

**Carmen E. Maestro Family Trust v 449 Washington
LLC**

2020 NY Slip Op 32054(U)

June 22, 2020

Supreme Court, Kings County

Docket Number: 520552/2016

Judge: Larry D. Martin

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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of June, 2020

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

-----X
CARMEN E. MAESTRO FAMILY TRUST,

Plaintiff,

- against -

Index No. 520552/2016

449 WASHINGTON LLC, THE CORCORAN GROUP, M. MONICA NOVO, LAW OFFICE OF SCOTT SCHWEBER, P.C.,

Defendants.

-----X
The following efiled papers read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>213-215, 227, 229, 261-264, 285-288</u>
Opposing Affidavits (Affirmations)	<u>262-264, 286-288, 321, 329</u>
Reply Affidavits (Affirmations)	<u>330, 333</u>

Upon the foregoing papers, defendant 449 Washington LLC (449 LLC), moves (Motion Sequence [MS] # 13) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the first, second, third, eighth, ninth, tenth and eleventh causes of action set forth in the complaint of plaintiff Carmen E. Maestro Family Trust. Defendants The Corcoran Group (Corcoran) and M. Monica Novo (Novo) move (MS # 14) for summary judgment dismissing the complaint as against them. Plaintiff cross-moves (MS

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15) for an order granting summary judgment against 449 LLC, dismissing the affirmative defenses of 449 LLC and awarding statutory interest. Plaintiff separately cross-moves (MS # 16) for an order granting summary judgment against Corcoran and Novo, dismissing the affirmative defenses of Corcoran and Novo and awarding statutory interest.

Plaintiff commenced this action to recover damages relating to the purchase and sale of a condominium unit. Plaintiff alleges that it engaged Corcoran as a real estate broker to show apartments with two bedrooms, two bathrooms and open light and views in the Tribeca neighborhood of Manhattan. Corcoran was previously retained by 449 LLC as the listing agent to market the condominium units in 449 LLC's building at 449 Washington Street in Manhattan. Novo, an agent employed by Corcoran, showed plaintiff an apartment in the subject building designated as Unit 3A. Plaintiff alleges that 449 LLC and Corcoran/Novo falsely marketed the unit as a two-bedroom and two-bathroom apartment with three exposures, when in fact the subject unit was only a legal one-bedroom apartment with two exposures. Plaintiff claims that defendants failed to disclose that the southern wall of the subject unit, which featured five windows, was actually on a "lot line," and therefore any construction along this lot line taller than the third floor of the subject building would require the sealing of the windows in the southern wall of the unit and the consequential loss of light and air.

Plaintiff alleges that it relied on the misrepresentations of 449 LLC, Corcoran and Novo as to the number of legal bedrooms in closing on the unit and that if it was made aware of the fact that the unit was only a legal one-bedroom and contained lot line windows

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which may require sealing, it would have exercised the contractual right of rescission and recovered its down payment. Plaintiff alleges that it suffered damages in that it could only sell the unit as a legal one-bedroom apartment (due to the loss of the lot line window of the second “bedroom”) at a price substantially lower than the sum plaintiff paid for the unit. Plaintiff further contends that the unit was negligently constructed and sustained damages from leaks.

In the complaint, plaintiff sets forth causes of action for breach of contract against 449 LLC in misrepresenting the number of legal bedrooms in the unit and the presence of lot line windows (first), breach of contract against 449 LLC for failing to offer a contractually guaranteed right of rescission (second), fraudulent inducement against 449 LLC and Corcoran/Novo (third), negligent misrepresentation against Corcoran/Novo (fourth), breach of fiduciary duty against Corcoran/Novo (fifth), negligent construction against 449 LLC (eighth), breach of implied housing merchant warranty against 449 LLC (ninth), violation of the Deceptive Practices Act (General Business Law [GBL] §§ 349 and 350 against 449 LLC and Corcoran/Novo (tenth) and civil conspiracy against 449 LLC and Corcoran/Novo (eleventh).¹

The Offering Plan issued by 449 LLC and incorporated into every Purchase Agreement contained the following provision:

¹This cause of action was also asserted against plaintiff’s attorney for the transaction, defendant Law Office of Scott Schweber, P.C. (Schweber), which is presently released from this action as the result of a settlement.

19. Lot Line Windows

All windows along the South facade, at the third, fourth, fifth, sixth and seventh floors, are 'Lot Line' windows since they are installed in a wall that runs directly adjacent to the side property line. Per building code, Lot Line Windows cannot serve as required windows for light & ventilation and are provided in this instance as an amenity only. These Lot Line Windows must be sealed if the adjacent property owner decides to enlarge its building vertically to block such openings in the future. The cost of closing off these window openings is the expense of the individual condominium unit owner.

In the schematic floor plan of the subject unit contained in the Offering Plan, five windows are depicted along the southern wall. Two of the windows, one in the dining area and one in the kitchen, are labeled "Lot Line Window- Typical." The other windows depicted along the southern wall in the schematic floor plan have no such labels; however, it is clear that these windows are located along the same plane as those labeled as lot line windows. Further, the schematic floor plan identifies one room as a master bedroom and the other room (which includes a lot line window) as a "library." The floor plan for the subject unit depicted in 449 LLC's marketing brochure also identifies one room as a master bedroom and the room abutting the southern wall as a "library." None of the windows along the southern wall are labeled or identified as lot line windows in the brochure floor plan. However, the brochure floor plan also includes the following disclaimer language, printed at the bottom of the page:

The complete offering terms are in an offering plan available from the Sponsor, File No. CD 13 0039 449 Washington LLC. The artist representations and interior decorations, finishes, appliances and furnishings are provided for illustrative

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purposes only. Sponsor makes no representations or warranties except as may be set forth in the Offering Plan. Sponsor reserves the right to substitute materials, appliances, equipment, fixtures and other construction and design details specified herein with similar materials, appliances, equipment and/or fixtures substantially equal or better quality. All dimensions are approximate and subject to normal construction variances and tolerances. Square footage exceeds the usable floor area. Sponsor reserves the right to make changes in accordance with the terms of the Offering Plan. Plans and dimensions may contain minor variations from floor to floor.

Further, Paragraph 12 of the Purchase Agreement provides:

12. No Representation. Except as herein or in the Plan specifically set forth, Purchaser acknowledges that he has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties or statements of any nature, whether made by Seller, Seller's Counsel or Selling Agent or otherwise, including, but not limited to, any relating to the description or physical condition of the Building or the Unit, the size or the dimensions of the Unit or the rooms therein contained or any other physical characteristics thereof, the building services, the estimated Common Charges and expenses allocable to the Unit or the right to any income tax deduction on account of any real estate taxes and/or mortgage interest paid by Purchaser. Purchaser agrees that Seller shall have no liability or responsibility to Purchaser if the layout or dimensions of the Unit or any part thereof or of the Common Elements as shown on the floor plans or on the architectural plans, mechanical plans, plumbing plans, structural plans and specifications for the Building is not accurate or correct, provided such layout or dimensions conform substantially to the floor plans and the architectural plans, mechanical plans, plumbing plans, structural plans and specifications for the Building and the site as modified or supplemented in accordance with the Plan and that Purchaser will not be relieved from its obligations hereunder by reason of any minor inaccuracy or error.

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On August 20, 2018, plaintiff's trustee, Kathryn Bigelow, appeared for an examination before trial (EBT). Bigelow testified that in early 2014, she hired Novo, who was referred by a friend, to help her find a two-bedroom, two-bathroom apartment in Tribeca (NYSCEF Doc No. 221 ["Bigelow EBT"], pp. 16-17). Novo thereafter introduced her to the subject property, which she viewed from the outside (Bigelow EBT, p. 21). Bigelow testified that while considering the purchase she spoke to Novo about a two-story garage located to the south of the building and if anything would happen with the structure. Bigelow testified that Novo assured her that most likely nothing would happen thereto (Bigelow EBT, pp. 22-24). Bigelow asked Novo to check if there was anything in the public records with regard to the garage, but Novo never responded on the issue and Bigelow did not pursue the matter further (Bigelow EBT, p. 26). Bigelow decided that plaintiff would purchase Unit 3A and retained Schweber to represent plaintiff in the transaction (Bigelow EBT, p. 27). Plaintiff's offer to purchase the unit was accepted in April of 2014 (Bigelow EBT, p. 30). At that time, Bigelow was concerned by the fact that the garage had been demolished and that scaffolding was erected and expressed her concern about the adjoining property to Schweber on the day she signed the Purchase Agreement (Bigelow EBT, p. 32). Bigelow stated she never personally read the Offering Plan for the condominium (Bigelow EBT, p. 45), nor did she read the Purchase Agreement before she signed it on May 14, 2014 (Bigelow EBT, pp. 47-48). On February 3, 2015, Bigelow agreed that Schweber should proceed with the closing on plaintiff's behalf (Bigelow EBT, pp. 147-148). Bigelow had never spoken to or had any direct contact with any representative

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of 449 LLC (Bigelow EBT, pp. 48, 51, 60) and 449 LLC never made any direct verbal or written representations to Bigelow that there would be no construction along the south side of the building (Bigelow EBT, p. 58).

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence” to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The “[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach (*see Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259, 1260 [2d Dept 2016]; *Legum v Russo*, 133 AD3d 638, 639 [2d Dept 2015]). With respect to the first cause of action against 449 LLC, plaintiff claims that the Purchase Agreement was breached because of alleged misrepresentations with respect to the lot line windows and number of legal bedrooms. However, it is unclear how the misrepresentations relate to a breach of the

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terms of the Purchase Agreement. The fact that the five windows on the southern side of the apartment were lot line windows was set forth clearly under paragraph 19 of the Special Risks section of the Offering Plan. Also, there is no language cited in either the Purchase Agreement or the Offering Plan which represents that the subject unit was a legal two-bedroom apartment, and the schematic floor plan in the Offering Plan for the subject unit identifies only one room as a “bedroom.”

Accordingly, the first cause of action is dismissed.

The second cause of action for breach of contract is predicated on the failure of 449 LLC to provide a contractually required “written offer” to plaintiff of the right to rescind. However, even assuming 449 LLC failed to meet its contractual obligation in such respect, the merger doctrine provides that in a real estate transaction, once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract (*see Ka Foon Lo v Curis*, 29 AD3d 525, 526 [2d Dept 2006]). The only exception to this rule is where the parties clearly intended that the particular provision of the contract supporting the claim would survive the delivery of the deed (*id.*). Here, there is no language offered that the rescission clauses would survive delivery of the deed.

As a result, the second cause of action for breach of contract is dismissed.

The third cause of action for fraudulent inducement is premised on the alleged misrepresentations of 449 LLC and Corcoran/Novo that the unit was a legal two-bedroom apartment, that the southern windows were not lot line windows, that the windows would not be blocked by the building constructed on the lot to the south and/or that the windows

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would not need to be sealed because the adjacent building would be set back 15 feet from the property line of 449 LLC's building.

To establish a claim for fraudulent inducement, plaintiff must show “misrepresentation or a material omission of fact which was false and known to be false by 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” (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; see *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403 [1958]; *Tsinias Enters. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271, 1272 [2d Dept 2019]).

To the extent plaintiff claims she relied on the brochure floor plan which is devoid of any indication that the southern wall windows were lot line windows, such reliance is not justifiable given that the brochure provided “[t]he artist representations and interior decorations, finishes, appliances and furnishings are provided for illustrative purposes only” and that “Sponsor makes no representations or warranties except as may be set forth in the Offering Plan.” Here, the Offering Plan clearly stated that “[a]ll windows along the South facade, at the third, fourth, fifth, sixth and seventh floors, are ‘Lot Line’ windows.” Bigelow’s averment that she did not read the Offering Plan before signing the Purchase Agreement prevents plaintiff from establishing justifiable reliance, an essential element of fraud (see *Stortini v Pollis*, 138 AD3d 977, 978 [2d Dept 2016]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [2008]). “A party who signs a document without any valid excuse for not having read it is ‘conclusively bound’ by its terms” (*Ferrarella v Godt*, 131 AD3d

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563, 567-568 [2015], quoting *Gillman v Chase Manhattan Bank*, 73 NY2d 1, 11 [1988]; see *Sorenson v Bridge Capital Corp.*, 52 AD3d at 266; *Sofio v Hughes*, 162 AD2d 518, 519 [1990]). Based upon the express terms of the Offering Plan and the Purchase Agreement, plaintiff cannot claim that it reasonably relied upon any purported misrepresentations contained in promotional materials or oral statements (see *Board of Mgrs. of 647 & 649 Place Condominium*, 49 Misc 3d 1216[A], 2015 NY Slip Op 51693 [U] [Sup Ct, Kings County, *9–10]). Plaintiff, therefore, cannot establish the requisite elements to sustain a claim of fraud as against 449 LLC (see *Oko v Walsh*, 28 AD3d 529, 529 [2d Dept 2006]).

As a result, the third cause of action is dismissed as against 449 LLC.

Corcoran/Novo have also demonstrated prima facie that no misrepresentation was made upon which plaintiff could have justifiable relied. At her EBT, Novo offered the following testimony:

Q. When you showed Ms. Bigelow the premises, she had not yet signed the contract?

A. Correct.

Q. When you showed her the third floor and fourth floors, did you demonstrate to her at that time where the lot-line windows were going to be?

A. Yes.

Q. You physically demonstrated to her?

A. I physically showed her on the third and fourth floor that the south side

windows were lot-lined.

Q. Did you indicate that every single window on the south side would be blocked?

A. I did (NYSCEF Doc No. 301 [“Novo EBT”], pp. 69-70).

* * *

Q. Did you indicate to her that those windows at some point would be blocked and she would have to brick them?

A. What I told Ms. Bigelow was that the south side windows are lot-lined.

Q. That was not my question.

A. That there is a possibility that the windows could be covered if a building was built next door, there is a current garage, single-floor garage that is there. Anything can happen. It’s New York real estate, this is a mid-block building, and a building at any given time, whether it’s one year from now, five years from now, ten years from now, anything can come up there (Novo EBT, pp. 70-71).

Q. Did you ever tell Ms. Bigelow that any building built next to 449 Washington Street would have some type of set off so the buildings would not be right on top of each other?

A. What we were conveyed by the sponsor and the sponsor’s contractor, which is Six Sigma, that under Tribeca’s zoning, that there is the potential of having to have -- if anything came up next door, that it would potentially have to be between a 15 and 30-foot setback. 15 on a residential, if it was a residential building, if it ever came up. 30 feet based on a commercial, but anything could change if anyone who acquired that property or

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decided to build would file a variance with the Department of Buildings. There was never a guarantee. This is the information that we have been provided by the contractors and the sponsor, and that is everything we said to her.

Q. You conveyed that message to Ms. Bigelow?

A. Yes, and every other person that came to the property (Novo EBT, pp104-105).

Novo also testified:

Q. Besides the conversation with the variance and the fourth floor instead of the third floor, did you ever have any other conversations regarding the potential of a building being built next door and obstructing her views?

A. Multiple times. She was told that something could come up prior to her signing the contract, and that because it's a mid-block building, anything can happen. It's New York real estate.

Q. Your answer is you had multiple conversations about the subject matter?

A. Yes (Novo EBT, pp. 108-109).

The EBT testimony of Bigelow does not show that an affirmative representation was made that there would be no future construction on the neighboring lot; rather the statements made by Novo, at best, were mere predictions as to likelihood:

Q. After you decided you were gonna purchase the apartment at 449 Washington Street, what was the next thing that you did to effectuate that decision?

A. Well, I had many conversations with [Novo], one of which was predominantly about the garage below. I was nervous about the fact that anything could happen to it.

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Q. When you say garage below, do you mean the --

A. The garage to the right of the building.

Q. To the right of the property?

A. Right.

Q. When did you have your first conversation with Monica Novo about the property to the right, and we'll call it the garage property?

A. The garage property, I had that conversation in March, April

Q. Of 2014?

A. Of 2014, March I would say.

Q. What did you say to her, what did she say to you, to the best of your recollection?

A. Well, I asked her if anything would happen with the garage below, because if it -- I was nervous that if something were to be built there, it would impede the light, and as a film maker, light is very important to me, and she assured me that most likely nothing would happen, and that was because part of the garage was tied to a landmark structure. The garage wasn't landmarked, but it was next -- it was attached to a landmark structure, and she said due to the fact it's landmarked, nothing -- it takes so long to go through city planning, so nothing will ever happen, so don't worry about that (Bigelow EBT, pp. 22-24).

“In general, a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud” (*Zanani v Savad*, 217 AD2d 696, 697 [2d Dept 1995]; see *American Food & Vending Corp. v International Bus.*

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Machs. Corp., 245 AD2d 1089, 1090 [4th Dept 1997], *appeal dismissed without opinion* 91 NY2d 956 [1998], *appeal denied* 93 NY2d 807 [1999] [“the alleged fraudulent representation by IBM’s representative relied upon (by plaintiff, namely) that a national vending contract (with plaintiff’s competitor) was ‘most unlikely’ and ‘there was nothing to worry about,’ was not a statement of fact, but an expression of opinion, which will not support an action for fraud”)]. According to the aforementioned testimony, any representation by Novo that no building would be constructed on the adjoining lot was not a misrepresentation of a present fact but either a future prediction or a representation conditioned upon the nonoccurrence of a future action (e.g. a zoning variance). Also, plaintiff could not have justifiably relied on any alleged misrepresentation by Corcoran/Novo regarding the unit’s location on a lot line given the clear statements in the Offering Plan which Bigelow admits having not read. Thus, a claim of fraudulent misrepresentation cannot be supported by allegations of misrepresentations concerning the existence of lot line windows or whether construction was planned for the adjoining lot.

However, in addition to said grounds, plaintiff is also basing its claims upon the representation in the marketing materials that the subject unit was a two-bedroom apartment, when, in fact, it was only a legal one-bedroom apartment. The representation is significant insofar as plaintiff alleges, in essence, that she was induced to make an inflated offer based on her belief that the unit was a two-bedroom apartment. Regardless of any discussions pertaining to lot lines and neighboring construction, there is no testimony or other proof offered that Corcoran or Novo ever expressly conveyed to

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Bigelow that the unit was, in actuality, only a legal one-bedroom apartment. Moreover, while plaintiff's fraud claims cannot be supported by allegations with respect to future construction on the adjoining lot, Bigelow avers in her affidavit in support of her cross motions for summary judgment that Corcoran and Novo misrepresented to her that "if a building was to be erected it would be at least 15 to 30 feet away from the property line of 449 Washington Street."

Corcoran/Novo argue that despite any representations with respect to the number of legal bedrooms in the unit, such could not be the cause of plaintiff's loss upon resale as apartments are priced according to square footage. Corcoran/Novo cite to the testimony of two non-party witnesses, Patty LaRocco and Iman Barkhordari, brokers that were retained by plaintiff to sell the apartment, that the apartment was valued according to square footage, and thus the value of the apartment could not have been diminished as the result of any change in designation from a two-bedroom to a one-bedroom apartment. Barkhordari testified:

Q. In selecting a comparable in order to determine what you're going to list the property at, 449 Washington Street, you mentioned that you looked at the size of the property to see if they were comparable in size; is that correct?

A. Correct.

Q. Did you also look at whether they had a similar number of bedrooms?

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A. It's hard to define that bedroom count because I don't know really what constitutes a bedroom. I just look at square footage. (NYSCEF Doc No. 328 ["Barkhordari EBT"], pp. 22-23).

LaRocca testified:

Q. If the same apartment was listed as a one-bedroom, would you have reduced the asking price?

A. It's a price per square foot.

Q. How many bedrooms are part of the apartment has no bearing on the asking price?

A. *Sometimes, yes.* Price per square foot, usually (NYSCEF Doc No. 239 ["LaRocca EBT"], p. 61)(emphasis added).

The court finds the aforesaid testimony of LaRocco and Barkhordari equivocal as to whether square footage was the sole motivator in pricing the apartment. There is no other proof offered to establish, as a matter of law, that the loss plaintiff took upon resale of the apartment was unrelated to the change in the number of legal bedrooms rather than, as Corcoran/Novo argue, "market forces."

A plaintiff alleging fraudulent inducement is limited to "out of pocket" damages, which consist solely of the actual pecuniary loss directly caused by the fraudulent inducement. "The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong" (*Reno v Bull*, 226 NY 546, 553 [1919]), or what is known as the "out-of-pocket" rule (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29

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NY3d 137, 142 [2017]; *Lama Holding Co.*, 88 NY2d at 421; *Hanlon v Macfadden Publs.*, 302 NY 502 [1951]). Under this rule, the loss is computed by ascertaining the “difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain” (*Sager v Friedman*, 270 NY 472, 481 [1936]; see *Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010]; *Lama Holding Co. v Smith Barney*, 88 NY2d at 421). The court finds that an issue of fact remains as to whether the subject apartment was improperly marketed and overvalued as a legal two-bedroom apartment, whether plaintiff was misled into believing that any potential neighboring structure would be set back from the unit’s lot line windows and whether plaintiff suffered actual damages when she submitted an offer based on said misrepresentations and was compelled to market and resell the unit as a one-bedroom apartment with endangered windows at a substantially lower price.

As a result, that part of the motion of Corcoran and Novo for dismissal of plaintiff’s third cause of action for fraudulent inducement as against these defendants is denied.

On a cause of action alleging negligent misrepresentation, the plaintiff is required to demonstrate “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information” (*J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148 [2007]). To establish a breach of fiduciary duty, the plaintiff must show the existence of a fiduciary relationship, misconduct that induced the plaintiff to engage in the transaction in question, and damages directly caused by that misconduct

(see *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]; *Ozelkan v Tyree Bros. Envtl. Servs., Inc.*, 29 AD3d 877, 879 [2d Dept 2006]). “[A] real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal” (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]; see *Cornwell v NRT N.Y. LLC*, 95 AD3d 637, 637-638 [1st Dept 2012]; *Daly v Kochanowicz*, 67 AD3d 78, 95 [2d Dept 2009]).

Here, the court finds an issue of fact as to the fourth and fifth causes of action since Corcoran and Novo have not demonstrated that they ever imparted correct information to Bigelow as to the number of legal bedrooms in the subject unit and the non-requirement that a neighboring structure be set back from the property line. Further, there is an issue of fact as to whether plaintiff was reasonable in relying on the two-bedroom representation in the marketing materials in making its offer on the unit.

As a result, that part of motion of Corcoran and Novo for dismissal of the fourth and fifth causes of action is denied.

449 LLC does not submit proof to establish, as a matter of law, that plaintiff’s claim for negligent construction of the unit is without merit. Plaintiff alleges that since the closing of title, the subject unit has “sustained several leaks,” the “HVAC has been problematic” and the unit “also sustained material design defects.” While 449 LLC maintains that problems in the unit and the building were addressed, neither the affidavit nor EBT testimony provided by 449’s manager, Gizman Abbas, demonstrates as a matter of law that the unit did not suffer any damage as the result of the alleged defects.

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Accordingly, that part of 449 LLC's motion for dismissal of the eighth cause of action is denied.

The cause of action for breach of the implied housing merchant warranty, however, must be dismissed, since General Business Law article 36-B, which codified the common-law housing warranty, applies only to new single-family homes or new for-sale units in a multi-unit residential structure of five stories or less, and not the seven story condominium at issue (*see* General Business Law § 777 [5]). The common-law housing warranty embodied in *Caceci v Di Canio Constr. Corp.* (72 NY2d 52 [1988]) was supplanted by General Business Law article 36-B (*see Fumarelli v Marsam Dev.*, 92 NY2d 298 [1998]). The statutory housing merchant warranty scheme codified under General Business Law article 36-B applies only to buildings of five stories or less, and not to the subject condominium, and the ruling in *Fumarelli* abrogates whatever common-law housing warranty may have existed with respect to buildings taller than five stories prior to the statutory codification (*see Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 683 [2d Dept 2016]; *20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 734 [1st Dept 2013]).

General Business Law §§ 349 and 350 were enacted to safeguard the “vast multitude which includes the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 273 [1977]). A cause of action to recover damages for a violation of General Business Law § 349 must “identify consumer-oriented

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misconduct which is deceptive and materially misleading to a reasonable consumer, and which causes actual damages” (*Wilner v Allstate Ins. Co.*, 71 AD3d 155, 161-162 [2d Dept 2010]; see *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). Defendants seek dismissal on the ground that the subject transaction was not consumer oriented. However, the Second Department has recognized a cause of action under the Deceptive Practices Act based upon deceptive or misleading information in brochures and advertisements for the sale of condominiums and cooperative apartments to the public (*Board of Mgrs. of Beacon Tower Condominium*, 136 AD3d at 685; *B.S.L. One Owners Corp. v Key Intl. Mfg.*, 225 AD2d 643, 644 [2d Dept 1996]; *Board of Mgrs. of Bayberry Greens Condominium v Bayberry Greens Assoc.*, 174 AD2d 595, 596 [2d Dept 1991]). Defendants fail to establish, as a matter of law, that the instant transaction does not fall within the ambit of the statutes, and there remains an issue of fact as to whether the materials indicating that the subject unit contains two legal bedrooms is deceptive or misleading.

Accordingly, those parts of the motions of 449 LLC and Corcoran/Novo for dismissal of the tenth cause of action is denied.

“New York does not recognize civil conspiracy to commit a tort . . . as an independent cause of action” (*Dickinson v Igoni*, 76 AD3d 943, 945 [2d Dept 2010]; see *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]; *Brackett v Griswold*, 112 NY 454, 466-467 [1889]). “[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort” (*Romano v Romano*, 2 AD3d 430,

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432 [2d Dept 2003]). However, “a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme” (*Litras v Litras*, 254 AD2d 395, 396 [2d Dept 1998]; see *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d at 969; *Brckett v Griswold*, 112 NY at 466-467; *Romano*, 2 AD3d at 431-432). In order “to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties’ intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010][internal quotation omitted]).

Plaintiff’s claims for civil conspiracy are based upon an alleged agreement between the parties to induce plaintiff to purchase the subject unit by misrepresenting that the subject premises was “a legal 2 bedroom, 2 bathroom apartment, with three (3) exposures, that the second bedroom did not have Lot Line Windows, and that the windows in the second bedroom would not be blocked nor obstructed by the construction of the adjacent building” and by failing to inform and allow plaintiff its rights of rescission.

As stated previously, 449 LLC has established that it made no misrepresentations to Bigelow with respect to the apartment which she could have justifiably relied upon. Accordingly, 449 LLC cannot be deemed to have acted together with Corcoran/Novo in furtherance of any agreement to compel plaintiff to acquire the unit. Plaintiff’s claim of civil conspiracy is therefore without merit.

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As a result, the eleventh cause of action is dismissed

Plaintiff has not otherwise established entitlement to summary judgment under the surviving causes of action. There remain issues of fact as to whether her reliance on the two-bedroom designation of the unit was reasonable under the circumstances and whether any misconduct was committed by Corcoran/Novo regarding the marketing of the unit for purposes of a breach of fiduciary duty claim. Further, there is no proof submitted establishing, as a matter of law, that any damages were suffered by plaintiff due to construction defects.

Accordingly, plaintiff's cross motion for summary judgment with respect to the surviving claims is denied.

Plaintiff further seeks summary judgment against Corcoran and Novo for violating the disclosure provisions of Real Property Law [RPL] § 443 pertaining to their participation in the marketing and sale of the unit as dual agents for both plaintiff and 449 LLC. RPL § 442-e (3) provides:

3. Penalty recoverable by person aggrieved. In case the offender shall have received any sum of money as commission, compensation or profit by or in consequence of his violation of any provision of this article, he shall also be liable to a penalty of not less than the amount of the sum of money received by him as such commission, compensation or profit and not more than four times the sum so received by him, as may be

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determined by the court, which penalty may be sued for and recovered by any person aggrieved and for his use and benefit, in any court of competent jurisdiction.

While the above provision entitles an aggrieved buyer to “sue[] for” a penalty for an RPL 443 disclosure violation, plaintiff never set forth any statutory claim in its complaint. “A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars” (*Palka v Village of Ossining*, 120 AD3d 641, 643 [2d Dept 2014]; see *Mezger v Wyndham Homes, Inc.*, 81 AD3d 795, 796 [2d Dept 2011]; *Pinn v Baker’s Variety*, 32 AD3d 463, 464 [2d Dept 2006]; *Yaeger v UCC Constructors*, 281 AD2d 990, 991 [4th Dept 2001]).

Accordingly, it is hereby

ORDERED that 449 LLC’s motion for summary judgment is granted to the extent that the first, second, third, ninth and eleventh causes of action are dismissed as against 449 LLC; and it is further

ORDERED that 449 LLC’s motion for summary judgment is otherwise denied; and it is further

ORDERED that the motion of Corcoran and Novo for summary judgment is granted to the extent that the eleventh cause of action is dismissed as against Corcoran and Novo; and it is further

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ORDERED that the motion of Corcoran and Novo is otherwise denied; and it is further

ORDERED that the cross motions of plaintiff for summary judgment are both denied in all respects.

The foregoing constitutes the decision and order of the court.

E N T E R,

LDM

J. S. C.