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SCANNED ON 2/15/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

0109881/2002

CHRYSIKOPOULOUS, JOHN S.
VS
SOHO GREEN ASSOCIATES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

SEQ 6

REARGUMENT/RECONSIDERATION

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
FEB 15 2005
COUNTY CLERK'S OFFICE

Dated: February 10, 2005

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JOHN S. CHRYSIKOPOULOS,

Plaintiff,

INDEX NO. 109881/02

-against-

SOHO GREENE ASSOCIATES, LLC, FRONT ROW ENTERPRISES, LLC., MECOX REALTY CORP., ALCHEMY PROPERTIES, INC., KENNETH S. HORN, MATTHEW ADAMS PROPERTIES, INC., ARPAD BAKSA ARCHITECT, P.C., NICHOLAS TJARTJALIS ARCHITECT, P.C., and NICHOLAS TJARTJALIS,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages and declaratory and injunctive relief relating to the condominium conversion of a historical building in Soho, defendants SoHo Greene Associates, LLC, ("SoHo Greene"), Mecox Realty Corp. ("Mecox"), Alchemy Properties, Inc. ("Alchemy") and Kenneth S. Horn ("Horn"), previously moved for summary judgment dismissing the complaint, as against them, and plaintiff cross-moved for partial summary judgment as to liability against the same four defendants. By a decision and order dated September 8, 2004, this Court granted defendants' motion only to the extent of dismissing the Eight and Ninth Causes of Action, and plaintiff was awarded partial summary judgment as to liability against defendants Soho Greene, Mecox, Alchemy and Horn. Defendants are now moving for an order pursuant to CPLR 2221 seeking leave to reargue those portions of the Court's prior order denying dismissal of the complaint as to the individual defendant Horn, and granting plaintiff partial summary judgment on the issue of liability.

As relevant, the following undisputed facts are repeated from the prior decision. Plaintiff is the former owner of condominium Unit #5A in the building known as 20-26 Greene Street in Manhattan. Defendant SoHo Greene was the sponsor of the offering plan pursuant to which the building was converted to condominium ownership. Defendants Mecox and Alchemy were joint managers of Soho Greene, and Alchemy was also the selling agent retained by Soho Greene in connection with the offering of the condominium units. Defendant Horn is a principal of SoHo Greene and Alchemy.

On or about March 19, 1999, the Department of Law of the State of New York, accepted for filing the Offering Plan for converting to condominium ownership the building at 20-26 Greene Street. The Offering Plan provided that the condominium was to consist of ten luxury residential units on the second through sixth floors, and two commercial units on the ground floor. The Offering Plan further provided that the sponsor, SoHo Greene, intended to covert and fully renovate the units on the second to sixth floors to residential use.

On December 23, 1999, plaintiff executed a Purchase Agreement with defendant SoHo Greene, for the purchase of Unit #5A, at the cost of $1.4 million. Plaintiff alleges that pursuant to the Purchase Agreement and the Offering Plan, the sponsor, SoHo Greene, was obligated to perform certain renovations to plaintiff's unit, which included installing wood flooring and two bathrooms, and removing a pre-existing elevator shaft from the unit.

Plaintiff alleges that at the time of the closing in April 2000, the renovations called for under the Offering Plan and the Purchase Agreement were not completed. After plaintiff moved into Unit #5A, he alleges that problems with the construction of the building became apparent and persisted up until 2003. These problems included an inoperable intercom system, frequent

lack of hot water, low water pressure, and non-functioning heat and air conditioning systems. Plaintiff further alleges that construction defects specific to his unit also became apparent, and included ceiling leaks, wall cracks, floor buckling and warping, improper installation of bathroom fixtures, improper pitching of shower drains, cracked bathroom tiles, inadequate ventilation for the mechanical room, and lack of venting to the laundry room floor. According to plaintiff, the course of dealings between the parties subsequent to the closing in April 2000, shows that the sponsor, through its principal, Horn, consistently and repeatedly acknowledged its responsibility to resolve the building wide problems, as well as those specific to plaintiff's unit.

In or about May 2002, plaintiff commenced the instant action. Of the nine causes of action in the complaint, the First, Third, Fourth, Seventh, Eight and Ninth are asserted against the four moving defendants, whom the complaint refers to collectively as "the Sponsor." The First Cause of Action for breach of contract asserts that the Sponsor breached its obligations under the Offering Plan and the Purchase Agreement, by failing to properly renovate Unit #5A, failing to cure the construction defects, and failing to obtain a permanent Certificate of Occupancy. The Third Cause of Action is for breach of warranties of fitness and habitability implied in the construction contract, the Offering Plan and the Purchase Agreement. The Fourth Cause of Action for negligence asserts that the renovations to Unit #5A were performed or were caused to be performed in a negligent and careless manner, and that by allowing the construction defects to remain uncured, Unit #5A has been further damaged. The Seventh Cause of Action is for breach of fiduciary duty, waste and mismanagement. The Eight Cause of Action asserts that the Sponsor violated General Business Law §350, by engaging in false advertising with respect to sale of the condominium units. The Ninth Cause of Action seeks declaratory and injunctive

relief requiring the Sponsor to make the necessary renovations and repairs to plaintiff's unit.

When defendants SoHo Greene, Mecox, Alchemy and Horn moved for summary judgment dismissing the complaint, this Court granted the motion only to the extent of dismissing the Eight and Ninth Causes of Action; the Court also granted plaintiff's cross-motion for partial summary judgment. Defendants now seek reargument of those portions of the prior order which denied dismissal of the complaint as to the individual defendant, Kenneth Horn, and which granted plaintiff partial summary judgment on the issue of liability.

Leave to reargue is granted only with respect to the issue of Horn's liability, and upon reargument, the complaint is dismissed as to defendant Horn. Leave to reargue is otherwise denied, as defendants have failed to show that the Court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law in granting plaintiff's cross-motion for partial summary judgment on liability. Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979).

In determining that defendant Horn could be personally liable to plaintiff, the Court relied on the certification to the condominium offering plan which Horn signed both in his capacity as the Managing Member of the sponsor, and in his individual capacity.[1] While defendants do not

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[1]The regulations promulgated pursuant to the Martin Act, Article 23-A of the General Business Law, require that a condominium offering plan include "a certification subscribed and sworn to by the sponsor and sponsor's principal." 13 NYCRR §19.1(o)(2). The regulations provide for the exact form and wording of the certification. Id. The certification that defendant Horn signed in his capacity as the managing member of the sponsor, and in his individual capacity, complied with these regulations by stating as follows:

> We are the sponsor and the principals of sponsor of the condominium offering plan for the captioned property. We understand that we have primary responsibility for compliance with the provisions of Article 23-A of the General Business Law, the regulations promulgated by the Department of Law in Part 20 and such other laws and regulations that may be applicable.
>
> We have read the entire offering plan. We have investigated the facts set

dispute that Horn executed the certification in his individual capacity, they maintain that the Court misapplied controlling principles of law in holding that he could be personally liable to plaintiff based upon his signature on the certification. The Court agrees.

In the authorities cited by this Court as support for the imposition of liability on defendant Horn, there was one controlling fact that is absent from the instant case. In each case where personal liability has been imposed on individuals who had executed the certification to the offering plan in their individual capacities, the plaintiffs had alleged that the offering plan contained material misrepresentations upon which they relied in purchasing their condominium units. Birnbaum v. Yonkers Contracting Co., Inc., 272 AD2d 355 (2nd Dept 2000); Board of

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forth in the offering plan and the underlying facts. We have exercised due diligence to form a basis for this certification. We jointly and severally certify that the offering plan does, and the documents submitted hereafter by us which amend or supplement the offering plan will:

(i) set forth the detailed terms of the transaction and be complete, current and accurate;
(ii) afford potential investors, purchasers and participants an adequate basis upon which to found their judgment;
(iii) not omit any material fact;
(iv) not contain any untrue statement of a material fact;
(v) not contain any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;
(vi) not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;
(vii) not contain any representation or statement which is false, where I/we:

(a) knew the truth;
(b) with reasonable effort could have known the truth;
(c) made no reasonable effort to ascertain the truth; or
(d) did not have knowledge concerning the representation or statement made.

This certification is made under penalty of perjury for the benefit of all persons to whom this offer is made. We understand that violations are subject to civil and criminal penalties of the General Business Law and Penal Law.

Managers of Woodcreek Condominium v. Santandrea, 247 AD2d 936 (4th Dept 1998); Zanani v. Savad, 228 AD2d 584 (2nd Dept 1996); Residential Board of Manager of Zeckendorf Towers v. Union Square-14th Street Associates, 190 AD2d 636 (1st Dept 1993). These authorities uniformly hold that by signing the certifications in their individual capacities, "the individual defendants thereby knowingly and intentionally advanced the alleged misrepresentations of the offering plan, and thus, can be held personally liable." Zanani v. Savad, supra; accord Birnbaum v. Yonkers Contracting Co., Inc., supra; Board of Managers of Woodcreek Condominium v. Santandrea, supra; Residential Board of Manager of Zeckendorf Towers v. Union Square-14th Street Associates, supra.

Here, however, plaintiff has not asserted any allegations, either in the complaint or elsewhere, that the offering plan contained any material misrepresentations upon which he relied in purchasing his condominium unit. Rather, plaintiff's surviving claims against the sponsor defendants are limited to breach of contract, breach of warranties of fitness and habitability, negligence, breach of fiduciary duty, waste and mismanagement. The only allegations in the complaint as to fraud were in the Eighth Cause of Action for fraudulent advertising under General Business Law §350, a claim that was dismissed in this Court's order of September 8, 2004.

In opposing reargument, third-party defendants cite Board of Managers of the Bromley Condominium v. 83rd Street Investors, L.P., NYLJ, February 2, 1992, p. 22, col. 3 (Sup. Ct., N.Y. Co.). Contrary to third-party defendants' assertion, Bromley does not hold that the sponsor's principals were exposed to personal liability by signing the certification to the offering plan. Bromley involved a motion to dismiss by certain defendants who were limited partners of the

limited partnership that was the sponsor of a condominium. Plaintiff argued that the limited partners had engaged in sufficient control of the business of the sponsor so as to lose their immunity from liability under the partnership law, pointing to, *inter alia*, the limited partners' execution of the certification to the offering plan. The Hon. Herman J. Cahn denied the motion, holding that a triable issue of fact existed as to whether the limited partners participated in the management of the partnership business through the appointment of their employees to the condominium's board of managers. In reaching this determination, Justice Cahn made no decision as to the significance of the signatures on the certification to the offering plan, as he found that "[e]ven assuming arguendo, that the execution by the limited partners of the certification to the offering plan does *not* render them liable as principals, the limited partners do not deny that their own personnel were members of the Board of Managers" (emphasis added). Id. Thus, Bromley provides no guidance with respect to the issue of Horn's individual liability based on his execution of the certification to the offering plan

Under the circumstances presented herein, where plaintiff has not asserted a claim for fraud or misrepresentation in connection with the offering plan, and plaintiff provides no other legally sufficient ground to hold defendant Horn personally liable based upon his certification to the offering plan, defendants are entitled to summary judgment dismissing the complaint as against defendant Horn.

Accordingly, it is hereby

ORDERED that defendants' motion for leave to reargue is granted only with respect to that portion of their prior motion to dismiss the complaint as against defendant Kenneth Horn, and upon reargument that portion of the motion is granted, and the complaint is dismissed as to

defendant Kenneth Horn, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that in all other respects, defendants' motion is denied; and it is further.

ORDERED that the parties are directed to appear for the conference previously scheduled for March 24, 2005 at 3:00 pm, Part 11, Room 351, 60 Centre Street.

DATED: February 10, 2005

ENTER:

J.S.C.