior) and Jacob Friedman (collectively, Maspeth defendants) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint against the Maspeth defendants. Defendant George Schwarz d/b/a George Schwarz Architect PLLC (Schwarz) moves for an order, pursuant to CPLR 3012 (d), granting an extension of time to appear and, pursuant to CPLR 3211 (a)(1), (5) & (7), dismissing the complaint against Schwarz. Plaintiff Board of Managers of Olive Park Condominium, on its own behalf and on behalf of individual unit owners, cross-moves for an order, pursuant to CPLR 3215, granting a default judgment in favor of plaintiff against Schwarz.

Plaintiff commenced this action on May 6, 2013 to recover damages related to various construction defects in a condominium building located at 100 Maspeth Avenue in Brooklyn. Maspeth, the sponsor of the condominium, acquired the property in November 2004. Superior was retained by Maspeth as the general contractor for the project, with Friedman as the superintendent of construction. TSF entered into a contract with Superior to provide engineering services in connection with the project. Tucci was the principal of TSF. Schwarz was retained by Superior as the architect for the project. The Offering Plan ("Plan") for the condominium was accepted for filing on March 14, 2007 and declared effective by notice dated June 3, 2008. The Plan was certified by Maspeth and Deutsch, a member of Maspeth, pursuant to 13 NYCRR § 20.4 (b). Schwartz certified the floor plans submitted in the Plan pursuant to 13 NYCRR § 20.4 (c) . A certificate of occupancy for the building was

issued on July 16, 2008. The Condominium Declaration ("Declaration"), dated August 13, 2008, was recorded with the City Register on August 15, 2008.

The Plan, which was incorporated into the purchase agreements for the residential units in the condominium, provided that "[t]he Condominium is being constructed in accordance with all applicable zoning and building laws, regulations, codes and other requirements of the City of New York," and that "[t]he Sponsor will diligently, expeditiously, and at Sponsor's own cost, complete the construction of the Units and Common Elements substantially in accordance with the plans and specifications described in the Plan." The Declaration includes a common element warranty which provides, in part:

> THIS COMMON ELEMENT WARRANTY IS GIVEN IN LIEU OF AND REPLACES ALL OTHER WARRANTIES ON THE CONSTRUCTION AND/OR RENOVATION OF THE PROPERTY'S GENERAL COMMON ELEMENTS BOTH EXPRESS AND IMPLIED (INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE AND THE HOUSING MERCHANT IMPLIED WARRANTY). THERE ARE NO COMMON ELEMENT WARRANTIES WHICH EXTEND BEYOND THE FACE HEREOF. THE PURPOSE OF THIS COMMON ELEMENT WARRANTY IS TO IDENTIFY THE SPONSOR'S RESPONSIBILITIES FOR CONSTRUCTION DEFECTS.
>
> NOTWITHSTANDING ANYTHING CONTAINED IN THIS COMMON ELEMENT WARRANTY TO THE CONTRARY, THE SPONSOR WILL REMAIN LIABLE IN ACCORDANCE WITH APPLICABLE LAW FOR GENERAL COMMON ELEMENT DEFECTS DUE TO SPONSOR'S FAILURE TO CONSTRUCT THE GENERAL COMMON ELEMENTS SUBSTANTIALLY IN ACCORDANCE WITH APPLICABLE

> BUILDING CODES AND FILED BUILDING PLANS AND SPECIFICATIONS.

The Common Element Warranty also provides, in part:

> Sponsor makes the following warranties to the Condominium solely with respect to the newly constructed portions of the general common elements. During the one-year Common Element Warranty Period which follows the substantial completion of the General Common Elements as certified by Sponsor's engineer or architect, the Sponsor will be responsible for correcting Material Defects in the General Common Elements which are caused solely by: (i) defective workmanship by Sponsor or any agent or subcontractor of or persons working for Sponsor; (ii) defective materials supplied by Sponsor or any agent or subcontractor of or persons working for Sponsor; and (iii) defective design by the architect, subcontractor, engineer or other design professional engaged solely by Sponsor.

The purchase agreements for the individual units contained a unit warranty which survived the closings. The unit warranty provides:

> Sponsor makes the following warranties to you solely with respect to the new elements of your unit, as described in the Description of Property and Building Condition in Part II of the Plan. For one year, the Unit will be free from: (1) defects caused by workmanship or materials that do not meet the standards of the applicable building code, or (for items not covered by code) locally accepted building practices; (2) defects caused by unskillful installation of the Plumbing, Electrical, Heating, Cooling and Ventilation Systems (if any); and (3) Material Defects in the structural elements (foundation, floors, walls, roof framing) which make it unsafe or unlivable.

The Unit Warranty also provides:

> THIS WARRANTY IS GIVEN IN LIEU OF AND REPLACES ALL OTHER WARRANTIES ON THE CONSTRUCTION

> AND SALE OF THE UNIT AND ITS COMPONENTS[,] BOTH EXPRESS AND IMPLIED (INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE AND THE HOUSING MERCHANT IMPLIED WARRANTY). THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACE HEREOF. THE PURPOSE OF THIS WARRANTY IS TO IDENTIFY THE SPONSOR'S RESPONSIBILITIES FOR CONSTRUCTION DEFECTS OF A LATENT OR HIDDEN NATURE THAT COULD NOT HAVE BEEN FOUND OR DISCLOSED ON FINAL INSPECTION OF THE UNIT.
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> NOTWITHSTANDING ANYTHING CONTAINED IN THIS WARRANTY TO THE CONTRARY, THE SPONSOR WILL REMAIN LIABLE IN ACCORDANCE WITH APPLICABLE LAW FOR DEFECTS DUE TO SPONSOR'S FAILURE TO CONSTRUCT THE UNIT SUBSTANTIALLY IN ACCORDANCE WITH APPLICABLE BUILDING CODES AND FILED BUILDING PLANS AND SPECIFICATIONS.

The closing of the first unit took place on August 19, 2008. Plaintiff alleges that in the months following the first closing, unit owners began observing and experiencing problems in their units and in the common areas of the building, including structural defects in the balconies and roof, water infiltration and mold. Plaintiff retained the services of an engineering and architectural firm, Howard L. Zimmerman Architects, P.C. to conduct an inspection of the building. According to the inspection report, dated June 8, 2012, and the affidavit of Howard L. Zimmerman, dated December 3, 2013,* numerous building code, safety and workmanship issues were found throughout the building. In its verified complaint, plaintiff sets forth causes of action against Maspeth and Deutsch for breach of contract

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*Zimmerman's affidavit is annexed to plaintiff's papers in opposition to the Maspeth defendants' motion for summary judgment.

(first), breach of the common elements warranty (second), breach of the unit warranty (third), breach of duty of good faith and fair dealing (fourth), breach of implied warranty (fifth), negligence (sixth), declaratory judgment and injunction (seventh), common law fraud (sixteenth) and violation of the Deceptive Practices Act (General Business Law [GBL] §§ 349 and 350) (seventeenth). Plaintiff sets forth causes of action against TSF and Tucci for breach of contract (eighth) and negligence (ninth), against Schwartz for breach of contract (tenth) and negligence (eleventh) and against Superior and Friedman for breach of contract (twelfth) and negligence (thirteenth).

Motion of TSF and Tucci for Dismissal

In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR 3211 (a) (7), "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" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one" (*see Meyer v Guinta*, 262 AD2d 463, 464 [2d Dept 1999]). In its eighth cause of action, plaintiff alleges that TSF/Tucci entered into a contract with Maspeth for engineering and design services, that TSF/Tucci "knew that Plaintiff and its Unit owners would benefit from" the contract, and that TSF/Tucci breached the contract in that the building was inadequately designed and not constructed in a

competent and workmanlike manner in accordance with the plans and specifications for the building as required by the Plan.

It is not in dispute that plaintiff was not a party to any contract with TSF/Tucci and thus has no standing to bring a breach of contract action unless it is deemed a third party beneficiary. An ordinary construction contract—i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party-does not give third parties who contract with the promisee the right to enforce the latter's contract with another, and such third parties are generally considered mere incidental beneficiaries (*see Board of Mgrs. of Riverview v Schorr Bros. Dev. Corp.*, 182 AD2d 664, 665 [2d Dept 1992]). Absent evidence of an express intent to benefit a plaintiff, a plaintiff who purchases a condominium unit is merely an incidental third-party beneficiary to the contracts between the sponsor and service providers which participated in the development of the condominium and, thus, has no standing to bring a breach of contract claim against such contractors (*see Leonard v Gateway II, LLC*, 68 AD 408, 408–09 [1st Dept 2009]); *Kerusa Co. LLC v W10 Z/515 Real Estate L.P.*, 50 AD3d 503, 504 [1st Dept 2008]). That a developer had in mind "the normal business motive to obtain a construction product of sufficient quality for ready marketability of the condominium units to potential customers ... is clearly not a basis from which to infer the requisite intent of the developer to bestow performance benefits upon the purchasers of the condominium units" (*Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159, 162 [3d Dept 1987]; *see also Bd of Mgrs. of Riverview,* 182 AD2d at 665 [breach

of contract claim properly dismissed against defendants who designed, planned, inspected and constructed condominium because plaintiff owner was not third party beneficiary of contract between defendants and sponsor of project]; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]; *cf. Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448, 456 [2d Dept 1988][motion to dismiss plaintiff's breach of contract claim denied when plaintiff alleged that promisee explicitly stated that its contracts would benefit plaintiff).

The agreement submitted by TSF/Tucci in support of its motion, which was between TSF and Superior (not Maspeth) does not contain any explicit language that the agreement was for the benefit of plaintiff or future unit owners.

Accordingly, the eighth cause of action is dismissed.

The tenth cause of action sounding in negligence is likewise dismissed as plaintiff has not alleged a duty on the part of TSF/Tucci which is distinct from the alleged contractual duties. "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated ... This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected therewith and dependent upon the contract" (*Board of Mgrs. of Riverview at Coll. Point Condominium III*, 182 AD2d at 666, citing *Clarke-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). No independent legal duty apart from the alleged contractual duties to plaintiff has been alleged in the complaint.

As a result, the motion of TSF/Tucci for dismissal of the complaint againt TSF/Tucci is granted.

Maspeth Defendants' Motion for Summary Judgment

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing papers (*id.*). Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden shifts to the opponent to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

The first cause of action for breach of contract against Maspeth and Deutsch is based on the alleged failure of Maspeth to construct the building in accordance with applicable building codes and filed plans and specifications. Maspeth argues that it did in fact construct the building according to applicable building codes as evidenced by the issuance of a certificate of occupancy. However, even if the insurance of a certificate of occupancy is presumptive evidence that the building was completed in accordance with all applicable New York City laws, regulations and code provisions, the affidavit of Howard Zimmerman is sufficient to raise an issue of fact as to whether the building was completed in accordance

with the Building Code or otherwise "in accordance with the plans and specifications described in the Plan" (*see Solomons v Greens at Half Hollow, LLC*, 26 Misc 3d 83 [Sup Ct, App Term, 2d Dept 2009]). Moreover, the Second Department has held that sponsor affiliates who executed a certification with the offering plan may be held personally liable (*see Birnbaum v Yonkers Contr. Co.*, 272 AD2d 355, 357 [2d Dept 2000]; *Zanani v Savad*, 228 AD2d 584, 585 [2d Dept 1996]; *see also Board of Mgrs. of 231 Norman Ave. Condominium v Norman Ave. Prop. Dev., LLC*, 36 Misc 3d 1232[A], 2012 NY Slip Op 51573[U] [Sup Ct, Kings County 2012]). Plaintiff may therefor seek damages for a breach of contract against Deutsch based upon Deutsch's certification of the Plan and the incorporation of the terms of the Plan in the purchase agreements (*see Board of Managers of Marke Gardens Condominium v 240/242 Franklin Ave. LLC*, 71 AD3d 935 [2d Dept 2010]; *Sternstein v Metropolitan Ave. Development LLC*, 32 Misc 3d 1207[A] 2011 NY Slip Op 51206[U] [Sup Ct Kings County 2011]; *Board of Mgrs. of the Crest Condominium v City View Gardens Phase II, LLC*, 35 Misc.3d 1223 [A], *4, 2012 NY Slip Op 50826[U] [Sup Ct, Kings County 2012]; *Kikirov v 335 Realty Assocs. LLC*, 31 Misc 3d 1212[A], 2011 NY Slip Op 50600[U] [Sup Ct, Kings County 2010]).

As a result, that part of the Maspeth defendants' motion for summary judgment dismissing the first cause of action against Maspeth and Deutsch is denied.

The Maspeth defendants do not offer any argument as to why the second and third cause of actions for breach of warranty should be dismissed as against Maspeth. Rather, the

Maspeth defendants argue that these claims cannot be sustained against Deutsch individually. A member of a limited liability company "cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof" (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [2005]). While Deutsch signed the Declaration, which contained the common element warranty, he did so only as a member on behalf of Maspeth. There is no evidence offered to demonstrate that Deutsch agreed to be held individualy liable for the common element warranty. With respect to the unit warranty made part of the purchase agreement, paragraph 5 therein expressly provides that such warranty "is made exclusively by the Sponsor whose name appears on the first page of this Warranty," to wit, "Maspeth Properties LLC."

As a result, the second and third causes of action are dismissed as against Deutsch only.

Plaintiff's fourth cause of action for breach of covenant of good faith and fair dealing alleges virtually identical facts as the first cause of action for breach of contract. While every contract contains an implied covenant of good faith and fair dealing, a cause of action based on this covenant is properly dismissed where it is duplicative of a breach of contract action, that is, where "both claims arise from the same facts and seek the identical damages for each alleged breach" *(Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010][citations omitted]; *see Bostany v Trump Organization LLC*, 73 AD3d 479, 481 [1st Dept 2010]).

As a result, the fourth cause of action is dismissed.

Plaintiff cannot maintain a fifth cause of action for breach of implied warranty as any implied warranty is expressly superceded by the common element and unit warranties. Moreover, the housing merchant implied warranty codified in GBL § 777-a is inapplicable to this case because it is limited to the construction of a "new home," defined in GBL § 777(5) as "any single family house or for-sale unit in a multi-unit residential structure of five stories or less." It is not in dispute that the subject building is more than five stories.

As a result, the fifth cause of action is dismissed.

The sixth cause of action for negligence is duplicative of the breach of contract and warranty causes of action. There is no duty alleged in this cause of action which is separate from the duties alleged in the first, second and third causes of action for breach of contract and breach of warranty. Therefore, the sixth cause of action is dismissed.

The seventh cause of action seeks a declaratory judgment and injunctive relief. A plaintiff may not seek a declaratory judgment when other remedies are available, such as a breach of contract action, which affords the plaintiff an adequate remedy (*see Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]; *Artech Info. Sys. v Tee*, 280 AD2d 117, 125 [1st Dept 2001]; *Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]). Thus, where a plaintiff's cause of action for a declaratory judgment simply parallels a breach of contract claim and merely seeks a declaration of the same rights and obligations as will be determined under the breach of contract claim, dismissal of the cause

of action for a declaratory judgment is warranted (*see Apple Records*, 137 AD2d at 54). Further, plaintiff has an adequate legal remedy (money damages) which precludes entitlement to injunctive relief (*Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763 [2d Dept 2009] ["Where the plaintiffs can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief"]).

Accordingly, the seventh cause of action is dismissed.

The Maspeth defendants argue that the sixteenth and seventeenth causes of action must be dismissed on grounds that they are preempted by the Martin Act. In *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236 [2009]), the Court of Appeals "held that the purchaser of a condominium could not sue the building's sponsor for common-law fraud where the purported fraud was predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act (General Business Law art 23–A) and the Attorney General's implementing regulations" *(Schlessinger v Valspar Corp.*, 21 NY3d 166, 171 [2013]).** In line with *Kerusa*, the Second Department held that the Martin Act did not preclude the condominium boards common-law fraud claims against the sponsor and its manager where "the alleged fraud and material misrepresentations contained not only

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**In relevant part, the Martin Act makes it illegal for a person to make or take part in a public offering or sale of securities consisting of participation interests in real estate, including condominium apartment buildings, unless an offering statement is filed with the Attorney General, who is responsible for implementing and enforcing the Martin Act (*see East Midtown Plaza Housing Co., Inc. v Cuomo*, 20 NY3d 161, 169 [2012]).

in the offering plan, but in brochures, advertisements, and purchase agreements, as well as oral statements made by the defendant" (*Board of Managers of Marke Gardens Condominium,* 71 AD3d at 936). The Second Department concluded, "the facts as alleged fit within a cognizable legal theory, and are not precluded by the Martin Act, as they do not "rel[y] *entirely* on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations" (*id. at 936* [internal quotations marks and citations omitted; emphasis added]). Here, the causes of action for fraud and violation of GBL §§ 349 and 350 are not based entirely on alleged omissions in the Plan but on misrepresentations in brochures, advertisements and oral statements regarding the condition of the building. Misrepresentations included in brochures and other materials may constitute the basis of a cause of action sounding in fraud (*see Introna v Huntington Learning Centers, Inc.*, 78 AD3d 896, 899 [2d Dept 2010]; *Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave.*, LLC, 71 AD3d 935 [2d Dept 2010]). Further, the Second Department recognizes a private cause of action under GBL § 349 for deceptive practices in the sale of condominiums (*Board of Mgrs. of Bayberry Greens Condominium v Bayberry Green Assocs.*, 174 AD2d 595 [2d Dept1991]).

The Maspeth defendants have not otherwise submitted admissible proof sufficient to establish entitlement to dismissal of the sixteenth and seventeenth causes of action as a matter of law. Accordingly, that part of the Maspeth defendants' motion for summary judgment dismissing the sixteenth and seventeenth causes of action is denied.

That part of the Maspeth defendants' motion for summary judgment dismissing the twelfth cause of action against Superior and Friedman for breach of contract is denied. The Maspeth defendants have not annexed a copy of its contract with Superior to its motion papers. As a result, this court is unable to find as a matter of law that the contract's terms do not provide for plaintiff to be an intended third-party beneficiary to the contract or that Friedman did not assume personal liability therein for the contract's performance.

Nonetheless, the thirteenth cause of action against Superior and Friedman for negligence is dismissed. Plaintiff does not allege that Superior/Friedman breached a duty independent of the contract, thus making this cause of action duplicative of the breach of contract action.

Schwartz's Motion for an Extension of Time to Appear and for Dismissal and Plaintiff's Cross Motion for a Default Judgment

"Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR 3012 [d]; *see Dutchess Truck Repair, Inc. v Boyce*, 120 AD3d 543, 544 [2d Dept 2014]; *EHS Quickstops Corp. v GRJH, Inc.*, 112 AD3d 577, 578 [2d Dept 2013]). "The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (*Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 890 [2010]; *see HSBC Bank USA, NA v Lafazan*, 115 AD3d 647, 647 [2d Dept 2014]; *Star Indus., Inc. v Innovative Beverages, Inc.*,

55 AD3d 903, 904 [2d Dept 2008]; *Antoine v Bee*, 26 AD3d 306, 306 [2d Dept 2006]). Schwarz attributes the delay in answering to financial difficulties, involvement in a separate lawsuit and unsuccessful attempts to obtain a defense and indemnity from his insurance carrier. The court finds that Schwarz has demonstrated a reasonable excuse for the delay, and did not evince an intent to willfully ignore or neglect to defend the action (*see Armstrong Trading, Ltd. v MBM Enters.*, 29 AD3d 835 [2d Dept 2006]; *Acevedo v New York City Trans. Auth.*, 16 AD3d 144 [1st Dept 2005]; *Scarlett v McCarthy*, 2 AD3d 623 [2d Dept 2003]; *Lehrman v Lake Katonah Club*, 295 AD2d 322 [2d Dept 2002]).

As a result, Schwarz's motion for an extension of time to appear is granted. As a consequence, plaintiff's motion for a default judgment against Schwarz is denied.

Similar to its claims against TSF/Tucci, plaintiff sets forth causes of action against Schwarz for breach of contract and negligence. In its tenth cause of action against Schwarz for breach of contract, plaintiff alleges that Schwarz entered into a contract with Maspeth for architectural and design services, "knew and intended that Plaintiff and its Unit owners would benefit from [his] contract with [Maspeth]" and that Schwarz breached the contract in that the building was improperly and inadequately designed and not constructed and completed in a workmanlike manner and in accordance with the plans and specifications. However, the agreement submitted by Schwarz, which was between him and Superior (not Maspeth), does not contain any explicit provision that plaintiff was an intended third party beneficiary of the contract. Moreover, the eleventh cause of action for negligence does not

allege that Schwarz had any duty to plaintiff independent of his alleged duties under the contract.

As a result, that part of Schwarz's motion to dismiss the complaint against Schwarz is granted.

The court notes that plaintiff has not provided an evidentiary basis indicating that further discovery will reveal evidence as to its alleged third-party beneficiary status. "Allegations of mere hope that the discovery will reveal something helpful ... provide[s] no basis for postponing the determination of the plaintiff's motion" (*Bryan v City of New York*, 206 AD2d 448, 448 [2d Dept 1994]).

To summarize, the motion of Schwarz for an extension of time to appear is granted and the cross motion of plaintiff for a default judgment against Schwarz is denied. The motions of TSF/Tucci, the Maspeth defendants and Schwarz for dismissal and summary judgment are granted to the extent that the second and third causes of action are dismissed as against Deutsch only and the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and thirteenth causes of action are dismissed in their entirety. The motions are denied as to the remaining causes of action.

The forgoing constitutes the decision and order of the court.

E N T E R,

Karen B. Rothenberg
Justice, Supreme Court

J. S. C.

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