SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
CIVIL TERM
360 ADAMS STREET
BROOKLYN, NEW YORK 11201

August 10, 2009

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Re: Board of Managers v. Woodpoint Plaza
Index No. 12579/06

Dear Counsel:

Please find an attached decision recently rendered by Justice Demarest in the above-referenced matter. This matter has been adjourned for a conference on October 14, 2009 at 9:45 A.M. in Commercial Part I.

Very truly yours,

Carl Regelmann, Esq.
Law Clerk to Justice
CAROLYN E. DEMAREST

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of August, 2009.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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BOARD OF MANAGERS OF WOODPOINT PLAZA CONDOMINIUM, ET AL.,
Plaintiffs,

- against -

WOOPOINT PLAZA LLC, CHESKEL WIEDER, YITZCHOK SCHWARTZ, AND MAURICE BREZEL
Defendants.

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Index No. 12579/06

DECISION AND ORDER

The following papers numbered 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1,4
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers (Memoranda of Law)	2,5,7,8,9

Plaintiffs move for summary judgment on plaintiffs' contract, warranty, fraud, negligence and malpractice claims[1] pursuant to CPLR 3212(b). Defendants cross-move for summary judgment

[1]Although plaintiffs did not indicate which numbered causes of action were the subject of the present summary judgment motion, it is clear from the motion that plaintiffs moved for summary judgment on causes of action one (breach of contract), two (breach of warranty), three (breach of contract), four (breach of limited warranty), five (breach of housing merchant warranty), six (negligence), second seven (breach of contract), eight (professional negligence), nine (breach of certification), ten (breach of certification), twelve (consumer fraud), and thirteen

dismissing the third, fourth, fifth, sixth, second seventh[2], eighth, ninth, tenth, eleventh and twelfth causes of action in the second amended complaint pursuant to CPLR 3212(b) for failure to state a cause of action.[3]

BACKGROUND

This action arises out of the sale of newly constructed condominium units by the sponsor defendant, Woodpoint Plaza, LLC ("Plaza"). The plaintiffs are the board of managers of Woodpoint Plaza Condominium and the individual condominium unit owners. Plaza filed an offering plan with the New York State Attorney General in 2003 which included a certification of the sponsor, signed by defendant Cheskel Wieder ("Wieder") as "a member" of Plaza and individually as the principal of Plaza, indicating that the first board of managers for the condominium would be composed of Wieder and defendant Yitzchok Schwartz ("Schwartz"). Plaintiffs allege in their motion that they discovered at the depositions in this action that Schwartz is an undisclosed principal of Plaza. The offering plan states that the architect, Karl Fischer ("Fischer"), prepared the plans and drew the specifications for the construction of the condominium. The defendant Maurice Brezel ("Brezel") was identified in the offering plan as the registered architect who reviewed Fischer's plans and specifications and prepared the "description of property and specifications" report ("Report") and

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(common law fraud). Plaintiff's did not move for summary judgment on causes of action seven (common charges/parking/closing adjustments) and eleven (breach of fiduciary duty).

[2]The second amended complaint contains two seventh causes of action. For the purposes of this decision, they will be referred to as the "seventh" cause of action and the "second seventh" cause of action.

[3]Although the defendants' argument that the complaint should be dismissed for "fail[ure] to state a cause of action" is generally raised in a motion to dismiss, issue has been joined and the defendants clearly moved for summary judgment pursuant to CPLR 3212. This decision will address defendants' motion accordingly.

executed the certification of architect included in the offering plan pursuant to the regulations. The offering plan was incorporated into all of the purchase agreements.[4]

The complaint alleges 13 causes of action and seeks monetary damages. The first, second, third, fourth, fifth, sixth and seventh causes of action are asserted against Plaza. However, plaintiffs seeks summary judgment on those causes of action against Wieder and Schwartz individually, in addition to Plaza, pursuant to the offering plan which provides for the principal of the sponsor to succeed to all obligations of the sponsor in the event of dissolution of the corporation. The sponsor was dissolved on February 1, 2007. The second seventh, eighth and ninth causes of action are asserted only against Brezel. The tenth, twelfth and thirteenth causes of action are asserted against Plaza and Wieder. The eleventh cause of action is asserted against Wieder and Schwartz.

The second amended complaint alleges that the construction of the condominium was deficient, was not in compliance with applicable building, fire safety, and energy codes, was not built in accordance with the offering plan, specifications or industry standards, was not completed in a skillful manner, and utilized substandard materials that differed from the materials listed in the offering plan. Plaintiffs have provided numerous affidavits from condominium unit owners in support of their summary judgment motion claiming some of the alleged deficiencies in the building including water leaks through the ceilings and windows which resulted in mold and other damage

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[4]Neither the summary judgment motion, nor the cross-motion, included any actual purchase agreements signed by the plaintiff condominium unit owners. However, a sample purchase agreement is included in the offering plan and plaintiffs' attorney has represented that the contracts were all substantially similar to the purchase agreement included in the offering plan and no substantial changes were incorporated into the individual purchase agreements. Defendants have not contested this. The sample purchase agreement states: "The Plan is incorporated herein by reference and made a part hereof with the same force and effect as if set forth at length. In the event of any inconsistency between the provisions of this Agreement and the Plan, the provision of the Plan will govern and be binding."

to the walls and floors, gaps in windows and patio doors which resulted in drafts and leaks, a flooded basement which lead to destruction of personal property, and the malfunction of the HVAC. The complaint also alleges that Plaza failed to remedy construction defects pursuant to the warranty, deliver "as built" plans as required by the offering plan, or hire an architect or engineer to make periodic inspections during the construction to determine whether the building was built in accordance with the offering plan, in violation of § 339-p of the Condominium Act.

Plaintiff's proposed expert architect, James Cicalo ("Cicalo"), of the architectural and engineering firm FSI, P.C. ("FSI"), submitted an affidavit in support of plaintiff's motion noting that he examined Fischer's plans and inspected the building in January of 2007. Cicalo's affidavit identified aspects of the condominium that he believed were improperly constructed upon his initial inspection: the workmanship of the facade was below acceptable industry standards; the steel lintel installation was incorrect; water was observed running through the construction and it appeared that there was inadequate flashing or the flashing had been inadequately installed; and several condominium units had obvious signs of water infiltration through patio doors and windows. Cicalo conducted a test probe on the facade and determined, among other things, that the flashing and end dams were improperly installed, the sheathing material on the metal studs on the exterior wall was improper, the lintels below the windows were loosely installed, there was no metal flashing at any point within the wall construction, the concrete panels were not mechanically anchored to the structure or wall construction and relied solely on gravity to remain in place, door openings were not properly waterproofed and that the windows and patio doors do not meet the specifications contained in the offering plan or the New York State Energy Code. FSI then prepared plans and specifications to remedy the alleged deficiencies in the construction and plaintiffs obtained a bid of $1.9 million

from a contractor to perform the work. The defendants subsequently sought contractor bids for repair work using the same FSI plans and received bids of $1.6 million and $1.1 million.

Although defendants have sought to reach a plan acceptable to all parties to remedy the various problems, defendants oppose plaintiffs' motion for summary judgment on the first cause of action claiming there are triable issues of fact concerning whether the alleged defects are actually present and whether any NYC Administrative Code sections have been violated in the construction of the condominium. While admitting that "some repairs are needed," defendants argue that plaintiffs are not entitled to summary judgment on their second cause of action because plaintiffs voided their warranty by refusing to allow the defendants to make repairs pursuant to the warranty. Defendants' expert architect, Donald Erwin ("Erwin"), submitted an affidavit in opposition to plaintiffs' motion for summary judgment noting that, after conducting a probe "around the windows," he prepared drawings and specifications to repair the problem areas at a substantially lower cost.

Defendants cross-move for summary judgment. Defendants argue that the third and fourth causes of action should be dismissed because they are encompassed in the first and second causes of action and because plaintiffs will not permit Plaza to make any further repairs in the building and should therefore be estopped from claiming that Plaza failed to make the repairs. Defendants argue the fifth cause of action should be dismissed because the Housing Merchant Implied Warranty was excluded in the offering plan pursuant to GBL § 777-b(3). Defendants contend that the sixth cause of action, although listed as a negligence cause of action, is merely a cause of action for punitive damages which, alone, is not a cause of action for which relief may be granted. Defendants argue that the second seventh, eighth, and ninth causes of action against Brezel are solely for his work in

supervising the construction of the condominium and should be dismissed because defendants have demonstrated that Brezel was not hired to supervise construction of the condominium and was retained solely to prepare the Report and architect's certification to be included in the offering plan. Furthermore, defendants claim that only the New York Attorney General can enforce such claims against the architect under the Martin Act. Defendants argue that the tenth cause of action for breach of certification, twelfth cause of action for consumer fraud, and thirteenth cause of action for common law fraud, due to the failure to disclose material facts in the offering plan, are only enforceable by the Attorney General under the Martin Act.

DISCUSSION

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

Although the defendants' proposed expert has admitted that "some repairs are needed" and defendants' counsel has admitted to the court that the defendants did not provide plaintiffs with a set of "as built" drawings, defendants have not conceded liability as to the particulars of plaintiffs' claims and have raised triable issues of fact concerning the construction and whether code

requirements were met, thus rendering summary judgment on the first and second causes of action inappropriate. The complaint alleges that the condominium was not constructed "in accordance with the Plans and Specifications and not in accordance with prevailing industry standards or applicable codes." Although the applicable codes alleged to have been violated are listed in the bill of particulars, plaintiffs did not address the requirements of the various codes in their summary judgment motion or demonstrate how the specific codes were violated. Therefore, the plaintiffs have failed to present prima facie evidence that the construction was in violation of any applicable codes (*see Zuckerman*, 49 NY2d at 562).

With respect to the windows and patio doors installed in the condominium, Cicalo's affidavit in support of the summary judgment motion notes, "I state flatly that [the windows and patio doors do] not meet the specifications contained in the offering plan." Despite including a copy of the manufacturer specifications for the windows ultimately installed in the condominium, plaintiffs have not demonstrated how the windows failed to meet the specifications contained in the offering plan which specifically states that "the Sponsor reserves the right to provide windows by different manufacturers, which are equal to or better than those listed above." Other than Cicalo's conclusory statement, plaintiffs have failed to demonstrate that the windows and patio doors installed were not in compliance with the terms of the offering plan. While the defendants' proposed expert apparently agrees that repairs are necessary for the "problem areas" surrounding the windows, it would be inappropriate to grant partial summary judgment on liability as to the first or second cause of action when there are issues of fact as to whether the replacement of the windows should be included in the assessment of damages and as to what the actual defects in the construction encompass (*see Clark-Fitzpatrick, Inc. v Long Island R.R.*, 198 AD2d 254, 255 [2d Dept 1993] (holding, "triable issues of

fact concerning the planning, design, and implementation of [the] construction project rendered the granting of partial summary judgment on the breach of contract cause of action inappropriate").

There are also outstanding issues of fact regarding Schwartz's personal liability for any claims against the sponsor. Pursuant to the offering plan, "[i]n the event of dissolution and liquidation, the principal of Sponsor will succeed to all obligations of Sponsor set forth in this Plan and may be held responsible for discharging any of Sponsor's obligations existing at the time of such dissolution and liquidation." As Plaza dissolved on February 1, 2007, plaintiffs seek to have summary judgment granted not only as to Plaza, but also against Wieder and Schwartz as principals of the Sponsor. The offering plan identifies Wieder as the sole principal of Plaza and, in deposition testimony, Wieder identified himself as the only member of Plaza. However, plaintiffs contend that Schwartz was an undisclosed principal based on Wieder and Schwartz's deposition admissions that Schwartz invested money in Plaza, received between 20 and 25% of the profits from the sale of the condominium units, made sure checks from Plaza were written for proper services rendered, and instructed Brezel on certain aspects of the architect's certification that was included in the offering plan. As there are conflicting accounts as to Schwartz's participation in Plaza, and Schwartz did not individually sign the sponsor's certification included in the offering plan, there are factual questions that must be resolved with respect to Schwartz's liability (*see* 13 NYCRR 20.1(c)(2) (defining "principal" for offering plan requirements of the Martin Act as including, "individuals who both (i) own an interest in or control sponsor and (ii) actively participate in the planning or consummation of the offering, regardless of the form of organization of sponsor"); *State v Manhattan View Dev., Ltd.*, 191 AD2d 259 [1st Dept 1993] (holding that an individual defendant was a principal of the sponsor pursuant to 13 NYCRR 20.1(c)(2) where defendant was officer of the sponsor, invested

money in the construction project, personally guaranteed a construction loan, and individually signed a certification as a principal of the sponsor); *see also Tiffany at Westbury Condominium by Its Bd. of Mgrs. v Marelli Dev. Corp.*, 40 AD3d 1073 [2d Dept 2007] (allowing breach of contract causes of action against individual principals of sponsor of condominium)). Accordingly, plaintiffs' motion for summary judgment as to the first and second causes of action are denied.

Defendants' cross-motion to dismiss the third and fourth causes of action for breach of contract and breach of limited warranty, respectively, must be granted as they are duplicative of the second cause of action. The third cause of action claims that Plaza attempted to remedy some of the defects but "breached its contractual obligations to the Board and the individual unit owners by failing to complete and repair the construction defects." This claim arises from the same facts and alleged damages as the second cause of action which also alleges that the defendants failed to repair the defects pursuant to the limited warranty. Similarly, the fourth cause of action claims that Plaza offered a limited warranty, whereby Plaza guaranteed certain aspects of the construction, and Plaza failed to make repairs under the warranty. This is also duplicative of the second cause of action which includes the identical claim that the defendants breached the "limited warranty" included in the offering plan, Plaza was notified of the defects, Plaza failed to remedy such defects, and plaintiffs have been damaged as a result. Accordingly, plaintiffs' motion for summary judgment as to the third and fourth causes of action is denied and defendants' cross-motion to dismiss the third and fourth causes of action is granted (*see Daniels v Lebit*, 299 AD2d 310 [2d Dept 2002]).

Plaintiffs' motion for summary judgment and defendants' cross-motion to dismiss the fifth cause of action for the breach of the Housing Merchant Warranty must be denied. Defendants argue that pursuant to the terms of the offering plan, "Section 777-a of the New York General Business

Law (Housing Merchant Implied Warranty Law) does not apply to this offering." Pursuant to General Business Law § 777-b(3)(d), a housing merchant implied warranty may be excluded only where the buyer is offered a limited warranty that exceeds the standards provided in General Business Law § 777-b(4) and (5). GBL § 777-b(4) requires the following disclosures in the limited warranty:

> f. what the builder and any other warrantor will do when a defect covered by the warranty does arise, and the time within which the builder and any other warrantor will act;
>
> . . . .
>
> h. step-by-step claims procedures required to be undertaken by the owner, if any, including directions for notification of the builder and any other warrantor;

Upon review of the offering plan, the limited warranty set forth therein does not include either a claims procedure for the owner, an indication of what the warrantor will do when a defect arises, or a time period within which the warrantor will act. As the limited warranty included in the offering plan fails to meet the standards provided in GBL § 777-b(4)(f) and (h), the defendants may not rely on the exclusion of the statutory housing merchant implied warranty found in the offering plan (*see Latiuk v Faber Constr. Co.*, 269 AD2d 820 [4th Dept 2000]). Dismissal of the fifth cause of action is therefore denied. Plaintiffs' motion for summary judgment on the fifth cause of action is also denied as it would be inappropriate to grant summary judgment where there are issues of fact as to what the actual defects in the construction encompass, and what defects defendants actually failed to repair under the statutory housing merchant implied warranty (*see Clark-Fitzpatrick, Inc.*, 198 AD2d at 255).

Defendants' cross-motion to dismiss the sixth cause of action for negligence must be granted. "It is a well-established principle that a simple breach of contract is not to be considered a tort

unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987]; *see also Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 [1st Dept 2006]). The only actionable duty owed to plaintiffs by Plaza, other than those obligations imposed under the Martin Act which are exclusively enforceable by the Attorney General, arose out of the contractual purchase of the condominium units (*Bridge St. Homeowners Ass'n v Brick Condominium Developers, LLC*, 18 Misc 3d 1128A [Sup Ct, Kings County 2008]; *see also Regatta Condo. Ass'n v Vill. of Mamaroneck*, 303 AD2d 739, 740 - 741 [2d Dept 2003]). Accordingly, plaintiffs' sixth cause of action for negligence is dismissed in that the substance of the claim duplicates the allegations of the first breach of contract cause of action.

Defendants move to dismiss the three causes of action against architect Brezel. Defendants argue that only the New York Attorney General can enforce the claims alleged against Brezel under the Martin Act. The Court of Appeals has not precluded the purchaser of a condominium unit from bringing a private right cause of action that is not predicated solely on the failure to comply with the requirements mandated by the Martin Act even though the allegations could also support a Martin Act violation. Most recently, in *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009], it was held that "a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated *solely* on alleged material omissions from the offering plan amendments mandated by the Martin Act (General Business Law art 23-A) and the Attorney General's implementing regulations (13 NYCRR part 20)" (emphasis added). However, where plaintiffs sufficiently plead causes of action that are not predicated solely on the failure to comply with the Martin Act, they are not precluded from bringing

common law causes of action against an architect that submitted the certification in support of the offering plan (*see Caboara v Babylon Cove Dev., LLC*, 54 AD3d 79 [2d Dept 2008] (holding that common-law fraud and breach of contract claims were not preempted by the Martin Act and that viable causes of action "may rest upon the same facts that would support a Martin Act violation as long as they are sufficient to satisfy traditional rules of pleading and proof")).

Defendants further argue that Brezel was retained solely for the preparation of the Report and certification and the causes of action alleged against Brezel should be dismissed as they all allege that the premises were not constructed in accordance with the plans and specifications and Brezel did not have a duty to supervise the construction. In the certification, Brezel certified that he was retained "to prepare a report describing the construction of the property," "visually inspected existing portions of the property," "examined the building plans and specification that were prepared by Karl Fischer, R.A.," and prepared the Report that was "*intended to be incorporated into the Offering Plan so that prospective purchasers may rely on the Report*" (emphasis added). In the certification, Brezel further represented:

> I have read the entire Report and investigated the facts set forth in the Report and the facts underlying it with due diligence in order to form a basis for this certification. *This certification is made for the benefit of all persons to whom this offer is made. I certify that the Report:*
>
> 1. *sets forth in narrative form the physical condition of the entire property as it will exist upon completion of construction, provided that the construction is in accordance with plans and specification that I examined*;
>
> 2. in my professional opinion affords potential investors, purchasers and participants adequate basis upon which to found their judgment concerning the description and/or physical condition of the property as it will exist upon completion of construction, provided that the construction is in accordance with the plans and specifications that I examined;

3. does not omit any material facts;

4. does not contain any untrue statements of a material fact;

5. does not contain any fraud, deception, concealment or suppression;

6. does not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;

7. does not contain any representations or statement which is false, where I; (i) knew the truth; (ii) with reasonable effort could have known the truth; (iii) made no reasonable effort to ascertain the truth; (iv) did not have the knowledge concerning the representations or statements made.

. . . .

This statement is not intended as a guarantee or warranty of the physical condition of the property. (emphasis added)

At the conclusion of the Report, the following statement appears above Brezel's signature:

> The building and site will be developed in accordance with the New York City Building Code, the Multiple Dwelling Law, the New York City Zoning Resolution and all other applicable authorities and in accordance with the plans and applications on file with the New York City Department of Buildings.

Plaintiffs' second seventh cause of action against Brezel for breach of contract is dismissed as plaintiffs have acknowledged that Brezel was not retained by Plaza to inspect the property and insure that the building was properly constructed. In their second seventh cause of action for breach of contract, plaintiffs claim "that Brezel had been retained to inspect the Premises to insure that the building was properly constructed in accordance with applicable codes, the plans and specifications, without defects, in a good and workmanlike manner, and customary building industry standards. . . . Brezel breached his contractual obligations to the Board and individual unit owners in that the Premises were not constructed in accordance with applicable codes, the plans and specifications, in a good and workmanlike manner . . . ." In their cross-motion, defendants claim that Brezel was not retained to supervise construction and that he was only retained to prepare the Report and sign the

architect's certification. In their reply memorandum of law, despite opposing the cross-motion, "plaintiffs accept that Brezel was not retained to supervise the construction." As there are no issues of fact regarding Brezel's role as the architect retained for the purpose of reviewing the adequacy of Fischer's plans and specifications, and preparing the Report and certification as to the adequacy of the plans and specifications for the benefit of the plaintiffs, plaintiffs' second seventh cause of action must be dismissed (*see Zuckerman*, 49 NY2d at 562; *Vermette*, 68 NY2d at 717).

The plaintiffs have failed to sufficiently plead a professional negligence cause of action against Brezel and defendants' motion to dismiss the eighth cause of action is granted. The eighth cause of action alleges "professional negligence" in the failure "to insure that the premises were constructed in accordance with applicable codes" and without defect, in conformity with the plans. "A claim of professional negligence requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury" (*D.D. Hamilton Textiles, Inc. v Estate of Mate*, 269 AD2d 214, 215 [1st Dept 2000], *citing Georgetti v United Hosp. Med. Ctr.*, 204 AD2d 271, 272 [2d Dept 1994]). Plaintiffs' eighth cause of action claims that "Brezel owed a duty to the Board and the individual unit owners to insure that the Premises were constructed in accordance with applicable codes, the plans and specification, without defect, in a good and workmanlike manner, and customary building industry standards." However, the architect's certification clearly indicates that Brezel disclaimed any duty to insure that the property was *constructed* in accordance with the plans he reviewed in preparing the offering plan certification and Report. The certification states that the narrative of the description of the property will accurately describe the finished structure, "provided that the construction is in accordance with plans and specification that I examined." Furthermore, the architect's certification specifically notes that

it "is not intended as a guarantee or warranty of the physical condition of the property." The eighth cause of action must be dismissed as the certification and Report clearly indicated that they were not to be used for the purpose of insuring that the premises were constructed without defect and in conformity with customary building industry standards and thus plaintiffs are unable to demonstrate that any construction defects were proximately cause by Brezel's review of the plans and specifications (*see D.D. Hamilton*, 269 AD2d at 215; *see also Tower Bldg. Restoration, Inc. v 20 E. 9th St. Apt. Corp.*, 7 AD3d 407, 408 [1st Dept 2004] (holding that dismissal of complaint alleging architectural malpractice was appropriate "since there was no proof that [the architect] supervised the construction or that he authorized the contractor's departures from his plans and specifications"). While a professional negligence cause of action against an architect that only provided a certification and report in association with a sponsor's offering plan may be appropriate in certain circumstances, the cause of action would require the allegation that the architect was negligent in the *examination* of the plans and specifications as that is what the architect is certifying and thus where a departure from the accepted standards of practice for an architect would occur. No allegation is made that Fischer's plans and specifications were not in compliance with applicable law and that Brezel was professionally negligent in certifying them as such.

Plaintiff's ninth cause of action against Brezel for breach of certification is dismissed as there is no private right of action for the enforcement of the Martin Act. Plaintiffs allege that "[a]s part of the Offering Plan, Brezel certified for the benefit of all persons to whom the offer was made" that the condominium, upon completion, would be as represented in the offering plan and Brezel "breached the certification" because the condominium is "not constructed in the physical condition set forth in the Offering Plan." It is noted that a cause of action for "breach of certification" does

not appear to have been recognized as a valid cause of action in any published decision in New York to date. This is consistent with the Court of Appeals decisions noting that "the Attorney General bears the sole responsibility for implementing and enforcing the Martin Act; there is no private right of action under the statute" (*Kerusa*, 12 NY3d at 244 (internal citations omitted); *see CPC Int'l v McKesson Corp.*, 70 NY2d 268 [1987]; *see also Caboara*, 54 AD3d at 81 (holding, "[t]he Court of Appeals has determined that there is neither an express nor an implied private right of action under the Martin Act")). To the extent that the condominium unit owners may have attempted to allege a common-law breach of contract cause of action distinct from a claim solely based on a violation of the Martin Act, the ninth cause of action is duplicative of the allegations in the second seventh cause of action which was dismissed for the reasons discussed above.

Similarly, plaintiffs' tenth cause of action against Plaza and Wieder for breach of certification is dismissed as there is no private right of action for the enforcement of the Martin Act (*see Kerusa*, 12 NY3d at 244; *CPC Int'l*, 70 NY2d at 268; *Caboara*, 54 AD3d at 81). Moreover, while an individual that executes a certification in their individual capacity may be held personally liable for advancing alleged misrepresentations contained in an offering plan (*Zanani v Savad*, 228 AD2d 584, 585 [2d Dept 1996]), the allegations in the tenth cause of action are duplicative of the first breach of contract cause of action against Plaza. As discussed above, the purchase agreement provides for Wieder's individual liability as to the obligations of Plaza with respect to the first cause of action where, as in the case of Plaza, the sponsor is dissolved. Accordingly, the tenth cause of action is dismissed.

In the twelfth cause of action alleging consumer fraud under the General Business Law, plaintiffs allege that Plaza and Wieder "made misrepresentations and failed to disclose material facts

concerning the Offering Plan and the Premises in connection with a business directed at consumers" and "such misrepresentations and omissions concerned the construction of the premises as well as the various obligations of Plaza and Wieder." As a result, plaintiffs claim that "[s]uch acts and omissions were deceptive and were likely to and did mislead consumers in violation of General Business Law sections 349 and 350" and they suffered damages as a result. "The elements of [a cause of action pursuant to GBL § 349] are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act. In determining whether a representation or omission is a deceptive act, the test is whether such act is 'likely to mislead a reasonable consumer acting reasonably under the circumstances'" (*Andre Strishak & Assocs., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002] (internal citations omitted)). Pursuant to GBL § 350, "[a] plaintiff must demonstrate that [an] advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury . Similarly, the test is whether the advertisement is 'likely to mislead a reasonable consumer acting reasonably under the circumstances'" (*Andre Strishak*, 300 AD2d at 609 (internal citations omitted)).

Plaintiffs' twelfth cause of action for consumer fraud pursuant to General Business Law §§ 349 and 350 is dismissed for failure to allege an act or practice that was misleading in a material respect or allege that plaintiffs relied on false advertisements when purchasing the condominium units. The complaint generally alleges that the condominium was not constructed in accordance with the plans, specifications and offering plan. Plaintiffs' only allegation of a misleading practice in the complaint is the general assertion that Plaza and Wieder "made misrepresentations and failed to disclose material facts concerning the Offering Plan." While the plaintiffs clearly alleged that defendants breached the contract by failing to build the condominium in accordance with the plans

and offering plan, "the complaint failed to allege an act or practice that was misleading in a material respect" pursuant to GBL § 349 (*Andre Strishak*, 300 AD2d at 610). Furthermore, the complaint fails to allege that defendants "relied upon or were aware of [an] allegedly false advertisement" when purchasing the condominium units pursuant to GBL § 350 (*Andre Strishak*, 300 AD2d at 610). As the complaint fails to properly allege the elements for causes of action pursuant to GBL §§ 349 or 350, the twelfth cause of action is dismissed. The court need not address defendants' contention that the Martin Act precludes plaintiffs' cause of action under GBL §§ 349 and 350.

Plaintiffs' motion as to the thirteenth cause of action for common law fraud is denied as plaintiffs have failed to demonstrate prima facie evidence of the alleged fraud. "The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury'" (*Ross v DeLorenzo*, 28 AD3d 631, 636 [2d Dept 2006], internal citations omitted). Plaintiffs' thirteenth cause of action claims, "Plaza and Wieder engaged in a scheme to defraud and deceive by making misrepresentations and concealing material facts in the Offering Plan and in the individual purchase agreements to the effect that the Premises would be constructed in accordance with applicable codes and the plans and specifications without defects and in a good and workmanlike manner." Plaintiffs further allege that Plaza and Wieder had reason to know that the condominium was not being built according to the codes, plans and specifications and intended to use contractors and suppliers that were not competent or licensed. However, plaintiffs have not demonstrated prima facie evidence that any specific codes were violated, that the contractors, subcontractors and suppliers were not competent or licensed to perform the work, or that Plaza and Wieder knew the property was not being built in accordance with the plans and specifications. Accordingly, plaintiffs' motion for summary judgment as to the thirteenth cause of action is denied (*see Zuckerman*, 49 NY2d at 562; *Ross*, 28 AD3d at 636).

Defendants' cross-motion to dismiss the eleventh cause of action for breach of fiduciary duty as to Schwartz and Wieder is denied as there are outstanding issues of fact. The offering plan, incorporated into the purchase agreement, clearly states that the first board of managers was to consist of Wieder and Schwartz. Defendants claim that "Schwartz never actually served on the Board of Managers because Sponsor turned over control to the purchasers shortly after they purchased" and Wieder "really never acted as a manager of the Condominium." In their affidavits in support of the cross-motion, both Wieder and Schwartz acknowledge that they were named as the initial members of the board of managers and the unit owners did not take control of the board of managers until at least one month after the certificate of occupancy was issued. As "a sponsor-appointed board of managers of a condominium owes a fiduciary duty to the unit purchasers" and there are issues of fact as to when Wieder and Schwartz were board members of Plaza, to what extent they performed as board members, and whether they breached a duty to the plaintiffs, defendants' cross-motion to dismiss the eleventh cause of action is denied (*Board of Managers v Fairway at N. Hills*, 193 AD2d 322, 327 [2d Dept 1993]).

CONCLUSION

Accordingly, plaintiffs' motion for summary judgment pursuant to CPLR 3212(b) is denied; Defendants' cross-motion for summary judgment is granted to the extent that causes of action three, four, six, second seven, eight, nine, ten, and twelve are dismissed, and denied as to the remaining causes of action.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. CAROLYN E. DEMAREST