Board of Mgrs. of the Impala Condominium v Impala Assoc., L.P.
2015 NY Slip Op 30514(U)
April 6, 2015
Supreme Court, New York County
Docket Number: 101683/2011
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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THE BOARD OF MANAGERS OF THE IMPALA CONDOMINIUM,

Plaintiff,

-against-

IMPALA ASSOCIATES, L.P.; RFD FIRST AVENUE LLC; RFR HOLDING LLC; TREVOR DAVIS; ABY ROSEN; MICHAEL FUCHS,

Defendants.

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DECISION AND ORDER

Index No.: 101683/2011
Mot. Seq. No. 001

O. PETER SHERWOOD, J.:

In this motion sequence number 001, defendants Impala Associates, L.P. (the "Sponsor"), RFD First Avenue LLC ("RFD"), RFR Holding LLC ("RFR", and together with RFD, the "Sponsor Affiliates"), Trevor Davis, Aby Rosen, and Michael Fuchs (together with Davis and Rosen, the "Sponsor Principals") move for summary judgment pursuant to CPLR 3212 dismissing the complaint in its entirety, and for summary judgment on their third counterclaim. For the following reasons, the motion is granted in part, and otherwise denied.

BACKGROUND

This action arises out of the defendants' alleged fraud and breach of contract in connection with the development, construction and sale of 181 residential units located at 404 East 76th Street in New York City, also known as the Impala Condominium. In the early 1990s, Fuchs and Rosen created RFR, a Manhattan real estate development company, to invest in and develop high-end Manhattan condominium and rental properties. Because neither Fuchs nor Rosen had any prior experience in developing high-rise residential properties in New York, they brought in Davis, an experienced architect with a masters degree from the Massachusetts Institute of Technology, as RFR's operational partner. Fuchs, Rosen and Davis formed the Sponsor to develop the Impala Condominium, and offer residential units for public sale pursuant to the terms of an offering plan (the "Offering Plan"). Fuchs, Rosen and Davis also created defendant RFD to act as the general partner of the Sponsor. The Attorney General accepted the Offering Plan for filing on February 14, 2001. The first closing of a residential condominium unit occurred on October 12, 2001.

In late 2001, unit owners began complaining about several alleged construction and design defects in the Impala, including water leaking into their units (*see* Roschelle aff ¶ 13, NYSCEF Doc. No. 34). In May 2003, the plaintiff engaged John J. Flynn Consulting Engineers ("Flynn") to attempt to ascertain the nature, extent and source of the various problems identified by the unit owners (*see* Roschelle aff, Exs. C & E, NYSCEF Doc. Nos. 37, 39). As part of the investigation, Flynn repeatedly sought to examine construction plans and drawings (*see id.*, Ex. D, NYSCEF Doc. No. 38 - emails requesting plans and drawings). On July 14, 2003, defendants' counsel represented via email that it would give Flynn access to plans for the Impala (*id.*, email dated July 14, 2003 at 4:59 PM). When Flynn found that certain drawings may have been missing and requested those documents, defendants represented that Flynn had a full set of architectural drawings (*see id.*, email dated August 19, 2003 at 3:28 PM, [wherein defendants represented that "[Mr. Lestingi] confirms to me that [Flynn] has a full set of architectural drawings"]). On September 16, 2003, Flynn issued a report (the "Flynn Report") revealing the results of the investigation (*see id.*, Ex. E, NYSCEF Doc. No. 39).

The Flynn Report indicated four major areas of concern: (1) damaged wood flooring; (2) exhaust ventilation systems; (3) large frame windows that failed to provide adequate open-able window area; and, as particularly relevant to this action, (4) cracks and other defects in the building's facade (*see id.*, pp. 37-38). With regard to the facade issues, Flynn noted that cracked windowsills "already show evidence of water infiltration" (*id.*, p. 7), but noted that the cause of the cracking could not be determined absent performing "probes" (*id.*, p. 6). Flynn further represented that he could not estimate the cost of fixing the facade issues without "certain architectural drawings which have not yet been provided, but have been promised by the Sponsor" (*id.*, p. 38).

After Flynn completed the report, the parties entered into settlement discussions aimed to remedying many of the defective conditions. On October 20, 2003, counsel to the parties met to discuss the findings in the Flynn Report. Among the items discussed were the concept, timing and cost of the plaintiff performing the recommended "probes" (*see* Roschelle aff, Ex. G, NYSCEF Doc. No. 42). On January 26, 2004, plaintiff's counsel emailed the Sponsor complaining that Flynn still had not received a complete set of building plans, and requested that the Sponsor provide them (*see id.*, Ex. H, email dated January 26, 2004 at 11:59 AM). The Sponsor responded simply, "ok" (*see id.*, email dated January 26, 2004 at 12:10 PM).

After Flynn's initial investigation, unit owners continued to complain about leaking windows. John Lestingi, the Impala Condominium's superintendent/resident manager, began filing "Incident Reports" in response to the complaints (*id.*, Ex. I, NYSCEF Doc. No. 44). On February 20, 2004, Flynn issued a letter supplementing the Flynn Report (*id.*, Ex. K, NYSCEF Doc. No. 46). The letter revealed the results of Flynn's investigation of the further complaints. Flynn confirmed the water infiltration through and around the windows in the inspected units, and reported that the leaks in those apartments "apparently reflect all of the northeast corner apartments" (*id.*, p.1).

The parties' attempt to negotiate a settlement failed, leading plaintiff to file a complaint before the Attorney General on February 25, 2004 (the "Attorney General Complaint") on behalf of itself and the residential unit owners. The Attorney General Complaint alleged, among other things, design and construction defects in the Impala Condominium building, that the Sponsor had made false representations in the Offering Plan, and that the Sponsor failed to satisfy its disclosure obligations under the Martin Act (Gen Bus Law, Article 23-A, § 352-e) with respect to the building's condition (*see* Roschelle aff, Ex. L, NYSCEF Doc. No. 47). Thereafter, the parties resumed settlement negotiations and reached a settlement agreement executed on October 29, 2004 (the "Settlement Agreement") (*see id.*, Ex. N, NYSCEF Doc. No. 49). The Settlement Agreement was later amended three times, the first two of which were executed on December 6, 2004, and the last as of January 5, 2005 (*see id.*, Exs. N-1 through N-3, NYSCEF Doc. Nos. 50-52; Siegal aff, Ex. 6, NYSCEF Doc. No. 71).

The Settlement Agreement required the Sponsor to make certain repairs to the reasonable satisfaction of John Flynn (*see id.*, Settlement Agreement §1[a]). For example, the Sponsor was required to repair the cracked window sills, install appropriate sized expansion joints if a third party engineer determined that such was required, waterproof the terrace, address active leaks in certain units and common areas, and to repair the exhaust system (*see id.*, Settlement Agreement Ex. A).

In consideration for the Sponsor's repair work, section 6(b) of the Settlement Agreement required the plaintiff to execute and deliver a general release (the "Board Release") to the Attorney General, to be turned over to the Sponsor "at such time as [the Attorney General] is satisfied that the conditions of this agreement have been satisfied" (*id.*, § 6[b]). Section 6(a) of the Settlement Agreement additionally required each participating individual unit owner to deliver a general release

(the "Individual Unit Owner Releases") to the Attorney General, to be turned over to the Sponsor "[a]s the Punch List Work and Floor work in each Unit are completed to Flynn's reasonable satisfaction" (*id.*, § 6[a]). The Settlement Agreement envisioned and specifically provided for the Board Release to be broad in scope (*see id.*, § 6; *see also* Release: Condominium Board to Sponsor, attached as Exhibit 2 to the Settlement Agreement, NYSCEF Doc. No. 71).

In the event the Sponsor and Flynn disagreed on any of Flynn's determinations regarding the repair work to be completed by the Sponsor, the Settlement Agreement provided that the parties would "engage a third party engineer to be final arbiter" (Roschelle aff, Ex. N, NYSCEF Doc. No. 49 - Settlement Agreement, p. 6). In the Second Amendment to the Settlement Agreement, the parties selected Andrew Freireich as the arbiter (*see id.*, Ex. N-2, NYSCEF Doc. No. 51). It also transferred from the Attorney General to Freireich the power to authorize delivery of the Board Release to the Sponsor "at such time as Freireich . . . shall be satisfied that the condition in the Settlement Agreement, as amended, has been satisfied" (id, ¶ 4). Because issues arose between the Sponsor and Flynn, the parties submitted the dispute to Freireich.

At the conclusion of the arbitration proceedings, Freireich issued a determination on December 5, 2010 (the "Freireich Determination"), the effect of which the parties make varying interpretations (*see id.*, Ex. P, NYSCEF Doc. No. 54). In plaintiff's view, Freireich found the Sponsor in breach of the Settlement Agreement, but allowed the Sponsor to remedy the breach by payment of $250,000 in damages, at which time the Board Release would be delivered to the Sponsor. Defendants, on the other hand, argue that the award of damages exceeds Freireich's authority under the terms of the Settlement Agreement. Moreover, the Sponsor contends that the Freireich Determination required plaintiff to release the defendants for claims arising from all work other than that concerning the Impala Condominium's exhaust ducts and exhaust system, the one area in which Freireich found the Sponsor's work to be unsatisfactory. Plaintiff replies that Freireich found that the "Sponsor has not fully and satisfactorily completed its obligations to the Condominium" (*id.*, p.5) and expressly withheld release of the Board Release until the terms of the Settlement Agreement are fully satisfied.

While the alternative dispute resolution process was ongoing before Freireich, plaintiff engaged its architect, CTA, to investigate the leaking windows and offer repair options. By

memorandum dated April 7, 2010, CTA outlined four repair options(*see* Roschelle aff, Ex. R, NYSCEF Doc. No. 56). Two of the repair options involved "installation of new metal flashing at the brick panel joints" (*see id.*, pp. 1-2).

In June 2010, Mr. Lestingi discovered a window shop drawing (the "Window Shop Drawings") which the defendants had not previously provided, and which allegedly showed the "true source of the water leaks at the Impala" (*see* Siegal aff, ¶ 20) in a locked file cabinet located in a basement room of the Impala occupied by the Sponsor (*see* Lestingi Dep. Tr. 152:3-159:13, NYSCEF Doc. No. 74). Plaintiff provided the Window Shop Drawings to its engineers, WJE Engineers Architects ("WJE"), which then inspected the windows and issued a report on August 9, 2011 (*see* Siegal aff, Ex. 11, NYSCEF Doc. No. 76). In the report, WJE explained that the Window Shop Drawings "contain key markups concerning waterproofing of the windows and particularly the window sills" which helped it determine that "the lack of sill pan flashing and end dams at the sills of the windows can explain every leak in the building" (*id.*, pp. 8-9). Thus, plaintiff contends that only at this time was the true source of the leaks discovered: the lack of sill-pan flashing.

The plaintiff commenced the instant action by filing a summons with notice on February 10, 2011. The complaint, filed on January 27, 2012, asserts eight causes of action and seeks punitive damages (*see* Roschelle aff, Ex B, NYSCEF Doc. No. 36). Counts 1 and 3 assert causes of action for common law fraud against the Sponsor in connection with the Offering Plan and Settlement Agreement, respectively. Count 2 asserts a cause of action for fraud against the Sponsor Principals on the basis of their certification of the Offering Plan. Count 4 asserts a claim for rescission or reformation of the Settlement Agreement. Counts 5 and 6 assert claims against the Sponsor for breach of the Settlement Agreement and Offering Plan, respectively. Count 7 asserts a claim against the Sponsor for breach of Offering Plan and violation of 13 NYCRR, Part 20 based on the Sponsor's failure to obtain a permanent certificate of occupancy for the Impala. Lastly, count 8 asserts a claim for unjust enrichment as against all defendants.

On August 4, 2014, the defendants filed the instant motion for summary judgment dismissing the complaint in its entirety, and for summary judgment on their third counter-claim for attorneys' fees, costs and expenses incurred in defending this action.

DISCUSSION

Although plaintiff's claims are not barred by the Board Release, each of the claims is defective for the reasons outlined below. The fraud and quasi-contract claims are duplicative of plaintiff's contract claims. The contract claims are either time-barred or subject to arbitration. Defendants' motion for summary judgment dismissing the complaint is therefore granted to the extent of dismissing each of the claims except Count 5 for breach of the Settlement Agreement. Additionally, defendants' motion for summary judgment on their third counterclaim for fees and expenses as the successful party to this litigation is denied as premature.

I. Summary Judgment Standard

The standards for summary judgment are well settled. Summary judgment is a drastic remedy that will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez*, 68 NY2d 329;*Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see Zuckerman*, 49 NY2d 557; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

II. The Release

As a threshold issue, defendants argue that the Board Release bars all of plaintiff's claims. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [quotations and citations omitted]; *Allen v Riese Org., Inc.*, 106 AD3d 514, 516 [1st Dept 2013]). "Where the language is clear and unambiguous, the release is binding on the parties unless it is shown that it was procured by fraud, duress, overreaching, illegality or mutual mistake" (*Allen*, 106 AD3d at 516). "[A] release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made" (*Centro Empresarial Cempresa*, 17 NY3d at 276 [internal quotation marks omitted]). "[A] party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release" (*id.*). The defendant has the initial burden of establishing that it has been released from the claims at issue (*id.*). However, a signed release "shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release (*Fleming v Ponziani*, 24 NY2d 105, 111 [1969]).

Under the terms of the Board Release, the plaintiff released the Sponsor, Sponsor Principals, and Sponsor Associates from "any and all claims . . . of any kind or character whatsoever, known or unknown, suspected or unsuspected, in contract or in tort . . . arising from . . . in whole or in part, directly or indirectly to: (a) the condominium offering plan, as amended . . . [and] (c) the construction, improvement, installation and design of the building" (*see* Release: Condominium Board to Sponsor, attached as exhibit 2 to the Settlement Agreement, NYSCEF Doc. No. 71). These terms encompass the claims asserted in this action. However, plaintiff attempts to escape the terms of the Board Release by arguing that it is invalid. It argues First, that a condition precedent to its effectiveness was not satisfied; and Second, that the defendants fraudulently induced it to provide the Board Release. Because a condition precedent to the Board Release becoming effective was not satisfied, the Court need not reach the issue of fraudulent inducement.

The Settlement Agreement conditions the effectiveness of the Board Release on completion of all of the required repair work to Freireich's satisfaction (*see* Roschelle aff, Ex, N, NYSCEF Doc. No. 49, § 6[b]["The [Board] Release . . . shall be . . . released by [Freireich] at such time that he is

satisfied that the conditions of [The Settlement] Agreement have been satisfied"]). This condition has not been satisfied because Freireich determined that the Sponsor failed to complete all repair work (Roschelle aff, Ex, P, NYSCEF Doc. No. 54 - Freireich Determination, § D[2], pp. 4-5). Specifically, Freireich determined that the Sponsor failed to complete the exhaust and ventilation work, and imposed a $250,000 damages award. Freireich directed delivery of the Board Release "be [a] contingent obligation[ ], to be made forthwith, and that following such that the terms of the [Settlement] Agreement shall be fully satisfied by all parties" (*id.*, §D[5], p. 5). That the parties dispute Freireich's authority under the Settlement Agreement to award monetary damages does not alter this conclusion. Freireich's authority to award damages aside, he found that the Sponsor failed to complete all of the required work. To-date, the Sponsor has not performed the required work (*see* Roschelle aff, NYSCEF Doc. No. 34, ¶ 33). Accordingly, the Sponsor is not entitled to benefit from the Board Release.

Nonetheless, the defendants assert that Freireich found that the Sponsor had satisfactorily completed 8 of 9 areas of work which it was obligated to perform under the Settlement Agreement. As to the alleged facade defects (described by Freireich as "apparently legitimate defects on the building's facade" [NYSCEF Doc. No. 54, p. 6]) Freireich noted that the Sponsor's engineering consultant had determined that any damage was a result of something other than a facade defect (*see id*, § E[1]e, p.7). Freireich found that there are no defects regarding the size and configuration of the expansion joints (*see id*, § E[1] j, p. 8). Freireich also held that plaintiff had failed to prove that the facade issues fall under the provisions of the Settlement Agreement (*see id*). He concluded that the Sponsor had fully met its obligations as to the facade defects issue (*see id*, § E[1] k). This finding and the holding were "based on the information tendered by the Parties" (*id*, § D[6] at p. 6). The information tendered to the arbitrator did not include the Window Shop Drawing withheld by the Sponsor. Whether the Window Shop Drawings have any significance in explaining the window leakage, is a matter that is disputed.

Defendants contend that they are entitled to be released now from all claims other than those arising from its failure to complete the ventilation and exhaust system repairs. To arrive at this position defendants conflate two distinct categories of releases provided for in the Settlement Agreement: (1) the Individual Unit Owner Releases relating to individual units (*see* Siegal aff, Ex.

6, NYSCEF Doc. No. 71, Settlement Agreement § 6[a]); and (2) the Board Release (*see id.*, § 6[b]). The Settlement Agreement requires the escrow agent to deliver the Individual Unit Owner Releases to the Sponsor as "the Punch List Work and Floor Work in each unit are completed to Flynn's reasonable satisfaction" (Settlement Agreement, § 6[a]). The Settlement Agreement also requires that the Board Release be released from escrow only "at such time as [Freireich] is satisfied that the conditions of this Agreement have been satisfied" (Settlement Agreement, § 6[b]; Second Amendment to Settlement Agreement, § 4). Accordingly, each of the Individual Unit Owners Releases were to be released by the escrow agent to the Sponsor as and when work was completed in each individual condominium unit. The Board Release which is a single document, does not provide for piecemeal release of the Sponsor's obligations as each item of the "Repairs" referred in Exhibit A of the Settlement Agreement is completed to the satisfaction of Freireich. It does not become effective until Freireich is satisfied that the Sponsor had completed all of the required work and authorizes its release.

Defendants also contend that their obligation to complete work under the contract should not be read as a condition precedent to delivery of the Board Release because (1) it would result in a complete forfeiture (*see Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]); (2) it is fundamentally unfair; and (3) plaintiff ratified the release (*see* Defs. Br., NYSCEF Doc. No 61, p. 12; Roschelle reply aff, NYSCEF Doc. No. 90, ¶¶ 27-31). These arguments are forestalled by the plain terms of the Settlement Agreement which provides for delivery of the Individual Unit Owner Releases as and when work is completed, and delivery of the Board Release only at the completion of the Sponsor's required work (*see* Roschelle aff, Ex. N, NYSCEF Doc. No. 49, Settlement Agreement § 6[a]-[b]; *see Oppenheimer*, 86 NY2d at 691 [noting that "[i]nterpretation as a means of reducing the risk of forfeiture cannot be employed if the occurrence of the event as a condition is expressed in unmistakable language"]). Had the parties intended for the plaintiff to provide a release to the Sponsor as and when it completed each category of work, they could have so provided. Indeed, the parties so provided with regard to the Individual Unit Owner Releases. In any event, the contract clearly provides that the Board Release be released from escrow only "at such time [Freireich] is satisfied that the conditions of this [Settlement] Agreement have been satisfied" (*see id.*, § 6[b]). Defendants' argument that plaintiff ratified the release by accepting

the benefit of the Settlement Agreement is similarly unavailing because plaintiff did not get what it bargained for in return for the Board Release - it did not receive the benefit of defendants' completion of all areas of repair work.

Accordingly, defendants' reliance on the Board Release as a defense to this action fails because the Board Release never became operative. Given this ruling, whether or not the Board Release was induced by fraud becomes academic.

III. The Tort and Quasi-Contract Claims

Although not barred by the Board Release, the tort and quasi-contract claims are defective for the reasons outlined below. As such, Counts 1, 2, 3, 4, and 8 are dismissed.

A. Fraud, and Fraud Based Rescission/Reformation of Settlement Agreement

1. Fraud (Counts1-4)

Counts 1 through 3 of the complaint sound in fraud. Counts 1 and 3 assert causes of action for common law fraud against the Sponsor in connection with the Offering Plan and Settlement Agreement, respectively. Count 2 asserts a cause of action for fraud against the Sponsor Principals on the basis of their certification of the Offering Plan. These claims are duplicative of the breach of contract claims asserted in Counts 5 and 6 of the complaint. In addition, Count 2 of the complaint is preempted by the Martin Act and must be dismissed.

Plaintiff's claims of fraud in relation to the Settlement Agreement and Offering Plan are duplicative of the breach of contract claims based on the same agreements. With regard to the Offering Plan, plaintiff alleges that the Sponsor misrepresented the quality of the Impala's construction (*see* Compl. ¶¶ 119-129). For example, the complaint alleges that "the Sponsor made the misrepresentation that the Impala was being constructed with the 'quality of construction comparable to the currently prevailing local standards and substantially in accordance with the Plans and Specifications'" (*see id.* ¶ 121). This claim asserts nothing more than that the Sponsor breached covenants in the Offering Plan. Thus, the only misrepresentations alleged in the complaint arising out of the Offering Plan are entirely duplicative of Count 6 which alleges breach of the Offering Plan. Similarly, in Count 3 for fraud in connection with the Settlement Agreement, plaintiff again alleges that the Sponsor misrepresented the quality of construction of the Impala, specifically by concealing knowledge of the "true cause of the Leak Issues" (*see* Compl., NYSCEF Doc. No. 36,

¶ 146). As with the Offering Plan fraud claim, this claim asserts nothing more than that the Sponsor breached express and implied covenants in the Settlement Agreement. As such, this claim is entirely duplicative of Count 5 for breach of the Settlement Agreement.

The existence and alleged concealment of the Window Shop Drawings do not alter these conclusions. Plaintiff contends that because the Sponsor knew of the Window Shop Drawings and failed to disclose them, a fraud claim lies. At bottom, this is nothing more than an assertion that the Sponsor knew of defects in the construction of the Impala and the cause but failed to disclose the facts to plaintiff. Thus, although plaintiff attempts to couch the claim in terms of fraud, it is merely a contention that the Sponsor breached covenants in the governing agreements regarding the quality of the Impala's construction. As such, the fraud claims are duplicative of the breach of contract claims and must be dismissed.

Additionally, Count 2 is defective because it is preempted by the Martin Act. "[T]here is no private right of action where the fraud and misrepresentation relies entirely on alleged omissions in filings required by the Martin Act" (*Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]; *Bd. of Managers of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542, 544 [1st Dept 2013]). "However, a private action may be maintained where the claim alleges a basis for fraud that is distinct from the Martin Act" (*Berenger*, 93 AD3d at 184). The Martin Act and its implementing regulations require certifications of the type that the Sponsor Principals made in the Offering Plan (*see* 13 NYCRR 20.4; *see generally* Gen Bus Law art 23-A). Thus, whether the Sponsor Principals may be held personally liable in this case turns on whether the plaintiff's claims against them are grounded solely on the certification in the Offering Plan.

In opposition, plaintiff posits that Count 2, although styled as one based on the Sponsor's Offering Plan certification, actually seeks to hold the Sponsor Principals liable for fraud independent of their Martin Act obligations (*see* Pl. Opp. Br., NYSCEF Doc. No. 63, p. 15 fn. 6). The allegations in Count 2 of the complaint are specifically and unequivocally grounded in representations that the Sponsor Principals made in their certification of the Offering Plan (*see* Compl., NYSCEF Doc. No. 36, ¶¶ 130-44; *see, e.g., id.* ¶ 138 ["Despite their knowledge of the misrepresentations in the Offering Plan as alleged herein, Defendants Rosen, Davis and Fuchs signed the certification to the Offering Plan"]; ¶ 140 ["Plaintiff reasonably relied on Rosen, Fuchs and Davis' certification to the

Offering Plan"]; ¶ 141 ["Davis, Rosen and Fuchs' certification caused injury to Plaintiff in that the Unit Owners purchased Units in a building rife with serious construction defects requiring substantial repairs"]). But for the Martin Act and its implementing regulations, the Sponsor Principals need not have made the certification. In any event, plaintiff provides no basis for imputing a duty to the Sponsor Principals in their personal capacities to disclose any alleged knowledge of the source of the window leaks (as opposed to through their official capacities as Sponsor Principals), such as to hold them personally liable for failing to do so. Moreover, plaintiff has not asserted that the Sponsor Principals are liable under an alter-ego or veil piercing theory. Accordingly, Count 2 is dismissed as preempted by the Martin Act.

2. Rescission/Reformation (Count 4)

Count 4 of the complaint seeks rescission and/or reformation of the Settlement Agreement. "In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof" (*Babylon Assoc. v Suffolk County*, 101 AD2d 207, 215 [2d Dept 1984]). Here, plaintiff seeks rescission/reformation on the grounds that the Settlement Agreement was fraudulently induced (*see* Compl. ¶ 158 ["The Board asserts unilateral mistake and fraud as the basis for rescission of the Settlement Agreement with respect to the Leak Issues."]). Plaintiff's allegations of fraud in the inducement again center on the Sponsor's failure to disclose construction defects - namely, the lack of sub-sill flashing and waterproofing. Accordingly, plaintiffs assert that enforcement of the Settlement Agreement as executed would be unconscionable and would permit the Sponsor to be unjustly enriched. However, as noted above, plaintiff's contentions assert nothing more than that the Sponsor breached the Settlement Agreement. As discussed above, such allegations are insufficient to sustain a claim for fraud in the inducement, and likewise are insufficient to justify rescission or reformation of the Settlement Agreement. Accordingly, Count 4 of the complaint for rescission or reformation of the Settlement Agreement is dismissed.

B. Unjust Enrichment (Count 8)

Plaintiff's eighth cause of action for unjust enrichment is similarly duplicative of the breach of contract claims. "The existence of a valid and enforceable written contract governing a particular

subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]). Plaintiff contends that it is permitted to plead its unjust enrichment claim in the alternative to the breach of contract claims. Plaintiff contends that in the event the Settlement Agreement is rescinded as fraudulently induced, the plaintiff may proceed on its unjust enrichment claim. However, as noted above, plaintiff's fraud claims assert nothing more than that the Sponsor breached express and implied covenants under the Settlement Agreement and Offering Plan. Such assertions cannot support a claim for rescission or reformation. Because the Settlement Agreement governs the subject matter of the dispute, and plaintiffs have demonstrated no basis for disputing the validity of that agreement, the unjust enrichment claim is dismissed (*see Massey v Byrne*, 112 AD3d 532, 533 34 [1st Dept 2013] [dismissing a fraud claim where it was "based on the same alleged promise as underlies the breach of contract claim").

The unjust enrichment claim must be dismissed as against the Sponsor Principals and the Sponsor Affiliates for the additional reason that the record does not support a sufficient connection between the Sponsor and Sponsor Principals or Sponsor Affiliates to support holding those entities liable (*see* Compl. ¶¶ 207-210). The complaint contains no allegations that the Sponsor Affiliates were involved in the development of the Impala Condominium at all (*see id.* ¶ 13). Conclusory allegations in the complaint that the Sponsor Principals controlled RFR which in turn was an agent of the Sponsor (*id.*) are unsupported by any factual detail sufficient to justify holding the Sponsor Principals personally liable for the Sponsor's actions. At best, the complaint alleges that the Sponsor Principals were "actively involved in the construction" of the Impala Condominium and its offering for sale (*see id.* ¶¶ 9-12). Neither the complaint nor the record provide any factual detail regarding the"active involvement" of the Sponsor Principals' in their personal capacities, so as to warrant holding them personally liable.

III. The Contract Claims (Counts 5, 6 and 7)

Defendants raise several issues with regard to the breach of contract claims (Counts 5, 6 and 7 of the complaint). Defendants first attack these claims on grounds that they are time barred. Second, with regard to Count 5 asserting breach of the Settlement Agreement, defendants argue that plaintiffs have agreed to arbitrate such claims. Lastly, defendants contend that Count 7, for breach

of the Offering Plan and violation of 13 NYCRR based on defendants' failure to obtain a permanent certificate of occupancy, is moot. Because Count 6 is time barred and Count 7 is moot, those claims are dismissed. As explained below, Count 5 for breach of the Settlement Agreement is not time barred, but must be referred to arbitration in accordance with the parties' agreement.

A. Applicable Statute of Limitations

Breach of contract claims are subject to a six-year statute of limitations running from the date of accrual of the cause of action (*see* CPLR 213[2]; *Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1030 [2013] *rearg denied*, 23 NY3d 934 [2014]). "If a contractual representation or warranty is false when made, a claim for its breach accrues at the time of the execution of the contract" (*U.S. Bank Nat. Ass'n v DLJ Mortg. Capital, Inc.*, 121 AD3d 535 [1st Dept 2014]).

B. Breach of the Settlement Agreement (Count 5)

Count 5 asserts breach of the Settlement Agreement based on the Sponsor's failure to satisfy its obligations to complete repair work (*see* Compl. ¶¶ 39-59, 174-78). Thus, the breach did not occur at the time the Settlement Agreement was executed, but instead upon the Sponsor's failure to perform its obligations under it. The Settlement Agreement obligated the Sponsor to complete the repair work within 120 days from the date of execution of the Settlement Agreement (*see* Settlement Agreement, NYSCEF Doc. No. 49, § 1[b]). The Third Amendment to the Settlement Agreement extended this time period by an additional 14 days (*see* NYSCEF Doc. No. 52, ¶ 1). Thus, according to the allegations in the complaint, defendants did not breach the Settlement Agreement until March 12, 2005, a date that is 134 days after the date of execution of the Settlement Agreement (*see* Compl. ¶ 57). Accordingly, the limitations period for claims for breach of Sponsor's repair work obligations expired on March 12, 2011. Plaintiff instituted this suit on February 10, 2011, within the applicable limitations period (CPLR 304[a]). Accordingly, the breach of contract claims based on breach of the Settlement Agreement are timely (*see* Feb. 24, 2015 Hr'g Tr. 5:2-7:10 [defense counsel acknowledging that the claim for breach of the Settlement Agreement is not time barred]).

Although the claim is not time barred, it nonetheless must be referral to arbitration. The Settlement Agreement contains a binding and enforceable arbitration provision (*see* Roschelle aff, Ex. N, NYSCEF Doc. No. 49 - Settlement Agreement, § 5). New York State public policy favors enforcement of arbitration agreements which reflect the informed negotiation and consent of the

parties (*see Westinghouse Elec. Corp. v New York City Transit Auth.*, 82 NY2d 47, 53 [1993]). The arbitration provision in the Settlement Agreement provides that disputes regarding the repair work to be completed by the Sponsor be submitted to Freireich as the final arbiter (*see id.*). In rendering the prior Freireich Determination, Freireich expressly stated that his decision was based on the record before him at that time (*see id.*, Ex. P, NYSCEF Doc. No. 54, p. 12). That record did not contain the Window Shop Drawings (*see id.*, at Appendix A). Thus, Freireich's determinations with regard to the facade issues may have been different had he had the withheld Window Shop Drawings before him to aid in his decision. Accordingly, plaintiff's claim for breach of the Settlement Agreement based on the Sponsor's failure to satisfy its obligations under that agreement to complete repair work must be heard by the arbitrator.[1]

C. Breach of the Offering Plan (Count 6)

Count 6 for breach of the Offering Plan accrued upon the Attorney General accepting the offering plan for filing on February 14, 2001 (*see* Roschelle aff, Ex. A., NYSCEF Doc. No. 35). This claim became time barred on February 14, 2007. Count 6 must be dismissed.

While acknowledging that the two-year discovery rule applied in the fraud context does not apply to breach of contract claims, the plaintiff argues that it should nonetheless apply in the construction context "given the latent nature of the defects" (*see* Pl. Opp. Br., NYSCEF Doc. No. 63, p.19 fn. 7). In support of the suggestion that the Court extend New York law in this direction, plaintiff cites only to a case decided by a District of Columbia court applying the law of that jurisdiction (*see id., citing Ehrenhaft v Malcolm Price, Inc.*, 483 A2d 1192, 1201-02 [DC 1984]). New York courts have not extended the two-year discovery rule into the realm of contracts. The two-year discovery rule is codified in CPLR 213[8] governing fraud claims. It is not included within CPLR 213[2] governing claims for breach of contract. Moreover, in New York, the law is firmly established that "[k]nowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations running in [a] contract [action]" (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 403 [1993]). Counts 6 is dismissed as time-barred.

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[1]Whether or not the Window Shop Drawings are material is an issue that may be addressed to the arbitrator.

D. Breach of the Offering Plan Certification and Violation of 13 NYCRR (Count 7)

Plaintiff's seventh cause of action seeks to hold the Sponsor liable for breach of the Offering Plan and violation of 13 NYCRR based on the Sponsor's alleged failure to obtain a permanent certificate of occupancy for the Impala Condominium. Part 20.3 of Title 13 of the New York Code of Rules and Regulations provides that "[t]he sponsor and its principals must obtain a permanent certificate of occupancy for the property within a projected timetable after closing the first unit"(13 NYCRR 20.3). In accordance with this regulation, the Offering Plan obligates the Sponsor to obtain temporary and permanent certificates of occupancy for the Impala Condominium (*see* Offering Plan, NYSCEF Doc. No. 69, pp. 84-85). On March 31, 2014, the Sponsor delivered a final certificate of occupancy for the Impala Condominium (*see* Roschelle aff, Ex. U, NYSCEF Doc. No. 59), rendering this claim moot. Moreover, because the permanent certificate of occupancy has been delivered, plaintiff's contention that "the Sponsor knew that the construction defects . . . would prevent issuance of a Permanent Certificate of Occupancy for the Building, and directly and proximately caused the damages to the Impala" is without merit (Compl. ¶ 203).

IV. Defendant's Motion for Summary Judgment on the Third Counterclaim

The defendants also move for summary judgment on their third counterclaim for attorneys' fees, costs and expenses based upon paragraph 9 of the Second Amendment to the Settlement Agreement, which provides that the prevailing party shall be entitled to its fees and expenses incurred in litigation between the parties arising from the Settlement Agreement (*see* Roschelle aff, Ex. N-2, NYSCEF Doc. No. 51, ¶ 9). Given that this action has not reached its conclusion, this aspect of the motion is denied as premature.

CONCLUSION

For the foregoing, the motion is granted to the extent of dismissing Counts 1, 2, 3, 4, 6, 7 and 8. Count 5 for breach of the Settlement Agreement shall be referred to arbitration in accordance with the terms of the arbitration provision of the Settlement Agreement and the action stayed pending the arbitration. Given that the only claim remaining in this action is for breach of the Settlement Agreement, punitive damages are not available (*see, e.g., Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289, 295 [1st Dept 1983] [noting that ordinarily "punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved . . ."] [quotation omitted]).

It is hereby,

ORDERED that plaintiff's motion for summary judgment (motion sequence number 001) is GRANTED to the extent that the FIRST, SECOND, THIRD, FOURTH, SIXTH, SEVENTH and EIGHTH Causes of Action are hereby DISMISSED as is the claim for punitive damages, and the motion is DENIED as to the FIFTH Cause of Action; and it is further

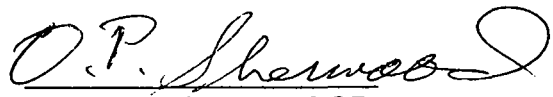
ORDERED that defendant's cross-motion for summary judgment as to its THIRD Counterclaim is DENIED; and it is further

ORDERED that the remaining claims and counterclaims are hereby STAYED and the matter is referred to arbitration before Andrew Freireich, Architect.

This constitutes the decision and order of the court.

DATED: April 6, 2015

E N T E R,



O. PETER SHERWOOD
J.S.C.