

**Accolade Condominium Homeowners Assoc. v SI
Pearl Partners LLC**

2019 NY Slip Op 30985(U)

April 8, 2019

Supreme Court, New York County

Docket Number: 150683/2018

Judge: William Franc Perry

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 150683/2018

THE ACCOLADE CONDOMINIUM HOMEOWNERS ASSOCIATION, MICHELE NICOLETTA, CHRISTOPHER CAMPBELL, and SANDRA CRUZ, individually and derivatively on behalf of THE ACCOLADE CONDOMINIUM and THE BOARD OF MANAGES OF THE ACCOLADE CONDOMINIUM,

MOTION DATE 2/14/19

MOTION SEQ. NO. 002

Plaintiffs,

- v -

DECISION AND ORDER

SI PEARL PARTNERS LLC, JEFFREY KAPLAN, ADAM MCMASTER, JOHN OZTURK, and PETER ANDRESEN,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISS

In motion sequence 002, defendants Jeffrey Kaplan, Adam McMaster, John Ozturk, and Peter Andresen (collectively, the "Non-Sponsor Defendants") move, pursuant to CPLR 3211(a)(1), (3), (5), and (7), to dismiss all claims asserted against them in the amended complaint (the "Amended Complaint") by plaintiffs the Accolade Condominium Homeowners Association (the "Association"), Michele Nicoletta, Christopher Campbell, and Sandra Cruz, individually and derivatively on behalf of the Accolade Condominium, and the Board of Managers of the Accolade Condominium (collectively, "Plaintiffs"), based on lack of standing, documentary evidence, lack of capacity to sue, and failure to state a cause of action. The Amended Complaint asserts nine causes of action against the Non-Sponsor Defendants for: (1) breach by defendant SI Pearl Partners, LLC (the "Sponsor") (together with the Non-Sponsor Defendants, "Defendants"), of certain purchase agreements and an offering plan; (2) breach of the Common Law Implied Housing Merchant Warranty; (3) fraud and negligent misrepresentation; (4) violation of General

Business Law § 349(a); (5) negligence; (6) negligent supervision; (7) breach of the purchase agreements; (8) breach of fiduciary duty; and (9) permanent injunction.

BACKGROUND

Plaintiffs Michele Nicoletta, Christopher Campbell, and Sandra Cruz (the “Unit Owners”) are owners of condominium units in the building located at 90 Bay Street Landing, Staten Island, New York 10301 (the “Building”), known as the Accolade Condominium (the “Condominium”), and allege that they represent the Accolade Condominium Homeowners Association (the “Association”) thereof. The Unit Owners are also members of the Board of Managers of the Accolade Condominium (the “Board”). This action is asserted against the Sponsor and Non-Sponsor Defendants, as Board members, for damages allegedly sustained by Plaintiffs, individually and derivatively, as a result of the failure (1) of the Sponsor to construct the Building and perform certain “Hurricane Sandy Repairs” in accordance with the promises and representations appearing in the purchase agreements and offering plan (the “Offering Plan”), the zoning resolutions, building codes, and other applicable laws, and (2) of the Non-Sponsor Defendants, who were designated as members of the Board by the Sponsor, to make repairs, conduct regular Board meetings, properly manage the Condominium, and otherwise carry out their duty as Board members to act in the best interests of the Condominium, not the Sponsor.

Plaintiffs contend that the failure of the Defendants to construct and repair the Building, which was the sole responsibility of the Sponsor, in accordance with the Offering Plan, including the Sponsor’s failure to use adequate materials and to personally finance its obligations under the agreements, has resulted in numerous construction defects, the cost of which to remedy is estimated to exceed \$1 million (Amended Complaint, ¶¶ 68-69). Further, Plaintiffs argue that the Sponsor-controlled Board has both failed to take the necessary action to remediate the situation,

such as scheduling Board meetings, and affirmatively acted to benefit the Sponsor at the expense of the Condominium and Unit Owners, through, *inter alia*, execution and use of purportedly invalid “Proxy Vote Authorizations” (Complaint, ¶ 82).

In the Offering Plan, the Sponsor undertook certain obligations regarding construction and repair of the Building. Principally, the Sponsor was required to:

[p]erform such work and supply such material, or will cause the same to be performed and supplied, as is necessary in order to complete the construction of the Building with a quality of construction comparable to the currently prevailing local standards and substantially in accordance with the Plans and Specifications for the work filed with the Department of Buildings of the City of New York and other appropriate governmental authorities

(Complaint, ¶ 31). In the event of construction defects, the Sponsor was to:

correct, repair or replace all defects in the construction of the Building and its appurtenances and the Units offered hereby, or in the installation or operation of any appliances, fixtures or equipment in the same, or will cause the same to be corrected, repaired, or replaced, but only if such defects are due to improper workmanship or material substantially at variance with the Plans and Specifications

(Complaint, ¶ 32). Further, the Sponsor agreed that “[a]ll costs and expenses in connection with the Sponsor’s construction of the Building and its appurtenances (including all sums properly due... for work performed and fixtures, material and equipment supplied or installed)” would be “paid by the Sponsor” (Complaint, ¶¶ 34-36).

Pursuant to the Offering Plan and the Condominium by-laws (the “By-Laws”), the Sponsor would retain the ability to appoint a controlling majority of four members of the seven-member Board until *the later of* (1) the fifth anniversary of the first closing, which occurred on January 23, 2015, or (2) the closing of title to 85% of the residential units, meaning it was possible for the Sponsor to retain control of the Board even after it sold every unit it owned. However, the By-Laws still provide that the Board has a fiduciary duty to act on behalf of the Unit Owners, providing that “[i]n exercising its powers and performing its duties under the

Declaration and these By-Laws, the Board shall act as, and shall be the agent of the Unit Owners, subject to and in accordance with the provisions of the Declaration and these By-Laws.”

(Complaint, ¶ 39; *see also*, Reply Affirmation, NYSCEF Doc. No. 49, ¶ 22 [“the argument here – which is not that the Non-Sponsor Defendants owed no fiduciary duty, but that Plaintiffs have failed to state a claim of a breach of fiduciary duty”]).

Plaintiffs state that construction defects in the Building were discovered when the Unit Owners gained possession of their units, and that they gave written notices to the Sponsor detailing these defects. Plaintiffs allege that the Sponsor acknowledged receipt of these notices (Complaint, ¶¶ 62-63). Thereafter, the Unit Owners retained Howard L. Zimmerman Architects, P.C. (the “Architect”), to conduct an investigation and report on the Building’s defects. On October 11, 2017, the Architect issues a report (the “Report”), which identified a number of violations of the various agreements and applicable codes and regulations (Complaint, ¶ 69). On October 24, 2017, the Unit Owners and Association, through their attorneys, gave the Sponsor notice of the defects identified by the Architect and a copy of the Report. Nonetheless, Plaintiffs allege the defects have not been adequately repaired, and that, to the extent the Sponsor has attempted to repair certain defects, it improperly directed the Non-Sponsor Defendants, as Board members, to expend Condominium funds, rather than using Sponsor funds as required by the Offering Plan.

Unable to obtain redress from the Board, Plaintiffs commenced this action. On August 23, 2018, Plaintiffs filed the Amended Complaint which contains nine causes of action against the Non-Sponsor Defendants. The causes of action alleged in the Amended Complaint include:

- (1). Breach of contract (purchase agreements and Offering Plan) against the Sponsor and Non-Sponsor Defendants for failing to construct the Condominium as promised;

- (2). Breach of the Common Law Implied Housing Merchant Warranty against the Sponsor and Non-Sponsor Defendants for failing to construct the Condominium in a skillful manner and free of material defects;
- (3). Fraud and negligent misrepresentation against the Sponsor and Non-Sponsor Defendants for representations in the Offering Plan regarding building codes, zoning, and Hurricane Sandy Repairs;
- (4). Violation of General Business Law § 349(a) against the Sponsor and Non-Sponsor Defendants for engaging in deceptive business practices;
- (5). Negligence against the Sponsor and Non-Sponsor Defendants for failing to exercise the requisite care in the design and oversight of construction;
- (6) Negligent supervision of construction against the Sponsor and Non-Sponsor Defendants;
- (7). Breach of contract (the purchase agreements) against the Sponsor and Non-Sponsor Defendants for using Condominium funds to finance the Sponsor's obligations to purchase equipment and repair construction defects;
- (8). Breach of fiduciary duty against the Non-Sponsor Defendants for failing to act in the best interest of the Condominium and to refrain from self-dealing; and
- (9). Permanent injunction against the Non-Sponsor Defendants directing them to carry out their duties as Board members in a fair and impartial manner without favor to the interests of the Sponsor and in the best interests of the Condominium.

DISCUSSION

On a motion to dismiss under CPLR 3211(a), the complaint is to be liberally construed (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d,144, 151-152 [2002]). The court must “accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Moreover, the plaintiffs are to be accorded the benefit of “every possible favorable inference” (*The 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 2012 N.Y. Slip Op. 31302[U] [Sup Ct New York Cnty 2012], *affd as mod sub nom.*, *Pine St. Homeowners Ass’n v 20 Pine St. LLC*, 2013 N.Y. Slip Op. 05962 [1st Dept.2013], quoting *511 W. 232nd Owners Corp.*, 98 NY2d at 152), although “bare legal conclusions” are not entitled to any such presumption or inference (*Delran v Prada USA Corp.*, 23 AD3d 308, 308 [1st Dept 2005] [citations omitted]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, “the documents relied upon must definitively dispose of plaintiff’s claim” (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and “conclusively establishes a defense to the asserted claims as a matter of law” (*Weil, Gotshal & Manges, LLP, v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted]).

A motion to dismiss, pursuant to CPLR 3211 (a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. “The issue of legal capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal as timely raised as a defense” (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [internal citation omitted]). The doctrine of legal capacity “concerns a litigant’s power to appear and bring its grievance before the court” (*Security Pac. Natl. Bank*, 31 AD3d at 279).

Concerning a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2010] [citation omitted]). The “question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts ‘can be fairly gathered from all the averments’” (*Foley v D’Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). A “plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face” (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]).

I. Futility Of Demand On Board To Initiate Suit.

Business Corporation Law § 626(c) requires that a shareholder bringing a derivative action seeking to vindicate the rights of the corporation allege, with particularity, either that an attempt was first made to get the board of directors to initiate such an action or that any such effort would be futile. This rule applies with equal force to unit owners in a condominium seeking to bring derivative claims on behalf of a condominium board (*Milford Mgt. Corp. v Dellaportas*, 2017 N.Y. Misc. LEXIS 1680, *9-*10 [Sup Ct NY Cnty 2017]). The demand requirement rests on “basic principles of corporate control that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in

the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts” (*Bansbach v Zinn*, 1 NY3d 1, 8-9 [2003], quoting *Barr v Wackman*, 36 NY2d 371, 378 [1975]). Accordingly, the demand requirement is excused only when the complaint’s specific allegations support the conclusion that “(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction” (*Wandel ex rel. Bed Bath & Beyond, Inc. v Eisenberg*, 60 AD3d 77, 80 [1st Dept 2009], quoting *Marx v Akers*, 88 NY2d 189, 198 [1996]).

This court finds that a demand under the present circumstances would have been futile. Plaintiffs allege that each of the Non-Sponsor Defendants is an officer, director, employee or otherwise affiliated with the Sponsor and/or a parent, subsidiary, principal or affiliate of the Sponsor, which appointed the Non-Sponsor Defendants as Board members of the Condominium. Moreover, at least one of the Non-Sponsor Defendants is alleged to be a principal of the Sponsor (*see Bansbach v Zinn*, 1 NY3d 1, 11 [2003] [holding “[t]he demand on the board was excused, where the majority of board members are not simply appointees of the sponsor, but principals of the sponsor and the corporate defendants”]). In addition, Plaintiffs could not reasonably expect the Board comprised of a majority of the Non-Sponsor Defendants to agree to act to commence litigation challenging improper conduct by the Board, such as failing to timely remedy construction defects, executing unauthorized voting proxies, and authorizing the use of Condominium funds to satisfy the Sponsor’s financial obligations under the Offering Plan, when it was the Non-Sponsor Defendants, as Board members, who authorized certain of the allegedly improper conduct (*see Milford Mgt. Corp. v Dellaportas*, 2017 N.Y. Slip Op. 30901[U], 10 [N.Y. Sup Ct, New York County 2017] [holding a demand would obviously have been futile, as

the ‘Retain-Milford’ plaintiffs could not expect a Board comprised of a majority of ‘Remove-Milford’ Board members, to agree to act to remove defendant from his office, when it was the ‘Remove-Milford’ Board members who voted to make defendant President of the Board after plaintiffs had objected to his presidency”]). Thus, Plaintiffs may maintain this shareholders derivative action despite their failure to make a demand on the Board prior to commencement.

II. Breach Of Contract.

The portion of Non-Sponsor Defendants’ motion seeking to dismiss the first and seventh causes of action for breach of the purchase agreements and Offering Plan is granted.

To state a claim for breach of contract in New York, one “must allege (1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages” (*Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004]). “To establish the existence of an enforceable agreement, a Plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound.” (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]).

Here, Plaintiffs’ breach of contract claims, which seek redress for the Sponsor’s alleged failure to perform its obligations under the purchasing agreements and Offering Plan, provide no legal basis to hold the Non-Sponsor Defendants individually liable to the Condominium for the Sponsor’s breaches (Amended Complaint, ¶¶ 109, 158). It is undisputed that the Non-Sponsor Defendants are not parties to purchase agreements or the Offering Plan that form the basis of Plaintiffs’ breach of contract claims. Alleged improper conduct by the Board does not alter the fact that the individual Board members themselves have no obligations under those agreements (*see* Pls. MOL, p.19, ¶ 2). Rather than salvage Plaintiffs’ claims, Plaintiffs’ decision to abandon its alter ego and corporate

veil theories has left Plaintiffs with little plausible explanation as to why this court should hold the Non-Sponsor Defendants, as principles or Board members, individually liable for the Sponsor's breach of the agreements, regardless of whether the breach of contract claims plead direct liability to the Unit Owners or derivative liability to the Condominium.

Plaintiffs' redress, if any, is against the contracting party, the Sponsor.

III. Breach Of The Common Law Implied Housing Merchant Warranty.

The portion of Non-Sponsor Defendants' motion seeking to dismiss the second cause of action for breach of the Common Law Implied Housing Merchant Warranty is granted.

The Non-Sponsor Defendants correctly argue that the housing merchant implied warranty, found in General Business Law ("GBL") article 36-B, fully eclipses the antecedent common law housing merchant implied warranty recognized in *Caceci v Di Canio Constr. Corp.*, 72 NY2d 52, 56 (1988) (*Fumarelli v Marsam Dev., Inc.*, 92 NY2d 298, 301 [1998]). Accordingly, the second cause of action for breach of the common law implied housing merchant warranty "must be dismissed as there is no cognizable cause of action recognized under that theory" (*Bd. of Managers of Park Slope Views Condominium v Park Slope Views, LLC*, 39 Misc 3d 1221(A) [Sup Ct Kings Cnty 2013]). To the extent Plaintiffs intended to plead a claim for violation of GBL article 36-B, the Sponsor's inclusion of a waiver of the protection in the Offering Plan (in accordance with GBL § 777-b) precludes that claim (*see 20 Pine Homeowners Assn. v 20 Pine St. LLC*, 109 A.D.3d 733, 733 [1st Dept 2013] ["a seller [can] exclude express and implied warranties by specific language in the offering plan."]). The purchase agreements, signed by the Unit Owners, similarly provide and disclose that "the Housing Merchant Implied Warranty Law (General Business Law Article 36-B) is not applicable to this offering", and that the Sponsor "is not making any express or implied

warranties of fitness for a particular purpose, merchantability, or habitability” (Purchasing Agreement, NYSCEF Doc. No. 43, ¶ 18).

IV. Fraud And Negligent Misrepresentation.

The portion of Non-Sponsor Defendants’ motion seeking to dismiss the third cause of action in the Amended Complaint for fraud and negligent misrepresentation is granted.

“The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). “[E]ach of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires... that ‘the circumstances constituting the wrong shall be stated in detail.’” (*Megarix Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209, 209-10 [1st Dept 1991]).

The Non-Sponsor Defendants argue that a claim that they misrepresented the Sponsor’s intention to construct the Building in accordance with the applicable building codes, zoning resolutions, and construction plans is properly brought as a breach of contract claim against the Sponsor, and not as a cause of action for fraud. All of the representations which are the basis for Plaintiffs’ claims, that the Condominium would be built in accordance with the provided plans, that the Sponsor would repair any construction defects, and the quality of certain construction and repairs, were terms of the purchase agreements, Offering Plan, and construction guarantees, as alleged in the Amended Complaint (Amended Complaint, ¶¶ 27-36, 56-60). “Although an agent for a disclosed principal may be held liable to a third party where the agent has committed fraud . . . a cause of action to recover damages for fraud will not arise when the only

fraud charged relates to a breach of contract” (*Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2d Dept 2009], quoting *Mastropieri v Solmar Const. Co., Inc.*, 159 AD2d 698, 700 [2d Dept 1990]). To survive a motion to dismiss, the alleged misrepresentation must be collateral to the contract, involve a duty separate from or in addition to that imposed by the contract (*The Hawthorne Group, LLC v. RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], citing *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]; see also *Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015] [to sustain fraudulent inducement cause of action, there must be a breach of a duty separate from or in addition to the contract duty]), and cause damages that are not recoverable in an action for breach of contract (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 32 Misc 3d 758, 774 [Sup Ct New York Cnty 2011], on reconsideration, 33 Misc 3d 1208(A), 939 N.Y.S.2d 742 [Sup Ct New York Cnty 2011], rev’d on other grounds, 102 A.D.3d 488 [1st Dept 2013]). Here, the damages sought are the same as those sought against the contracting party, the Sponsor.

In addition, the Amended Complaint fails to state allegations comprising fraud by the Non-Sponsor Defendants with the required specificity (see generally *Megaris Furs v. Gimbel Bros.*, 172 A.D.2d 209, 210 [1st Dept 1991]). The Non-Sponsor Defendants are not alleged to have made any direct communications to Plaintiffs. The Amended Complaint contains only vague allegations that the Non-Sponsor Defendants are somehow derivatively liable to Plaintiffs for the Sponsor’s fraud, and the failure of the Non-Sponsor Defendants, as Board members, to take action against the Sponsor (Amended Complaint, ¶ 131; see also *Gramazio v Borda, Wallace & Witty*, 181 A.D.2d 428, 429 [1st Dept 1992] [“mere allegations in conclusory form, that the moving

defendants participated in or assisted in the commission of a fraud are insufficient to state a cause of action.”)].

V. Violation of General Business Law § 349(a).

The branch of Non-Sponsor Defendants’ motion seeking to dismiss the fourth cause of action against the Non-Sponsor Defendants for deceptive acts and business practices in violation of GBL § 349 is granted.

The fourth cause of action must be dismissed “since it stems from a private contractual dispute between the parties without ramification for the public at large” (*The 20 Pine St. Homeowners Assn.*, 2012 WL 1965623, quoting *Merin v. Precinct Devs. LLC*, 74 AD3d 688, 689 [1st Dept 2010] [citations omitted]). In addition, none of the false, deceptive and misleading statements alleged in the Amended Complaint are directly attributed to the Non-Sponsor Defendants. Regardless, “[t]o the extent the offering can be construed as directed at the public [at large], the section 349 claim is preempted by the Martin Act” which would mean that only the Attorney General would have standing to bring this claim (*id.* [citation omitted]).

VI. Negligence.

The branch of Non-Sponsor Defendants’ motion seeking to dismiss the fifth and sixth causes of action against the Non-Sponsor Defendants for negligence and negligent supervision of construction is granted.

To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (*see Katehis v Sovereign Assoc., Inc.*, 44 Misc 3d 1220(A) [Sup Ct NY Cnty 2014], citing *Elmaliach v.*

Bank of China Ltd., 110 AD3d 192 [1st Dept 2013]). Here, Plaintiffs' conclusory allegation that the Non-Sponsor Defendants are somehow "derivatively" liable for their failure to act to hold the Sponsor accountable for construction defects that may constitute a breach of the agreements between the Unit Owners and the Sponsor seemingly confuses the concept of derivative liability, whereby an individual with an interest in an entity can, under certain circumstances, commence litigation on behalf of the entity, and vicarious liability, whereby one individual may be liable for the acts of another. It is uncontested that the Sponsor, not the Condominium, or the Board, had the duty to supervise construction and to construct and repair the Building in accordance with the purchase agreements and the Offering Plan. While the Board could have taken different action against the Sponsor in an attempt to force the Sponsor to repair certain defects, to the extent they exist, the Non-Sponsor Defendants had no duty to construct the Building free of defects, which failure is alleged to have caused Plaintiffs' damages.

Regardless, as the alleged damages are the direct result of the Sponsor's purported breach of the agreements between the Unit Owners and the Sponsor, Plaintiffs' remedy lies in breach of contract, not negligence (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987] [where a complaint alleges that work required by a contract was performed negligently, it states a cause of action to recover damages for breach of contract, not negligence]; *see also Wildenstein v 5H&Co.*, 97 AD3d 488, 491-92 [1st Dept 2012]; *The 20 Pine St. Homeowners Assn.*, 2012 NY Slip Op 31302[U]). The allegations that support Plaintiffs' causes of action for negligence are also impermissibly duplicative of the allegations that form the basis of their breach of contract claims.

VII. Breach Of Fiduciary Duty.

The branch of Non-Sponsor Defendants' motion seeking to dismiss the eighth and ninth causes of action against the Non-Sponsor Defendants for breach of fiduciary duty and permanent injunction is granted.

[T]he Court of Appeals decided that the appropriate standard for judicial review of decisions of boards of managers of residential condominiums ... is 'analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors'” (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 110 [1st Dept 2006], citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]). To bring “an action against the individual members of a ... condominium board ... plaintiffs [are] required to plead with specificity independent tortious acts by each individual defendant in order to overcome ... the business judgment rule” (*Pelton*, 38 AD3d at 10). The business judgment rule prohibits judicial inquiry into actions taken in furtherance of corporate purposes by directors made in the exercise of honest judgment (*see Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459 [1st Dept 2010]).

(*The 20 Pine Street Homeowners Assn.*, 2012 WL 1965623).

Here, Plaintiffs fail to plead any specific independent acts by individual Board members that can sustain a cause of action against them for breach of their fiduciary duty to the Condominium (*see supra*, Part IV). In light of the court's determination that the Amended Complaint fails to state a cause of action for breach of fiduciary duty, Plaintiffs' ninth cause of action seeking a permanent injunction directing the Non-Sponsor Defendants to cease acting in contravention of their fiduciary duty to the Condominium and to otherwise perform their obligations as Board members without consideration of the interests of the Sponsor must be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants Jeffrey Kaplan, Adam McMaster, John Ozturk, and Peter Andresen motion is granted in its entirety and the Amended Complaint is dismissed as against these defendants, and the clerk is directed to enter judgment accordingly, without costs and disbursements; and it is further

ORDERED that the action is severed and continued against SI Pearl Partners, LLC, and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the action shall bear the following caption:

THE ACCOLADE CONDOMINIUM HOMEOWNERS
ASSOCIATION, MICHELE NICOLETTA, CHRISTOPHER
CAMPBELL, and SANDRA CRUZ, individually and
derivatively on behalf of THE ACCOLADE CONDOMINIUM
and THE BOARD OF MANAGES OF THE ACCOLADE
CONDOMINIUM.,

Plaintiffs,

-against-

SI PEARL PARTNERS LLC,

Defendant.

And it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address ww.nycourts.gov/supctmanh); and it is further

ORDERED that all remaining parties are directed to appear for a Preliminary Conference at 9:30 a.m. on May 28, 2019 at Part 23, in Room 307, in the Courthouse located at 80 Centre Street, New York, New York.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

4/8/19
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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