At an IAS Term, Part 25 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of October 2022.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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VIVIENNE BUADU, LAWRENCE GARVIN, DIONNE HARRIS, INE LOLOMARI, LISA McGHEE, ARISLEYDA SKINNER, RONALS SKINNER, and LANCE WALTERS,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., TNS DEVELOPMENT GROUP, LTD., GREAT AMERICAN CONSTRUCTION CORP., DELIGHT CONSTRUCTION CORP., and JANE AND JOHN DOES ## 1 - 100,

Defendants.

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DECISION and ORDER

Index No. 500163/2018
Mot. Seq. 001

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 25 – 26, 27 – 38, 39, 53 – 54, 60, 61 – 66, 67, 71, 74 – 77. Argument on the record on August 24, 2022 (transcript enclosed).

Defendants THE CITY OF NEW YORK (hereinafter the "City"), and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT (hereinafter "HPD") (collectively, "municipal defendants") move for an order pursuant CPLR §§ 3211(a)(2), 3211(a)(5), 3211(a)(7) granting dismissal of the complaint in its entirety against the municipal defendants on the basis that Plaintiffs failed to comply with Notice of Claim requirements, the claims were instituted beyond the applicable statute of limitations, and that the various claims fail to state a cause of action.

Plaintiffs commenced this action on or about January 3, 2018. The claims against the municipal defendants are the following:

1. First cause of action for fraud;
2. Second cause of action for conspiracy to commit fraud;
3. Third cause of action for negligent misrepresentation;
4. Fourth cause of action for negligent administration of a governmental function;
5. Fifth cause of action for breach of contract;
6. Sixth cause of action for breach of express warranty;
7. Seventh cause of action for breach of implied warranty of habitability;
8. Eighth cause of action for unjust enrichment;
9. Ninth cause of action for violation of New York City Human Rights Law, New York City Administrative Code § 8-107(5)(a)(2) (hereinafter "NYCHRL").

Pursuant to CPLR § 3211(a), claimants must satisfy the notice of claim requirements of the General Municipal Law 50-e and 50-i, failure to do so divests the Court of subject matter jurisdiction to hear the action. *See Cruscuola v. State of New York*, 188 A.D.3d 645 [2d Dept. 2020]. General Municipal Law (GML) § 50 – e requires that "any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation… the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises". (*see* GML § 50 – e). Tort claims against a municipality require a notice of claim be served on the municipality. (*see* GML 50 § 50 – i). "Service of a notice of claim within 90 days after accrual of the claim is a condition precedent to the commencement of a tort action against the defendants

City of New York" (*see* GML §§ 50 – e [1][a], 50-i[1][a]; *Maxwell v. City of New York*, 29 A.D.3d 540, 541 [2d Dept. 2006].

In conjunction with GML § 50 - e notice of claim requirements for tort actions, Administrative Code 7-201 requires a notice of claim to be filed to recover damages for breach of contract and unjust enrichment. *EMD Construction Corp. v. New York City Dept. of Housing Preservation and Develop, et. al.*, 70 A.D.3d 893 [2d Dept. 2010]. Pursuant to Admin. Code §7-201 "in every action or special proceeding prosecuted or maintained against the city, the complaint or necessary moving papers shall contain an allegation that 'at least thirty days have elapsed since the…claim or claims upon which such action…is founded were presented to the comptroller for adjustment, and that the comptroller has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment." (*See* Administrative Code of City of N.Y. § 7–201 [a]; *Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 265 [1969]; *Raven El. Corp. v. City of New York*, 291 A.D.2d 355 [1st Dept. 2002]; *City of New York v. 611 W. 152nd St.*, 273 A.D.2d 125 [1st Dept. 2000]; *City of New York v. Candelario*, 223 A.D.2d 617 [2d Dept. 1996].

Indeed, compliance with provisions of the Administrative Code requires that one who prosecutes a claim against the City for a money judgment must allege and establish that he has previously presented to the Comptroller a demand for the relief sought. *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 [1969]; *EMD Const. Corp.*, 70 A.D.3d 893 [2d Dept 2010]; *see also*, *PBS Bldg. Sys., Inc. v. City of New York*, 1996 WL 583380 [SDNY Oct. 10, 1996]. "A timely notice of claim is a condition precedent to maintaining an action against the City of New York (*see* Administrative Code § 7-201; *see generally Parochial Bus Sys. v. Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 547 [1983])." *Neuman v. City of New York*, 186 A.D.3d 1523 [2d Dept. 2020].

Here, Plaintiffs assert claims for damages for fraud, conspiracy to commit fraud, negligent misrepresentation and negligent administration of a governmental function (first through fourth causes of action). These claims sound in tort, and pursuant to GML § 50 –require a notice of claim to be served upon the City and require compliance with Section 7-201 of the Administrative Code. In the instant matter, a notice of claim was not filed nor was compliance with the code pleaded. Therefore, the first through fourth causes of action, which sound in tort, must be dismissed for these failures.

Administrative Code 7-201 expressly applies to "every action or proceeding" thus this section requires a Notice of Claim for contract-based actions as well as tort claims. (*see generally*, *Candelario*, 223 A.D.2d 617 [2d Dept. 1996].

In this matter, no notice of claim was filed regarding the claims for breach of contract, breach of express warranty, breach of implied warranty of habitability or unjust enrichment. In so far as each of these claims seek monetary damages, they all fall within the requirements of Administrative Code 7-201. "[S]tatutory requirements conditioning suit [against a governmental entity] must be strictly construed." *Varsity Tr., Inc. v. Board of Educ. of City of N.Y.*, 5 N.Y.3d 532, 536 [2005], quoting *Dreger v. New York State Thruway Auth.*, 81 N.Y.2d 721, 724 [1992]; *Inc. Vil. of Freeport v. Freeport Plaza W., LLC*, 206 A.D.3d 703 [2d Dept. 2022]. As above, as to these causes of action there has not been compliance with notice of claim requirements, as such these claims must be dismissed.

Another basis for dismissal of causes of action numbered 1 through 8 is the failure to comply with the applicable statutes of limitations. On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) upon the ground that it is time-barred, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue had expired (*see Cottone v.*

Selective Surfaces, Inc., 68 A.D.3d 1038, 1040 [2d Dept. 2009]. In this regard, the facts as alleged in the complaint must be construed in the light most favorable to the plaintiff (*see Id.* at 1041). *House of Spices (India), Inc. v. SMJ Services, Inc.*, 103 A.D.3d 848, 849 [2d Dept 2013]). As discussed below, plaintiffs' claims 1 through 8 were untimely interposed and require dismissal.

Plaintiffs allege the municipal defendants committed fraud and conspiracy to commit fraud. "General Municipal Law § 50 – i (1) prohibits an action based on tort against municipal…defendants unless the action is commenced no later than one year and 90 days 'after the happening of the event upon which the claim is based.'" *See Sandpebble Builders, Inc. v. Mansir*, 90 A.D.3d 888 [2011]; *General Municipal Law § 50 – i.* "A cause of action based upon fraud accrues at the time the plaintiff 'possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence'" (internal citations omitted). *Clarke-St. John v. City of New York*, 164 A.D.3d 743 [2d Dept. 2018]. Here, Plaintiffs allege the fraud took place after the sale of the property. They claim that the First, Second, Third, and Fourth causes of action accrued on March 21, 2017, when an architect, Mr. John D. Nakrosis, Jr., RA, informed Plaintiffs' the properties at 115 Pulaski Street and 83 Hart Avenue, Brooklyn, NY were severely and systemically damaged. They argue the statute of limitations began to run in 2017 upon Plaintiffs' discovery of the fraud. Defendants argue that, assuming the statute of limitations begins to run at the time of discovery of said fraud, such discovery took place in 2012 when Plaintiffs acquired an independent inspection report, "the Heimer Report," or through email correspondence with the developers between June 6, 2007 to April 2013, or as evidenced by complaints to HPD that resulted in a 2013 report drafted by HPD.

A review of the 80-page Heimer report supports the municipal defendants' position. The 2-page Nakrosis report reveals nothing of substance that was not stated in the earlier report. Thus,

applying the discovery rule to ascertain the accrual of the cause of action for the fraud claims, the court finds the statute began to run in 2012, or at the latest, in 2013. As the action was commenced in 2018, over a year and ninety days later, the claim of fraud is time barred. Similarly, the claim for conspiracy to commit fraud is time barred as "conspiracy is not an independent tort, and is time barred when the substantive tort underlying it is time barred." *See Schlotthauer v. Sanders*, 153 A.D.2d 731 [2d Dept. 1989] citing *Williams v. Arpie*, 44 N.Y.2d 689 [1978].

Plaintiffs cause of action for negligent misrepresentations is against HPD only. Plaintiffs also allege that the municipal defendants were negligent in the administration of a governmental function because they were "tasked with carrying out and overseeing the procurement, construction and sales at issue." For both claims, GML § 50 – i governs and the latest date of the happening of the event would be the sale of the property in 2008. Applying the one year and ninety days statute of limitations the action should have commenced at the latest by 2010. As this action commenced in 2018, these claims are time barred.

Plaintiffs claim that municipal defendants breached their contract. The municipal defendants refer to the contract, the Purchase Agreements between respective Plaintiffs and the seller Marcy New Homes LLC for the properties, to illustrate municipal defendants are not listed in the Purchase Agreements and are not parties to the agreement. However, assuming an enforceable contract existed, the claim must have been raised within six years. *See* CPLR 213. The last purchase made by any of the plaintiffs of a Marcy New Homes building was in 2008. The claim accrues on the date of closing on the property. As no cause of action for breach of contract was instituted within 6 years of the closing and Plaintiffs have not produced any other contract to substantiate this cause of action, the claim of breach of contract is time barred.

Plaintiffs allege municipal defendants represented that the homes contained express warranties and that the municipal defendants' action and inaction amounted to a breach of these express warranties. The express warranties were made at the closing of the property when Plaintiffs bought the property. A pamphlet distributed at closing allegedly delineated these express warranties. The express warranties included: a six-year warranty against major defects in the load bearing structure due to the builder, a five-year warranty against roof defects due to the builder, a two-year warranty for electrical and HVAC system defects due to the builder, and a one-year warranty for appliances. The warranties expressly provided a maximum six-year protection to the homeowners from the date of closing on the property. As previously noted, the last closing of the properties at issue took place in 2008. At the latest, Plaintiffs must have brought a breach of express warranty claim against the builders by 2014. Inasmuch as this the action was commenced in 2018 this cause of action is time barred.

Plaintiffs also allege municipal defendants breached an implied warranty of habitability. Here, Plaintiffs became owners on the date of sale and no landlord-tenant relationship existed once the unit was sold. In the light most favorable to the Plaintiffs, all units were sold in or before 2008. The claim accrued on the date of sale as no landlord-tenant relationship existed once the unit was sold. Even assuming the facts underlying plaintiffs' complaint state a cause of action with regards to this claim, this claim must have been interposed within six years of the date of the 2008 sale, that is no later than in 2014. *See* NY REAL PROP § 235-b. As the complaint was filed in 2018, it is time barred.

Plaintiffs also allege unjust enrichment. "'The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff' (*Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 [2012], quoting *Mandarin Trading*

Ltd. v. Wildenstein, 16 N.Y.3d 173). 'An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim' (*Corsello,* 18 N.Y.3d at 790)." *See Scifo v. Taibi,* 198 A.D.3d 704 [2d Dept. 2021]. Here, Plaintiffs unjust enrichment claim simply replaces conventional contract or tort causes of action against the municipal defendants sounding in damages and negligence. This claim, whether a tort or contract based, is time barred as discussed above.

Plaintiffs allege municipal defendants discriminated against Plaintiffs on the basis of their income and status as purchasers under an affordable housing program. On this basis, Plaintiffs allege the municipal defendants violated N.Y. City Human Rights Law § 8-107(5)(a)(2). Administrative Code § 8-502(d) requires that "[a] civil action…must be commenced within three years after the alleged unlawful discriminatory practice or act of discriminatory harassment." Here, the alleged discrimination took place no later than 2013 when Plaintiff alleges Defendant, "HPD continued to represent that additional repair work would be done. Despite these assurances, Defendant HPD issued an inspection wherein it maintained that the work was performed at industry standards and instead blamed the common defects on 'poor maintenance' by the homeowner". Para. 46, 66 – 67, and 130 of the Complaint. Plaintiffs further allege, "as recently as 2013, Defendant HPD has promised to remedy the complained of issues, and yet has failed to complete this work." Para 66 of the Complaint. Additionally, "Plaintiffs have alleged that the Defendants, including the Municipal Defendants, 'maintained this campaign of fraud in constructing and selling these deficient homes to purchasing Plaintiffs based on their assumption that Plaintiffs were financially vulnerable and unsophisticated purchasers, making them ideal victims for their campaign of fraud.' {Ex. A to Shaw Aff, Verified Complaint Para. 129). Plaintiffs allege they became aware of the fraud and misconduct on March 21, 2017, by the Nakrosis Report.

The court disagrees and finds the claim accrued in 2013 at the time of the Heimer Report and the ensuing emails. Therefore, Plaintiffs must have commenced the action by 2016 to stay within the three-year limitation period. As noted above, Plaintiffs commenced this civil action in 2018 thus their cause of action is time barred.

Furthermore, pursuant to CPLR 3211(7) Plaintiffs "pleading fails to state a cause of action". *See* CPLR § 3211(7). A notice of claim must state "'the time when, the place where and the manner in which the claim arose.' (GML § 50-e[2]; *Brown v. City of New York*, 95 N.Y.2d 389) [2000][internal citations omitted]. The purpose of the statutory notice of claim requirement is to afford the public corporation an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available (*see Teresta v. City of New York*, 304 N.Y. 440, 443 [1952]; *Palmer v. Society for Seamen's Children*, 88 A.D.3d 970 [2d Dept. 2011][internal citations omitted])." *See Vallejo-Bayas v. New York City Transit Authority*, 103 A.D.3d 881 [2d Dept. 2013].

Plaintiffs allege municipal defendants committed fraud, conspiracy to commit fraud, breach of contract, negligence, discrimination, breach of express and implied warranty, and unjust enrichment. A cause of action of fraud requires "the circumstances constituting the wrong shall be stated in detail". *See* CPLR 3016(b). Here, Plaintiffs do not state with particularity the date, the purported misrepresentations, the means in which they received the purported misrepresentations, who said it, the language used, nor evidence of their reliance on the information. Similarly, the cause of action of conspiracy to commit fraud must "connect the actions of separate defendants with an otherwise actionable tort." *See Alexander & Alexander, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 [1986]. Accordingly, the court finds that plaintiffs fail to state a cause of action of fraud. They also fail to state a cause of action for conspiracy to commit fraud as Plaintiffs only assert the cause

of action against one defendant, HPD and do not state in detail how HPD conspired to commit fraud.

Likewise, Plaintiffs have not produced sufficient evidence to establish a special relationship with the municipal defendants nor detailed how Plaintiffs were entrapped by municipal defendants' actions. The court finds plaintiffs fail to state a cause of action of negligent misrepresentation. Also, plaintiffs have not produced sufficient evidence to establish municipal defendants' involvement in the development of plaintiffs' properties. The court finds plaintiffs fail to state a cause of action of negligent administration of a governmental function. As discussed above, plaintiffs have not produced a contract to substantiate subject breach. The Court finds that plaintiffs fail to state a cause of action of breach of contract.

With regards to the claim for breach of express warranty, the municipal defendants argue that they were not privy to any warranty agreements and cannot be held liable for a breach when the municipal defendants were not parties in the agreement. The court agrees. Accordingly, this claim fails and must be dismissed pursuant to CPLR 3211 (a)(7) as a cause of action is not stated.

A breach of implied warranty of habitability is between a landlord and a tenant. Landlord-Tenant relationships "shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." *See* NY REAL PROP § 235-b. In this matter, there never existed a landlord tenant relationship. Therefore, this claim also fails to state a cause of action.

'An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim' (*Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 [2012])."

See Scifo v. Taibi, 198 A.D.3d 704 [2d Dept. 2021]. For this reason and in accordance to the above, the claim for unjust enrichment is dismissed.

Based on the foregoing, the action against the municipal defendants is dismissed in its entirety. The Clerk is directed to transfer the case to a non-City part.

This constitutes the decision and order of the court.

ENTER.

Hon. Consuelo Mallafre Melendez
J. S. C