2011 NY Slip Op 50600
Iosif Kikirov, Plaintiff,
v.
355 Realty Associates, LLC, et al., Defendants.
11021/10
Supreme Court Of The State Of New York
Kings County
Decided on April 12, 2011

Attorneys for Plaintiff:
Malvina Lin, Esq.

Attorney for Defendants:
Edward Safran, Esq.

Carolyn E. Demarest, J.

Upon the foregoing papers, in this action by plaintiff Iosif Kikirov (plaintiff) alleging, among other claims, breach of contract, arising out of the sale of a newly constructed condominium unit, defendants 355 Realty Associates, LLC (355 Realty), Vision Property Management LLC (Vision), Foremost Contracting, LLC (Foremost), MMJ Contracting Corp. (MMJ), Michael J. Marino, Jr. (Michael Marino), Anthony Piscione, Ahron Hersh, and Toby Hersh (collectively, defendants) move for an order, pursuant to CPLR 3211 (a) (1), (5), and (7), dismissing each of the four causes of action alleged in plaintiff's amended complaint.

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355 Realty was the sponsor of 355 Kings Highway Condominium, a condominium project located at 355 Kings Highway, in Brooklyn, New York. The condominium units were allegedly marketed as "ultra luxury condos," and a "Manhattan style condominium building," which would be the "epitome of luxury and quality." The construction of the six-story 28 unit residential condominium building began in approximately November 2003. Vision was responsible for the management of the condominium building, pursuant to an agreement dated August 2004. Foremost and MMJ were general contractors for the condominium project. 355 Realty submitted an offering plan for the condominium project to the Attorney General, which was accepted for filing on March 30, 2005. The offering plan was certified by Michael Marino, Anthony Piscione, Ahron Hersh, and Toby Hersh, who are the principals of 355 Realty. Michael Marino and Anthony Piscione are also allegedly members of Vision and Foremost as well as shareholders of MMJ. Paragraph 28 of the offering plan projected that the construction of the condominium units would be completed by March 25, 2005. The offering plan provided that the structure was to be built under plans approved by the New York City Department of Buildings, and that the sponsor would "complete the premises in accordance with the building plans."

Paragraph 19 of the offering plan stated that "the New York State Housing Merchant Implied warranty has been limited for this offering" (p. 134). However, according to plaintiff,[1] the offering plan, as filed with the New York State Attorney General's Office, at pages 134 through 137, contained the entire text of the Housing Merchant Implied Warranty. Plaintiff claims that the offering plan actually disseminated to potential purchasers was missing pages 134 through 137 but the inclusion of such text in the offering plan filed with the Attorney General renders the statutory warranty applicable to his unit. Plaintiff also claims that page 46 of the offering plan stated that "[t]he [s]ponsor will cause to be corrected any defects in the construction of the [b]uilding, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with the [offering p]lan and [s]pecifications, in accordance with the New York State statute regarding housing merchant implied warranties which is described in this plan."

Plaintiff entered into a purchase agreement, dated December 21, 2005, with 355 Realty (which was executed on behalf of 355 Realty by Michael Marino, as its member) for the purchase of Unit 2G in the building. The purchase price for Unit 2G was $520,000, and plaintiff closed on his purchase on May 17, 2006. The purchase agreement provided that the offering plan "is incorporated herein by reference and made a part of this agreement with the same

effect as if fully set forth herein." The purchase agreement further provided that "[i]n the event of any inconsistency between this [a]greement and the [offering p]lan, the [offering p]lan shall govern to the extent that it enlarges upon or

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deals at greater length with [s]eller's obligations or imposes greater obligations on [s]eller." At the time of closing, only a temporary certificate of occupancy had been issued for the condominium.[2]

A blank form of limited warranty was annexed as a rider to the purchase agreement. The limited warranty provided that it was "in lieu of and replace[d] all other warranties on the construction and sale of the unit and its components, both express and implied (including any warranties of merchantability or fitness for a particular purpose)," and that "there [we]re no warranties which extend beyond the face [t]hereof." The limited warranty further provided that its "purpose . . . [wa]s to identify the seller's responsibilities for construction defects of a latent or hidden nature that could not have been found or disclosed on final inspection of the unit."While the limited warranty stated that it was "made exclusively by the [s]eller whose name and address appear[ed] on . . . page 1," the name and address of the seller on that page was left blank.

The limited warranty stated that its coverage began on the date upon which the deed to the unit was delivered to the purchaser and provided one year of basic coverage, which encompassed:

"(a) defective workmanship by the [s]eller, or an agent, employee or subcontractor of the [s]eller; (b) defective materials furnished by the [s]eller, or an agent, employee or subcontractor of the [s]eller; (c) defective design, provided by an architect, engineer, surveyor, or other design professional retained exclusively by the [s]eller; or (d) defective installation of appliances sold as part of the unit by the [s]eller or an agent, employee or subcontractor of the [s]eller."

The limited warranty also provided coverage for two years for major systems, which encompassed plumbing, electrical, heating, cooling, and ventilation systems of the unit installed by the seller. In addition, the limited warranty provided coverage of six years for major structural defects, which encompassed latent major structural defects resulting from:

"(a) defective workmanship by the [s]eller, or an agent, employee or subcontractor of the [s]eller; (b) defective materials furnished by the [s]eller, or an agent, employee or subcontractor of the [s]eller; or (c) defective design, provided by an architect, engineer, surveyor, or other design professional retained exclusively by the [s]eller."

A major structural defect was defined in the limited warranty as:

"a defect resulting in actual physical damage to the following load-bearing portions which affects their load-bearing functions to the extent that the [u]nit becomes unsafe, unsanitary or otherwise unlivable: foundation systems and footings, beams, girders, lintels, columns, walls and partitions, floor systems, and roof framing systems."

The limited warranty provided that "[i]f a defect occur[red] in an item covered by

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this warranty, the [s]eller w[ould] repair, replace, or pay the [p]urchaser the reasonable cost of repairing or replacing the defective item(s), within sixty (60) days after the [s]eller's inspection or testing disclose[d] the problem." The limited warranty further provided a step by step claims procedure, in which written notice of any warranty claim was required to be made on an attached "Notice of Warranty Claim Form" and received by the seller no later than the tenth day after the expiration of the applicable warranty period. Such notice was required to be sent by the purchaser to the seller by certified or express mail, return receipt requested. The limited warranty annexed to plaintiff's purchase agreement does not contain the parties' signatures. Plaintiff, in an affidavit, states that he does not recall the limited warranty rider ever being completed and signed at the closing, and that he does not have a copy of a completed and signed limited warranty rider in his records, but concedes that the limited warranty was annexed to the purchase agreement.

After taking occupancy of his condominium unit, plaintiff allegedly experienced serious leakage and moisture problems in his unit, which caused a dangerous mold condition to develop, in addition to causing actual damage to the structural elements of his unit. According to plaintiff, the walls, moldings, and wood floors of his unit are constantly wet and moist, and there is severe buckling of the wood floors. Plaintiff claims that these problems have caused his unit to be uninhabitable. Plaintiff alleges that he has been forced to remove all of his personal belongings from his unit and has been unable to occupy his unit.

Plaintiff states that he notified defendants numerous times of these problems, and that at the end of 2006 and beginning of 2007, Foremost attempted to repair the leakage problems in his unit for the first time, but only made things worse. Specifically, plaintiff asserts[3] that Foremost's contractors opened his walls to remove the stained drywall, but never corrected the cause of the leaks, destroyed the walls, and never properly taped and painted the sheet rock. Plaintiff alleges that Foremost repaired the openings in a defective manner. Plaintiff also claims that his floor was repaired at that time by a subcontractor hired by Foremost, but the basic structural problem was never resolved and the leaks continued, compromising the beams and causing the mold conditions, in addition to all of the physical damage present in the unit. On or about July 16, 2009, plaintiff allegedly sent a notice of the defects to 355 Realty and to the managing agent designated by the condominium board, by certified mail, return receipt requested. Plaintiff asserts that defendants have failed and refused to repair and remedy the defective condition, and that the damage is extensive and requires major structural repairs.

On December 15, 2009, Five Boro Mold Specialist (retained by plaintiff) prepared

and provided plaintiff with a report based upon its physical inspection and testing of the unit. The report showed that heavy excess moisture and buckling as a result of water seepage was observed, and that, among other things, waterproofing and/or sealing of the exterior/foundation walls was needed to prevent future moisture intrusions and consequential mold growth. Plaintiff asserts that without remedial action to the exterior and foundation elements of the building, any repair of the unit would be a waste of money and futile.

On May 4, 2010, plaintiff filed this action against defendants.[4] Plaintiff's original complaint asserted eight causes of action. By decision and order dated September 13, 2010, the court granted a motion by defendants to dismiss plaintiff's second cause of action for breach of implied covenants of good faith and fair dealing, his third cause of action for breach of implied warranties, his fifth cause of action for negligence as against 355 Realty, Michael Marino, Anthony Piscione, Ahron Hersh, and Toby Hersh, his seventh cause of action for negligence as against Vision, Foremost, and MMJ, and his eighth cause of action for violations of General Business Law § 349 and § 350, and granted plaintiff leave to replead his first cause of action for breach of contract as against 355 Realty, Michael Marino, Anthony Piscione, Ahron Hersh, and Toby Hersh, his fourth cause of action for breach of statutory warranties, and his sixth cause of action for breach of contract as against Vision, Foremost, and MMJ.

Plaintiff, by his amended complaint dated October 18, 2010, has repleaded these three causes of action by asserting a first cause of action for breach of contract as against 355 Realty, Michael Marino, Anthony Piscione, Ahron Hersh, and Toby Hersh, a second cause of action for breach of statutory warranties, and a third cause of action for breach of contract as against Vision, Foremost, and MMJ. In addition, plaintiff, in his amended complaint, has added a fourth cause of action for fraud. Plaintiff has also attached, as exhibit A to the amended complaint, a copy of the December 21, 2005 purchase agreement.

Defendants, in support of their instant motion, argue that each of the four causes of action alleged by plaintiff in his amended complaint fail to state a claim upon which relief may be granted, and that plaintiff's amended complaint must be dismissed pursuant to CPLR 3211 (a) (7). Defendants also cite to CPLR 3211 (a) (1), and (5), asserting that dismissal is also required based upon documentary evidence and the Statute of Limitations contained in the limited warranty.

"When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the

allegations of the complaint as true and provide [the] plaintiff . . . the benefit of every possible favorable inference'"(*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners, L.P.*, 5 NY3d at 591; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Such a motion, pursuant to CPLR 3211 (a) (7), must fail if the facts as alleged fit within any cognizable legal theory (*see Leon*, 84 NY2d at 87-88; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello*, 40 NY2d at 634).

Where a motion to dismiss is brought pursuant to CPLR 3211 (a) (1) based upon the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Leon*, 84 NY2d at 88; *Rubinstein v Salomon*, 46 AD3d 536, 539 [2007]).

With respect to plaintiff's first cause of action for breach of contract, defendants argue that plaintiff, in his amended complaint, fails to allege, in nonconclusory language, the specific provisions of the contract upon which liability is predicated, and that this warrants dismissal of this cause of action. This argument is rejected. In defendants' prior motion, defendants raised this identical argument. The court noted that plaintiff had annexed page 46 of the offering plan, which was incorporated into the purchase agreement. As noted above, that page of the offering plan, entitled "Rights and Obligations of Sponsor," provided, among other things, that the sponsor would "complete the premises in accordance with the building plans," and that the sponsor would "cause to be corrected any defects in the construction of the [b]uilding, . . . due to improper workmanship or material substantially at variance with the [p]lan and [s]pecifications, in accordance with the New York State statute regarding housing merchant implied warranties which is described in this plan." The court found that plaintiff's reference to these provisions specified the terms of the contract claimed to have been breached.

The purchase agreement has now been submitted to the court, which, as previously noted, explicitly incorporated the terms of the offering plan, which included the above quoted page 46. Plaintiff specifies, in his amended complaint, that the incorporated terms of the offering plan provided, among other things, that the sponsor would perform such work and supply such materials, and cause the same to be performed and supplied, as was necessary in order to complete the design and construction comparable to the currently prevailing local standards and substantially in accordance with the plans and specifications for the design and construction work filed with the New York City Department of Buildings and other appropriate governmental authorities and generally in

accordance with good design and construction standards and practices for first class, luxury condominiums in Brooklyn. Plaintiff sets forth, in this cause of action, that the sponsor breached its contractual obligations to him because the building was improperly and inadequately designed and constructed and completed in an incompetent and unworkmanlike manner, substantially below applicable standards for a first class, luxury condominium in Brooklyn, and not in accordance with the plans and specifications for the building. In addition, it is noted that paragraph 13 of the purchase agreement provided that "[t]he construction of the [b]uilding and the [u]nit and the materials, equipment and fixtures installed therein shall be substantially in accordance with the [offering p]lan and the architectural plans and specifications, as said plans are modified or amended as provided in the [offering p]lan."

Thus, contrary to defendants' argument, plaintiff's complaint contains sufficient allegations with respect to the contract terms which were allegedly breached. While defendants complain that plaintiff fails to specifically quote, in his amended complaint, the precise terms of the offering plan and the purchase agreement which were breached, "[w]hen evidentiary material is considered [i.e., the purchase agreement and the relevant terms of the offering plan], the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 188 [2007]). "It is well-established law that a pleading, although inartfully drawn, should not be dismissed, so long as it sets forth a cause of action" (*McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1990]). Thus, any inartful pleading in this regard does not warrant dismissal of plaintiff's first cause of action.

When plaintiff refers to the "sponsor" in his first cause of action (and throughout his complaint), plaintiff uses the term "sponsor" to also encompass and refer to the individual defendants, Michael Marino, Anthony Picione, Ahron Hersh, and Toby Hersh, who are members of 355 Realty, a limited liability company. Defendants reiterate their argument that these individual defendants cannot be held liable to plaintiff on a breach of contract theory due to their lack of privity with plaintiff. Defendants also repeat their argument that members of a limited liability company are generally statutorily exempted from individual liability for the contractual obligations of a limited liability company (*see* Limited Liability Company Law § 609; *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [2005]; *Collins v E-Magine*, 291 AD2d 350, 351 [2002]).

The court, in its September 13, 2010 decision and order, noted, however, that a plaintiff may seek damages for breach of contract against the individual principals of the sponsor based upon their certification of the offering plan and the incorporation of the terms of the offering plan by a specific provision in the purchase agreement (*see Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284, 1288 [2009]; *Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1075-1076 [2007]; *Board of Mgrs. of Woodpoint Plaza Condominium v Woodpoint Plaza LLC*,

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24 Misc 3d 1233[A], 2009 NY Slip Op 51715[U], *5-6 [Sup Ct, Kings County 2009]). The sole allegations in the amended complaint against the individual defendants, principals of both the sponsor and the general contractor, Foremost, and the building manager, Vision, relate to their certification of the offering plan. It is further suggested that their roles in the various defendant entities somehow might render them liable to plaintiff for breach of contract, although there are no allegations to support the piercing of the limited liability veil. Discovery might be needed to support such allegations. It is undisputed that Michael Marino, Anthony Picione, Ahron Hersh, and Toby Hersh certified the offering plan, and the offering plan was incorporated into plaintiff's purchase agreement. While these individual defendants appear to contend that their certifications were merely ministerial and done to comply with the Martin Act, and that they may not be held liable solely on such basis *(see Kerusa Co. LLC v W 10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]; *Hamlet on Olde Oyster Bay*, 65 AD3d 1284 [2009]), because no copy of the offering plan has been submitted, it is not possible to determine the context or confirm that such certifications were not made individually (*see Zanani v Savad*, 228 AD2d 584, 585 [1996]). Contrary to defendants' argument, the Martin Act does not preempt an otherwise validly pleaded common-law cause of action (*see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 304 [2010]). Thus, defendants' motion must be denied insofar as it seeks dismissal of plaintiff's complaint as against Michael Marino, Anthony Piscione, Ahron Hersh, and Toby Hersh.

Defendants also contend that once title to plaintiff's unit closed and the deed was delivered to plaintiff, any claims plaintiff had arising from the contract were extinguished by the doctrine of merger. This contention is without merit. Paragraph 13 of the purchase agreement provided that while "[t]he issuance of a temporary or final [c]ertificate of [o]ccupancy for the entire building shall be a prerequisite to [c]losing the title and shall be deemed presumptive evidence that the [b]uilding has been fully completed in accordance with the plans and specifications," it further specifically provided that this is "without prejudice . . . to any rights which the . . . [u]nit [o]wners may have with respect to [s]eller's obligation to cause defects in construction or materials to be corrected as set forth under Right and Obligations of Sponsor' in Part I of the [offering p]lan."

Defendants also argue that the sponsor's obligations are only as set forth in the limited warranty contained in the rider to the purchase agreement and that the second cause of action for "Breach of Statutory Warranties," pursuant to General Business Law § 777-a, must be dismissed as inapplicable to this six-story structure. Defendants further contend that the first cause of action for Breach of Contract must be dismissed as untimely because, pursuant to the rider, the conditions of which plaintiff complains are not major structural defects, which are warranted for six years, but are, at best, only covered by the one-year warranty, which expired one year following the closing on plaintiff's unit on May 17, 2006. Defendants maintain that plaintiff failed to give the

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contractually required notice in a timely manner since plaintiff claims to have first sent notice by certified mail on July 16, 2009, more than three years following the closing and the effective date of the rider. Defendants contend

that plaintiff failed to timely submit a notice of warranty claim to the seller prior to the filing of this lawsuit within 30 days after the expiration of the applicable warranty period or 30 days after the seller provided written notice of rejection of plaintiff's claim, thus failing to comply with a condition precedent to bringing suit.

Plaintiff, however, in paragraphs 51, 61, 67, 83, and 111 of his amended complaint, alleges that there was actual damage to the structural elements of Unit 2G, which requires major structural repairs, and that all of the alleged defects are structural. Plaintiff also specifies, in paragraphs 88 of his amended complaint, that in the Five Boro Report, there was an observation of a crack present between the porch and the exterior rear foundation wall of the property, which appeared to have been a primary source of water seepage within his home. In addition, plaintiff has annexed an April 20, 2010 letter from Mag Realty Corp., which stated that with respect to the damages in Unit 2G, among other listed units in the building, "the Board ha[d] decided [that] the damages are covered by sponsors' warrantee of structure." Thus, plaintiff has sufficiently alleged that the alleged defects are structural in nature so as to be covered by the six-year warranty contained in the rider. Consequently, plaintiff's July 16, 2009 notice, by certified mail, return receipt requested, was timely given within six years from the date of closing on May 17, 2006, and prior to the commencement of this lawsuit.

While defendants dispute that the alleged defects are actually structural in nature, plaintiff's allegations as to their structural nature are sufficient, at this juncture, to withstand defendants' motion to dismiss. Thus, dismissal of plaintiff's first cause of action must be denied.

Defendants' motion also seeks dismissal of plaintiff's second cause of action for breach of statutory warranties, which alleges that, under applicable law, including General Business Law § 777-a, et seq., the sponsor warranted to purchasers of units that the units would be constructed in a skillful, careful, and workmanlike manner, consistent with proper design, engineering, and construction standards and practices, and free of material latent, design, and structural defects. Defendants argue that General Business Law § 777-a , known as the housing merchant implied warranty, is inapplicable to this case because it is limited to the construction of a "new home," defined in General Business Law § 777 (5) as "any single family house or for-sale unit in a multi-unit residential structure of five stories or less." As noted above, the building in which plaintiff's condominium unit is located is a six-story building.

Plaintiff, however, asserts that General Business Law § 777-a was expressly incorporated into the purchase agreement by the parties (*see Sharpe v Mann*, 34 AD3d 959, 960 [2006]). Specifically, plaintiff's amended complaint alleges that the offering plan, incorporated into the purchase agreement, provided, on page 46, that the sponsor

would "cause to be corrected any defect in the construction of the [b]uilding, . . . due to improper workmanship or material substantially at variance with the [offering p]lan and [s]pecifications, in accordance with the New York State statute regarding housing merchant implied warranties which is described in this plan." As noted above, plaintiff alleges that pages 134 though 137 of the offering plan filed with the New York State Attorney General's Office contained the entire text of General Business Law § 777-a. While plaintiff acknowledges that a limited warranty was annexed to the purchase agreement, plaintiff notes that the purchase agreement provided that "[i]n the event of any inconsistency between this [a]greement and the [offering p]lan, the [offering p]lan shall govern to the extent that it enlarges upon or deals at greater length with [s]eller's obligations or imposes greater obligations on [s]eller."

Plaintiff alternatively alleges that paragraph 19 of the offering plan stated that the New York State Housing Merchant Implied Warranty has been limited for this offering. General Business Law § 777-b permits the exclusion or modification of required housing merchant implied warranty by the builder or seller of a new home if the buyer is offered a limited warranty in accordance with the provisions of that statute. Here, a limited warranty was annexed as a rider to the purchase agreement. However, as the full text of the offering plan has not been provided, the court is unable to examine the entire written agreement so as to determine the purpose of the inclusion of the text of General Business Law § 777 and dismissal of this cause of action must, therefore, be denied.

Plaintiff's third cause of action alleges a breach of contract claim as against Vision, Foremost, and MMJ based upon their contract with 355 Realty, pursuant to which they agreed to be the general contractors/construction

managers for the condominium, to undertake oversight responsibility for the design and construction of the condominium, to prepare and/or review drawings, plans, and specifications for the condominium, and to otherwise manage and oversee the project. Plaintiff alleges that Vision, Foremost, and MMJ breached their contractual obligations in that the condominium units were improperly and inadequately designed and constructed, and completed in an incompetent and unworkmanlike manner, with material design and construction defects.

Plaintiff alleges that he was an intended third-party beneficiary to these contracts by virtue of the purchase agreement, which incorporated the offering plan by reference. With respect to Vision, in his opposition papers in response to defendants' prior motion to dismiss, plaintiff annexed a page from the offering plan. That page referred to a management agreement dated August 2004, under which the property was to be managed by Vision, and Vision was to be responsible for "doing all things reasonable and necessary for the proper maintenance of the building," presumably during plaintiff's occupancy. Thus, since plaintiff contends that Vision breached its duty to see that repairs were made and that the building was properly maintained, and plaintiff could be an intended third-party beneficiary of such a management contract, dismissal of this claim as against Vision, at this early pleadings stage of this action, should be denied.

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With respect to Foremost and MMJ, although it has been held that a plaintiff who purchases a condominium unit is generally a mere incidental third-party beneficiary to a contract between the general contractors and the sponsor (*see Leonard v Gateway II, LLC*, 68 AD3d 408, 408 [2009]; *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 50 AD3d 503, 504 [2008]; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*,190 AD2d 636, 637 [1993]), such a plaintiff can be held to be an intended third-party beneficiary to such a contract when the contract is expressly intended to benefit the plaintiff and the plaintiff relied upon the contractor's obligations under the contract (*see Caprer v Nussbaum*, 36 AD3d 176, 201 [2006]; *Kidd v Havens*, 171 AD2d 336, 339 [1991]; *Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave. LLC*, 20 Misc 3d 1138[A], 2008 NY Slip Op 51789[U], *4-5 [Sup Ct, Kings County 2008]; *Bridge St. Homeowners Assn. v Brick Condominium Developers, LLC*, 18 Misc 3d 1128[A], 2008 NY Slip Op 50221[U], *3 [Sup Ct, Kings County 2008]).

In its September 13, 2010 decision and order, the court referenced paragraph 4 of the "Rights and Obligations of Sponsor" contained in the offering plan, which stated that the sponsor "will deliver . . . on behalf of [u]nit [o]wners an assignment of all assignable warranties and other undertakings received by the [s]ponsor from contractors, materialmen or others in connection with the construction and equipping of the [b]uilding." The court noted that it appeared from this paragraph that plaintiff may be in privity with Foremost and MMJ by virtue of assignments from the contracting sponsor. While plaintiff has not expressly alleged any such contractual assignments, it is probable that discovery is necessary to ascertain whether there exist any such assignments.

Plaintiff alleges, in his amended complaint, that Vision, Foremost, and MMJ have acknowledged notice of the defects and have not denied that they are responsible for providing a warranty to plaintiff. Plaintiff also refers to this warranty, in his amended complaint, by noting that paragraph 16 of the purchase agreement stated that the "[s]eller shall not be liable to . . . the [p]urchaser for any matter as to which an assignable warranty . . . has been assigned . . . to [p]urchaser and in such case the sole recourse of such . . . [p]urchaser . . . shall be against the warrantor . . . except that in the event a contractor or subcontractor is financially unable or refuses to perform its warranty . . . [s]eller shall not be excused from its obligations enumerated in the [offering p]lan under Rights and Obligations of Sponsor.'" Consequently, the court finds that dismissal of plaintiff's third cause of action as against Foremost and MMJ must also be denied.

Plaintiff's fourth cause of action alleges a newly asserted claim of fraud. Plaintiff alleges, in this fourth cause of action, that defendants made false statements and representations orally, in advertisements, and in the purchase agreement, that the condominium was properly and adequately designed and constructed and completed in a competent and workmanlike manner, in accordance with the condominium plans and specifications and proper design, engineering, and construction standards and practices

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consistent with applicable standards for a first class, luxury condominium in Brooklyn.

Plaintiff further alleges, in this fourth cause of action for fraud, that the offering plan and purchase agreement were designed to provide potential purchasers with the false impression that the units purchased were, in fact, covered by statutory and/or contractual warranties that could be enforced by the unit owners, and that the availability of a statutory and/or common-law warranty for the unit was a material term, upon which he relied in entering into the purchase agreement and closing on his unit, and that defendants have demonstrated that they had no intention to honor such warranties. Plaintiff has submitted his own affidavit and the affidavit of Yevgeniy Demchenko, the owner of Unit 4A of the building, in which they both state that they were told that their units would be covered by a six-year warranty.

In order to sustain a claim for fraud, "there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce [him or her] to act upon it, causing injury" (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [2003]; *see also Ross v DeLorenzo*, 28 AD3d 631, 636 [2006]; *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 437 [1988]; *Brine v 65th St. Townhouse LLC*, 20 Misc 3d 1138 [A], 2008 NY Slip Op 51780[U], *4 [Sup Ct, NY County 2008]).

Insofar as plaintiff's fourth cause of action for fraud is based upon misrepresentations as to whether the work performed would be adequately performed, it must be dismissed because it is duplicative of his first cause of action for breach of contract. "A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract" (*Tiffany at Westbury Condominium*, 40 AD3d at 1076; *see also Ross*, 28 AD3d at 636; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2001]; *Morgan v Smith Corp.*, 265 AD2d 536, 536 [1999]). Such misrepresentations are not collateral to the contract because they pertain to the exact allegations found in plaintiff's breach of contract claim, namely, that the work performed was substandard and not in accordance with its terms.

Insofar as plaintiff's fourth cause of action for fraud is based upon defendants' representations that they were providing plaintiff with warranties, paragraph 16 of the purchase agreement expressly stated that the "[p]urchaser acknowledges that he has not relied upon any . . . advertisements, representations, warranties, statements . . . of any nature whatsoever, whether written or oral, made by [s]eller or otherwise, . . . except as [are] herein or in the [offering p]lan specifically represented . . ." Whereas the court has not dismissed plaintiff's first or second causes of action pertaining to breach of contractual or statutory warranties, plaintiff may recover damages to the extent that such warranties were given and demonstrated to have been breached. To the extent that the fourth cause of action may be construed as based upon representations contained in the offering plan, there is no private right of action available as redress for such misrepresentations are exclusively within the purview of the Attorney General. *Hamlet on*

Olde Oyster Bay, 65 AD3d at 1287.

Accordingly, defendants' motion to dismiss plaintiff's amended complaint is granted to the extent that it seeks dismissal of plaintiff's fourth cause of action, and it is denied in all other respects.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

Notes:

[1]The offering plan has not been submitted to the court by either plaintiff or defendants.

[2]Plaintiff alleges that subsequent to the filing of this action, a final certificate of occupancy was procured for the condominium.

[3]While plaintiff refers to Foremost's attempt to remedy the problems in his complaint, these specific assertions describing Foremost's unsuccessful repair are contained in a sworn affidavit by plaintiff, which is annexed to his opposition papers.

[4]Although this action originally named Mag Realty Corp., who was alleged to be the property manager for the owners at 355 Kings Highway, as a defendant, Mag Realty Corp. did not appear in this action, and plaintiff, in his amended complaint, has removed Mag Realty Corp.'s name from the caption of this action.
