Board of Directors of the Maidstone Landing Homeowners Assn., Inc. v Maidstone Landing, LLC

2012 NY Slip Op 30973(U)

April 9, 2012

Supreme Court, New York County

Docket Number: 600438/07

Judge: Martin Shulman

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SCANNED ON 4/12/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN** J.S.C. PART 1

Justice

Index Number : 600438/2007
MAIDSTONE LANDING HOMEOWNERS
VS.
MAIDSTONE LANDING LLC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 600438/07

MOTION DATE ______

MOTION SEQ. NO. 003

The following papers, numbered 1 to 4, were read on this motion ~~to~~/for summary judgment

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-U | No(s). 1, 2

Answering Affidavits — Exhibits 1-4 | No(s). 3, 4

Replying Affidavits ______ | No(s). ______

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

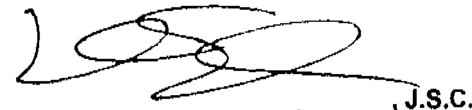
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 9, 2012



______, J.S.C.

MARTIN SHULMAN
J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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THE BOARD OF DIRECTORS OF THE MAIDSTONE LANDING HOMEOWNERS ASSOCIATION, INC., suing on behalf of its members, THE BOARD OF MANAGERS OF THE MAIDSTONE LANDING CONDOMINIUM I, suing on behalf of its unit owners, and THE BOARD OF MANAGERS OF MAIDSTONE LANDING CONDOMINIUM II, suing on behalf of its unit owners,

Plaintiffs,

-against-

MAIDSTONE LANDING, LLC, WILBER FRIED, DAVID FRIED, JUDITH FRIED, EXETER BUILDING CORP., DOUGLAS R. SHARP and BLOODGOOD, SHARP, BUSTER ARCHITECTS AND PLANNERS, INC.,

Defendants.

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Index No.: 600438/07

DECISION AND ORDER

FILED

APR 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

SHULMAN, J.:

Motion sequence numbers 003, 004 and 005 are consolidated for disposition. In motion sequence number 003, defendants Maidstone Landing, LLC (Maidstone), Exeter Building Corp. (Exeter), Wilber Fried (Wilber[1]), David Fried (David) and Judith Fried (Judith) (collectively, the 003 movants) move, pursuant to CPLR 3212, for summary judgment dismissing the causes of action asserted against them.

In motion sequence number 004, defendants Douglas R. Sharp (Sharp) and Bloodgood, Sharp, Buster Architects and Planners, Inc. (Bloodgood) (together, BSB)

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[1] The caption indicates that this defendant's name is "Wilber" but, internally, he is called "Wilbur." For consistency, the court is referring to him as indicated in the caption.

move, pursuant to CPLR 3212, for summary judgment dismissing all claims, cross claims and counterclaims asserted against them.

In motion sequence number 005, plaintiffs move, pursuant to CPLR 3212, for: (1) summary judgment on their first through fifth causes of action asserted against Maidstone and Exeter; and (2) summary judgment on their ninth[2] cause of action for breach of fiduciary duty against Wilber, Judith and David.

BACKGROUND

Plaintiffs are suing for property damage allegedly resulting from defendants' failure to construct the condominium units in a workmanlike manner, thereby breaching the contract with the homeowners. Plaintiffs assert that because of shoddy construction the units suffered severe leaks and water damage.

The complaint asserts 14 causes of action: (1) breach of contract (the purchase agreement) against Maidstone; (2) breach of contract with respect to the recreational facilities against Maidstone; (3) breach of warranty (the purchase agreement) against Maidstone; (4) breach of limited warranty against Maidstone; (5) breach of warranty with respect to the recreational facilities against Maidstone; (6) negligent misrepresentation against Wilber, David, Judith and Maidstone; (7) fraud in the inducement against Wilber, David, Judith and Maidstone; (8) fraudulent concealment against Wilber, David, Judith and Maidstone; (9) breach of fiduciary duty against Wilber, David and Judith; (10) aiding and abetting a breach of fiduciary duty against Maidstone; (11) violations of General Business Law (GBL) §§ 349 and 350 against Wilber, David, Judith and

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[2] Plaintiffs' motion incorrectly identifies the cause of action for breach of fiduciary duty as the eighth cause of action.

Maidstone; (12) breach of contract against BSB; (13) fraud against BSB; and (14) negligent misrepresentation against BSB.

Maidstone, the condominium's sponsor, promulgated the offering plan for the sale of 44 homes in Condominium I and 38 homes in Condominium II and organized the Maidstone Landing Homeowners Association, Inc. (HOA) to own, operate and maintain the condominium's recreational and common areas facilities, including the homes, swimming pool, tennis courts, beach and clubhouse building. Motion 003, Exs. E and F. As indicated in the offering plan (Motion 003, Ex. D), Maidstone was to retain control of the board of directors (board) until 95% of the homes were conveyed, as well as control of the board of managers (managers) of Condominium I and II until 95% of the homes in each phase was sold. *Id.*

Maidstone extended to each individual purchaser a limited warranty, which warranted the construction quality of the individual units against latent defects in the heating, ventilation, air conditioning, plumbing and electrical systems within the individual homes, as well as latent major structural defects. The limited warranty states, in pertinent part:

> LIMITED WARRANTY. Seller herein makes no housing merchant implied warranty or any other warranties, express or implied, in connection with the Purchase Agreement or home covered hereby and all such warranties are excluded, except as provided in the Limited Warranty annexed hereto as Schedule "1". The terms of the Limited Warranty are hereby incorporated into this Purchase Agreement and there are no warranties which extend beyond the face thereof. Purchaser hereby acknowledges that a written copy of the terms of the annexed Limited Warranty has been provided by Seller to Purchaser for Purchaser's examination and that a reasonable period of time for its examination by Purchaser has been afforded to Purchaser prior to the time of Purchaser's execution of the Purchase Agreement. Purchaser understands and accepts the annexed

> warranty to the Purchase Agreement in lieu of any other express or implied warranties in connection with this transaction . . .

Motion 003, Ex. K. The limited warranty further provides that it:

> . . . is in lieu of and replaces all other warranties on the construction and sale of the home and its components, both express and implied (including any warranties of merchantability or fitness for a particular purpose). There are no warranties which extend beyond the face hereof. The purpose of this Limited Warranty is to identify the Seller's responsibilities for construction defects of a latent or hidden nature that could not have been found or disclosed on final inspection of the home.

Motion 003, Ex. L. The limited warranty expressly states that it was given to the original homeowner and did not extend to subsequent purchasers. *Id.*

The limited warranty offered coverage for one year for latent defects consisting of defective workmanship by the Seller, defective materials provided by the seller, defective design provided by the architect or other design professional and defective installation of appliances. The limited warranty offered coverage for two years for major system coverage and six year coverage for major structural defects based on defective workmanship, materials or design. *Id.*

In addition, the limited warranty specifically excluded from the six-year coverage:

> Damage to the following non-load bearing portions of the Home are not covered by this six (6) year coverage: roofing and sheathing; dry wall and plaster; exterior siding; brick, stone and stucco veneer; floor covering materials; wall, tile and other wall coverings; non-load bearing walls and partitions; concrete floors in attached garages and basements that are built separately from the foundation walls or other structural elements of the Home; electrical, plumbing, heating, cooling and ventilation systems; appliances, fixtures and items of equipment; paint; doors and windows; trim, cabinets; hardware; and insulation.

Id. In order for Seller to be obligated under the limited warranty, a step-by-step claims procedure must be followed:

[* 6]

> a. Written notice of any warranty claim must be made on the attached 'Notice of Warranty Claim Form' and must be received by Seller no later than the tenth day after the expiration of the applicable warranty period. Such notice must be sent by Purchaser to Seller by certified or express mail, return receipt requested. If this form shall not properly be completed and received by Seller by that deadline, the Seller will have no duty to respond to any complaint or demand contained in such form, and any and all claims may be rejected. COMPLETION AND DELIVERY OF SUCH NOTICE OF WARRANTY CLAIM IN A TIMELY MANNER IS NECESSARY TO PROTECT THE RIGHTS OF THE PURCHASER UNDER THIS LIMITED WARRANTY.

Id. Moreover, pursuant to the provisions of the limited warranty:

> 8. Legal Actions.
> a. No claim under this warranty may be commenced or asserted against Seller in any lawsuit unless a properly completed Notice of Warranty Claim Form has been received by the Seller in the time period set forth in paragraph 7 of this warranty.
>
> b. No lawsuit against the Seller under this warranty may be commenced more than thirty (30) days after the expiration date of the applicable warranty coverage, or thirty (30) days after Seller has given written notice of its rejection of Purchaser's claim with respect to such claim, or thirty (30) days after builder has substantially completed corrective action for a defect with respect to such defect.

Id. Coverage for common elements was deemed to be given to the managers. *Id.*

The purchase agreement contains a merger clause, which states:

> Anything to the contrary herein contained notwithstanding it is specifically understood and agreed by the parties hereto that the acceptance of the delivery of the deed at the time of the closing of title hereunder shall constitute full compliance by the seller with the terms of this agreement and none of the terms hereof, except as otherwise herein expressly provided, shall survive delivery and acceptance of the deed. All representations contained in the Offering Plan shall survive delivery of the deed. All parties hereto do hereby agree that trial by jury in any action, proceeding or counterclaim arising out of or from this Agreement is hereby waived.

Motion 003, Ex. K.

[* 7]

The offering plan contains the following warranties with respect to the common elements:

> Regarding the Common Elements the Sponsor will correct any defects in the construction of the Common Elements, or the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with this Offering Plan provided and on condition that Sponsor is notified of or becomes aware of such defect(s) within twelve (12) months of the date of substantial completion of the defective portion(s) of the Common Elements. The question of construction shall be comparable to the local standards customary in the particular trade and in accordance with the Plans and Specifications.

Motion 003, Ex. D.

Construction of the homes comprising Condominium I began in 2000 and by April 8, 2002, 95% of those homes had been conveyed. Title to 95% of the homes comprising Condominium II was conveyed by October 16, 2003. Motion 003, Ex. M. The summons and notice for the instant action was filed on June 4, 2007. By October 16, 2003, Maidstone had transferred control of the board to the unit owners, with Wilber being the only remaining sponsor member of the six-member board. Motion 003, Ex. N.

By letter dated August 13, 2003, counsel for HOA advised Maidstone that several defects and/or omissions had arisen as a result of the planning and construction of the homes. Motion 003, Ex. O. A list of the items needing to be addressed was attached to this letter, most dealing with individual units and some concerning the common element clubhouse and walkway lampposts. *Id.* The 003 movants maintain that they attempted to address these issues and indicate that plaintiffs' complaints to the Attorney General about those alleged defects never resulted in any enforcement proceedings, civil penalties or mandated remedial work.

The 003 movants aver that Maidstone contracted with Exeter to act as the general contractor for the construction of the condominiums. While Wilber is Exeter's chief executive officer (Motion 003, Ex. Q), the entities maintain separate books and records.

Motion sequence number 003

The 003 movants contend that the causes of action asserting breaches of warranty are time-barred by the limited warranty's provisions because those claims are based on alleged defects covered by either the one- or two-year coverage period. The latest time for filing the instant action, based on those defects, would have been in October 2005. Since plaintiffs instituted this lawsuit in 2007, the 003 movants argue that the first, second, third, fourth and fifth causes of action must be dismissed.

The 003 movants state that Maidstone and Exeter are separate entities, maintaining separate books and records, and Maidstone cannot be considered to be Exeter's alter ego as plaintiffs allege. Since the complaint makes no specific allegation against Exeter, except that Exeter is a member of Maidstone, the 003 movants maintain that the complaint must be dismissed against Exeter. In addition, the 003 movants argue that there was no contract between Exeter and plaintiffs, thus no privity exists between Exeter and plaintiffs upon which to assert liability.

The 003 movants also claim that the ninth and tenth causes of action alleging a breach of fiduciary duty and aiding and abetting a breach of fiduciary duty are barred by the three-year statute of limitations because plaintiffs are only seeking monetary damages.

The 003 movants maintain that no breach of the purchase agreement may be maintained because of the merger clause, so that only claims based on a breach of the limited warranty may be posited. The 003 movants claim that the breach of warranty claims are time-barred by the provisions of the limited warranty, so that all of the first five causes of action must be dismissed. Further, no evidence of an agreement regarding recreational facilities has been provided and the 003 movants assert that there is none. In support of this contention, the 003 movants submit a portion of the deposition of Mark Manzi, a member of HOA's board, who testified that he does not know of any documents or contracts between HOA and Maidstone concerning any recreational facilities. Motion 003, Ex. R.

Lastly, the 003 movants aver that any claim against Wilber as Maidstone's alter ego must be dismissed because there is no evidence that he dominated and controlled Maidstone so as to perpetrate a wrong or an injustice.

BSB submits an affirmation in partial support of the 003 movants' motion to the extent that the motion seeks to dismiss the complaint. BSB state that they oppose any motion on the 03 movants' part for summary judgment on any cross claims asserted against them; however, the court notes that the instant motion only seeks to dismiss the complaint and makes no mention of the cross claims.

In opposition to motion sequence number 003, plaintiffs contend that their breach of warranty claims do not preclude their breach of contract claims because they are separate and apart from the obligations appearing in the limited warranty.

Plaintiffs also state that the breach of warranty claims are not time-barred because most of them fall within the six-year coverage period, and there are separate

warranties for the common elements, which are not limited by the time limitations noted in the 003 movants' arguments. It is plaintiffs' position that Wilber, an experienced developer who admitted that he was on site almost every day during construction, should have been aware of the defects forming the basis of this lawsuit, and no written notice is required for alleged defects in the common elements.

Plaintiffs reiterate their arguments originally posited in the earlier motion this court decided regarding Wilber, David and Judith owing plaintiffs fiduciary duties. As was previously determined, this cause of action was deemed viable because of the fiduciary obligations condominium board members owe to the unit owners.

It is plaintiffs' position that Wilber, David and Judith were aware of the conditions that form the basis of this lawsuit and failed to address them during the time that they controlled the board for selfish motives: to benefit themselves financially as the owners of Maidstone and Exeter. Moreover, plaintiffs assert that Maidstone aided and abetted Wilber in his breach of fiduciary obligations.

With regard to the seventh cause of action, plaintiffs insist that they may maintain a cause of action for fraudulent inducement based on what they claim were affirmative misrepresentations. Plaintiffs also state that Maidstone, Wilber and Exeter may be held individually liable for these misrepresentations. However, this court's prior order, as amended, dismissed this cause of action against Wilber, Judith and David.

Plaintiffs also claim that their cause of action for violation of GBL §§ 349 and 350 should not be dismissed because the offering plan was sufficiently consumer oriented to come within the purview of the statute.

Plaintiffs admit that there is no separate recreational facilities agreement, but that those facilities are included in the offering plan and are, therefore, subject to the same terms indicated therein.

In reply, the 003 movants state that the seventh and eighth causes of action should be dismissed as to Maidstone. As previously noted, these causes of action were dismissed as against Wilber, Judith and David. The 003 movants also argue that GBL §§ 349 and 350 are inapplicable to private, single-shot transactions. Otherwise, the 003 movants reiterate their arguments previously discussed.

Motion sequence number 004

BSB (the architects) argue that the causes of action asserted against them should be dismissed based on: (1) a lack of privity between them and plaintiffs; (2) the fact that they had no control over the means and methods of construction; and (3) their designs were within the standard of care for architects in New York.

On January 13, 1995, BSB entered into a contract with Exeter for architectural design services. Motion 004, Ex. I. This contract stated, in pertinent part:

> TASK I–PRELIMINARY GRADING PLAN:
> ARCHITECT will prepare a preliminary grading plan based on the refined concept plan. This is not an engineering drawing. The grading plan is intended to be used to guide the site engineering and to illustrate grade changes across the site relative to building floor elevations and road slopes.
>
> TASK II–SITE CROSS SECTION
> ARCHITECT will prepare a site cross section through the center of the site (the interior hillside area) in order to study the relationships of floor elevations, building height roof lines, and view potentials from this area. The cross-section will be based on TASK I preliminary grading information.

Id. In addition, the contract stated "[i]t is recognized that the ARCHITECT does not have control over the cost of labor, materials or equipment, over [Exeter]'s methods of determining construction prices or over competitive bidding." *Id.* Further, the contract provides that it was not to be considered an engineering drawing.

In 1998, BSB and Exeter entered into a second contract, wherein BSB was to provide "Basic Architectural Services," including schematic design services, design development services and construction document services of buildings to be built at the condominium complex, including duplex townhouses, a clubhouse and a pool area. *Id.* According to this contract, BSB did not have oversight of the construction, nor was it responsible for the means and methods of construction. *Id.*

The architects state that at no time during the construction phase did they ever receive any complaints regarding water leaks. David S. Sieglinger (Sieglinger), the owner of the company that acted as the construction manager for the condominium project, was deposed in this matter and affirmed the architects' statements regarding a lack of notice of any leaks. Motion 004, Ex. G. Further, according to the testimony of Manzi, the Architectural Review Committee of the Maidstone Homeowners Association never made any complaints to the architects regarding their design.

The architects maintain that they never entered into any contracts with plaintiffs, nor has any individual unit owner ever complained to them about their designs. Moreover, the architects state that they have never had any direct communication with any of the plaintiffs.

In support of their contentions, the architects provide expert reports attributing the unit owners' alleged problems to construction defects rather than any architectural design defects. Motion 004, Ex. N. In addition, the architects provide the expert affidavit of Alan Ritchie, AIA, who opines, with a reasonable degree of architectural certainty, that the architects' work was within the standard of care for architects in planning and drafting. Motion 004, Ex. P. Lastly, the architects assert that the cross claim asserted against them for common-law indemnification and contribution should be dismissed if any wrongdoing is attributable to Maidstone and/or Exeter.

The 003 movants oppose only that portion of the architects' motion seeking dismissal of the cross claims for indemnification and contribution. According to the 003 movants, pursuant to the terms of their contract with Exeter, the architects were required to be on the job site during construction and notify them if there was any deviation in the architectural plans or work was not being performed in accordance with the contracts. The 003 movants argue that, since wrongdoing has yet to be determined, it would be premature to dismiss their cross claim for indemnification. Further, the 003 movants argue that since plaintiffs have alleged damages relating to the architects' work, the claim for contribution qualifies as tort damages and injury to property, allowing the 003 movants to seek contribution.

In reply to the 003 movants' opposition, the architects claim that the contract between them and Exeter provides that:

> . . . because architect is not providing construction observation services, [Exeter] shall hold architect harmless and shall indemnify and defend architect from and against any and all claims ... arising out of or resulting from the project except that his indemnification shall not bar any claims [Exeter] may have against the architect, the damages resulting from the

> architect's negligent work in performing his duties specified under this agreement. [Exeter] shall hold the architect harmless from all legal claims against this work except for those where liability has been adjudicated by a court of law.

Motion 004, Ex. I. The architects assert that this contractual provision entitles them to indemnification and contribution from the 003 movants, not the other way around. In addition, the architects note that, according to the 003 movants' own experts, no design defects were found with their drawings, plans or designs. Motion 004, Ex. K. Nor do these experts attribute any wrongdoing to the architects. *Id.*

Lastly, the architects refer to their contract with Exeter which states that, whereas the architects were obligated to visit the site to determine, in general, whether the work was being performed in accordance with the contract, they were "not required to make exhaustive or continuous site inspections to check the quality or quantity of work ..., and shall not be responsible for [the failure of any contractor] to carry out the work in accordance with the contract documents." Motion 004, Ex. I. Hence, the architects maintain that the cross-claims for indemnification and contribution asserted against them should be dismissed.

In opposition to the architects' motion, plaintiffs argue that BSB are liable for misrepresentations in the offering plan, regardless of any privity of contract between the eventual unit owners and these defendants as the architects. In addition, plaintiffs aver that questions of fact exist as to whether the architectural designs were reasonable, and they challenge the conclusory opinion of BSB's architectural expert.

In reply, the architects state that all of the expert affidavits and reports indicate that there were no design defects in their work and that any problems plaintiffs face

would have been the result of shoddy building and construction techniques. Plaintiffs fail to refute these experts with contradictory expert opinions of their own. Consequently, the architects maintain that plaintiffs' causes of action against them must be dismissed.

The architects point out that they never provided an architect's certification for the offering plan, merely an architect's report, and, even if there were privity of contract between them and plaintiffs, there is no evidence that they breached their contractual obligations to provide appropriate architectural designs. The architects again argue that since they were not responsible for the means and methods of construction they cannot be held liable for construction defects.

Motion sequence number 005

The arguments plaintiffs present in their motion are essentially the same arguments they present in opposition to the 003 movants' motion and thus do not require reiteration. Similarly, the 003 movants' opposition is, in sum and substance, the same arguments they present in their main motion (motion sequence 003) and also will not be restated. Plaintiffs' reply reiterates their previous arguments and oppositions.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a

genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Motion sequence numbers 003 and 005

<u>The first, third and fourth causes of action.</u>

These causes of action assert claims against Maidstone for breach of contract with respect to the purchase agreement and breaches of the limited warranty associated therewith. Those portions of the 003 movants' motion (motion sequence number 003) and plaintiffs' motion (motion sequence number 005) seeking summary judgment on these causes of action are denied.

The court agrees with plaintiffs that these causes of action are not barred by the provisions of the limited warranties in the purchase agreement because they allege specific provisions of the agreement in addition to those covered by the warranties. *Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1076 (2d Dept 2007). Plaintiffs allege that the 003 movants failed to "comply with all the applicable city, state and federal laws, administrative rules and regulations (Motion 003, Ex. A), which is a violation of a specific covenant appearing in the purchase agreement. Therefore, plaintiffs are entitled to assert a breach of contract cause of action.

Further, the warranties covering the common elements are not subject to the time limitations and notice requirements of the warranties associated with the individual

units. Therefore, any alleged breach of those warranties is subject to a six-year statutory period, which had not run when the present action was commenced. *See Gallup v Summerset Homes, LLC,* 82 AD3d 1658 (4th Dept 2011).

However, questions of fact exist as to whether Maidstone "became aware" of the problems within 12 months after substantial completion of the project, since the HOA's August 13, 2003 letter referenced above did not specify all of the alleged defects that form the basis of this lawsuit. Moreover, even assuming that Maidstone had timely notice of the alleged problems, as stated in this court's earlier decision, there is a divergence of opinion between the experts as to the existence and/or the degree of the alleged defects. These conflicting expert reports raise issues of fact (*Frobose v Weiner*, 19 AD3d 258 [1st Dept 2005]), and "[w]hen experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution." *Shields v Baktidy*, 11 AD3d 671, 672 (2d Dept 2004). "[T]he weight to be afforded the conflicting testimony of experts is a matter particularly within the province of the jury [internal quotation marks and citation omitted]." *Gleeson-Casey v Otis El. Co.*, 268 AD2d 406, 407 (2d Dept 2000). Accordingly, based on the foregoing, the branches of both motions seeking summary judgment on these causes of action must be denied.

The second and fifth causes of action.

The portion of the 003 movants' motion (motion sequence number 003) seeking summary judgment dismissing the second and fifth causes of action is granted. Thus, the portion of plaintiffs' motion (motion sequence number 005) seeking summary judgment on these same causes of action must be denied.

The second cause of action alleges a breach of the recreational agreement and the fifth cause of action alleges breach of warranty thereon. However, it is undisputed that there was no separate agreement covering those facilities, which were incorporated into the purchase agreement. Therefore, these causes of action are duplicative of the first cause of action and thus are dismissed.

The sixth, seventh and eighth causes of action.

By prior decision dated January 8, 2009, this court granted Wilber's cross-motion dismissing the sixth, seventh and eighth causes of action against him. Thereafter, this court amended its January 8, 2009 decision and order to reflect that these causes of action were also dismissed as to co-defendants Judith and David. However, the same reasons articulated in that decision apply equally to defendant Maidstone. Consequently, that portion of the 003 movants' motion (motion sequence number 003) seeking summary judgment on the sixth, seventh and eighth causes of action against Maidstone is granted and those causes of action are dismissed as to that defendant.

The ninth cause of action.

That portion of the 003 movants' motion (motion sequence number 003) seeking summary judgment dismissing the ninth cause of action is granted as asserted against David and Judith, and the portion of plaintiffs' motion (motion sequence number 005) seeking summary judgment on the ninth cause of action is denied.

As this court previously stated, Wilber, Judith and David, as members of the board of managers of the condominium association, owed a fiduciary obligation to the unit owners. *Caprer v Nussbaum,* 36 AD3d 176 (2d Dept 2006). However, the court

agrees with the 003 movants that this cause of action is time-barred. As held in *Kaufman v Cohen,* 307 AD2d 113, 118 (1st Dept 2003):

> New York law does not provide any single limitations period for breach of fiduciary duty claims. Generally, the applicable statute of limitations for a breach of fiduciary claims depends upon the substantive remedy sought [citations omitted].

When the only relief sought is money damages, courts have held that the three-year statutory period of CPLR §214 (4) applies. *IDT Corp. v Morgan Stanley Dean Witter & Co.,* 12 NY3d 132 (2009). Since Judith and David relinquished their seats on the board in or about September 2003 and the instant action was not commenced until 2007, this cause of action is time-barred. The court did not consider this issue in its prior decision regarding this cause of action because it was not previously raised.

However, from the arguments presented, it appears that Wilber retained his seat on the board until May 17, 2004, which is less than three years prior to this lawsuit's commencement. *See Westchester Religious Inst. v Kamerman,* 262 AD2d 131 (1st Dept 1999). Questions of fact exist as to whether Wilber, as a member of the board, knew of the alleged defects and failed to remedy them in order to benefit himself as the owner of Maidstone and Exeter. Thus, this cause of action cannot be dismissed against him.

<u>The tenth cause of action.</u>

The only remaining portion of the ninth cause of action is that portion asserted against Wilber. As stated in *Sanford/Kissena Owners Corp. v Daral Props., LLC,* 84 AD3d 1210, 1212 (2d Dept 2011):

> One who aids and abets a breach of a fiduciary duty is liable for that breach, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered substantial assistance to the fiduciary in the course of effecting the alleged breach of duty.

As further stated in *Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 (2d Dept 2010):

> Substantial assistance [to a breach of fiduciary duty] occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur [internal quotation marks and citation omitted].

Here, there is no evidence indicating that Maidstone provided such "substantial assistance" to any alleged breach of fiduciary duty. Consequently, the portion of the 003 movants' motion (motion sequence number 003) seeking summary judgment dismissing the tenth cause of action against Maidstone is granted.

The eleventh cause of action.

That portion of the 003 movants' motion (motion sequence number 003) seeking summary judgment dismissing the eleventh cause of action is granted. GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in the state." GBL § 350 declares unlawful "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

The 003 movants argue that this cause of action is pre-empted by GBL Article 23-A, which grants the Attorney General the exclusive authority to investigate and prosecute false or fraudulent representations contained in a publicly disseminated condominium offering plan. *CPC Intl. Inc. v McKesson Corp.*, 70 NY2d 268 (1987). In *Thompson v Parkchester Apts. Co.* (271 AD2d 311, 311 [1st Dept 2000]), the court held

that those plaintiffs failed to "set forth a viable claim under [GBL] § 349 since they have not met the threshold requirement for such a claim by showing that the alleged deceptive acts, if permitted to continue, would have a broad impact on consumers at large." *See also Devlin v 645 First Ave. Manhattan Co.,* 229 AD2d 343 (1st Dept 1996).

In the case at bar, plaintiffs have also failed to establish that the alleged deceptive practices have an impact on consumers at large. Moreover, although a recent decision held that a condominium association may maintain a private cause of action pursuant to these sections of the GBL for breach of contract, negligence or fraud (*Bridge St. Homeowners Assn. v Brick Condominium Devs., LLC,* 18 Misc 3d 1128[A], 2008 NY Slip Op 50221(U) [Sup Ct, Kings County 2008], citing *511 W. 232nd Owners Corp v Jennifer Realty Co.,* 98 NY2d 144 [2002]), plaintiffs have failed to plead fraud with sufficient particularity or to submit evidence of fraud sufficient to sustain this cause of action. Nor have plaintiffs proffered evidence of negligence or breach of contract sufficiently to warrant maintaining this cause of action. Hence, the eleventh cause of action must be dismissed.

Motion sequence number 004

This motion concerns the last three causes of action plaintiffs assert against the architects and the 003 movants' cross-claim for indemnification and contribution against them.

The twelfth cause of action.

That portion of the architects' motion seeking summary judgment on the twelfth cause of action is granted. There is no dispute that there never was a contract entered

into between plaintiffs and the architects. However, plaintiffs allege, in sum and substance, that they are the third-party beneficiaries of the contracts entered into between the architects and Exeter. An examination of those agreements indicates that the architects never expressly agreed that their services were intended to benefit third parties and plaintiffs thus lack the ability to enforce those contractual provisions. *Board of Mgrs. of Riverview at College Point Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664 (2d Dept 1992); *see also Key Intl. Mfg., Inc. v Morse/Diesel, Inc.*, 142 AD2d 448 (2d Dept 1988). Plaintiffs cannot maintain this cause of action against the architects because they were not in privity with them. *M. Paladino, Inc. v J. Lucchese & Son Contr. Corp.*, 247 AD2d 515 (2d Dept 1998).

However, even assuming that plaintiffs could maintain this claim, based on the evidence presented this cause of action would still be dismissed. Not a scintilla of evidence has been adduced that establishes, or even brings into question, any acts of architect malpractice.

The architects have met their burden by establishing that all the expert opinions provided by all parties indicate that the cause of the alleged problems was faulty construction. They also submit an expert affidavit opining that they did not deviate from standard architectural practice. Although plaintiffs challenge the architects' expert's opinion, they have "failed to meet [their] burden to adduce credible expert testimony that [the architects]'s plans and specifications deviated from locally prevailing standards of architectural practice." *Tower Bldg. Restoration, Inc. v 20 E. 9th St. Apt. Corp.*, 7 AD3d 407, 408 (1st Dept 2004).

Moreover, the architects provide documentary and testimonial evidence that they were not responsible for the means and methods of Exeter's and/or Maidstone's work. Therefore, they cannot be held liable for any injuries resulting therefrom. *See generally Zolotar v Ben Krupinski, Gen. Contr., Inc.*, 36 AD3d 802 (2d Dept 2007). Based on the foregoing, the twelfth cause of action against the architects is dismissed.

<u>The thirteenth cause of action.</u>

The portion of the architects' motion seeking summary judgment dismissing the thirteenth cause of action against them for fraud is also granted. As stated in *Friedman v Anderson (*23 AD3d 163, 166 [1st Dept 2005]):

> "[a] mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1 [1999]). Furthermore, a plaintiff seeking to recover for fraud and misrepresentation is required "to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1994]).

CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what his or her respective role was in the alleged deception.

In the instant matter plaintiffs' fraud allegations are conclusory and lack sufficient particularity to satisfy CPLR 3016 (b)'s requirements. The mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud. *See 767 Third Ave. LLC v Greble & Finger,* LLP, 8 AD3d 75, 76 (1st Dept 2004); *Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248 (1st Dept 1997).

The fourteenth cause of action.

That portion of the architects' motion seeking summary judgment dismissing the fourteenth cause of action against them for negligent misrepresentation is granted. "It is settled that a claim arising out of an alleged breach of contract, here, the [offering plan], may not be converted into a tort action absent the violation of a legal duty independent of that created in the contract." *Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220, 221 (1st Dept 2001); *Board of Mgrs. of Riverview at College Point Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664, *supra*. Since no independent legal duty has been sufficiently alleged, this cause of action against the architects is dismissed.

The cross claims.

That portion of the architects' motion (motion sequence number 004) seeking summary judgment dismissing the cross claims against them for indemnification and contribution is granted. Not only is contribution unavailable to the 003 movants under the economic loss doctrine (*Galvin Bros., Inc. v Town of Babylon,* 91 AD3d 715 [2d Dept 2012]; *Sound Refrigeration & Air Conditioning, Inc. v All City Testing & Balancing Corp.,* 84 AD3d 1349 [2d Dept 2011]), but there is no evidence that the architects are in any way liable for the alleged construction defects. All of the evidence indicates that the problems were associated with faulty construction, which was out of the architects' control. Therefore, the 003 movants are not entitled to indemnification as well.

For all of the foregoing reasons, it is hereby

ORDERED that the portion of defendants Maidstone Landing LLC, Wilber Fried, David Fried, Judith Fried and Exeter Building Corp.'s motion for summary judgment (motion sequence number 003) seeking to dismiss the first, third and fourth causes of action is denied; and it is further

ORDERED that the portion of defendants Maidstone Landing LLC, Wilber Fried, David Fried, Judith Fried and Exeter Building Corp.'s motion for summary judgment (motion sequence number 003) seeking to dismiss the second, fifth, sixth, seventh, eighth, tenth and eleventh causes of action is granted and said causes of action are dismissed; and it is further

ORDERED that the portion of defendants Maidstone Landing LLC, Wilber Fried, David Fried, Judith Fried and Exeter Building Corp.'s motion for summary judgment (motion sequence number 003) seeking to dismiss the ninth cause of action is granted as asserted against David Fried and Judith Fried only and is denied as to Wilber Fried; and it is further

ORDERED that Douglas R. Sharp and Bloodgood, Sharp, Buster Architects and Planners, Inc.'s motion for summary judgment (motion sequence number 004) is granted and the complaint and cross claims asserted against them are severed and dismissed, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that plaintiffs' motion (motion sequence number 005) seeking summary judgment on their first through fifth and ninth causes of action is denied in its entirety.

The parties are directed to proceed to mediation as previously scheduled.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: April 9, 2012

Martin Shulman, J.S.C.

FILED

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