

**Board of Mgrs. of the Gateway Condominium v  
Gateway II, LLC**

2022 NY Slip Op 31074(U)

February 9, 2022

Supreme Court, New York County

Docket Number: Index No. 652225/2014

Judge: Sabrina Kraus

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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. SABRINA KRAUS** PART 57TR

*Justice*

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BOARD OF MANAGERS OF THE GATEWAY  
CONDOMINIUM,

Plaintiff,

- v -

GATEWAY II, LLC, STEVEN C. GAETANO, MATTHEW  
GAETANO, MICHAEL GAETANO, GAETANO AND  
ASSOCIATES, INC., THE GAETANO DEVELOPMENT  
CORP., STEVEN C. GAETANO ARCHITECTS,  
P.C., MANHATTAN PROPERTY MANAGERS, INC.

Defendant.

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INDEX NO. 652225/2014  
MOTION DATE 10/25/2021,  
10/25/2021  
MOTION SEQ. NO. 006 007

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 233, 235, 237, 239, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 234, 236, 238, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 298, 299

were read on this motion to/for SUMMARY JUDGMENT

Plaintiff commenced this action seeking damages for breach of contract for failing to construct the condominium building located at 2098 Eighth Avenue, New York, New York (Subject Building), in accordance with the Offering Plan.

On February 27, 2015, plaintiff discontinued the action as to Gaetano and Associates, Inc. and The Gaetano Development Corp.

On January 5, 2016, the court (Reed, J) dismissed the action as against Steven C. Gaetano, Matthew Gaetano, Michael Gaetano, and Steven C. Gaetano Architects, PC, as well as the third cause of action for Indemnification.

### **PENDING MOTIONS**

In February 2021, plaintiff moved for partial summary judgment on the issue of liability as to the breach of contract claim against Gateway II, LLC (Gateway), as a result of Gateway's failure to obtain a Certificate of Occupancy for the Subject Building and its alleged failure to construct the Subject Building in accordance with all applicable government codes and regulations. Gateway opposes the motion.

Gateway and Manhattan Property Managers, Inc (collectively Defendants) then moved for summary judgment, dismissing the remaining causes of action. Plaintiff oppose the motion.

The motions are consolidated herein for disposition.

### **DISCUSSION**

The following facts are undisputed between the parties. Gateway filed with the New York State Attorney General's Office an Offering Plan for the Subject Building dated October 29, 2004 (Offering Plan). Gateway is listed as the Sponsor for the Subject Building in the Offering Plan. In the Offering Plan, Gateway represented that the Subject Building would be "renovated and constructed in accordance with all applicable zoning and building laws, regulations, codes, and other requirements of the City of New York." In the Offering Plan, Gateway further

represented that it would obtain a Permanent Certificate of Occupancy (PCO”) for the Subject Building.

The Purchase Agreement (Purchase Agreement) executed by each individual unit purchaser when purchasing individual condominium units within the Subject Building, and furnished by Gateway to each individual unit owner, provides that the Offering Plan and any amendments thereto are “incorporated . . . by reference and made a part of [the Purchase Agreement] with the same force and effect as if fully set forth herein.” Pursuant to both the Offering Plan and Purchase Agreement, Gateway had a contractual obligation to construct the Subject Building in accordance with all applicable New York City (NYC) Department of Building (DOB) building codes, NYC Building Code(s), Americans with Disabilities Act (ADA) regulations, and all other applicable codes and regulations, and to obtain a PCO for the Building.

On or about April 11, 2013, plaintiff hired RAND Engineering & Architecture, D.P.C. (RAND) to conduct and issue a Physical Condition Survey (RAND Report) for the Subject Building. RAND visited the Subject Building to conduct inspections on the following dates: November 28, 2012, January 4, 2013; January 31, 2013; February 19, 2013; February 27, 2013; and March 11, 2013. To date, the Subject Building does not have a PCO.

***Plaintiff’s motion for partial summary judgment for breach of contract as to the failure to obtain a Certificate of Occupancy is granted***

“The 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 demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986], citing

*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404.)”.

“Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, supra, 49 N.Y.2d at p. 562)”.

Plaintiff claims Gateway breached the Offering Plan and Purchase Agreement by failing to obtain a PCO. The elements for a breach of contract claim are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. (*Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426, [1st Dept. 2010]).

Here it is undisputed that a contract exists between the parties, the Offering Plan and Purchase Agreement. It is also undisputed that the Subject Building does not have a PCO. Plaintiff asserts Gateway has failed over a period of (10) years to obtain a PCO in breach of the Offering Plan. Specifically, plaintiff points to Section 16, paragraph 10 and 11, of the Offering Plan which states, in pertinent part,

(10) The Sponsor will diligently, expeditiously and at Sponsor's own cost, complete the renovation of the Units -and Common Elements substantially in accordance with the plans and specifications described in the Plan. If any work still remains to be done to complete such work, then provided such work will not prevent the issuance of a new permanent Certificate of Occupancy, the Sponsor, at Sponsor's own cost and expense, will perform or cause all such work to be performed and will supply or cause all material therefor to be supplied and will pay for such work and materials and discharge or bond all mechanic's liens which may be tiled as a result of the renovation of the Units or Common Elements.

(11) The Sponsor reserves the right to close title to Units after procuring a Temporary Certificate of Occupancy with respect to a Unit. However, the Sponsor will complete the renovation and obtain a Permanent Certificate of Occupancy for the entire project before the Temporary Certificate of occupancy (as same may be renewed, replaced or extended) expires. This period may extend longer than three (3) years from the First Unit Closing. (NYSCEF Doc 188).

In support, plaintiff submits the affidavit of Robert Proffitt (Proffitt), an architect retained by plaintiff to assist in obtaining a PCO. On January 25, 2021, Proffitt conducted a review of the DOB website, finding that all but one (1) violation has been remedied by plaintiff. The outstanding violation, No. 35264303Y, was issued on May 4, 2017<sup>1</sup>, for “FAILURE TO MAINTAIN EXTERIOR BLDG WALLS & APPURTENANCES. AT TIME OF INSPECTION OBSERVED ON EXP#1 WEST ELEV: SPLIT, CRACK & ERODING WINDOW SILLS ON SEVERAL FLOOR LEVELS SPACED, CRACKS & DAMAGE BRICK AT SEVERAL FL LEVELS. (NYSCEF Doc No. 200)

Proffitt also asserts all but two DOB objections have been resolved by plaintiff. The two open objections are to properly install dryer exhaust vents and to provide fire stopping on steel. (NYSCEF Doc. No 201). It is Proffitt’s professional opinion that Gateway breached the Offering Plan in constructing the Subject Building in a defective and/or deficient manner, which resulted in numerous DOB violations and objections, which to this day prevent plaintiff’s from obtaining a PCO.

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<sup>1</sup> The affidavit states the violation was issued on July 3, 2017 however the DOB violation is dated May 4, 2017.

Plaintiff has established Gateway materially breached the Offering Plan by failing to obtain a PCO for the building.

In opposition, Gateway does not dispute that the Subject Building still does not have a PCO. Rather, they argue that plaintiff has failed to cooperate and allow Gateway access to the Subject Building to perform the work necessary to obtain a PCO. Gateway offers (6) six letters to plaintiff's council dated 2015, 2016 and 2019, however only two of the letters, both dated in February 2016, are requesting access. Although the other letters reference various DOB violations, Gateway fails to offer an affidavit of anyone with personal knowledge, which would rebut Proffitt's affidavit regarding the one outstanding violation as of today, involving the exterior of the Subject Building.

Additionally, Gateway argues that plaintiff has performed work on the Subject Building, without proper permits, that has resulted in DOB violations that prevent a PCO from being issued. However, Gateway has failed to produce evidence of these allegations sufficient to establish the existence of material issues of fact. The list of DOB violations submitted by Gateway, (NYSCEF Doc No. 283) is from 2017 and Gateway admits in the attorneys' affidavit that these violations have been corrected.

The agreement clearly obligated Gateway to obtain a POC, "for the entire project before the Temporary Certificate of occupancy (as same may be renewed, replaced or extended) expires" and it is undisputed that this was not done. The Subject Building does not have Temporary Certificate of Occupancy at this point in time.

Gateway insists throughout the opposition papers that plaintiff relies only on the outdated RAND report, however Gateway fails to address the two accompanying affidavits submitted in support by plaintiff, by two engineers employed by RAND, one of which conducted a walkthrough of the Subject Building as recently as October 2020, and annotated the original RAND report to highlight those issues that are still outstanding. In fact it is Gateway that relies entirely on outdated documentation.

The First Department has held that a failure to obtain a certificate of occupancy under similar circumstances warrants a finding of partial summary judgment as to liability, *Board of Managers of BeWilliam Condominium v 90 William St Development Group LLC*, 187 AD3d 680 (1<sup>st</sup> Dept 2020), relying on *Board of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 882 (1st Dept 2016). Gateway's arguments that plaintiff contributed to the failure to obtain a POC can be raised when the court considers the issue of damages.

***Plaintiff's motion for partial summary judgment for breach of contract as to Gateway's alleged failure to construct the Subject Building in accordance with applicable codes and regulations is granted***

Plaintiff seeks partial summary judgment, as to liability, alleging Gateway breached their contractual obligations under the Offering Plan by failing to construct the Subject Building in accordance with applicable codes and regulations. In 2013, plaintiff hired RAND to conduct a Physical Condition Survey. RAND then issued a report (2013 Report)<sup>2</sup> (NYSEF doc 192, 193,

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<sup>2</sup> The author of the 2013 Report, Ivan Mrakovic, passed away in 2020

194) finding that the Subject Building violated approximately (49) forty-nine NYC Building Codes and other laws and regulations. These violations were to the fire-proofing, ventilation, structural stability of the Subject Building and Americans with Disabilities Act compliance.

In October 2020, Jamey R. Ehrman (Ehrman) professional engineer employed by RAND, conducted another walk through inspection of the Subject Building, and made annotations to the 2013 Report, (2020 Report) (NYSCEF Doc 195, 196, 197, 198). Plaintiff offers in support of the motion for partial summary judgment, the 2020 Report as well as an affidavit of Ehrman.

In further support, plaintiff provides the affidavit of Michael Larkin, PE (Larkin), employed by RAND, and familiar with the Subject Building.

Larkin affirms that among the alleged defects or deficiencies asserted by plaintiff are defects in the balconies and building facades, which has allegedly caused water intrusion; defects with the Exterior Insulation Finish System (EIFS), specifically the allegation that reinforcing mesh was not properly back-wrapped on the insulation boards along the bottom terminations, wall openings and transitions to different materials, and that EIFS surfaces were found lacking proper base coat for the proper embedment of reinforcing mesh at top and bottom edges along the balconies and air conditioner sleeves. The 2013 Report found that the balconies and building facades deviated from what was promised in the Offering Plan.

Larkin further affirms that other alleged violations include: structural steel framing supports for the building tower are missing the required three hour fire rated protection; balcony railings were found to have excessive lateral movement when horizontal pressure is applied, and

that the 6 floor terraces along the west elevation are missing a formal exterior floor drainage system. Further, according to Larkin, the more newly constructed facades deviate from the representations in the Offering Plan in that the Offering Plan states that newly constructed exterior walls were to be made of reinforced autoclaved aerated concrete (AAC). Instead, the exterior walls provided by Gateway, according to Larkin, primarily consist of metal stud framing gypsum sheathing, and EIFS treatment, which is inferior to AAC wall construction.

Gateway fails to offer any rebuttal to the two engineer affidavits, but rather insists that the 2013 Report is outdated, and relies on the court's (Reed, J) prior ruling, which denied plaintiff's motion for partial summary judgment. However, Gateway misinterprets Justice Reed's decision. Plaintiff's prior motion was denied on procedural grounds, as plaintiff submitted an expert's affidavit in reply, instead of with the original moving papers. Justice Reed clearly indicated it was a procedural issue and granted leave to renew. Gateway fails to submit evidence to establish the existence of a material issue of fact.

***Defendants motion for summary judgment is granted***

Defendants move to dismiss plaintiff's remaining causes of action against Gateway and Manhattan Property Management (MPM) arguing that plaintiff cannot prevail on the breach of contract cause of action by failing to provide admissible evidence that Gateway breached the Offering Plan, failed to provide admissible evidence of damages and refusing to allow Gateway access to the Subject Building.

For the reasons discussed above, the motion for summary judgment as it relates to Gateway is denied, as the court has granted partial summary judgment in favor of plaintiffs, as to liability. As to the issue of damages, in opposition, plaintiff offers evidence sufficient to raise material issues of fact as to what if any expenses plaintiff incurred in remediating a number of issues throughout the Subject Building, (Exhibits H through T).

However, as to MPM, plaintiff submits no evidence to support the claim that MPM breached the management agreement. As a matter of fact, neither side discusses MPM at all, with the exception of one paragraph in point II of defendants' memorandum of law. Therefore, MPM's motion for summary judgment is granted and the action is dismissed as to MPM.

### **CONCLUSION**

Wherefore, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted as to liability and defendants' motion for summary judgment is denied as to Gateway II LLC but granted as to Manhattan Property Management; and it is further

ORDERED that the action is dismissed as to Manhattan Property Management; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further


ORDERED that any relief sought not expressly addressed herein has nonetheless been considered and is denied.

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)); and it is further

ORDERED that this constitutes the decision and order of this court.

This constitutes the decision and order of the court.

  
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<u>2/9/2022</u> DATE	<u>SABRINA KRAUS, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLER ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> SUBMIT ORDER	