Mirbabayeva v Metrotech LLC 1

2017 NY Slip Op 30049(U)

January 6, 2017

Supreme Court, New York County

Docket Number: 162825/2015

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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KRISTINA MIRBABAYEVA and KM & KK
FAMILY TRUST,

Plaintiffs,

-against -

METROTECH LLC 1, CLIPPER EQUITY, LLC,
RESIDENTIAL MANAGEMENT GROUP, LLC
d/b/a DOUGLAS ELLIMAN PROPERTY
MANAGEMENT and THE 7 METROTECH
CONDOMINIUM ASSOCIATION,

Defendants.

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Index No.: 162825/2015
Subm. Date: July 20, 2016
Motion Sequence No. 002

DECISION AND ORDER

COIN, J.:

In this breach of contract action, defendants Metrotech LLC 1 (Metrotech) and Clipper Equity, LLC (Clipper) move pursuant to CPLR 3211 (a) (1), (3) and (7) for an order dismissing the amended verified complaint in its entirety. For the following reasons, the motion is denied in part and granted in part.

Background

The complaint alleges that in 2005, Clipper and Metrotech purchased the premises located at 365 Bridge Street, Brooklyn, New York (the Property) and converted the Property into condominium apartments. Plaintiff alleges that David Bistricer (Bistricer), a principal of Clipper, formed Metrotech to act as the Sponsor of the Property's condominium conversion. Clipper and Metrotech operate at the same address under Bistricer's leadership and control. Plaintiff contends that Clipper controls the Property, citing its listing on Clipper's website (Popik

In April 2015, plaintiff Kristina Mirbabayeva (plaintiff) purchased a penthouse apartment, unit 26A, located on the 26th and 27th floors of the Property (the Unit), from Metrotech for $3,198,000.00 (plaintiff aff, ¶¶ 7-8). Plaintiff purchased the Unit based on the offering plan, which described the Unit as a three-bedroom, two-bathroom duplex unit of approximately 2,715 square feet, complete with luxury amenities, including a private elevator (Popik Aff., Ex. C at 35). Prior to the purchase, plaintiff also reviewed the architect's report, which described "two private . . . residential elevators running from the 25th floor to the 26th floor servicing the associated residential units," one of which was plaintiff's (*see* Popik Aff., Ex. D at 10). There is no alternative elevator service to the Unit (plaintiff aff, ¶ 7).

In addition, before the March 24, 2015 closing, plaintiff's counsel alerted Metrotech's real estate broker that the elevator and intrercom were not working properly (Popik Aff, Ex. G). After repeated complaints, on April 21, 2015, Avi Klugmann, Clipper's Assistant Project Manager, responded that the elevator problems would be remedied (*id.*). Three days later, he also informed plaintiff's fiancé, Alex Kopenkin, that the elevator company would come to diagnose the problem (*id.*). A string of further email communications evidence continued problems.

On or about August 25, 2015, plaintiff Mirbabayeva transferred the deed to the Unit to plaintiff KM & KK Family Trust (KMKK). KMKK currently owns the Unit, and Mirbabayeva continues to reside there. KMKK received all of the rights and interests associated with the Unit (Popik Aff., Ex. H, § 1.04). According to plaintiff, the lack of a functioning elevator rendered the Unit partially inaccessible, depressing the Unit's market value and making it virtually unsellable. Despite promises to repair, as of the date of the opposition, the Elevator had not been

successfully repaired. Mirbabayeva contends that it became a fire hazard and dangerous trap, first for her pregnant self and then for her newborn baby.

In addition, other problems began to surface, including issues with the HVAC units. In December 2015, there was no heat, with all six HVAC units broken. Building staff attempted to fix the HVAC units twice with no success. Plaintiff and her husband moved to a hotel, as plaintiff was seven months pregnant at the time and could not risk getting sick. Further, in February 2016, plaintiff purchased six new replacement HVAC units at a cost of $19,053.13 (Popik Aff., Ex. I). Plaintiffs claim that the HVAC units initially installed in the Unit were not new, but dated back to 2006 and 2007.

Plaintiffs argue that defendants collectively were responsible for the sponsorship, design, construction, marketing, sale and management of the Property and the Unit. Plaintiffs relied on the representations in the offering materials, and believed that they were buying into a building free of material design and construction defects, constructed in accordance with the standards of a luxury residence. According to plaintiffs, defendants concealed the design and construction defects. If plaintiffs knew of these defects, they would not have purchased the apartment.

<u>Relevant Contract Provisions</u>

The purchase agreement between Metrotech and Mirbabayeva (the Purchase Agreement) provides, "The [Offering] Plan is hereby incorporated in this Agreement with the same force and effect as if set forth at length . . ." (Pennisi Aff., Ex. A, ¶3(d) at 4). The Offering Plan states,

> Sponsor . . . will correct or cause to be corrected patent defects in the construction or design of the Property (. . .) and the Units or in the installation or operation of any mechanical equipment therein but <u>only if</u> (a) such patent defects are due to substantially improper workmanship or material substantially and materially at variance with the architectural plans

> and specifications or a defect in design which renders the .... Units or their systems or equipment unsafe or inoperable; and (b) (i) as to any Unit, Sponsor is notified of such defects in the purchaser's Inspection Report to be completed, dated and signed prior to the closing of title to purchaser's Unit or (ii) as to the Common Elements, Sponsor is notified by a majority of those residential/professional members of the Condominium Board who are unrelated to Sponsor within two months from the time they are elected at the first meeting of the Unit Owners (which will be held within approximately six (6) months after the First Closing). If any patent defect in the Common Elements within an Unsold Unit can only be detected after said two-month period by occupancy of such Unsold Unit, then Sponsor will correct said defect referred to in the preceding clause (a) if notified by a majority of those residential/professional members of the Condominium Board who are unrelated to Sponsor within two (2) months from the closing of title to such Unsold Unit.
>
> Sponsor will correct or cause to be corrected latent defects (that is, defects which are not visually ascertainable) in the construction or design of the Building and the Units or in the installation or operation of any mechanical equipment therein but <u>only if</u> (a) such latent defects are due to substantially improper workmanship or material substantially and materially at variance with the architectural plans and specifications or a defect in design which renders the Building or the Units therein or their systems or equipment unsafe or inoperable; and (ii) as to the Common Elements, Sponsor is notified by a majority of those residential/professional members of the Condominium Board who are unrelated to Sponsor within one (1) year after the First Closing

(Pennisi Aff., Ex C, offering plan at 106).

Under the Offering Plan, the term "Common Elements" is defined as "all areas of the Property other than the Units and the equipment and installations contained in such areas or elsewhere and shall include the General Common Elements, Residential/Professional Limited Common Elements and the Individual Limited Common Elements" (Pennisi Aff., Ex. D, Offering Plan at 15). "General Common Element" is defined as

> "those Common Elements which are to be used in common by or service or benefit (i) all Unit Owners (including the Retail Unit Owner and the Garage Unit Owner) or (ii) one or more Residential Units or Professional Units and

[*5]

> one or more of the Retail Unit and Garage Unit and includes all Common Elements other than the Individual Limited Common Elements and the Residential/Professional Limited Common Elements

(*id.* at 16). According to the Offering Plan, "[t]he term 'Individual Limited Common Elements' means, in general, the balconies and/or terraces to which there is direct and exclusive access from the interior of certain Residential Units as denoted in the Purchase Price Schedule and Exhibit B to the Declaration" (*id.*). The term "Residential/Professional Limited Common Elements" is defined as "those Common Elements which are to be used in common by all owners of the Residential Units and Professional Units only and includes all Equipment in such areas or elsewhere which enclose or service only the Residential Units and Professional Units" (*id.* at 16). "Equipment" is defined as "any installation, equipment, fixtures, apparatus and facilities" (*id.* at 15).

Pursuant to the Purchase Agreement,

> Purchaser's payment of the Balance and acceptance of a deed to the Unit shall constitute Purchaser's recognition that Sponsor has satisfactorily performed those obligations stated in the Plan and this Agreement to be performed by Sponsor prior to closing and, unless otherwise set forth herein, none of the provisions of this Agreement shall survive the closing

(Pennisi Aff., Ex. A, ¶1(d) at 2).

Plaintiffs commenced this action on December 18, 2015, and served an amended verified complaint on March 2, 2016 (the complaint), alleging the following causes of action: (1) breach of contract regarding the Elevator; (2) negligence regarding the Elevator; (3) rescission of the Purchase Agreement; (4) breach of implied covenant of good faith and fair dealing regarding the Elevator; (5) breach of implied warranties regarding the Elevator; (6) breach of contract regarding the HVAC units; (7) negligence regarding the HVAC units and property damage; and

(8) breach of implied warranties regarding the HVAC units (Popik Aff., Ex. J).

By order dated July 20, 2016, the action was severed and dismissed, together will all cross-claims, as against defendants Residential Management Group LLC and The 7 Metrotech Condominium Association only.

Discussion

Under CPLR 3211 (a) (1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence." Dismissal based on documentary evidence is warranted only if the evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense as a matter of law (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2d Dept 2011] [citation omitted]).

“On a motion to dismiss, pursuant to CPLR 3211 [a] [3], plaintiff is only required to raise an issue of fact as to standing. The burden is on the defendant, ‘to establish prima facie, that plaintiff lacks standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied’” (*Siba Contr. Corp. v Statec Inc.*, 2016 WL 6139781, *2 [Sup Ct, NY County 2016], quoting *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52 [2d Dept 2015]).

When determining a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged as true, accord the nonmoving party the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]). Where the allegations contained in the pleadings consist of bare legal conclusions, however, they are not entitled to such

consideration (*Beattie v Brown & Wood*, 243 AD2d 395 [1st Dept 1997]).

Standing

"Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006] [citation omitted and internal quotation marks omitted]). "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*id.*).

Defendants argue that Mirbabayeva does not have standing in this matter because she transferred the Unit to KMKK and, since August 24, 2015, is merely an individual residing in the Unit, divested of privity with defendant Sponsor. Further, defendants argue that KMKK does not have standing to maintain a breach of contract cause of action action against defendants, as it was not a signatory to the Purchase Agreement.

Plaintiffs counter that the cause of action for breach of contract accrued when plaintiff Mirbabayeva owned the Unit and that Mirbabayeva suffered damages as a result of the breach. Plaintiffs also argue that KMKK maintains legal standing under the plain terms of the Trust Agreement, which granted KMKK any and all rights associated with the Unit, including litigation matters arising out of the Unit's ownership (Popik Aff., Ex. H, § 1.04 at 2).

Defendant has met its burden to establish prima facie that plaintiff Mirbabayeva has no standing to assert her claims arising from the Purchase Agreement, as she assigned all rights, title and interest in the Unit to the trust, retaining no rights. In opposition, plaintiff Mirbabayeva has presented no issue of fact to demonstrate that she has standing in this action. Therefore, KMKK

alone has standing. The fact that KMKK was not a signatory to the purchase agreement is irrelevant. Defendants fail to support with legal authority their argument that the transfer of ownership of the Unit could not be accompanied by a concurrent assignment of all rights under the Purchase Agreement.

Breach of Contract - First and Sixth Causes of Action

Plaintiffs assert that defendants' alleged failure to repair the private elevator constitutes a breach of the Purchase Agreement (first cause of action). In addition, they claim that one year after the closing, six HVAC units were no longer functioning and had to be replaced, and that plaintiffs' lighting fixtures and furniture located on the terrace were damaged during facade restoration work (sixth cause of action).

The essential elements for pleading a cause of action for breach of contract are the existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of the contract, and resulting damages from the breach (*Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Alter Ego Liability

Defendants argue that the only defendant who was a party to the Purchase Agreement with Mirbabayeva is the sponsor-defendant Metrotech, and as Clipper is not a party to the Purchase Agreement, the first cause of action as against it should be dismissed. Plaintiffs admit that Clipper was not a party to the Purchase Agreement, but argue that Metrotech is merely a shell corporation acting as an alter ego of Clipper. Plaintiffs assert that it was Clipper that originally purchased the building for conversion, but because it was banned from developing

condominiums/cooperatives from 1998 until 2009, David Bistricer, an alleged principal of both entities, formed Metrotech as a nominal sponsor. [1]

"As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and, consequently, will not impose liability upon shareholders for the acts of the corporation" (*Billy v Consol. Machine Tool Corp.*, 51 NY2d 152, 163 [1980], citing *Port Chester Elec. Const. v Atlas*, 40 NY2d 652, 656 [1976]). However, in rare circumstances, a "[n]on-party to a contract may be held liable under the contract if the plaintiff is able to show that the non-party is the alter ego of a contracting party" (28 NY Prac. Contract Law § 18:6 [2015], citing *Donald Dean & Sons, Inc. v Xonitek Sys. Corp.*, 656 F Supp 2d 314 [ND NY 2009]). For one corporation to be considered an alter ego of another, there must be present such level of domination that the subservient entity acts as an instrumentality or is used to conceal the true identity of the principal (*cf. Castings v M. Fabrikant & Sons*, 216 AD2d 111, 112 [1st Dept 1995] [citation omitted] [principle enunciated although alter ego not found]; *see also Holme v Global Minerals and Metals Corp.*, 63 AD3d 417, 418 [1st Dept 2009] [denying motion to dismiss claim of alter ego liability against successor corporation based on theory of de facto merger]; *United Mizrahi Bank Ltd. v Sullivan*, 2000 WL 1678040 [SD NY 2000] [employing theory of "equitable ownership" as underlying alter ego liability]).

The allegations levied against Clipper for purposes of this motions to dismiss are sufficient to state a claim of alter ego liability.

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[1] While neither the original nor the amended complaint contains any allegations of alter ego liability against Clipper, the allegations in Mirbabayeva's affidavit may be considered in determining this motion, as the relevant test on a motion to dismiss for failure to state a cause of action is whether proponent of a pleading has a claim, and not whether he has stated one in the pleading (*see Leon*, 84 NY2d at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The Merger Doctrine

Next, defendants argue that under the merger doctrine in a real estate transaction, once a deed is delivered, the terms of the deed are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract unless the parties expressly agree to the contrary (*TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75 [1st Dept 2015]).

"[U]nless there was a clear intent evidenced by the parties that a particular provision of the contract of sale [would] survive the delivery of the deed," any claims arising from the contract of sale are extinguished by the doctrine of merger upon successful closing of title (*Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006] [internal quotation marks and citation omitted]; *see also Polsky v 145 Hudson St. Assoc., L.P.*, 139 AD3d 434, 435 [1st Dept 2016]; *Cerand v Burstein*, 72 AD3d 1262, 1264-65 [3d Dept 2010][conduct of parties demonstrated intent for contractual obligation to survive closing]). While defendant argues that it was only after the Purchase Agreement was executed that Mirbabayeva learned the elevator was not working, there is evidence that the parties were working on correcting the elevator issue before and after the deed was transferred, as evidenced by the parties' emails (Popik Aff., Ex G).

Furthermore, paragraph 17 of the Purchase Agreement provides, in relevant part, that "nothing herein shall relieve Sponsor of its obligations as set forth in the section of the Plan entitled 'Rights and Obligations of the Sponsor'" (paragraph 5 of the Plan), concluding with the statement that "[t]his paragraph shall survive the closing of title" (Popik Aff. Ex., F at 16). Thus, the merger doctrine does not preclude KMKK's claim (*Polsky*, 139 AD3d at 435).

Requisite Notification

Under the Plan at paragraph 5, the Sponsor is responsible to "correct or cause to be corrected latent defects (that is, defects which are not visually ascertainable) in the construction or design of the Building and the Units or in the installation or operation of any mechanical equipment therein but only if (a) such latent defects are due to improper workmanship . . . or a defect in design which renders the Building and the Units . . . or their systems or equipment unsafe or inoperable" (Pennisi Aff., Ex. C at 106). To the extent that defendants argue that they did not receive proper notice of the defect from a majority of the residential/professional members of the Condominium Board, the Plan only requires such notice as it pertains to common elements (*id.*).

Defendants argue that the elevator, which serviced only plaintiffs' apartment was, in fact, a "Common Element of the Building." The Court is not persuaded by this argument. To construe an elevator that opens directly into a penthouse apartment, for which only the apartment owner has the key, as a common element would blur the line between the common and private areas of the condominium. Both the architect's report and the Offering Plan reaffirm the private nature of the Elevator. Thus, the architect's report states, "There will be two private (Hyda Ride) residential elevators running from the 25th floor to the 26th floor servicing the associate residential units. These elevators are not public and will be purchased with the associated residential units" (Popik Aff., Ex. D at 10). The Plan defines "Common Elements" as "all areas of the Property *other than the Units and the equipment and installation contained in such areas*" (emphasis added) (Pennisi Aff., Ex. D at 15). Further, the Plan states: "For access to floors 26 and 27, there are two (2) private elevators, one of which will exclusively service each

of the two (2) duplex units on floors 26 and 27" (Popik Aff., Ex. C at 24). Accordingly, the Court determines that the lack of prior notification by a majority of the board does not preclude KMKK's claim .

HVAC Units

The Court dismisses so much of KMKK's sixth cause of action for breach of contract as alleges damage to the terrace lighting and furniture during facade renovation, since plaintiffs failed to support such claims in their opposition.

Regarding the HVAC units, defendants argue that plaintiffs fail to allege that any defect was set forth in the inspection report prior to the closing of title to the Unit as required under the Plan (Pennisi Aff., Ex. C). To the extent that the issue with the HVAC units was a latent defect, defendants argue that the problem with the units did not occur until eight months after the closing and there is no allegation that the problems with the HVAC units were a result of improper workmanship or a defect in their design.

In opposition, Mirbabayeva avers merely that she was led to believe that the HVAC units were to be brand new, but discovered that they were manufactured between 2006 and 2007. While nothing in the Plan, the Purchase Agreement or the Architect's Report indicates that the units were to be supplied in "new" condition, there is an issue of fact as to whether the HVAC units had sufficient service life remaining at the time of the sale to enable Sponsor to represent in good faith that the apartment came supplied with such equipment. Accordingly, the motion to dismiss the balance of the sixth cause of action for breach of contract concerning the HVAC units is denied.

Negligence - Second and Seventh Causes of Action

Plaintiff's second and seventh causes of action for negligence allege breach of the duty of due care regarding the elevators and lack of heat supply, respectively.

In order to sustain a negligence claim based on a duty of care, plaintiffs must allege: "(1) the defendant owed the plaintiff a cognizable duty of care, (2) the defendant failed to discharge that duty and (3) the plaintiff suffered damage as a proximate result of such failure" (*Donohue v Copiague Union Free School Dist.*, 64 AD2d 29, 32 [2d Dept 1978], *affd* 47 NY2d 440 [1979]).

"[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [internal citations omitted]). "Simply alleging a duty of due care does not transform a breach of contract action into a tort claim" (*Briar Contr. Corp. v City of New York*, 156 AD2d 628, 629 [2d Dept 1989]; *see also Bd. of Mgrs. of Lore Condominium v Gaetano*, 2012 NY Slip Op 32654[U] [Sup Ct, NY County Oct. 15, 2012]). Because plaintiffs fail to cite any duty of care owed by defendants to plaintiffs independent of the purchase agreement and offering plan, the motion to dismiss the second and seventh causes of action is granted and said causes of action are dismissed.

Rescission of Contract—Third Cause of Action

Plaintiffs allege that defendants intentionally misrepresented a material fact in regard to the nonfunctionality of the elevator and that plaintiffs reasonably relied on such

misrepresentation to their detriment (complaint, ¶¶ 56-57). Plaintiffs, therefore, seek rescission of the Agreement and an award of a money judgment in the amount of the fair market value of the Unit on or about February 2015, plus interest from April 2015, costs and attorneys' fees (complaint ¶ 58).

Defendants argue, and plaintiffs do not dispute, that the equitable remedy of rescission "is to be invoked only where there is lacking complete and adequate remedy at law and where the *status quo* may be substantially restored" (*Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 13 [1972]). Whether rescission is appropriate is a matter of court discretion (*id.*). Here, as contract damages may be available on plaintiffs' first cause of action for breach of contract, the rescission claim is dismissed.

Breach of Implied Covenant of Good Faith and Fair Dealing - Fourth Cause of Action

"For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]). Where a cause of action for breach of implied covenant of good faith and fair dealing . . . is duplicative of the facts and damages claim, the cause of action must be dismissed (*Engelhard Corp. v Research Corp.*, 268 AD2d 358, 358-59 [1st Dept 2000]). "A claim for breach of the implied covenant of good faith and fair dealing is duplicative of a breach of contract claim where it relies on the same facts and seeks identical damages" (*Baker v 40 E. 80 Apt. Corp.*, 2012 NY Slip Op 32634[U] [Sup Ct, NY County Oct. 10, 2012], citing *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]).

Plaintiffs argue that this claim is predicated upon defendants' promise to deliver a habitable unit without safety hazards, consistent with the terms of the Agreement. As the alleged breach of the implied covenant of good faith and fair dealing relies upon the same facts and damages as the breach of contract causes of action, it is dismissed as duplicative.

Breach of Implied Warranties - Fifth and Eight Causes of Action

Defendant argues that the fifth and eighth causes of action for breach of implied warranties have been abrogated under New York law. The Court agrees.

In *Caceci v Di Canio Constr. Corp.* (72 NY2d 52, 56 [1988]), the Court of Appeals held that a claim based on breach of implied warranties between a seller and purchaser of a house "could . . . arise at closing of title when the [seller] conveyed a house which suffered from latent material defects." Months after *Caceci* was decided, General Business Law article 36–B was enacted as "a legal reaction to *Caceci*" (*Fumarelli v Marsam Dev. Inc.*, 92 NY2d 298, 303, 305 [1998]). In *Fumarelli*, the Court of Appeals held that the statutory housing merchant implied warranty is a full substitute for the common law housing merchant implied warranty (*id.*). As a result, breach of implied warranty claims can be asserted only pursuant to General Business Law § 777-b. Plaintiffs therefore may not proceed with the common law breach of warranty claim (*see Bradley v 50 Orchard St. Assoc. LLC*, 2012 NY Slip Op 30948[U] [Sup Ct, NY County Apr. 9, 2012]; *Lorne v 50 Madison Ave., LLC*, 2008 NY Slip Op 33453[U] [Sup Ct, NY County Dec. 11, 2008], *revd on other grounds* 65 AD3d 879 [1st Dept 2009]). Accordingly, the cause of action for breach of implied warranties is dismissed.

Conclusion

Accordingly, it is

ORDERED that the motion of defendants Clipper Equity, LLC and Metrotech LLC 1 to dismiss the complaint pursuant to CPLR 3211 (a) (1), (3) and (7) is granted (i) to the extent of dismissing the complaint in its entirety as asserted by individual plaintiff Kristina Mirbabayeva, and, (ii) as to the claims pled by plaintiff KM & KK Family Trust, to the extent of dismissing (a) the second through fifth causes of action, (b) so much of the sixth cause of action as seeks damages for the terrace lighting and furniture, and (c) the seventh and eighth causes of action of the complaint, and the motion is otherwise denied; and it is further

ORDERED that the Clerk of Court shall sever and dismiss the complaint as asserted by individual plaintiff Kristina Mirbabayeva, and the remainder of the action shall continue as provided above; and it is further

ORDERED that the caption of the action shall be amended accordingly; and it is further

ORDERED that movants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 311, 71 Thomas Street, on February 22, 2017, at 2:00 p.m.

This constitutes the Decision and Order of the Court.

Dated: January 6, 2017

ENTER:

Ellen M. Coin, A.J.S.C.