

<b>Sacks v Knolls at Pinewood, LLC</b>
2016 NY Slip Op 32850(U)
March 29, 2016
Supreme Court, Westchester County
Docket Number: 58955/2014
Judge: Charles D. Wood
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To commence the statutory time period 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

JASON FARINA in his capacity as President of the  
unincorporated association known as THE BOARD  
OF MANAGERS OF THE HOME OWNERS  
ASSOCIATION OF THE PRESERVE AT  
GREENBURGH CONDOMINIUM,

Additional Supplemental  
Defendants,

-----X  
THE KNOLLS AT PINWEED, LLC, PINWOOD  
DEVELOPMENT CORP., and URI HASON,

Third Party Plaintiffs

-against-

EURO STYLE ENTERPRISES, INC., EURO STYLE

Amended  
DECISION and ORDER

Index No. 58955/2014  
Sequence No. 6,7,8

CONCRETE CORPORATION, TESTWELL, INC.,  
TESTWELL LABORATORIES, INC., TESTWELL  
CRAIG LABORATORIES, INC., TESTWELL  
EQUITY HOLDINGS, INC., TESTWELL CRAIG,  
INC., TESTWELL-CRAIG, INC., ROCKAWAY  
INDUSTRIES, INC., NELSTAD MATERIAL  
CORPORATION and NELSTAD READY MIX  
CONCRETE CORPORATION,

Third-Party Defendants.

-----X  
THE KNOLLS AT PINWOOD, LLC, PINWOOD  
DEVELOPMENT CORP., and URI HASON,

Second Third-Party Plaintiffs

-against-

CRONIN ENGINEERING PROFESSIONAL  
ENGINEER, P.C.,

Second Third-Party Defendant

-----X  
**WOOD, J.**

The following papers were read in connection with the following motions of Jason Farina, as president of the Board of Managers of the Home Owners Association of the Preserve at Greenburgh Condominium (the "Condominium"), plaintiff, and the sponsor, The Knolls at Pinewood, LLC, ("the Knolls") Builder Pinewood Development Corp. ("Pinewood") the principal of both the sponsor and the builder, Uri Hason ("Hason") (collectively, "Hason Defendants"):

- Condominium's Notice of Motion (Seq 6), Counsel's Affirmation, Exhibits.
- Plaintiff's Notice of Motion (Seq 7), Memorandum of Law, McLeod's Affirmation, Exhibits.
- Hason Defendants' Notice of Cross-Motion (Seq 8), Counsel's Affirmation, Exhibit.
- Hason Defendants Counsel Affirmation in Opposition, Exhibits,
- Plaintiff's Counsel's Affirmation in Reply, Exhibits,
- Plaintiff's Memorandum of Law In Reply.
- Condominium's Counsel's Reply Affirmation.

In this action, plaintiff seeks an award for damages against the Sponsor, its principals, contractors and others, arising from alleged defects to her condominium unit located at the Preserve Court in Greenburgh.

Based upon the foregoing, the motions are decided as follows:

In Motion Seq 6, the Condominium moves for leave to reargue and/or renew the decision and order of this court dated July 22, 2016, to the extent that said order granted dismissal of the Condominium's cross-claims for breach of fiduciary duty and negligent misrepresentation against Hason Defendants, the cross-claim for unjust enrichment against Hason Defendants, and upon the granting of reargument and/or renewal for an order reinstating the aforesaid cross claims against Hason Defendants.

Under CPLR 2221(d), motions for reargument are "addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (*Mazzei v Licardi*, 47 AD3d 774 [2d Dept 2008], citing *Carillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]; *Singleton v Lenox Hill Hospital*, 61 AD3d 956, 957 [2d Dept 2009]). A motion for reargument is "not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (*Gellert & Rodner v Gem Community Management, Inc.* 20 AD3d 388 [2d Dept 2005]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]). Nor does it function as a forum to proffer arguments "different from those originally tendered" (*Amato v Lord & Taylor*, 10 AD3d 374, 375 [2d Dept 2004]) or on a new theory of law not previously advanced (*Frisenda v X Large Enterprises, Inc.*, 280 AD2d 514, 515 [2d Dept 2001]). Rather, the movant must satisfactorily demonstrate matters of fact or law allegedly overlooked or misapprehended on the prior motion

(*Matter of Hoffman v Debello-Teheny*, 27 AD3d 743 [2d Dept 2006]). New facts may not be submitted or considered by the court (*Trahan v Gallea*, 48 AD3d 791, 792 [2d Dept 2008]; *Quinn v Menzel*, 282 AD2d 513 [2d Dept 2001]). Moreover, a motion for leave to reargue must be identified specifically as such, and must be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry(see CPLR 2221(d)(3)). Courts have allowed a motion for reargument to be made after the statutory time frames in CPLR 2221(d)(3) have expired if a timely notice of appeal has been served and filed (*Itzkowitz v. King Kullen Grocery Co*, 22 AD3d 636[2d Dept 2005]). Indeed, this court has discretion pursuant to CPLR §2004 to extend the time fixed by statute “as may be just and upon good cause shown” CPLR §2004; *Itzkowitz at 638*. In addition, courts have automatically denied motions to reargue based upon the movant’s failure to include with the motion a complete set of the original papers, as they are germane to said motion to reargue (see, Connors, Supplementary Practice Commentaries McKinney’s Cons. Laws of N.Y. C2221:7;).

The Condominium maintains (among other things) it has stated a claim that the Knolls, as sponsor, and Hason breached their duty to notify the Condominium, the existing home owner and every prospective purchaser of the alleged defective common elements and to repair those defects. After a thorough review of the papers presented on the original motion, the court finds that there was a substantial basis for its decision. The Second Department has held that there is no fiduciary relationship between a sponsor and a condominium (*Caprer v Nussbaum*, 36 AD3d 176, 191 [2d Dept 2006]). Since the moving defendants failed to show that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision, the moving defendants’ application for reargument is not supported by the record or the case law, and is denied.

Under CPLR 2221, “a motion for leave to renew must be based upon new or additional facts, which although in existence at the time of the original motion, were not made known to

party seeking renewal, and were not known to the court” (Morrison v Rosenberg, 278 AD2d 392 [2d Dept 2000]). Leave to renew is “not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion” (Orange and Rockland Utilities, Inc. v Assessor of the Town of Haverstraw, 304 AD2d 668, 669 [2d Dept 2003] quoting Stone v Bridgehampton Race Circuit, 244 AD2d 403 [2d Dept 1997]). However, the rule is flexible and additional or new facts that were known to the movant on its initial application, may be offered if the movant first establishes a reasonable excuse as to why the additional facts were not submitted on the original application (Matter of Gold v Gold, 53 AD3d 485, 487 [2d Dept 2008]). “A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (Cent. Mortgage Co. v Resheff, 136 AD3d 962, 963 [2d Dept 2016]). The Second Department has found that the Supreme Court “lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion” (Cent. Mortgage Co. v Resheff, 136 AD3d at 963).

The Condominium now relies on a promotional document. However, the Hason Defendants represent this came from a discovery exchange by them, which was sent by Fed Ex from their office to the Condominium’s Counsel more than four months before the Condominium’s opposition to the original motion was served. The Condominium asserts that prior to the Hason’s deposition, this material had not been identified in any manner and its usage by the Hason Defendants for sales of condominium units was unexplained, and the purpose of the documents was not clear from the face of the documents.

In light of the foregoing, the Condominium's contentions do not warrant the granting of a motion to renew. Accordingly, the Condominium's motion for leave to reargue/renew is denied.

Turning to plaintiff's application motion Seq 7, plaintiff argues that she should be granted leave to amend the pleadings to assert a claim of breach of offering plan as against Hason. Knolls argues that plaintiff lacks standing to assert a claim against Hason for breach of the Offering Plan. Plaintiff contends that she can assert a breach of the Offering Plain because the purchase agreement incorporates the terms of the Offering Plan and states "The Purchaser...agrees to be bound by the proposed Declaration, by-laws and Offering Plan of the said condominium... all of which were incorporated by reference" (McLeod Aff, Ewx A at p. 3, Section 7).

It is well settled that "leave to amend a complaint should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not result in surprise or prejudice to the opposing party" (Old World Custom Homes, Inc. v Crane, 33 AD3d 600 [2d Dept 2006]; Lucido v Mancuso, 49 AD3d 220 [2d Dept 2008]).

Generally, "Real Property Law §339-dd does not preclude an individual unit owner from suing the sponsor or the board of managers for wrongs to the unit owner's interest in his or her individual unit, because such actions seek to enforce a right unique to the individual owner" (Caprer v Nussbaum, 36 AD3d 176, 186 [2d Dept 2006]). However, individual unit owners here have no standing to sue individually for injury to the common elements or finances (Caprer v Nussbaum, 36 AD3d 176, 186 [2d Dept 2006]).

Plaintiff argues that such an amendment would not prejudice or surprise defendants, since the homeowner's association has already asserted this cause of action against Hason. Plaintiff is an individual unit owner and lacks standing to seek damages for injury to Condominium's common elements. Upon a reading of plaintiff's Third Amended Complaint, it appears to infer

injuries to the common elements. As such, plaintiff's motion to amend the complaint in its current form is denied without prejudice.

Next, Hason Defendants (Seq 8) cross move to dismiss the Condominium's amended answer and cross claims or alternatively request that this court designate the amended answer as a supplemental answer with cross-claims or grant an extension of time to respond to the amended answer and cross-claims. The Condominium served the amended answer and cross claims following depositions to add as a party Mark Freedman, a certifying principal of the Sponsor, the Knolls and to preserve its claims against Freedman and the Hason Defendants. Hason Defendants argue that the Condominium previously agreed in writing pursuant to a stipulation to withdraw all cross claims in the amended answer which were dismissed by this court. Based on the foregoing, the court grants Hason Defendants cross motion to the extent Hason Defendants shall have an extension of time to respond to Condominium's amended answer and cross claims.

This constitutes the Decision and Order of the Court.

THEREFORE, based upon the stated reasons, it is hereby:

ORDERED, that the Condominium's motion (Seq 6) for leave to reargue/renew is denied; and it is further

ORDERED, that Plaintiff's motion to amend the complaint (Seq 7) in its current form is denied without prejudice; and it is further

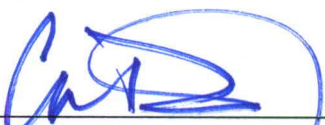
ORDERED, the court grants Hason Defendants cross motion (Seq 8) to the extent Hason Defendants shall serve and file their response to Condominium's amended answer and cross claims within 20 days from the date this decision and order was entered on NYSCEF, and denied otherwise; and it is further

ORDERED, that, counsel and the parties are directed to appear on May 22, 2017

at 9:30 A.M., at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601, at the Compliance Conference Part, Room 800; and it is further

ORDERED, that plaintiff shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service within five (5) days of service in accordance with the NYSCEF protocols.

Dated: March 29, 2016  
White Plains, New York

  
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HON. CHARLES D. WOOD  
Justice of the Supreme Court

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