

Sacks v Knolls at Pinewood, LLC
2015 NY Slip Op 32812(U)
April 8, 2015
Supreme Court, Westchester County
Docket Number: 58955/2014
Judge: Charles D. Wood
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LOIS SACKS,

Plaintiff,

- against -

THE KNOLLS AT PINWOOD, LLC,,
PINWOOD DEVELOPMENT CORP.,
URI HASON, EDMOND GEMMOLA, and
GEMMOLA & ASSOCIATES,

Defendants,

CRONIN ENGINEERING PROFESSIONAL
ENGINEERING, P.C., JOHN DOE 1, JOHN DOE 2
and JOHN DOE 3,

Supplemental Defendants.

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WOOD, J.

DECISION AND ORDER

Index No. 58955/2014
Sequence Nos. 1, 2, 3

The following papers were read in connection with the following motions: (Seq 1)- The Knolls at Pinewood, LLC, (“the Knolls”) Pinewood Development Corp.(“Pinewood”) Uri Hason (“Hason”) (collectively, “Hason defendants”) to dismiss certain causes of action as against them; (Seq 2)- plaintiff’s cross-motion to amend the complaint; (Seq 3), Cronin Engineering Professional Engineer, P.C (“Cronin”) motion to dismiss all claims against it, including cross-claims of Edmond Gemmola, and Gemmola & Associates (“Gemmola”):

Hason Defendants' Notice of Motion, (Seq 1), Counsel's Affirmation, Exhibits, Memorandum of Law.
Plaintiff's Affidavit in Opposition, Taylor Affidavit, Peraza Affidavit
Plaintiff's Notice of Cross-Motion (Seq 2), Counsel's Affirmation, Exhibits, Memorandum of Law in Support of Cross-Motion, and in opposition to Defendant's Notice of Motion of Cronin's Counsel's Affirmation (Seq 3), Exhibits, Cronin's Affidavit, Exhibits, Memorandum of Law,
Hason Defendants' Counsel's Affirmation in Opposition to Cronin Engineering Motion, Exhibits, Gemmola's Counsel's Affirmation in Opposition,
Plaintiff's Counsel's Affirmation, Plaintiff's Memorandum of Law in Opposition to Cronin's Motion to Dismiss.
Taylor's Affidavit in Opposition to Cronin's Motion to Dismiss, Exhibits
Hason Defendants' Counsel's Reply Affirmation,
Omnibus Reply Memorandum of Law of Cronin in Support.

By way of background, plaintiff purchased a condominium unit ("Condo") for \$725,000, in a condominium development in Greenburgh known as "The Preserve at Greenburgh Condominium" ("the Preserve") from Knolls, which is the developer and sponsor for the Preserve, pursuant to a Purchase Agreement dated October 30, 2009 ("the Purchase Agreement"). Shortly after plaintiff purchased the Condo, she started noticing cracks, sloping floors, problems with windows, and other issues. According to plaintiff, each of the Knolls, Pinewood (the general contractor) and Hason (the person overseeing the construction operations at the Preserve), were responsible for making sure that such defects did not occur. Some of the conditions have been repaired, some of the repaired areas have re-cracked and other conditions have been getting worse. Starting in the spring of 2012, Hason's brother, Eli Hason, attempted to fix the cracks in the Condo from a cosmetic prospective, but the cracks reappeared a year later. Eli Hason again repaired the cracks in the Spring of 2013, but by the fall of 2013, the cracks had reappeared. Plaintiff asserts that material defects in the foundation has made the Condo unsafe. Because of her concerns of the condition of the Condo, in August 2013, she hired a local engineer, John

Annuziata to investigate the problem. He reported that he suspected the exterior walls settled unevenly causing the off level window sills, sloped floors, etc., but assured plaintiff that the building is stable. Plaintiff has a six year warranty for the Condo which states “six years from and after the warranty date the home will be free from material defects. Plaintiff alleges that the Knolls has not honored said warranty, and to date, the Knolls have not fixed the Condo. Plaintiff believes that the Knolls likely knew the foundation did not have suitable soil.

As a result, plaintiff commenced this action against Hason defendants and others on June 4, 2014 by the filing of the summons and complaint with the Clerk. Thereafter, plaintiff filed a supplemental summons and amended complaint on July 29, 2014 (“Amended Complaint”). Defendants have interposed answers.

NOW, based upon the foregoing, the motions are decided as follows:

It is well settled that pursuant to CPLR (a)(7) “upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory”¹ (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 A.D.3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted

¹Internal citations omitted.

by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). Moreover, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7), a court may “freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a) (7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180; Marist College v Chazen Envtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

Hason Defendants' Motion to Dismiss

Hason defendants maintain that all of plaintiff's causes of action against them other than the breach of warranty cause of action must be dismissed because they have been inadequately pled or are duplicative of the breach of warranty cause of action. Hason defendants submit that the current action is a simple breach of warranty action that plaintiff is attempting to transform into a

fraud, fraudulent conveyance deceptive acts, tort and equity action.

In opposition to Hason defendants' motion, plaintiff offers the engineering report of Exponent Engineering P.C. ("Exponent") which reviewed the site and foundation plans, and performed a preliminary evaluation of the conditions at the premises based on their observations, and engineering experience. They observed that there has been excessive foundation settlement, especially at the southeast corner, which has manifested itself as structural damage, such as the crack in the north foundation wall, sloping floors and other conditions such as diagonal cracks at the corners of the doors, gaps between the wall and floors, cracking along the ceiling moldings and racked doors. According to the site drawings, the original topography at the rear of the premises, particularly at the southeast corner, sloped down away from the building. Exponent concludes that it is therefore likely that fill material was used to level the area, and it is possible that the foundations in this area are bearing on fill material that was not properly compacted. It appears that excessive soil settlement to a lesser degree is also occurring along the front of the property.

Plaintiff also offers an affidavit from Michael P. Taylor ("Taylor"), a professional engineer licensed in New York State, a principal at GeoDesign, P.C., who has worked as a civil/geotechnical engineer in the New York City Metropolitan area for over 25 years. He attests that on February 7, 2014, he personally inspected the premises. In June 2014, he oversaw various soil investigations at the premises. He attests that the subsurface exploration data consists of uncontrolled fill overlying natural glacial till and bedrock. He continues that the principal cause of settlement at the premises is due to poor subgrade conditions (uncontrolled fill) beneath the footings and ground floor slabs. Taylor asserts that the existing fill is not suitable for support of

shallow foundations in its present state. He advances that this material appears to have been placed in an uncontrolled fashion, and apparently on an unprepared slope beneath the fill. This uncontrolled fill is generally not suitable for site grading on and/or to create steep slopes, and/or for carrying foundation loads and building structures such as exists at the premises. He claim that several documents from the Town of Greenburgh Department of Buildings (“DOB”) indicate the presence of man-made fill prior to or at the time of permitting and apparent site design.

Moreover, he asserts that it is not clear if the uncontrolled fill extends beneath the building’s entire foundation system or portions of it, whereby other units within the building could be impacted by the uncontrolled fill and/or an isolated repair to the Condo. In addition, there is a boulder wall and slope instability which can result in steep failure surfaces extending directly into the rear deck attached to the Condo and/or into the building itself, which requires more investigation. Taylor concludes that it is his professional opinion based on his observations of the settlement, of the foundation cracks, the visible building distortion, and of the results of the soil tests, that the foundation system is settling and is not functioning as intended, and most likely cannot safely support the loading and basic performance required in the New York State Building Code.

Notwithstanding the foregoing, Hason defendants now bring a motion to dismiss pursuant to CPLR Section 3211(a)(1)(7), specifically as to: (1) breach of contract; (2) rescission of contract and damages; (3) negligence; (4) unjust enrichment; (5) fraud; (6) intentional infliction of emotional distress; (7) violations of New York General Business Law Sections 349 and 350; and (8) fraudulent conveyance without leave to replead against the Knolls.

Breach of Contract

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach (Canzoa v Atanasio, 118 AD3d 837 [2d Dept 2014]; Furia v Furia, 116 AD2d 694 [2d Dept 1986]). Plaintiff must establish the provisions of the contract the defendant is alleged to have breached (Sud v Sud, 211 AD2d 423 [2d Dept 1995]); Atkinson v Mobil Oil Corp., 205 AD2d 719 (2d Dept. 1994). The court is to give practical interpretation to the language employed and the parties' reasonable expectations (Slamow v Del Col, 174 AD2d 725, 726 (2d Dept 1991), *aff'd*, 79 N.Y.2d 1016 (1992). Parol evidence will not be considered in interpreting a contract unless the contract is ambiguous (South Road Assocs., LLC v IBM Corp., 4 NY2d 272 (2005); The question of whether an agreement is ambiguous is a question of law to be determined by the Court (Innophos, Inc. v Rhodai, S.A., 10 NY3d 25 [2008]; JJFN Holdings, Inc. v Monarch Investment Properties, Inc., 289 AD2d 528 [2d Dept 2001]). Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations (Uribe v Merchants Bank of New York, 92 NY2d 336 [1998]; Around the Clock Delicatessen, Inc. v. Larkin, 232 AD2d 514 [2d Dept 1996]). Ambiguity does not exist simply because the parties urge different interpretations of its terms (Bethlehem Steel Co. v. Turner Construction Co., 2 NY2d 456 [1957]). When the parties' intent to be bound by a contractual obligation "is determinable by written agreements, the question is one of law" (Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285, 291 [1973]; Berghold v Kirschenbaum, 287 AD2d 673 [2d Dept 2001]).

Hason defendants contend that plaintiff has failed to sufficiently plead a cause of action for breach of contract because: (1) plaintiff does not identify the contractual provisions that were

breached; the material terms of the breached contract and or specific provisions of the contract that were breached. The amended complaint states that “the Knolls breached its contract with Lois Sacks by selling Lois Sacks a structure that was different than promised and agreed to by the Knolls.”

Moreover, Hason defendants allege that plaintiff’s breach of contract cause of action is duplicative of her breach of warranty claim and therefore must be dismissed. Plaintiff in her breach of warranty cause of action alleges, in pertinent part, “the Knolls breached its warranty with Lois Sacks by failing to honor the contractual and statutory warranty for material defects in the property, including defects in the foundation system. Since the causes of action for breach of contract and breach of warranty both allege that the Knolls breached its obligation to plaintiff by selling her a home with a defective foundation system, plaintiff’s breach of contract cause of action is wholly duplicative of her breach of warranty cause of action and therefore must be dismissed.

However plaintiff submits that the main contract provisions that the Knolls breached were the promises to construct the foundation according to the Building Code and according to the approved drawings. Plaintiff relies on the report of Michael Taylor, as above-mentioned, who conducted soil tests and concluded that the Knolls constructed the foundation on uncontrolled fill, meaning soil that is not undisturbed and that is not engineered to carry loads (Taylor Aff par. 7-8). Taylor concluded that the uncontrolled fill is not suitable for the foundation.

Based upon the record, the evidence shows that plaintiff alleges that the Knolls violated specific provisions of the Purchase Agreement other than warranty provisions, such as noncompliance with building plans as filed with building department (Tiffany at Westbury

Condominium by its Bd. Of Mgrs v. Marelli Dev Corp., 40 AD3d 1073, 1075-1076 [2d Dept 2007]).

In light of the foregoing, and in the spirit of affording the pleading a liberal construction, accepting the facts alleged in the pleading as true, and according the plaintiff the benefit of every possible inference, the complaint adequately alleges all of the essential elements of a cause of action to recover damages for breach of contract against the Knolls.

Fraud

The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (Greenberg v Blake, 117AD3d 683 [2d Dept 2014]; (Deutsche Bank Natl. Trust Co. v Sinclair, 68 AD3d 914, 916 [2d Dept 2009])).

Furthermore, a fraud claim must be based upon a misrepresentation of an existing fact rather than upon an “expression of future expectations” (68 AD3d 914, 916). However, even if plead with sufficient particularity to comply with the requirements of CPLR 3016, “a cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim” (Heffez v L & G Gen. Constr., Inc., 56 AD3d 526 [2d Dept 2008]).

Here, the Knolls argues that plaintiff’s cause of action for fraud must be dismissed because it does not meet the particularity requirements of CPLR 3016(b). The amended complaint states: “upon information and belief, the Knolls never intended to honor its warranty obligations when it entered into the contract with Lois Sacks and knew that the representations were false; the Knolls, Pinewood and Uri Hason intended to deceive Lois Sacks, and they knew Lois Sacks was relying

upon such representations. Upon information and belief the Knolls was purposefully undercapitalized with no reserves for contingent liabilities; this evidences a premediation that the Knolls was not planning on honoring any warranty obligations from the outset.” Hason defendants argue that the fraud claim is duplicative of the breach of warranty claim.

Based upon the record, and the parties’ arguments, the court finds that plaintiff has failed to plead with the requisite particularity pursuant to CPLR 3016 (b), as to its allegations against the Hason Defendants, which are purely speculative and conclusory. Accordingly, the causes of action sounding in fraud against the Hason Defendants are dismissed.

Unjust Enrichment

In order to prevail on a claim of unjust enrichment, it must be shown that the other party was enriched, at that party’s expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (Old Republic Natl. Tit. Ins. Co. v Luft, 52 AD3d 491 [2d Dept 2008]). The existence of a valid and enforceable written contract covering a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter (Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp., 64 AD3d 85, 102 [2d Dept 2009]). However, an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012]). [U]njust enrichment is not a catchall cause of action to be used when others fail, but, rather, [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff (Corsello, 18 NY3d at 790).

The Hason defendants argue that plaintiff’s unjust enrichment claim fails because it is

duplicative of her breach of warranty claim. This court agrees that the unjust enrichment cause of action is duplicative of the breach of warranty cause of action, and breach of contract cause of action against the Knolls. Thus, dismissal of plaintiff's unjust enrichment claim is also mandated due to its failure to state a viable cause of action (see CPLR 3211 [a] [7]), as against the Knolls.

Intentional Infliction of emotional distress

Hason defendants contend that the court must dismiss plaintiff's cause of action for the intentional infliction of emotional distress because plaintiff has failed to allege conduct on the part of Hason defendants that is so outrageous as to support a claim for the intentional infliction of emotional distress. In order to properly plead a cause of action for the intentional infliction of emotional distress, "the complaint must allege conduct that was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and [is] utterly intolerable in a civilized community" (Bauman v Hanover Community Bank, 100AD3d 814, 816-817 [2d Dept 2012]). Plaintiff contends that the Knolls and Uri Hason recklessly ignored plaintiff's pleas to honor the warranty, leaving plaintiff in a structurally unsound house, concerned for her safety and her financial well being. Plaintiff also claims that her house is virtually unmarketable. Based upon the pleadings, the court finds that the Hason Defendant's conduct was not so outrageous in character, and so extreme in degree as to support a claim for the intentional infliction of emotional distress. Accordingly, this particular cause of action against Hason Defendants is dismissed.

Rescission of Contract

"As a general rule, rescission of a contract is permitted for such a breach as substantially defeats the purpose for entering into the contract initially. It is not permitted for a slight, casual or technical breach, but only for such as are material and willful, or, if not willful, so substantial and

fundamental as to strongly tend to defeat the object of the parties in making the contract” (Wiljeff, LLC v United Realty Management Corp., 82 AD3d 1616 [2011]). Plaintiff claims that the Knolls breach was material, willful, and fundamental, and the damages are potentially difficult to ascertain; therefore rescission is appropriate. Hason defendants assert that plaintiff’s cause of action for rescission of contract and damages must be dismissed because rescission is a legal remedy and not a cause of action, and even if found to be a cause of action, that plaintiff failed to plead the same with sufficient particularity.

Based upon the record, the court finds that plaintiff has not properly pled a cause of action for rescission and this must be dismissed.

Negligence and Negligent Misrepresentation

A claim for negligent misrepresentation requires plaintiff to plead “the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff” that the information was incorrect; and reasonable reliance on the information” (J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 [2007]). The negligent misrepresentation claim is duplicative of the breach of warranty claim and breach of contract claim. Plaintiff claims that the Hason defendants knew that they failed to follow the Building code and approved plans. Based upon the record, and light of the foregoing this cause of action is dismissed as against the Hason defendants, as plaintiff did not adequately demonstrate this cause of action.

Plaintiff brings a negligence claim against Pinewood and Hason, in that they failed to follow the building code, failed to follow the approved plans, and their knowledge that something was wrong at the southeast corner, created a dangerous condition.

The elements of negligence are: “(1) a duty owed by the defendant to the plaintiff, (2) a

breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury” (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). Hason defendants argue that plaintiff’s negligence claim against Pinewood and Hason must be dismissed because: (1) under the law of New York, a plaintiff cannot recover solely for economic loss arising out of negligence construction in the absence of a contractual relationship; and (2) there is no contractual privity between plaintiff, on the one hand, and Pinewood and Hason, on the other hand. Based upon the record, plaintiff has not made a sufficient showing for the cause of action for negligence against Pinewood and Hason.

Regarding the Knolls, the court finds that the cause of action sounding in negligence was merely a restatement, of the implied contractual obligations asserted in the cause of action for breach of contract and warranty as against the Knolls, and there is no showing that this action should transform into a tort (Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co., 109 AD3d 953, 954 [2d Dept 2013], and therefore must be dismissed.

General Business Law Section 349 and 350

General Business Law § 349 (a) renders unlawful deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state. Although Section § 349 primarily discusses enforcement by the Attorney General, subsection (h) explicitly permits an individual injured by a § 349 violation to bring a private action seeking injunctive relief or damages. Such a plaintiff must demonstrate that the defendant engaged in a consumer-oriented act or practice, that such act or practice was materially deceptive or misleading and that plaintiff sustained damages (David v #1 Mktg. Serv., Inc., 113 AD3d 810,811 [2d Dept

2014]). In contrast, private contract disputes which are unique to the parties do not fall within the ambit of the statute. In fact, court have held that individual condominium purchasers do not have a viable claim under section 349 against sponsors and management for construction defects because the plaintiff purchasers cannot show that the alleged deceptive acts of the defendants have a broad impact on consumers at large (Board of Managers of Marke Gardens Condominium v 240/242 Franklin Avenue, LLC, 71AD3d 935 [2d Dept 2010]).

Here, plaintiff does not allege that the Knolls engaged in deceptive business practices directed at members of the public general and thus, they do not state a valid claim under the statute. Accordingly, that branch of Hason defendants' motion seeking dismissal of plaintiff's claim alleging a violation of GBL § 349 and seeking damages under § 349 (h) is granted and said claim is dismissed. Plaintiff does not identify any deceptive acts or conduct and/or materially misleading statements on the part of the Knolls.

Likewise, plaintiff's cause of action for violation of General Business Law §350 must be dismissed because such a violation requires false advertising, and the Amended Complaint fails to allege that the Knolls advertised in connection with the sale of the Condo.

Fraudulent Conveyance

Plaintiff asserts that the Knolls' failure to pay Lois Sacks' warranty claim implies insolvency and creates a non-conclusory basis for the belief that the Knolls transferred funds to insiders. The Hason defendants counter that plaintiff fails to identify any specific conveyances. Plaintiff is not privy to the Knolls' finances. Plaintiff's theory is that since the Knolls had both a contractual and statutory 6 year warranty obligation, if the Knolls at some point had funds and then transferred those funds to an insider, the transfer was likely done to hinder or delay future

creditors. Plaintiff continues that given that Hason defendants knew that there were issues, any transfers that the Knolls made to Hason or Pinewood were likely with the intent to defraud creditors such as plaintiff. Hason defendants assert that this cause of action must be dismissed because the Amended Complaint fails to identify any conveyances made by the Knolls to Pinewood and/or Hanson. Plaintiff brings claims for fraudulent conveyance under New York Debtor and Creditor Law Sections 273, 274, 275, 276 and 276-a.

Based upon the record, the court finds that since plaintiff's allegations about the purported insolvency of the Knolls, and purported transfers are speculative and not supported by any credible evidence, this cause of action must be dismissed.

Alter Ego Liability

Plaintiff pleads "upon information and belief" that: Pinewood is the parent company of the Knolls; and Hason is the president of Pinewood and the managing member of the Knolls. Plaintiff alleges that Pinewood and Hason are the alter egos of the Knolls and should be held liable for the Knolls' conduct and acts. She claims that the Knolls and Pinewood are effectively one and the same, controlled by Hason, and sharing the same address. The Amended Complaint reads: "Upon information and belief, Pinewood formed the Knolls to act as the owner and sponsor of the Preserve, with the Knolls having no other business activities and to insulate Pinewood from liability" (Amended Complaint, p. 12). In contrast, Hason defendants allege that plaintiff has failed to adequately plead alter ego liability.

In order to show alter ego liability and the piercing of the corporate veil, a plaintiff must establish through factual allegations that the owner of a corporation "exercised complete domination over the [corporation] in the transaction at issue and, in doing so abused the privilege

of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff” (East Hampton Union Free School District v Sandpebble Builders, Inc., 66 AD3d 122, 126 [2d Dept 2009]). “Factors to be considered in determining whether the owner has ‘abused the privilege of doing business in the corporate form’ include whether there was a ‘failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use” (66 AD3d at 127).

Here, plaintiff’s bald allegations that the Knolls was undercapitalized and failed to reserve funds for potential warranty claims, which abused the corporate form, fail demonstrate alter ego status. Moreover, plaintiff’s contentions were based upon information and belief, in that Pinewood and Hason appointed all directors and officers of the Knolls, the Knolls has never had any employees, but rather, Pinewood managed all of the Knolls’ affairs; and if Knolls did have employees, they reported and were dominated and controlled by Pinewood and Hason. These claims are all speculative and without any factual support. Accordingly, this cause of action is unsubstantiated and is dismissed.

Plaintiff’s motion to Amend Complaint

Pursuant to CPLR 3025(b), leave to amend a pleading should generally be freely granted absent prejudice to the opposing party (CPLR 3025[b]; Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983], such leave should be denied where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit (Mortgage Elec. Registration Sys., Inc. v Reid, 85 AD3d 880, 881 [2d Dept 2011]). Plaintiff cross-moves to file a second amend complaint and for leave to file and serve a second supplemental summons pursuant to CPLR 3025(b), naming Mark Freedman and Nancy Phillips as defendants. According to plaintiff,

the offering plain lists Hason and Mark Freedman as the Knolls' principals.

Also, plaintiff seeks to add a negligence claim against Nancy Phillips ("Phillips"). Nancy Phillips worked for Testwell, Inc. to certify that the soil met the required soil bearing capacity of 4,000 pounds per square foot. The engineer who performed these tests was Nancy Phillips. Hason defendants maintain that plaintiff cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship, which is absent between plaintiff and Phillips. Moreover, Hason defendants maintain that since Freedman and Phillips do not owe a legal or contractual duty to plaintiff, this court should deny plaintiff's cross-motion for leave to add them as parties. The court denies plaintiff's application to amend, as plaintiff has not met her burden to demonstrate that these causes of actions are meritorious.

Plaintiff also seeks to amend the complaint to assert a direct breach of contract claim against the developer's principal, Freedman. Hason defendants contend that plaintiff's proposed cause of action for breach of contract against Freedman fails as a matter of law because Freedman was not a signatory to the Purchase Agreement, and plaintiff has failed to plead that Freedman was an alter ego of the Knolls and, as such, is personally liable for the debts of the Knolls.

Again, based on the foregoing, plaintiff's motion to amend the pleadings is denied in its entirety, insofar as plaintiff has failed to meet her burden that the amendment is meritorious.

Cronin's Motion to Dismiss

Cronin moves to dismiss the Amended Complaint and all cross claims against it. This action includes a claim by plaintiff for negligence concerning the civil engineering services provided by Cronin in connection with the Condo. Despite the fact that plaintiff did not hire Cronin, plaintiff alleges that Cronin owed a duty to her to design her premises in a manner that

did not create an unreasonable risk of harm to person and property and that Cronin breached such duty. The sole cause of action in the Amended Complaint against Cronin is that it breached its duty by failing to properly design the site plan and failing to perform related tasks.

Cronin explains that it is a civil engineering firm that entered into a contact with Richard Albert on or about February 11, 2004, to prepare site grading plans and utility plans in connection with the Condo. These services were completed in 2007. Cronin also amended the approved site plan for the Knolls and Hason, which was approved by the appropriate governmental agency.

Plaintiff filed her amended complaint on or about July 29, 2014, more than three years after March 3, 2011, when Cronin physically completed all its aforementioned services. Cronin asserts that plaintiff's cause of action against it is barred by CPLR 214(6), which establishes a three year limitations period for an action to recover damages for malpractice against a design professional (Manhattanville College v James John Romeo Consulting Engineer, P.C., 5 AD3d 637, 640 [2d Dept 2004]). On a motion to dismiss an action based upon the expiration of the statute of limitations, the movant bears the initial burden of establishing prima facie that the time in which to commence suit expired prior to commencement (Saravese v Shatz, 273AD2d 219, 220 [2d Dept 2000]). The burden then shifts to the party opposing the motion to demonstrate evidentiary facts that the case fall within exception (273AD2d 219, 220). A malpractice cause of action against a design professional accrues, and the statute of limitations begins to run, upon the completion of the contract and the termination of the parties professional relationship (Frank v Mays Group, LLC, 30AD3d 369, 369-370 [2d Dept 2006]).

Contrary to Cronin's allegations, plaintiff maintains that Cronin performed work through February 2012, which would make the claim timely. She admits that she is not a party to the

contract with Cronin, and argues that her claim against Cronin is a third party claim of simple negligence, therefore, plaintiff's claims against Cronin are timely.

Cronin also contends that plaintiff lacks privity and a duty relationship with Cronin requiring dismissal of negligence claim. Timothy Cronin, III, PE attests that Cronin was not involved with preparing any site grading plans and/or site utility plans on behalf of plaintiff in any manner. Cronin also asserts that plaintiff lacks standing to assert a negligence claim, as plaintiff has failed to allege any legal duty owed by Cronin. A cause of action cannot be sustained absent privity of contract or its functional equivalent (Segall v Rapkin, 243 AD2d 624,625 [2d Dept 1997]). Cronin avers that it had no direct contact with plaintiff in connection with the site plans, and plaintiff was a remote purchaser (Marino v Dwyers-Berry Construction Corp., 193 AD2d 654 [2d Dept 1993]). Plaintiff claims that Cronin failed to act to the required standard of professional care with respect to representations it made respecting the soil conditions at the project site.

Moreover, plaintiff does not allege personal injury, but she seeks repair and remediation costs for damages caused as a result of Cronin's alleged breach of duty. However, "the rule which bars recovery for economic losses in the absence of privity as applied to actions against architects or engineers is also settled as a matter of New York law. We note that analogous rules apply in actions against other professionals as well" (Key Int'l Mfg., Inc. v Morse/Diesel, Inc., 142 AD2d 448, 453 [2d Dept 1988]).

Based upon the foregoing, the plaintiff has not established that there is a contractual relationship or a functional relationship with Cronin, and thus her negligence cause of action as against Cronin is dismissed.

Next, Cronin asserts that Gemmola has asserted a cross claim against it for contractual

indemnification, common law indemnification and contribution, which must be dismissed. As described by plaintiff, the relationship between Gemmola and Cronin is that Gemmola “as the registered architect failed to properly design the foundation system by failing to account for fill material underneath the foundation’ and that they ‘failed to properly oversee the construction of the foundation system.” According to Taylor, Gemmola--the architect for the project--copied verbatim Cronin’s statements, and as a result, failed to mention the presence of man made fill. Despite knowing that there was man made fill at the site, Cronin seems to have prepared a document for the condominium filings stating that soil borings were not warranted. Thus, Cronin should have known that Gemmola might rely on its stamped site plan drawings that fail to identify the presence of man-made fill at the site. Taylor opines that Cronin’s misleading site development plans and subsequent statements were contributing factors in creating a dangerous condition, namely that the contractor built the subject building on highly variable uncontrolled man-made fill soil that is subject to detrimental movements, and was not suitable for carrying and uniformly supporting the required building design load and foundation system (Taylor Affidavit, p.9).

To support its motion to dismiss Gemmola’s cross claim, Cronin asserts that it has no agreement with Gemmola, written or otherwise, to indemnify Gemmola under any circumstances. Cronin argues that Gemmola’s cross-claims for common law indemnification should be dismissed because there are independent allegations of wrongdoing alleged against Gemmola by plaintiff, and there is no reading of the pleadings that could be interpreted to mean that Gemmola was sued for any act of Cronin. Moreover, Gemmola’s cross-claim for contribution should be dismissed because such a claim is not viable as a matter of law where the recovery sought is a purely economic loss, which is the case here. Purely economic loss resulting from a breach of contract

does not constitute injury to property within the meaning of Article 14 of the CPLR.

In response, Gremmola asserts that it withdraws its cross-claim against Cronin for contractual indemnification as specifically related to plaintiff's direct claims. However, Gremmola alleges that its claim of implied indemnification is viable in that it may be held vicariously responsible for defects supplied by Cronin and not through any fault of its own.

Keeping in mind the liberal pleading requirements, the material elements of the cause of action of common law indemnification and contribution in the cross-claim by Gremmola against Cronin have been satisfied except as to the portion that has been withdrawn by Gremmola.

Accordingly, based on the stated reasons, it is hereby

ORDERED, that the Hason defendants' motion to dismiss (Seq 1) certain causes of action in the Amended Complaint is granted as to the: Third Cause of Action-Rescission, Fourth Cause of Action as to Hason defendants only, Fifth Cause of Action-Unjust Enrichment, Sixth Cause of Action-Fraud, Seventh Cause of Action-Intentional Infliction of Emotional Distress; Eighth Cause of Action-Deceptive Trade Practices; Ninth Cause of Action-Fraudulent Conveyance; and denied as to the Breach of Contract Cause of Action; and it is further

ORDERED, that the clerk shall mark his records accordingly; and it is further

ORDERED, that plaintiff's cross-motion to amend the Amended Complaint is denied in its entirety; and it is further

ORDERED, that Cronin's motion to dismiss plaintiff's fourth cause of action-negligence against it is granted; and Cronin's motion to dismiss the cross-claims of Gremmola are granted to the extent that the claim of contractual indemnification is dismissed; and otherwise denied; and it is further

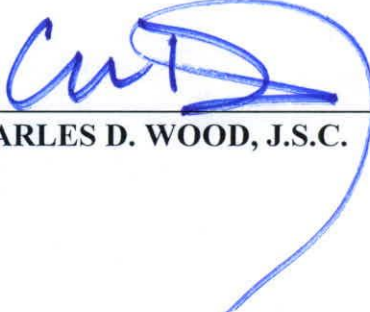
ORDERED, that Hason Defendants shall serve a copy of this order to all parties within ten (10) days of notice of entry, and file proof of service within five (5) days of service; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference Part on Monday May 4, 2015, in Room 811 of the Westchester County Courthouse.

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

Dated: White Plains, New York
April 8, 2015



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