[***1] **Board of Managers of NV 101 N 5th Street Condominium, Plaintiff, against Michael Morton, et al., Defendants.**

501306/12

SUPREME COURT OF NEW YORK, KINGS COUNTY

39 Misc. 3d 1212(A); 2013 N.Y. Misc. LEXIS 1537; 2013 NY Slip Op 50575(U)

April 12, 2013, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HEADNOTES

[*1212A] Contracts--Breach or Performance of Contract--Condominium Board's Action for Damages for Defects in Construction of Condominium. Fraud--Fraud in Inducement--Inducement to Enter into Settlement Agreement and Release.

COUNSEL: [**1] For Plaintiff: Irwin, Lewin, Cohn & Lewin, P.C., New York, NY.

For 150 Berry LLC, Michael Morton & Morton Group, Defendant: Patrick J. Sweeney, Esq., Holland & Knight, New York, NY.

For Karl Fischer Architecture, Defendant: Adam Hanan, Esq., Wilson Elser Moskowitz Edelman & Dicker, LLP, New York, NY.

JUDGES: David I. Schmidt, J.

OPINION BY: David I. Schmidt

OPINION

David I. Schmidt, J.

Upon the foregoing papers, motion sequence numbers 1 and 2 are consolidated for disposition. Defendant Karl Fisher Architect PLLC (Fischer) moves for an order: (1) pursuant to *CPLR 3211(a)(1)* and *(a)(7)*, dismissing the third cause of action of plaintiff Board of Managers of NV 101 N 5th Street Condominium (the Board); (2) pursuant to *CPLR 3211(a)(1)* and *(a)(7)*, dismissing plaintiff's fourth cause of action; and (3) pursuant to *CPLR 3211(a)(1)* and *(a)(7)*, dismissing plaintiff's fifth cause of action. Defendants 150 Berry LLC (150 Berry or the Sponsor) and Michael Morton (hereinafter collectively referred to as the Morton Defendants) move for an order: (1) pursuant to *CPLR 3211(a)(5)*, dismissing the first, second, sixth, seventh, eighth, tenth and eleventh causes of action against them; (2) pursuant to *CPLR 3211(a)(7)* and *3016(b)*, dismissing [**2] the sixth cause of action; and (3) pursuant to *CPLR 3211(a)(1)* and *(a)(7)*, dismissing the first, second, sixth, seventh, eight, tenth and eleventh causes of action against Mr. [***2] Morton.[1]

1 In its Memorandum of Law, plaintiff agreed to discontinue the action, without prejudice, as against the Morton Group Inc. Accordingly, this decision will not address any of the claims as pleaded against the Group.

Facts and Procedural Background

Plaintiff commenced this action on May 29, 2012 seeking to recover damages for the alleged defective and/or negligent design, development, construction and operation of the condominium project known as 101 NV N 5th Condominium, located at 101 North 5th Street in Brooklyn (the Condominium), a seven story building having 40 residential units. Fischer was the architect for the project. 150 Berry was the Sponsor. Mr. Morton was a principal of the Sponsor and served on the Board as the Sponsor's designee.

Pursuant to an Offering Plan dated December 10, 2007, 150 Berry offered units in the Condominium to purchasers. The purchaser of each unit executed a purchase agreement with the Sponsor, which agreement incorporated the Offering Plan (the Purchase Agreements).

On April [**3] 28, 2009, the New York City Department of Buildings (DOB) issued a temporary certificate of occupancy (TCO) for the Condominium. On July 14, 2009, a final certificate of occupancy (CO) was issued.

Plaintiff alleges in its complaint that subsequent to the closing of the first unit, it began receiving complaints from unit owners for defects including, for example, leaks, HVAC problems, improper roofing, missing pavers, improper drainage and cracking of the concrete floor.

Fischer's Motion

Facts

By letter dated September 26, 2005, Fischer sent a proposal to Mr. Morton to provide architectural and engineering services for the Condominium. As is relevant herein, the letter agreement provides that Fischer is obligated to prepare final construction documents, including all required plans and specifications; obtain a TCO or CO; conduct fields visits as needed; and conduct up to two inspections to determine final completion and the quality of the work. The agreement further provides that "[i]f the C of O is not obtained within 4 months of substantial completion of the project, the architect will be paid the full amount of this item. However, the architect will continue to assist the owner in obtaining [**4] the C of O." By letter to Mr. Morton dated March 26, 2006, the agreement was amended to include interior design (hereinafter, these agreements shall be collectively referred to as the Contract).[2]

2 Although Fischer does not have signed copies of these letter agreements, plaintiff relies upon copies of the same unsigned agreements.

In September 2005, Fischer performed a visual inspection of the Condominium [***3] and prepared a report dated October 9, 2007, which was certified on the same date. Fischer again visually inspected the Condominium on March 13, 2008 and based upon this inspection, prepared an Attorney General's Report dated October 27, 2008, which was intended to be made a part of the Offering Plan. By certifications dated April 2, 2008 and January 26, 2009, Fischer stated that:

"The sponsor of the offering plan to convert the . . . property to condominium ownership retained our firm to prepare a report disclosing the condition of the property (the Report'). We visually inspected the property on March 13, and prepared the Report dated April 01, 2008, a copy of which is intended to be incorporated into the offering plan so that prospective purchasers may rely on the Report.

"We have [**5] read the entire Report and investigated the facts set forth in the Report and the facts underlying it and conducted the visual inspection referred to above with due diligence in order to form a basis for this certification. We certify that the Report and all documents prepared by us disclose all the material facts which were then discernable from a visual inspection of the property. This certification is made for the benefit of all persons to whom this offer is made. We certify that the Report based on our visual inspection:

"(i) sets forth in narrative form the physical condition of the entire property and is current and accurate as of the date of the inspection;

"(ii) in our professional opinion affords potential investors, purchasers and participants an adequate basis upon which to found their judgment concerning the physical condition of the property;

"(iii) does not omit any material fact;

"(iv) does not contain any untrue statement of a material fact;

"(v) does not contain any fraud, deception, concealment or suppression;

"(vi) does not contain any promise or representation as to the future which is beyond the reasonable expectation or unwarranted by existing circumstances;

"(vii) does [**6] not contain any representation or statement which is false where we:

"(a) knew the truth

"(b) with reasonable effort could have known the truth;

[***4] "(c) made no reasonable effort to ascertain the truth; or

"(d) did not have knowledge concerning the representations or statement made.

"It is understood that all aspects of the physical condition of the property cannot be determined by a visual inspection and that all statements contained in this certification are premised on and limited to such a visual inspection. . . .

"This statement is not intended as a guarantee or warranty of the physical condition of the property."

(hereinafter the certifications shall be collectively referred to as the Certifications).

Plaintiff's Claims against Fischer

The Board asserts three causes of action against Fischer. The third cause of action is for breach of contract, premised upon its claim that the purchasers of the individual units of the Condominium are third-party beneficiaries of the contract between Fischer and Mr. Morton. The fourth cause of action is for negligent misrepresentation and the fifth is for professional malpractice.

Fischer's Contention that the Action against It is Time Barred

Fischer's Contentions

Fischer [**7] first argues that all causes of action against it are time barred, since it completed its work more than three years before the commencement of the instant action. More specifically, Fischer explains that it forwarded the necessary documents to its expediter, who filed an application for a CO on October 15, 2008. Thereafter, an inspection was performed by DOB personnel on March 17, 2009, for which Fischer was present. At that point, the DOB certified that the project could obtain its final CO and a TCO was issued on April 28, 2009. Fischer thus contends that it performed its final obligation under the Contract on October 15, 2008, when it filed the papers needed to obtain the CO. Accordingly, since this action was not commenced until May 29, 2012, Fischer argues that the claims against it must be dismissed as time barred.

The Law

It is now well established that regardless of whether pleaded as causes of action sounding in contract or tort, all claims against design professionals for malpractice are subject to a three-year statute of limitations pursuant to *CPLR 214(6)*, which controls "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless [**8] of whether the underlying theory is based in contract or tort." In interpreting this 1996 amendment to *CPLR 214*, the Court of Appeals noted that "[t]he Legislature specifically amended this statute in 1996 to counteract the effect of decisions by this Court that abrogat[ed] and circumvent[ed] the original legislative intent' by allowing actions that were technically malpractice actions to proceed under a six-year [***5] contract statute of limitations" (*Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co.], 3 NY3d 538, 542, 821 N.E.2d 952, 788 N.Y.S.2d 648 [2004]*, citing Revised Assembly Mem in Support, Bill Jacket, L 1996, ch 623; *accord Napoli v Moisan Architects, 77 AD3d 895, 895-896, 909 N.Y.S.2d 389 [2010])*.

In addressing the issue of when a cause of action for malpractice accrues, the Appellate Division, Second Department, explained that "[a] cause of action to recover damages against an architect for professional malpractice . . . accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship. The completion of an architect's obligations must be viewed in light of the particular circumstances of the case" (*Vlahakis v Belcom Dev., 86 AD3d 567, 567-568, 927 N.Y.S.2d 152 [2011]* [**9] [internal citations omitted]). Thus, " [a]n owner's claim against a design professional accrues . . . when the designer completes its performance of significant (i.e.

non-ministerial) duties under the parties' contract'" (*Sendar Dev. Co. v CMA Design Studio, 68 AD3d 500, 503, 890 N.Y.S.2d 534 [2009]*, quoting *Parsons Brinckerhoff Quade & Douglas v EnergyPro Constr. Partners, 271 AD2d 233, 234, 707 N.Y.S.2d 30 [2000])*. In applying this rationale, it is been held that under circumstances where an architect was obligated to obtain a CO, a plaintiff's claim against the architect did not begin to accrue for statute of limitations purposes until the issuance of the CO, since that was determined to be the actual completion of the work to be performed and the consequent termination of the professional relationship (*Frank v Mazs Group, 30 AD3d 369, 369-370, 815 N.Y.S.2d 738 [2006])*.

Discussion

On the facts of this case, the court determines that Fischer's obligations under the Contract terminated when the final CO was issued. In so holding, the court rejects Fischer's assertion that its contractual obligations ended when it filed papers with the DOB. In this regard, the Contract clearly provides that Fischer's responsibilities included obtaining [**10] a final CO. The fact the Contract provides that Fischer would be paid in full four months after the substantial completion of the Condominium, even if the CO was not issued, is not controlling, since the Contract provision so stating goes on to obligate Fischer to cooperate with the owner in obtaining the CO.

From this it follows that plaintiff's claims against Fischer accrued on July 14, 2009. Thus, since plaintiff commenced the instant action on May 29, 2012, the claims as against Fischer are not time barred. The cases relied upon by Fischer, including, for example, *Board of Managers of 255 Hudson Condominium v Hudson Street Associates (37 Misc 3d 1222[A], 2012 NY Slip Op 52136[U] [Sup Ct, New York County, 2012])*, do not compel a contrary result, since in those decision, the court found that there was no contractual responsibility for the issuance of a CO, a finding that this court has determined is not supported by the language of the Contract.

Dismissal of the Breach of Contract Claim against Fischer

Plaintiff's Claims against Fischer

In its complaint, plaintiff alleges that Fischer was aware that the reports that it [***6] prepared pursuant to the terms of the Contract would be relied upon [**11] by the purchasers of the individual units, as is made clear by the above quoted language of the Certifications. The Board argues that despite these representations, the reports omitted material facts and representations, were deceptive and contained promises and representations which were untrue or unwarranted. Further, since the Certifications were incorporated into the Offering Plan and the Offering Plan was incorporated into each of the Purchase Agreements for the individual units, plaintiff concludes that the individual purchasers were intended to be third-party beneficiaries of the Contract.

Fischer's Contentions

Fischer contends that a review of its reports and Certifications makes it clear that it was not inspecting the final as-built work that would be marketed to potential buyers, but that it was visually inspecting the property while construction was ongoing. In his affidavit, Mr. Fischer further alleges that Fischer was not responsible for the means and methods of the contractors performing work on the Condominium, since pursuant to Section 3.15 of the Contract, "[d]uring the construction phase, the responsibility for controlled inspections will be transferred to an independent [**12] company retained by the client." Thus, the purpose of Fischer's inspections was to certify that based upon visual inspections, the Condominium appeared to conform to the construction plans and drawings and that the work was substantially completed, so that Fischer was not obligated to determine that the work complied with the plans filed with the DOB.

Fischer goes on to argue that this cause of action against it must also be dismissed since neither the Board nor the individual unit purchasers were intended beneficiaries of the Contract. Fischer also argues that the Board is not in privity with it and thus has no standing to maintain a breach of contract action. In this regard, Fischer did not make the Certifications for the benefit of the Board, which had yet to be formed, or the purchasers of the individual units, who were not yet known. Fischer thus concludes that the terms of the Contract do not evidence an intent to bestow a benefit upon plaintiff. Finally, Fischer contends that since it was obligated to prepare the Certifications pursuant to the regulations of the Attorney General's Office (*General Business Law § 352-e[6]*), the representations made therein cannot

support a private [**13] cause of action.

The Board's Contentions

In opposition to this demand for dismissal, the Board argues that it has standing to assert its claims pursuant to *Real Property Law § 339-dd*. It further avers that it is a third-party beneficiary of the Contract, because Fischer's Certifications specifically state that they are "made for the benefit of all persons to whom this offer is made."

Fischer's Reply

In reply, Fischer argues that in the recent case of *Board of Managers of the 231 Norman Ave. Condominium v 231 Norman Avenue Property Development, LLC (36 Misc 3d 1232[A], 959 N.Y.S.2d 87, 2012 Slip Op 51573[U] [Sup Ct, Kings County 2012]*, the Honorable Carolyn E. Demarest dismissed claims sounding in breach of contract, negligence and [***7] professional malpractice against the architects of a condominium that are virtually identical to those raised in this action. Fischer therefore asserts that its motion must be granted because that decision is controlling herein. Fischer also argues that it is entitled to dismissal pursuant to the settlement agreement and release executed between the Board and the Sponsor, which is more fully discussed hereinafter, since the release should be construed to be an admission against [**14] interests that establishes that all of the defects complained of herein have been corrected.

Standard of Review

In addressing a motion to dismiss pursuant to *CPLR 3211(a)(7)*, the court must accept the factual allegations set forth in the complaint in support of that cause of action as true, and accord to the plaintiff the benefit of every possible favorable inference to be drawn therefrom (*see e.g. Kronick v Thebault Co., 70 AD3d 648, 648-649, 892 N.Y.S.2d 895 [2010]* [citations omitted]). The "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg, 43 NY2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977])*.

Pursuant to *CPLR 3211(a)(1)*, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez, 84 NY2d 83, 88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]*, citing *Heaney v Purdy, 29 NY2d 157, 272 N.E.2d 550, 324 N.Y.S.2d 47 [1971])*. A clear and complete written agreement between sophisticated, counseled business people negotiating at arm's length may be considered to be documentary evidence (*see e.g. Fontanetta v John Doe 1, 73 AD3d 78, 898 N.Y.S.2d 569 [2010]*; [**15] *150 Broadway NY Assocs. v Bodner, 14 AD3d 1, 7, 784 N.Y.S.2d 63 [2004])*. Thus:

"[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to *CPLR 3211(a)(1)*, regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim. This follows from the bedrock principle that it is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document. This rule has special import "in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length."""

(*150 Broadway NY Assocs., 14 AD3d at 5-6*).

The Law

It is first noted that even though a plaintiff casts this claim in contract, it does not follow that the allegations fall into the designated cause of action, and the issue is whether the allegations set forth [**16] by plaintiff amount to a cause of action for professional [***8] negligence (*see Travelers Indem. Co. v Zeff Design, 60 AD3d 453, 455, 875 N.Y.S.2d 456 [2009])*.

Turning to the issue of whether the Board and the individual unit owners can maintain this action as third-party beneficiaries of the Contract, it is well established that:

"Parties asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting

parties of a duty to compensate [them] if the benefit is lost'" (*Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 336, 451 N.E.2d 459, 464 N.Y.S.2d 712 [1983])*."

(*Mendel v Henry Phipps Plaza W., 6 NY3d 783, 786, 844 N.E.2d 748, 811 N.Y.S.2d 294 [2006])*. It is equally well settled "that a third party may sue as a beneficiary on a contract made for his benefit (*Port Chester Electrical Constr. v Atlas, 40 NY2d 652, 655, 357 N.E.2d 983, 389 N.Y.S.2d 327 [1976]*, citing *Lawrence v Fox, 20 NY 268 [1859]*; 17A CJS, Contracts, § 519 [3]; 10 NY Jur, Contracts, § 237).

It has also been held that:

" [G]enerally . [**17] . . the ordinary construction contract--i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party--does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries' (*Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 653, 656, 357 N.E.2d 983, 389 N.Y.S.2d 327)*."

(*Board of Managers of Riverview at College Point Condominium III v Schorr Bros. Dev. Corp., 182 AD2d 664, 665, 582 N.Y.S.2d 258 [1992])*.

Also relative to the issues now before the court are the provisions of the Martin Act (General Business Law, Art 23-A). The Martin Act regulates the offer and sale of securities within or from New York (*see e.g. Kralik v 239 E. 79th St. Owners Corp., 5 NY3d 54, 58, 832 N.E.2d 707, 799 N.Y.S.2d 433 [2005])*. It "is a disclosure statute designed to protect the public from fraud in the sale of real estate securities and the Attorney General enforces its provisions and implementing regulations" (*Berenger v 261 W. LLC, 93 AD3d 175, 184, 940 N.Y.S.2d 4 [2012]*, citing *CPC Intl. v McKesson Corp., 70 NY2d 268, 276-277, 514 N.E.2d 116, 519 N.Y.S.2d 804 [1987]*; *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, 12 NY3d 236, 245, 906 N.E.2d 1049, 879 N.Y.S.2d 17 [2009])*. [**18] More specifically:

"[T]he Martin Act makes it illegal for a person to make or take part in a public offering or sale' of securities consisting of participation interests in real estate, including cooperative apartment buildings, unless an offering statement is filed with the Attorney General (*General Business Law § 352-e[1][a]*). The purpose of the disclosures required in an offering plan is to safeguard the purchasers of cooperatives and condominiums by mandating full disclosure of risks' and promoting unit purchasers' self-protection by analysis of risks' (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, 12 NY3d 236, 243, 906 N.E.2d 1049, 879 N.Y.S.2d 17 [2009]* [internal quotation marks and citation omitted])." [***9]

(*East Midtown Plaza Hous. Co. v Cuomo, 20 NY3d 161, 169, 981 N.E.2d 240, 957 N.Y.S.2d 644 [2012])*.

Thus, it is well settled that there is no there is no private right of action premised entirely on alleged omissions in filings required by the Martin Act (*see e.g. Kerusa Co. LLC, 12 NY3d at 247*; *Berenger, 93 AD3d at 184*). It is equally clear, however, that "an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and [**19] the Martin Act is not enough to extinguish common-law remedies" (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt., 18 NY3d 341, 353, 962 N.E.2d 765, 939 N.Y.S.2d 274 [2011]*; *see also Newswalk Condominium v Shaya B. Pac., LLC, 102 A.D.3d 932, 961 N.Y.S.2d 203, 2013 NY Slip Op 465 [2013]*; *Caboara v Babylon Cove Dev., LLC, 82 AD3d 1141, 1142-1143, 920 N.Y.S.2d 191 [2011])*.

Discussion

As a threshold issue, the court finds that as a general rule, a Board of Managers of a condominium has standing to maintain an action pursuant to *Real Property Law § 339-dd*, under which a Board is empowered to maintain an action on behalf of the condominium owners with respect to " any cause of action' relating to the common elements or more than one unit" (*see e.g. Residential Bd. of Managers of Zeckendorf Towers v Union Square-14th St. Assocs., 190 AD2d 636, 594 N.Y.S.2d 161 [1993]*, citing *Board of Managers v Fairways at North Hills, 150 AD2d 32, 38, 545 N.Y.S.2d 343 [1989])*. The court must therefore address the merits of each cause of action asserted.

Plaintiff's cause of action for breach of contract is predicated upon its assertion that Fischer's reports and Certifications omitted facts and that representations of material facts were untrue. Plaintiff alleges no other independent breaches of contract on the part of Fischer.

Thus, [**20] since plaintiff's claim is premised exclusively upon alleged misrepresentations made in statements required by the Martin Act, the cause of action is preempted (*see generally Kerusa Co. LLC, 12 NY3d at 247*). In addition, although a cause of action for breach of contract is asserted, the claim is more properly characterized as a claim for professional malpractice, so that the claim is properly dismissed for this reason as well (*see generally Travelers Indem. Co., 60 AD3d at 455*). Plaintiff also fails to establish that it was in privity with Fischer, which is another basis upon which its breach of contract cause of action must be dismissed (*see Leonard v Gateway II, LLC, 68 AD3d 408, 890 N.Y.S.2d 33 [2009]*, citing *Residential Bd. of Mgrs. of Zeckendorf Towers, 190 AD2d at 637*).

Further, plaintiff fails to establish that it, or any of the individual unit owners, are intended third-party beneficiaries of the Contract. In the first instance, in support of its claim, plaintiff relies upon the language in the Certifications that states that "a copy of [the report] is intended to be incorporated into the offering plan so that prospective purchasers may rely on the Report" and that the "certification is made [**21] for the benefit of all persons to whom this offer is made." This language, however, is set forth in the regulations implementing the Martin Act (*see 13 NYCRR § 20.4[c]*), and thus will be not interpreted as creating a private cause of action, as discussed above (*see e.g. Hamlet on* [***10] *Olde Oyster Bay Home Owners Assn. v Holiday Org., 65 AD3d 1284, 1287-1288, 887 N.Y.S.2d 125 [2009]*, citing *Kerusa Co. LLC, 12 NY3d at 236* [the certifications in the offering plans executed by the defendants were given pursuant to the Attorney General's implementing regulations and, as such, may not be the basis of private causes of action against them]).

In addition, as was also noted above, it is well settled that a the purchaser of a condominium unit is merely an incidental beneficiary of the Contract who does not have the right to sue to enforce it as a third-party beneficiary (*see Board of Managers of Riverview at College Point Condominium III, 182 AD2d at 665*; *see also Leonard, 68 AD3d 408, 890 N.Y.S.2d 33*). This case is also distinguishable from those in which the court held that the controlling agreements specifically recognized the plaintiff's rights and stated that they were intended to be beneficiaries. In this regard, the Board points [**22] to no such specific language, and instead relies solely upon the general representations required under the Martin Act (*see generally Diamond Castle Partners IV PROXIMATE CAUSE, L.P. v IAC/InterActiveCorp, 82 AD3d 421, 918 N.Y.S.2d 73 [2011]* [plaintiffs had standing to bring an action alleging breach of contract under which defendant sold its subsidiary to an acquisition entity formed by plaintiffs; although not signatories to the subject purchase agreement, the agreement was plainly intended to give plaintiffs enforceable rights, since it expressly provided that defendant would indemnify and hold harmless buyer and its affiliates, defined to include plaintiffs]; *Board of Mgrs. of Alfred Condominium v Carol Mgt., 214 AD2d 380, 382, 624 N.Y.S.2d 598 [1995], lv dismissed 87 NY2d 942, 664 N.E.2d 889, 641 N.Y.S.2d 824 [1996]* [contract's reference to unit owners as beneficiaries trumped general disclaimer of obligations to third parties in agreement between construction manager and sponsor]). Thus, since the Contract does not extend privity to plaintiffs as intended third-party beneficiaries, plaintiffs may not maintain a breach of contract claim as against the Architect defendants (*see Board of Mgrs. of the 231 Norman Ave. Condominium, 2012 Slip Op 51573[U] at *9*).[3]

3 The [**23] court notes that this decision, being rendered by a court of concurrent jurisdiction, is not controlling herein. Nonetheless, "[a] decision of a court of equal or inferior jurisdiction is not necessarily controlling, though entitled to respectful consideration" (McKinney's Cons Laws of NY, Book 1, Statutes § 72, at 143-144).

Finally, since Fischer is not a party to the settlement agreement or release that the Board executed in favor of the Morton Defendants, it is not effective to preclude plaintiff's claim as asserted against it (*see Birnbaum v Yonkers Contr. Co., 272 AD2d 355, 356-357, 707 N.Y.S.2d 662 [2000])*.

Dismissal of Breach of the Negligent Misrepresentation Claim against Fischer

Plaintiff's Claims against Fischer

In its complaint, the Board alleges that in its reports, Fischer made representations regarding the design, construction and condition of the Condominium that it knew or should have known that the purchasers of individual units would rely upon. The [***11] individual purchasers therefore suffered damages when these representations proved to be false.

Discussion

As discussed above, there is no private right of action where the alleged misrepresentations relied on by a plaintiff rest entirely on [**24] omissions in filings required by the Martin Act (*see e.g. Kerusa Co. LLC, 12 NY3d at 247*; *Merin v Precinct Devs. LLC, 74 AD3d 688, 688-689, 902 N.Y.S.2d 821 [2010]*; *Hamlet on Olde Oyster Bay Home Owners Assn., 65 AD3d at 1287-1288*). Herein, since plaintiff makes no "affirmative misrepresentations that do not rest entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations" (*Caboara, 82 AD3d at 1142-1143* [internal citations omitted]), this cause of action must be dismissed.

Further, in order to sustain a claim for misrepresentation, a plaintiff must show that the damages it sustained as a result were different or supplementary to damages sustained by reason of alleged professional malpractice (*see generally Simcuski v Saeli, 44 NY2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 [1978])*. Here, the various causes of action against Fischer are based on the same allegations of professional malpractice, and plaintiff fails to demonstrate any difference between these two sets of damages. Thus, plaintiff's claim for misrepresentation is a cause of action for professional malpractice, and for this reason, cannot be sustained, as is more fully discussed hereinafter (*see Travelers Indem. Co., 60 AD3d at 455*).

In [**25] the alternative, in order to make a prima facie showing on a cause of action premised upon negligent misrepresentation, a plaintiff must establish, among other elements, that it relied upon the fraudulent misrepresentation, and that as a result, it was induced to engage in a specific course of conduct (*Ross v Louise Wise Servs., 8 NY3d 478, 868 N.E.2d 189, 836 N.Y.S.2d 509 [2007]*; *Meyercord v Curry, 38 AD3d 315, 832 N.Y.S.2d 29 [2007])*. In this case, plaintiff fails to make a showing that any of the purchasers of the individual units relied upon Fischer's reports or Certifications in deciding to purchase the units (*see generally Berenger, 93 AD3d at 184*).

In addition, "[i]t has long been the law in New York that a plaintiff in an action for negligent misrepresentation must show either privity of contract between the plaintiff and the defendant or a relationship so close as to approach that of privity" (*Sykes v RFD Third Ave. 1 Assocs., LLC, 15 NY3d 370, 372, 938 N.E.2d 325, 912 N.Y.S.2d 172 [2010]* [internal citation omitted], *affd 15 NY3d 370, 938 N.E.2d 325, 912 N.Y.S.2d 172 [2010]*. In this case, plaintiff fails to sufficiently allege that it was a known party to the Contract, or that Fischer knew that particular prospective purchasers of the units would rely on its reports or Certifications (*see generally Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 36 Misc 3d 1205[A], 954 N.Y.S.2d 762, 2012 NY Slip Op 51207[U] [Sup Ct, New York County, 2012])* [**26] . Thus, in the absence of privity, plaintiff cannot succeed on its claim against Fischer.

Dismissal of the Malpractice Claim against Fischer

Plaintiff's Claims against Fischer

In its complaint, the Board alleges that Fischer rendered architectural services in [***12] connection with the design, construction and supervision of the Condominium, and as licensed architects, had a duty to render services in a manner that was consistent with the care and competence of a reasonably skilled architect. The Board alleges that Fischer failed to do so.

Fischer's Contentions

In support of that branch of its motion seeking to dismiss this cause of action, Fischer again argues that the malpractice claim must be dismissed, since the Board has no contractual relationship with it and that plaintiff cannot recover for economic loss arising out of negligent construction in the absence of such a relationship; that there is no privity between Fischer and the Board, so that the Board has no right to enforce the Sponsor's Contract with Fischer; and that the Board has no standing as a matter of law to commence [**27] an action in reliance upon alleged misrepresentations that were contained in the Certifications, as such a claim can only be pursued by the Attorney General's Office.

The Law

Architects, in the exercise of their profession, assume certain legal duties independent of their contractual obligations, and may be held liable for failure to exercise reasonable care irrespective of their contractual duties (*see e.g. QB, LLC v A/R Architects, LLP, 19 AD3d 675, 677, 797 N.Y.S.2d 552 [2005])*. A claim of malpractice against a professional engineer requires expert testimony to establish a viable cause of action, proof that there was

a departure from accepted standards of practice and that the departure was a proximate cause of the injury (*see e.g. Travelers Indem. Co., 60 AD3d at 455*). It has also been held that in the absence of a relationship approaching privity, a claim for architectural malpractice is properly dismissed (*see e.g. 905 5th Assoc. v Weintraub, 85 AD3d 667, 668, 927 N.Y.S.2d 29 [2011]*, citing *Board of Mgrs. of Yardarm Beach Condominium v Vector Yardarm, 109 AD2d 684, 487 N.Y.S.2d 17 [1985], appeal dismissed 65 NY2d 998, 484 N.E.2d 662, 494 N.Y.S.2d 299 [1985])*.

Discussion

As was noted above with regard to plaintiff's claims of breach of contract and negligent misrepresentation, [**28] plaintiff relies solely upon the representations that Fischer made in its reports and Certifications, so that the statements relied upon are required by the Martin Act. Thus, these allegations cannot form the basis of a private cause of action (*see generally Hamlet on Olde Oyster Bay Home Owners Assn., 65 AD3d at 1287-1288*). Moreover, plaintiff fails to point to any specific actions or inactions on the part of Fischer that caused the complained of defects in the Condominium, nor does it offer the affidavit of an expert to correct this pleading deficiency. Accordingly, plaintiff's claim of malpractice must also be dismissed for this reason (*see generally Travelers Indem. Co., 60 AD3d at 455*).

In addition, having found above that no privity exists between plaintiff and Fischer, the cause of action for malpractice must be dismissed for this reason as well (*see e.g. Board of Mgrs. of the 231 Norman Ave. Condominium, 2012 NY Slip Op 51573[U] at *8-9*, citing *905 5th Assoc. v Weintraub, 85 AD3d 667, 668, 927 N.Y.S.2d 29 [2011])*.

[***13] ***The Morton Defendants***

Plaintiff's Claims against the Morton Defendants

In its complaint, the Board alleges that when it began to receive complaints regarding problems with the Condominium, [**29] defendants conducted an investigation. On July 26, 2010, the Board entered into an agreement with the Sponsor that set forth "Post Closing Representations," pursuant to which the Board acknowledged the existence of certain construction and design defects and agreed "to use commercially reasonable efforts to remedy" the enumerated conditions. Thereafter, plaintiff learned of additional defects, which defendants failed to remedy. Plaintiff thus alleges that defendants failed to comply with the provisions of the Offering Plan and its marketing and sales literature, along with the Purchase Agreements and/or the Post Closing Representations, when they failed to build the Condominium in accordance with the plans, as would be appropriate for a luxury building, and failed to remedy the defects as agreed.

More specifically, the first cause of action alleges that the Morton Defendants breached the representations made in the Offering Plan and Purchase Agreements. The second cause of action alleges that the Morton Defendants breached the Post Closing Representations. The sixth cause of action alleges that the Morton Defendants fraudulently induced it to enter into the Post Closing Representations, [**30] having knowledge of the defects that existed in the Condominium and having already issued or being about to issue releases to the contractors, subcontractors and vendors responsible for the defects. The seventh cause of action alleges breach of the warranty contained in the Offering Plan and Purchase agreements. The eighth cause of action alleges breach of fiduciary duty in failing to disclose he alleged defects in the Condominium. The tenth cause of action alleges negligent misrepresentation and the eleventh cause of action alleges negligent misrepresentation regarding the projected expenses.

The Morton Defendants

In support of their motion to dismiss, the Morton Defendants first argue that what plaintiff has characterized as "Post Closing Representations" is clearly a Settlement Agreement, and that the document is so titled. Moreover, plaintiff fails to appraise the court that the Settlement Agreement annexed a general release and covenant not to sue, dated July 27, 2010, entered into between the Board and the Morton Defendants, that precludes the Board from maintaining any of the causes of action alleged against them in the complaint (the Release). More specifically, the Release provides [**31] that the Board releases and discharges 150 Berry and Mr. Morton from:

"all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in

law, admiralty or equity, which against the Releasees the Releasors ever had, now have or hereafter can, shall or may have, for, upon or by reason of any matter cause of thing whatsoever from the beginning of the world to the date of the [***14] Release, whether known or unknown, including without limitation: any claims resulting from or arising out of the act, omissions or negligence of the Releasees; any claims arising out of or relating to the Condominium Offering Plan for NV 101 N 5th Condominium and any amendments thereto (the Offering Plan'), and the building located at 101 North 5th Street, Brooklyn, New York (the Building'); including, but not limited to, any claims arising out of or relating to a breach or an alleged breach of fiduciary duty owed to the Releasors; any claims arising out of or relating to the Offering Plan; any claims arising out [**32] of or relating to the design and/or construction of the Buildings, including claims for acts, omission or negligence and or breach of implied or express warranties; any claims arising out of or relating to representations and warranties made by the Releasees, their agents, servants or employees, including claims that such representations were either negligently made and/or fraudulent; and any claims relating to or arising out of Releasees' ownership, operation, control and/or management of the land, building and improvements at the Condominium."

The Release further provides that it was intended to "be effective and remain in effect as a fully [sic] and complete notwithstanding the discovery or existence or any additional claims or facts." The Release was executed by Nada Arnot, as President of the Board.

Plaintiff's Opposition

In opposition to the motion, plaintiff alleges that Mr. Morton, as a member of the Board, owed a fiduciary duty to the Board and did not reveal any facts relating to the alleged defects in the condominium before the Board signed the Settlement Agreement. Plaintiff also alleges that the Settlement Agreement and Release must be set aside as induced by fraud, since [**33] at the time that the agreements were signed, the Sponsor knew or should have known of the defects that existed in the Condominium and had already issued, or was about to issue, releases to the contractors, subcontractors and vendors. Plaintiff concludes that for these reasons, the Settlement Agreement is unenforceable.

Plaintiff also argues that it properly commenced an action against Mr. Morton, in his individual capacity, because he was a member of the Board and accordingly owed a fiduciary duty to it. In so arguing, as is made clear in its memorandum of law, plaintiff is no longer arguing that the corporate veil should be pierced, as was alleged in the complaint. Plaintiff also relies upon the fact that Mr. Morton signed the Contract with Fischer in his individual capacity to argue that he can be held liable to the Board because he personally took on the duty to supervise the architect and the contractors.

The Release

CPLR 3211(a)(5) provides for the dismissal of claim that is governed by a release. In discussing the effect of a release, the Court of Appeals has explained that:

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the [**34] release' (*Global Mins. & Metals Corp. v Holme, 35 AD3d 93, 98, 824 N.Y.S.2d 210 [1st Dept 2006])*. If the language of a release is clear and unambiguous, the signing [***15] of a release is a "jural act" binding on the parties' (*Booth v 3669 Delaware, 92 NY2d 934, 935, 703 N.E.2d 757, 680 N.Y.S.2d 899 [1998]*, quoting *Mangini v McClurg, 24 NY2d 556, 563, 249 N.E.2d 386, 301 N.Y.S.2d 508 [1969])*. A release should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice' (*Mangini, 24 NY2d at 563*). A release may be invalidated, however, for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake' (*id*.).

"Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release' (*Fleming v Ponziani, 24 NY2d 105, 111, 247 N.E.2d 114, 299 N.Y.S.2d 134 [1969])*. A plaintiff seeking to invalidate a release due to fraudulent inducement must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, [**35] knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury' (*Global Minerals, 35 AD3d at 98*).

"Notably, release may encompass unknown claims, including unknown fraud claims, if the parties so intend

and the agreement is fairly and knowingly made' (*Mangini, 24 NY2d at 566-567*; *Alleghany Corp. v Kirby, 333 F2d 327, 333 [2d Cir 1964])*. As the Appellate Division majority explained below (*Centro, 76 AD3d at 318*), a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release (*see Bellefonte Re Ins. Co. v Argonaut Ins. Co., 757 F2d 523, 527-528 [2d Cir 1985])*. Were this not the case, no party could ever settle a fraud claim with any finality."

(*Centro Empresarial Cempresa v América Móvil, S.A.B. Danielle C.V., 17 NY3d 269, 276, 952 N.E.2d 995, 929 N.Y.S.2d 3 [2011]*; *see also Birnbaum, 272 AD2d at 356* [the clear, unambiguous release executed by the condominium's board of managers in favor of the Sponsor established that the Sponsor was entitled to summary judgment dismissing the complaint insofar as asserted against it]).

Applying the above principles [**36] of law to the facts of this case, as fully discussed in *Centro Empresarial Cempresa*, the language in the Release is broad enough to encompass all of the claims asserted by plaintiff in its complaint. Further, as was also discussed in *Centro Empresarial Cempresa*, the Release is broad enough to encompass plaintiff's claims that it was fraudulently induced to execute the Release and that Mr. Morton breached his fiduciary duty to the Board. In so holding, the court rejects the Board's assertion that a different finding should be made because its members are not sophisticated business people, since they are managing a luxury building that has 40 units and had access to legal counsel.

[***16] ***Breach of Fiduciary Duty***

In the alternative, the court finds that plaintiff's claim that the Release is unenforceable because Mr. Morton owed a fiduciary duty to the Board is without merit. "It is well settled that a fiduciary relationship ceases once the parties thereto become adversaries" (*EBC I v Goldman Sachs & Co., 91 AD3d 211, 215, 936 N.Y.S.2d 92 [2011]*, *lv granted 19 NY3d 810, 976 N.E.2d 249, 951 N.Y.S.2d 720 [2012]*, citing *Eastbrook Caribe A.V.V. v Fresh Del Monte Produce, 11 AD3d 296, 297, 783 N.Y.S.2d 533 [2004], lv dismissed and denied 4 NY3d 844, 830 N.E.2d 313, 797 N.Y.S.2d 414 [2005]*; *accord Carr v Neilson, 77 AD3d 877, 878, 909 N.Y.S.2d 387 [2010]*, [**37] *lv denied 16 NY3d 706, 944 N.E.2d 1151, 919 N.Y.S.2d 511 [2011]* [even assuming that defendants had fiduciary duties to plaintiff at some point, a fiduciary relationship ceases when parties become adversaries in litigation]). Thus, once the parties' relationship became adversarial, which is clearly evidenced by the need to execute the Settlement Agreement and the Release, any fiduciary duty that had existed between Mr. Morton and the Board had come to an end.

Fraudulent Inducement

The court also finds that plaintiff fails to allege facts sufficient to support the conclusion that it was fraudulently induced to enter into the Settlement Agreement and Release. It is well settled that:

"In an action to recover damages for fraud, the plaintiff must prove a 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 (*see, Channel Master Corp. v Aluminium Ltd. Sales, 4 NY2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259*; *New York Univ. v Continental Ins. Co., 87 NY2d 308, 318, 662 N.E.2d 763, 639 N.Y.S.2d 283*.)."

(*Lama Holding Co. v Smith Barney, 88 NY2d 413, 421, 668 N.E.2d 1370, 646 N.Y.S.2d 76 [1996])*. In order to plead a claim of fraud [**38] in accordance with the requirements of *CPLR 3016(b)*, each of the elements must be supported by factual allegations containing the details constituting the wrong (*see e.g. Barclay Arms. v Barclay Arms Assocs., 74 NY2d 644, 646, 540 N.E.2d 707, 542 N.Y.S.2d 512 [1989]*; *Cohen v Houseconnect Realty, 289 AD2d 277, 278, 734 N.Y.S.2d 205 [2001])*. Bare, conclusory allegations of fraud attributed to the defendants are insufficient to satisfy the pleading requirement of *CPLR 3016(b)* (*see e.g. Fink v Citizens Mortg Banking, 148 AD2d 578, 578, 539 N.Y.S.2d 45 [1989]*; *Glassman v Catli, 111 AD2d 744, 745, 489 N.Y.S.2d 777 [1985])*.

In addition, it is equally well settled that:

"While a party who is fraudulently induced to enter into a contract may join a cause of action for fraud with one for breach of the same contract, it may do so only if the misrepresentations alleged consist of more than mere promissory statements about what is to be done in the future (*see, Deerfield Communications Corp. v*

Chesebrough-Ponds Inc., 68 NY2d 954, 502 N.E.2d 1003, 510 N.Y.S.2d 88; *Shlang v Bear's Estates Development of Smallwood, NY, 194 AD2d 914, 599 N.Y.S.2d 141*)."

(*Eastman Kodak Co. v Roopak Enters., 202 AD2d 220, 222, 608 N.Y.S.2d 445 [1994]*). Thus, " "a [***17] representation of opinion or a prediction of something which is hoped or expected to occur in the future will not [**39] sustain an action for fraud"'" (*Platus Corp. Pension Plan v Nazareth, 271 AD2d 422, 423, 705 N.Y.S.2d 649 [2000]*, quoting *Landes v Sullivan, 235 AD2d 657, 659, 651 N.Y.S.2d 731 [1997]*, quoting *Zanani v Savad, 217 AD2d 696, 697, 630 N.Y.S.2d 89 [1995]*). Further, "[i]n a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform" (*Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320, 323-324, 776 N.Y.S.2d 273 [2004]*, citing *Deerfield Communications, 68 NY2d at 956*).

As alleged by the Morton Defendants, plaintiff's conclusory allegations of fraud in the inducement are insufficient to satisfy the pleading requirements of *CPLR 3016(b)*, since plaintiff fails to offer any details with regard to the alleged fraudulent misrepresentations, who made them, how they were made, to whom they were made and how plaintiff relied upon them to its detriment. Further, the majority of plaintiff's allegations concern future events, i.e., defects in the Condominium that were not known at the time that the Settlement Agreement and Release were entered into. To the extent that [**40] the allegations are based upon existing facts, the claims are barred by the Release, as discussed in detail above. Moreover, to the extent that the claims are based upon representations required by the Martin Act, a private cause of action is not available (*see e.g. Merin, 74 AD3d at 688-689*, citing *Kerusa Co. LLC, 12 NY3d 236, 906 N.E.2d 1049, 879 N.Y.S.2d 17*).

Finally, it is well settled that a cause of action to recover damages for fraud does not lie where, as here, the only fraud claimed relates to an alleged breach of contract (*see e.g. Hylan Elec. Contr. v MasTec N. Am., 74 AD3d 1148, 1149, 903 N.Y.S.2d 528 [2010]*, citing *Rocchio v Biondi, 40 AD3d 615, 617, 835 N.Y.S.2d 401 [2007]*; *Sokol v Addison, 293 AD2d 600, 601, 742 N.Y.S.2d 311 [2002]*; *Mastropieri v Solmar Constr. Co., 159 AD2d 698, 700, 553 N.Y.S.2d 187 [1990]*; *accord Tiffany at Westbury Condominium by Its Bd. of Mgrs. v. Marelli Dev., 40 AD3d 1073, 1077, 840 N.Y.S.2d 74 [2007]*). Here, plaintiffs' cause of action for fraud is wholly duplicative of the breach of contract claim.

Conclusion

For [**41] the foregoing reasons, the motions by Fischer, 150 Berry and Mr. Morton are granted and the complaint is dismissed as against them. The complaint is dismissed as against the Morton Group on consent. The remaining causes of action are severed and shall continue.

The foregoing constitutes the order and decision of this court.