

<b>Board of Mgrs. of the 390 Lorimer St. Condominium v Lorimer 390 LLC</b>
2019 NY Slip Op 31419(U)
May 7, 2019
Supreme Court, Kings County
Docket Number: 503232/15
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 11

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BOARD OF MANAGERS OF THE 390  
LORIMER STREET CONDOMINIUM,

Plaintiffs, Decision and order

- against -

Index No. 503232/15

ms # 13

LORIMER 390 LLC, READ PROPERTY GROUP  
LLC d/b/a READ PROPERTY GROUP, ROBERT  
WOLF, AARON KLEIN, JOSH OSTREICHER,  
CHRISTOPHER DIERIG, R.A., S3  
ARCHITECTURE LLC, TSF ENGINEERING, P.C.,  
NEW INNOVATIVE WINDOW & DOOR SYSTEMS CORP.,  
DJM PROPERTIES, INC. d/b/a APTSANDLOFTS.COM  
and DAVID MAUND INC., d/b/a APTS AND LOFTS.COM

Defendants, May 7, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant Innovative Window and Door Systems LLC [hereinafter 'Innovative'] has moved seeking to reargue a decision and order dated January 9, 2019 which denied Innovative's motion seeking to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded previously, this lawsuit concerns the sale of condominium units at a newly constructed condominium building located at 390 Lorimer Street in Kings County. Specifically, the plaintiff, on behalf of numerous unit owners initiated the current action on the grounds the units were essentially

defective. The complaint alleges the construction was done in a defective manner, promises made by the product sponsor were never included within the units and the construction did not comply with fire-rated construction requirements among other deficiencies. The defendant Innovative Window and Door Systems LLC moved seeking to dismiss the complaint on the grounds that a settlement was reached between them and the sponsor in another lawsuit foreclosing any further litigation. The court denied the motion and held there were questions whether the plaintiff was a third party beneficiary of the contract between Innovative and the contractor. Innovative has now moved seeking to reargue that determination arguing that the issue of the settlement was never decided and that in any event the plaintiff, as a matter of law, is not a third party beneficiary of that contract.

#### Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

Concerning the conclusion reached the plaintiff might be a third party beneficiary Innovative now argues there are factual

differences in this case which must govern the conclusion that no such third party beneficiary status was intended. However, the court acknowledged that in the prior order and specifically noted that to the extent there are factual issues concerning the precise terms of the contract "the better course of action on a motion to dismiss is to permit the pleading to go forward and allow discovery to narrow and sharpen the issues" (see, Order dated January 9, 2019). Innovative has not raised any other issue in this regard and consequently the motion seeking reargument on this ground is denied.

Turning to the stipulation entered into between Innovative and the sponsor releasing Innovative from any claims, Innovative asserts that "at the time of the Stipulation, Plaintiff and the Sponsor were the same party" (Memorandum of Law in Support, page 9). However, Innovative has not presented any evidence of that assertion. Indeed, the plaintiff has sued the sponsor Lorimer 390 LLC making the assertion it is "undisputed" they were the same party difficult. Thus, that prong of the motion to reargue is denied without prejudice.

The motion seeking reargument dismissing the negligence claim is granted. It is well settled that in construction cases any claim accrues when the work is completed (Cabrini Medical Center v. Desina, 64 NY2d 1059, 489 NYS2d 872 [1985]). Thus,

any claim of negligence in this case is really a claim for breach of contract (see, Calamel v. Ridge View Realty Corp., 115 AD2d 279, 496 NYS2d 154 [4<sup>th</sup> Dept., 1985]). Therefore, upon reargument the motion to dismiss the negligence claim is granted.

So ordered.

ENTER:



DATED: May 7, 2019  
Brooklyn N.Y.

Hon. Leon Ruchelsman  
JSC

KINGS COUNTY CLERK  
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