

**The 20 Pine St. Homeowners Assn. v 20 Pine St.  
LLC**

2012 NY Slip Op 31302(U)

May 2, 2012

Sup Ct, NY County

Docket Number: 102920/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

THE 20 PINE STREET HOMEOWNERS ASSOCIATION  
and DANIEL JOSEPH MCCORMICK, CLAUDIO  
BARBERO MONTAGNA, AMIR BABAK BEHNAM, KAZEM  
BEHNAM, 20 PINE, LLC, CARLA B. BUFFULIN,  
GUILIANO INFANTOZZI, TRUST FBO HENNING F.  
BLOMBACK AND REVOCABLE TRUST FBO CHIANG  
CHING, HEATHER CURATOLO, ANDREW WISNEWSKI,  
LUCIANO D'ADAMIO, GIOVANNA D'ANDREA,  
FREDERICO DEVERA, PIU BANERJEE, ARNAB DEY,  
LOUIS DILORENZO, CHARISSE MELOTO, APURVA  
DIXIT, RUPALI DIXIT, LARRY J.B. EVANS,  
PHYLLIS A. EVANS, NANCY H. FOGARTY, STACEY  
L. HAEFELE, TAREK HALLABA, NAHED HALLABA,  
THOMAS HEINZ, ROSSANA SHOKRIAN, ELLIOT  
HEN-TOV, WILLIAM HYMAN, NANCY HYMAN, ROBERT  
KARICOD, MONICA A. PAREKH, THOMAS A. KELLER,  
TRUSTEE OF THE THOMAS A. KELLER LIVING  
TRUST, CHARLES RICHTER KING, BARBARA BERRIE,  
MAXIM A. KOGAN, WILLIAM D. KOULMENTAS, ELENI  
KOULMENTAS, SAMUEL DREW LANG, GRACIELA  
BERGNER, ROGER LEFEVRE, MARC SUTIN, ELIZABETH  
MACKAY, NATALIE MARKOFF, JOSEPH PLUMMER, BIMAL  
MASSAND, SEEMA MASSAND, ERICA K. OLIVEIRA,  
HELGA PAULSEN, KEVIN A. RELIHAN, CAROLYN RELIHAN,  
ERIK REYNOLDS, MARIA CLAUDIA R IBEIRO DE CASTRO,  
WERNER STANZL, ALVIN L. ROYSE, NASSIR SHOKRIAN  
AND SARAH L. SHOKRIAN, AS TRUSTEES OF THE  
SHOKRIAN TRUST DATED 3-17-1999, THE RVS LIMITED  
PARTNESHIP, NEIL S. SIMON, JOYCE KLEINBERG,  
BRADLEY SOLOMON, JOHAN STYLANDER, STEPHANIE  
PFRIENDER STYLANDER, GERRIE B. TEO, JOSHUA F.  
WHITE, DONG DONG ZHOU, HUAKANG ZHOU, KEN WONG,  
CHRISTINE LEE, RICHARD B. KANG, ALON ZIV,  
and SUZIE H. KIM and LAURA SALTZMAN,

INDEX NO. 102920/11  
MOTION SEQ. NO. 007

**FILED**  
MAY 16 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs,

-against-

20 PINE STREET LLC, 20 PINE MANAGERS, LLC,  
BOYMEELGREEN FAMILY, LLC, JESHAYAHU BOYMEELGREEN  
a/k/a SHAYA BOYMEELGREEN, AI PROPERTIES AND  
DEVELOPMENTS (USA) CORP., PINCHAS COHEN,  
RICHARD MARIN, TAMIR KAZAZ, AFRICA ISRAEL  
INVESTMENTS INTERNATIONAL 1997 LIMITED, AFRICA  
ISRAEL INVESTMENTS LIMITED, GIORGIO ARMANI CORP.,  
ARMANI CASA, CRISTINA BENARDEAU, KEVIN BERGIN,  
CLOSERS CONSULTING, INC., GRUZEN SAMTON, LLP,

MICHAEL GELFAND, COSENTINI ASSOCIATES, INC.,  
 BOYMELGREEN DEVELOPERS LLC a/k/a BOYMELGREEN  
 CONSTRUCTION, COPPER CONSTRUCTION, LLC, JIM  
 PERSHING, WONDER WORKS CONSTRUCTION &  
 DEVELOPMENT CORP., ISRAEL BERGER AND ASSOCIATES,  
 LLC, JDP MECHANICAL, INC., TRANE USA, INC., 5  
 STAR ELECTRIC OF LONG ISLAND, INC., RAEI  
 AUTOMATIC SPRINKLER COMPANY, INC., CLASSIC FIRE  
 SYSTEMS, INC., PACE PLUMBING CORP., LEONARD  
 POWERS, INC., DELTA SHEET METAL CORP., EAGLE  
 ONE ROOFING CONTRACTORS, INC., URBAN RECREATIONAL,  
 INC., THE BOARD OF MANAGERS OF THE 20 PINE STREET  
 CONDOMINIUM, ARI SCHWEBEL, ANDY ASHWAL, GENNYENE  
 BRUGGER, DAMIEN STEIN, ANDREW FAULDS, GABE RUBIN,  
 RENA BATASH, GETZY FELIG, PAZ KASPI, LORI LEVINE,  
 GAL BACK, LIRON HEN-BRENNER, JACK JEMAL, JOSEPH  
 DAMANTI, ADAM BIENELPE, AND MICHAEL SHVO d/b/a  
 SHVO MARKETING,

**FILED**

MAY 16 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion:  Yes  No

Motion sequences 003, 006, 007, and 008 are hereby consolidated for purposes of disposition.

In motion sequence 003, defendants Giorgio Armani Corp., Armani Casa and Kevin Bergin (collectively "marketing design defendants") move to dismiss the complaint as against them pursuant to CPLR 3211(a)(1) and (7) and CPLR 3016(b) on the basis that plaintiff's fifteenth cause of action as against them fails to plead fraud with the requisite specificity. In motion sequence 006, defendants Gruzen Samton, LLP and Michael Gelfand (Gelfand) move to dismiss the complaint as asserted against it, pursuant to CPLR 3211(a)(1), (3), (5) and (7). Gelfand also moves pursuant to CPLR 214(6).

Defendants move in motion sequence 007, pursuant to CPLR 3211(a)(1), (3), (7) and (8), to: (1) dismiss the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, thirteenth, sixteenth and seventeenth causes of action asserted as against defendants 20 Pine Street LLC (Sponsor), 20 Pine Street Managers, LLC, Boymelgreen Family LLC, Jeshayahu Boymelgreen a/k/a Shaya Boymelgreen (together, Boymelgreen), AI Properties and Developments (USA) Corp. (AI), Pinchas Cohen (Cohen), Richard Marin (Marin), Tamir Kazaz (Kazaz), Africa Israel Investments International 1997 Limited and Africa Israel Investments Limited (together, Africa Israel entities) (collectively, the Non-Sponsor defendants), based on lack of standing and documentary evidence; (2) dismiss the complaint in its entirety asserted as against Africa Israel, based on lack of personal jurisdiction; (3) dismiss the complaint in its entirety as asserted against the Non-Sponsor defendants, based on plaintiffs' failure to make any specific allegations against such defendants and plaintiffs' inability to pierce the corporate veil; (4) dismiss the second, third, fourth and eighth causes of action, as plaintiffs are not intended third-party beneficiaries of the contracts; (5) dismiss the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, thirteenth, sixteenth and seventeenth causes of action as being duplicative of the first cause of action for breach of contract; (6) dismiss the thirteenth, fifteenth, sixteenth and seventeenth causes of action for failing to particularize such claims; (7) dismiss the fifth and sixth causes of action, since plaintiffs are not entitled to such warranties under the offering plan; (8) dismiss the sixteenth cause of action because plaintiffs do not meet the statutory threshold under General Business Law (GBL) § 349; (9) dismiss the eighteenth cause of action for failing to plead the elements of a conversion; and (10) dismiss the eighteenth and nineteenth causes of action because plaintiffs fail to plead the necessary elements to find individual Sponsor board member defendants liable.<sup>1</sup>

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<sup>1</sup> The plaintiffs and the defendants each designate the named defendants differently, so, for the sake of simplicity, the Court is using the group designations appearing above.

In motion sequence 008, defendant Trane U.S. Inc. (i/p/a Trane USA Inc.) (Trane) moves to dismiss plaintiffs' complaint as asserted against it pursuant to CPLR 3211(a)(1), (3) and (7).

In an Interim Order dated March 5, 2012, the Court gave notice to all parties that all pending motions to dismiss before the Court, including pending motions in Room 130, may be treated and converted as motions for summary judgment pursuant to CPLR 3211(c). The Interim Order gave the parties an opportunity to submit papers to the Court in support of or in opposition to the conversion, by March 21, 2012. The following papers were received by the Court regarding the conversion: defendants Delta Sheet Metal Corp. and Classic Fire Systems submitted an affirmation in support; defendants Israel Berger and Associates, LLC and Cosentini Associates submitted papers neither in opposition or in support of the conversion, yet requested that the Court not bar them from filing a successive summary judgment motion, if necessary; defendants Eagle One Roofing Contractors, Inc. and Rael Automatic Sprinkler Company, Inc. submit an affirmation in support of the conversion; plaintiffs submit an affirmation and memorandum of law in opposition to the Court's conversion on the basis that, *inter alia*, the Court provided inadequate notice of the conversion given the sheer volume of motion papers of the outstanding motion papers as well as on the basis that defendants have not met the standard for summary judgment in their respective motions to dismiss. Defendants Gruzen Samton LLP and Michael Gelfand submitted responsive papers after March 21, 2012 deadline, and as a result their papers were not considered by the Court.

Additionally, the Court is in receipt of various letter correspondence from the parties in opposition to plaintiffs' submission of an affirmation of counsel and memorandum of law in opposition to the Court's conversion of the pending motions to dismiss, on the basis that plaintiffs are attempting to relitigate or rebrief the substance of the motions that were previously submitted to the Court.

## BACKGROUND

Plaintiffs are owners of condominium units in defendant 20 Pine Street Condominium, and allege that they represent the Homeowners Association (HOA) thereof. This action is asserted against the Sponsor, its principals, architects, engineers, contractors, interior designers and selling agent for damages allegedly sustained by plaintiffs as a result of defendants' failure to construct the condominium in accordance with the promises appearing in the offering plan, the plans and specifications filed with and approved by the Department of Buildings (DOB), the New York City Building Code (Building Code), and local industry standards.

Plaintiffs contend that the failure on the part of defendants to construct the condominium in accordance with the offering plan and specifications has resulted in numerous construction defects, which have caused and continue to cause life, safety and health hazards to the residents of the condominium (Complaint ¶¶ 196-204). Further, plaintiffs argue that the Sponsor-controlled Board has failed to take any action to remediate the situation.

Pursuant to the offering plan, the Sponsor can retain control of the Board of Directors (Board) until it obtains a permanent certificate of occupancy (CO), which it has failed to do. According to the offering plan, as incorporated into the purchase agreements entered into between the Sponsor and each of the plaintiffs individually, the Sponsor stated that:

1. "[I]mprovements described in the Plans and Specifications shall, upon the issuance of a permanent certificate of occupancy for the Building, be in compliance with all applicable zoning codes of the city of New York and other applicable regulations, codes and governmental requirements" (Complaint ¶ 129);
2. "Sponsor will, at Sponsor's sole cost and expense and with reasonable diligence, perform or cause to be performed such work, and will supply or cause to be supplied all

materials, which are necessary to complete the renovation of the Building substantially in accordance with the description contained in the section of the Plan entitled 'Description of Property and Specifications'" (Complaint ¶ 130);

3. "[Q]uality of construction shall be comparable to local standards customary in the particular trade and in accordance with the Plans and Specifications for the Building (Complaint ¶ 132);

4. Sponsor has an "obligation to correct material defects in the renovation or construction of those common elements or the units which are required to be renovated or constructed in accordance with the plans and specifications" (Complaint ¶ 136);

5. Sponsor "will correct or cause to be corrected patent defects in the renovation or construction of the Common Elements or Units or in the installation or operation of any mechanical equipment therein ... " (Complaint ¶ 137);

6. Sponsor "will correct or cause to be corrected latent defects (that is, defects which are not visually ascertainable) in the construction of the Building and the Units or in the installation of operation of any mechanical equipment therein ..." (Complaint ¶ 138);

7. Sponsor shall have the obligation to "repair or replace ... any defective item or construction (arising as a result of substantial and material defects in material or as a result of improper workmanship substantially at variance with the Plans and Specifications)" (Complaint ¶ 139); and

8. "If only a temporary certificate of occupancy for the Building or a Unit for which title has closed shall have been issued, the Sponsor will use reasonable diligence to cause the local building department to renew continuously the temporary certificate of occupancy until the permanent certificate of occupancy covering all Units offer under this Plan shall have been issued. Sponsor will, at sponsor's sole cost and expense, do and perform or cause to be

performed all work and supply or cause to be supplied all materials necessary to renew the temporary certificate of occupancy and to obtain such permanent certificate of occupancy ... Sponsor anticipates obtaining a permanent certificate of occupancy for the Property no later than two years from the date of closing of title to the First Unit that is closed under the Plan and shall use all reasonable efforts to obtain same" (Complaint ¶ 134).

Additionally, the architect's report, prepared by defendant Gruzen Samton Architects Planners & Interior Designers, LLP, s/h/a Gruzen Samton, LLP (Gruzen), allegedly made specific representations concerning the quality of the construction and materials that would be used, which plaintiffs contend have not been met.

Plaintiffs also state that the Sponsor made certain promises concerning the interior design of the condominium, indicating an extremely upscale design, which plaintiffs assert have not been met. Plaintiffs say that construction defects with the building were evident from the time that they gained possession of their units, and that they gave written notices to the Sponsor and/or the Sponsor's representatives about these defects. Plaintiffs contend that the Sponsor and/or its representatives acknowledged receipt of these notices. Additionally, during March and April of 2009, plaintiffs sent 25 detailed letters to the Board, outlining the construction defects (Motion Seq. 001, exhibit 3).

In response to these notices, the Board hired Rand Engineering and Architecture, PC (Rand) to perform a physical inspection and prepare a report on the condition of the building. According to plaintiffs, Rand issued a report that recommended various courses of action to remedy the defects, estimated the cost of the recommended remediation, and recommended that further investigation be performed, based on indications of latent defects.

Plaintiffs contend that the Board refused to remediate the defects identified by Rand or to share the Rand report with the unit owners. Plaintiffs say that only an oral summary of the Rand report was provided to them, which indicated a large number of problems that needed to



be addressed at a cost of approximately \$5.6 million. Plaintiffs argue that, while the Board is controlled by the Sponsor, the unit owners lack the information and resources to correct the construction problems with the building. According to the condominium's by-laws, the Sponsor can retain control of the Board until the later of (1) the closing of title to residential units having an aggregate common interest of at least 95% of the total common interest, or (2) the issuance of a permanent CO (Complaint ¶¶ 145). Plaintiffs state that, to date, the Sponsor has sold nearly 95% of the total common interest, but has failed to file for a permanent CO, but has continually sought and received temporary COs.

The verified complaint alleges 19 causes of action:

(1) breach of contract (the purchase agreement) asserted as against the Sponsor and the controlling Sponsor defendants, for construction defects;

(2) breach of contract (the architectural agreement) asserted as against Gruzen, Michael Gelfand (Gelfand), Sponsor and Sponsor-controlled defendants, for construction defects;

(3) breach of contract (the engineering agreement) asserted as against Sponsor, Sponsor-controlled defendants and Cosentini Associates, Inc. (Cosentini), based on construction defects;

(4) breach of contract (the contractors' agreements) asserted as against Boymelgreen, Copper Construction, LLC (Copper), Jim Pershing (Pershing), Wonder Works Construction & Development Corp. (Wonder Works), Closer Consulting, Inc. (Closer), Israel Berger and Associates, LLC (Berger), JDP Mechanical, Inc. (JDP), Trane USA, INC. (Trane), 5 Star Electric of Long Island, Inc. (5 Star), Rael Automatic Sprinkler Company, Inc. (Rael), Classic Fire Systems, Inc. (Classic), Pace Plumbing Corp. (Pace), Leonard Powers, Inc. (Powers), Delta Sheet Metal Corp. (Delta), Eagle One Roofing Contractors, Inc. (Eagle), Urban Suburban Recreational, Inc. (USR) (collectively, the contractor defendants), the Sponsor and the Sponsor-controlled defendants, for construction defects;

- (5) breach of express warranty asserted as against the Sponsor and the Sponsor-controlled defendants;
- (6) breach of common-law implied housing merchant warranty, asserted as against the Sponsor and the Non-Sponsor defendants;
- (7) breach of contract asserted as against the Sponsor and the Non-Sponsor defendants for failing to obtain a permanent CO;
- (8) failure to comply with General Business Law (GBL) §§ 352-e(2)(b) and 352(h), asserted as against the Sponsor, the Non-Sponsor defendants, Gruzen, Gelfand and Cosentini;
- (9) negligence, asserted as against the Sponsor, the Non-Sponsor defendants, Gruzen, Gelfand and Cosentini;
- (10) negligence asserted as against the Sponsor, the non-Sponsor controlled defendants and the contractor defendants;
- (11) professional malpractice, asserted as against Gruzen and Gelfand;
- (12) professional malpractice, asserted as against Cosentini;
- (13) fraud and negligent misrepresentation, asserted as against the Sponsor and the Non-Sponsor defendants;
- (14) fraud and negligent misrepresentation, asserted as against Gruzen and Gelfand;
- (15) fraud, asserted as against Armani Casa (Casa), Cristina Benardeau (Benardeau), Kevin Bergin (Bergin) (collectively, the marketing design defendants) and Michael Shvo d/b/a Shvo Marketing (Shvo);
- (16) violation of GBL § 349(a), asserted as against the Sponsor and the Non-Sponsor defendants;
- (17) violation of 15 USC § 1703(a)(2), asserted as against the Sponsor and the Non-Sponsor defendants;
- (18) conversion, asserted as against the condominium Board; and

(19) breach of fiduciary duty, asserted as against the condominium Board.

### STANDARD

CPLR 3211(a), provides that:

"a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- [1] A defense is founded upon documentary evidence;
- [3] The party asserting the cause of action has not legal capacity to sue;
- [5] the action may not be maintained because of... statute of limitations
- [7] The pleading fails to state a cause of action;
- [8] The court has not jurisdiction of the person of the defendant"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

A motion to dismiss, pursuant to CPLR 3211(a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. "The issue of legal

capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal as timely raised as a defense" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006] [international citation omitted]). The doctrine of legal capacity "concerns a litigant's power to appear and bring its grievance before the court" (*Security Pac. Natl. Bank*, 31 AD3d at 279).

Upon a CPLR 3211(a)(5) motion to dismiss a complaint as time barred under the applicable statute of limitations, the initial burden is on the defendant to show that the claims against him are time barred by the applicable statute of limitations (*See Tristaino v Teitler*, 24 Misc3d 1244[A] [2009]). Then, the burden shifts to the plaintiff to establish that the relation back doctrine applies (*id.*). Concerning a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

#### DISCUSSION

As a preliminary matter, the Court will consider plaintiffs' entire submission in opposition to the conversion, as the parties were put on notice to make a complete record and to come forward with any evidence that could possibly be considered (*see State Bd. of Equalization and Assessment v Kerwick*, 72 AD2d 292, 301 [3d Dept 1980] ["the court must notify the parties of its intention to make a summary determination, thus enabling them to submit additional proof in support of their positions"], *affd* 52 NY2d 557 [1981]; *cf. Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [Court improperly converted motion to dismiss into one for summary judgment,

without notice to the parties and an opportunity to submit additional papers]; see Siegel, N.Y. Prac. § 270 [4th ed. 2007] ["[t]his notice requirement therefore offers the parties an opportunity to submit everything they've got"]. After due notice given to the parties, and upon a review of the submissions, the Court will treat the herein motions to dismiss as summary judgment motions, pursuant to CPLR 3211(c). Furthermore, in deciding this motion the Court may, in its discretion, search the record and grant summary judgment to non-moving parties (see CPLR 3212(b); see also *Atiencia v MBBCO II, Inc.*, 75 AD3d 424 [1st Dept 2010] ["A court, in the course of deciding a motion, is empowered to search the record and award summary judgment to a nonmoving party"]; *Mini Mint Inc. v Citigroup Inc.*, 83 AD3d 596 [1st Dept 2011]; *Brooks v City of New York*, 212 AD2d 435, 435 [1st Dept 1995]).

Plaintiffs' 1<sup>st</sup> Cause of Action Asserted Against the Sponsor

The portion of defendants' motion seeking to dismiss the first cause of action for breach of contract asserted as against the Sponsor is denied. Although it is well-settled that "individual unit owners lack standing to seek damages for injury to the building's common elements" the offering plan specifically grants such a right to the individual unit owners under circumstances in which the condominium Board fails to act to enforce the Sponsor's obligations (*Board of Managers of the Chelsea 19 Condominium v Chelsea 19 Associates*, 73 AD3d 581, 581 [1st Dept 2010] [internal citation omitted]; see *Kerusa Co. LLC v W10Z/515 Real Estate Limited Partnership*, 50 AD3d 503 [1st Dept 2008]; *Devlin v. 645 First Avenue Manhattan Company*, 229 AD2d 343 [1st Dept 1996]).

It is the defendants position that the plaintiffs lack standing to assert causes of action for breach of contract against the Sponsor because the Board has been acting to cure the construction defects. However, plaintiffs claim that such actions by the Sponsor-controlled Board have been both unreasonable and ineffective. In viewing the allegations of the complaint and opposition papers as true and in a light most favorable to plaintiffs, the Court cannot

conclude that the plaintiffs lack standing pursuant to the rights granted to unit owners under the terms of the offering plan.

Plaintiffs' 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Causes of Action Asserted Against the Non-Sponsor Defendants

The portion of defendants' motion seeking to dismiss the first, second, third and fourth causes of action for breach of contract asserted as against the Non-Sponsor defendants is granted.

Plaintiffs claim that they have standing to assert a cause of action for breach of contract against the Non-Sponsor defendants as third-party beneficiaries of the Sponsor-affiliated contractors' contracts. In support of this contention, plaintiffs cite to *Board of Mgrs. of the Alfred Condominium v Carol Mgt.*, which found that individual condominium unit owners had standing to sue the building's contractors as third-party beneficiaries of the contract between the contractors and the sponsor (214 AD2d 380 [1st Dept 1995]). However, that case as well as its progeny, involved contracts in which the eventual purchasers of the units were specifically stated to be beneficiaries of the agreements (see *Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421 [1st Dept 2011]).

The Court finds that the case at bar is distinguishable from *Board of Mgrs. of the Alfred Condominium* and its progeny because none of the contracts that are subject to these causes of action contain any reference to eventual purchasers as beneficiaries of the agreements (see *Board of Mgrs. of the Alfred Condominium*, 214 AD2d at 380; *Diamond Castle Partners IV PRC, L.P.*, 82 AD3d at 421). Absent such express contractual language, or alleged direct contact between plaintiffs and the Non-Sponsor defendants, the unit owners lack standing to assert claims against the contractors (see e.g. *Sykes v RFD Third Ave. 1 Assoc., LLC*, 67 AD3d 162 [1st Dept 2009]; *affd* 15 NY3d 370 [2010]; see also *Westpac Banking Corp. v Deschamps*, 66 NY2d 16 [1985]). Accordingly, plaintiffs' first, second, third and fourth causes of action are dismissed as against all defendants except for the Sponsor.

### Plaintiffs' 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Causes of Action Asserted Against the Sponsor

Similarly, and for the same reasons as just discussed, the branch of defendants' motion seeking to dismiss the second, third and fourth causes of action asserted as against the Sponsor is granted. Since the plaintiffs are not third-party beneficiaries of the architectural, engineering or construction contracts, they have no standing to sue any party to those agreements, and these causes of action are dismissed (see e.g. *Sykes*, 15 NY3d at 370).

### Plaintiffs' 5<sup>th</sup> and 6<sup>th</sup> Cause of Action

The branch of defendants' motion seeking to dismiss the fifth and sixth causes of action asserted as against the Sponsor and the Non-Sponsor defendants, for breach of an express warranty and breach of the common-law implied housing merchant warranty respectively, is granted.

In opposition, plaintiffs rely on *Caceci v Di Canio Construction Corp.*, which held that a builder is subject to a "housing merchant" warranty to the purchaser of the premises (72 NY2d 52 [1988]). However, in analyzing *Caceci* in light of GBL Art. 36-B, which superceded *Caceci's* holding for buildings with no more than five stories, the Court of Appeals held, in *Fumarelli v Marsam Development, Inc.*, a case involving a suit between the purchaser of a luxury condominium and the condominium's seller, that a seller could exclude express and implied warranties by specific language in the offering plan (92 NY2d 298 [1998]; Motion, exhibit C). Such specific limitation of warranties appears in the instant offering plan. Therefore, the fifth and sixth causes of action are dismissed (see *Gallup v Summerset Homes, LLC*, 82 AD3d 1658 [4th Dept 2011]).

### Plaintiffs' 7<sup>th</sup> Cause of Action

The branch of defendants' motion seeking to dismiss the seventh cause of action asserted as against the Sponsor and the Non-Sponsor defendants for breach of contract for failing to obtain a permanent CO is denied with respect to the Sponsor, and is granted with

respect to the Non-Sponsor defendants for the reasons stated by the Court in its discussion of plaintiffs' second, third, and fourth causes of action.

#### Plaintiffs' 8<sup>th</sup> Cause of Action

The portion of defendants' motion seeking to dismiss the eighth cause of action for violation of GBL §§ 352-e (2)(b) and (h) asserted as against the Sponsor, the Non-Sponsor defendants, Gruzen, Gelfand and Cosentini is granted. GBL § 352 et seq., known as the Martin Act, vests to the Attorney General exclusive authority to enforce its provisions and implement regulations (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]; *Kralik v 239 E. 79<sup>th</sup> St. Owners Corp.*, 5 NY3d 54 [2005]), and "there is no private right of action under the statute" (*Kerusa Co. LLC*, 12 NY3d at 244). Accordingly, plaintiffs' eighth cause of action must be dismissed.

#### Plaintiffs' 9<sup>th</sup> and 10<sup>th</sup> Causes of Action

The branch of defendants' motion seeking to dismiss the ninth and tenth causes of action asserted as against the Sponsor, Non-Sponsor defendants, Gruzen, Gelfand, Cosentini and the contractor defendants for negligence is granted.

The allegations of negligence in the complaint are based on defects in the construction of the condominium and, as such, sound in breach of contract rather than tort (*see Gallup*, 82 AD3d at 1658; *Hamlet on Old Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284 [2d Dept 2009]; *Rothstein v Equity Ventures*, 299 AD2d 472 [2d Dept 2002]). Further, a contractor generally does not owe a duty of care to a non-contracting party (*see Timmins v Tishman Construction Corp.*, 9 AD3d 62 [1st Dept 2004]), except in three circumstances: (1) while discharging a contractual obligation, creates an unreasonable risk of harm; (2) the non-contracting third party suffered an injury based on reasonable reliance on the contractors continuing performance of a contractual obligation; or (3) where the contracting party has displaced the other party's duty to maintain the premises safely (*see Powell v HIS*



*Contractors, Inc.*, 75 AD3d 463 [1st Dept 2010]). However, none of those circumstances are applicable to the case at bar. Accordingly, plaintiffs' ninth and tenth causes of action are dismissed.

#### Plaintiffs' 11<sup>th</sup> and 12<sup>th</sup> Causes of Action

The portion of defendants' motion seeking to dismiss the eleventh and twelfth causes of action asserted as against Gruzen, Gelfand and Cosentini for professional malpractice is granted.

Although there is no privity between plaintiffs and Gruzen, Gelfand or Cosentini, a claim for professional malpractice "may be asserted absent privity of contract where the relationship of the parties is so close as to approach that of privity" (*Tambrands, Inc. v Lockwood Greene Engineers, Inc.*, 178 AD2d 406, 408 [2d Dept 1991] [internal quotation marks and citation omitted]). However, in the instant matter, no such close relationship has been alleged, and the causes of action and injuries claimed are duplicative of the breach of contract claims. Therefore, plaintiffs' eleventh and twelfth causes of action are dismissed.

#### Plaintiffs' 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Causes of Action

The branch of defendants' motion seeking to dismiss the thirteenth and fourteenth causes of action asserted as against the Sponsor, the Non-Sponsor defendants, Gruzen, and Gelfand alleging fraud and negligent misrepresentation, and the fifteenth cause of action asserted as against the marketing design defendants and Shvo, alleging fraud, is granted.

The allegations in the complaint with respect to these three causes of action fall into two main categories: (1) the defendants failure to fulfill the promises appearing in the offering plan; and (2) the statement about the quality of the performance. Neither of these two types of allegations supports a theory of fraud or negligent misrepresentation. The mere assertion that the defendants did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud (see CPLR 3016[b]; *Hylan Elec. Contr., Inc. v*

*MasTec N. Am., Inc.*, 74 AD3d 1148 [2d Dept 2010]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75 [1st Dept 2004]; *Modell's N.Y. Inc. v Noodle Kidoodle*, 242 AD2d 248, 249 [1st Dept 1997]. Further, optimistic or boastful statements about performance or quality – puffery – do not support an action for fraud (see *Jacobs v Lewis*, 261 AD2d 127 [1st Dept 1999]; FRAUD PARTICULARITY CASE). Accordingly, plaintiffs' thirteenth, fourteenth, and fifteenth causes of action are dismissed.

#### Plaintiffs' 16<sup>th</sup> Cause of Action

The portion of defendants' motion seeking to dismiss the sixteenth cause of action asserted as against the Sponsor and Non-Sponsor defendants for deceptive acts and practices in violation of GBL § 349 is granted. The sixteenth cause of action is dismissed, "since it stem[s] from a private contractual dispute between the parties without ramification for the public at large" (*Merin v Precinct Devs. LLC*, 74 AD3d 688, 689 [1st Dept 2010] [internal citations omitted]; *Thompson v Parkchester Apts. Co.*, 271 AD2d 311 [1st Dept 2000]). The Court is unpersuaded by plaintiffs' argument that their claim affects the public at large because the defendants construct other condominiums that have post-construction problems. Furthermore, "[t]o the extent the offering can be construed as directed at the public [at large], the section 349 claim is preempted by the Martin Act" which would mean that only the Attorney General would have standing to bring this claim (*Merin*, 74 AD3d at 689).

#### Plaintiffs' 17<sup>th</sup> Cause of Action

The portion of defendants' motion seeking to dismiss the seventeenth cause of action asserted as against the Sponsor and Non-Sponsor defendants alleging a violation of the Interstate Land Sales Full Disclosure Act (ILSA), 15 USC § 1703(a)(2) is granted.

The section of ILSA cited by plaintiffs concerns misrepresentation and fraud with respect to the sale of land, including condominiums (*Tencza v Tag Court Square, LLC*, 803 F Supp 2d 279 [SD NY 2011]; *Cruz v Leview Fulton Club, LLC*, 711 F Supp 2d 329 [SD NY 2010]). The

allegations that appear as support for plaintiffs' seventeenth cause of action are virtually identical to the allegations appearing in their fourteenth and fifteenth causes of action, which, as previously stated, do not rise to the level of fraud or misrepresentation. Accordingly, plaintiffs' seventeenth cause of action is dismissed.

#### Plaintiffs' 18<sup>th</sup> Cause of Action

The portion of defendants' motion seeking to dismiss the eighteenth cause of action for conversion of the condominium funds asserted as against the Board is granted. "Conversion is the intentional and unauthorized exercise of control over personal property owned by another that interferes with the owner's right of possession" (*Richman v Harleysville Worcester Ins. Co.*, 85 AD3d 651, 652 [1st Dept 2011]; see *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]).

In the case at bar, plaintiffs' allege that they disagree with the use of the condominium funds by the Board, contending that the funds should have been expended differently. The Court finds that plaintiffs failed to establish the requisite elements of a conversion, and therefore the eighteenth cause of action is dismissed.

#### Plaintiffs' 19<sup>th</sup> Cause of Action

The branch of defendants' motion seeking to dismiss the nineteenth cause of action for breach of fiduciary duty asserted as against the individual members of the Board is granted.

"[T]he Court of Appeals decided that the appropriate standard for judicial review of decisions of boards of managers of residential condominiums ... is 'analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors'" (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 10 [1st Dept 2006], citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]). To bring "an action against the individual members of a ... condominium board ... plaintiffs [are] required to plead with specificity independent tortious acts by each individual defendant in order to overcome ...

the business judgment rule" (*Pelton*, 38 AD3d at 10). The business judgment rule prohibits judicial inquiry into actions taken in furtherance of corporate purposes by directors made in the exercise of honest judgment (see *Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459 [1st Dept 2010]). In the instant matter, plaintiffs have failed to plead any specific independent acts of the individual Board members so as to sustain this cause of action. Accordingly, the plaintiffs' nineteenth cause of action is dismissed and the individual Board members are dismissed from the action.

#### Jurisdiction over the Africa Israel Entities

Lastly, with respect to the Court's jurisdiction over the Africa Israel entities, the Court grants that portion of defendants' motion seeking to dismiss the complaint for lack of personal jurisdiction asserted as against said defendants. "Mere ownership by a parent company of a subsidiary that is subject to personal jurisdiction is insufficient to establish jurisdiction over the parent" (*Moreau v RPM, Inc.*, 20 AD3d 456, 257 [2d Dept 2005]; *Adriana Development Corp. N.V. v Gaspar*, 81 AD2d 235 [1st Dept 1981]). Further, since the tort and contract claims asserted as against the Africa Israel entities have been dismissed, there is no basis for the Court to exercise jurisdiction over those defendants (see CPLR 302 [jurisdiction based on tortious acts committed without the state causing injury within the state]).

#### CONCLUSION

Based on the foregoing, and the Court having converted defendants' motions to summary judgment and in its discretion, searched the record, it is hereby

ORDERED that defendants Giorgio Armani Corp., Armani Casa and Kevin Bergin's motion (Motion Sequence 003) is granted in its entirety and the complaint is dismissed as against these defendants; and it is further,

ORDERED that defendants Gruzen Samton, LLP and Michael Gelfand's motion (Motion

Sequence 006) is granted in its entirety and the complaint is dismissed as against these defendants; and it is further,

ORDERED that defendants 20 Pine Street LLC, 20 Pine Street Managers, LLC, Boymelgreen Family LLC, Jeshayahu Boymelgreen a/k/a Shaya Boymelgreen, AI Properties and Developments (USA) Corp., Pinchas Cohen, Richard Marin, Tamir Kazaz, Africa Israel Investments International 1997 Limited and Africa Israel Investments Limited's motion (Motion Sequence 007) is granted in its entirety and the complaint is dismissed in its entirety as against said defendants, except the first and seventh causes of action as against 20 Pine Street LLC; and it is further,

ORDERED that defendant Trane U.S. Inc. (i/p/a Trane USA Inc.)'s motion (Motion Sequence 008) is granted in its entirety and the complaint is dismissed as against it; and it is further,

ORDERED that the Court, in searching the record, grants summary judgment to non-moving defendants, and the complaint is hereby dismissed in its entirety except the first and seventh causes of action as against 20 Pine Street LLC; and it is further,

ORDERED that the action is severed and continued against 20 Pine Street LLC; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the action shall bear the following caption:

-----X  
 THE 20 PINE STREET HOMEOWNERS ASSOCIATION  
 and DANIEL JOSEPH MCCORMICK, CLAUDIO  
 BARBERO MONTAGNA, AMIR BABAK BEHNAM, KAZEM  
 BEHNAM, 20 PINE, LLC, CARLA B. BUFFULIN,  
 GIULIANO INFANTOZZI, TRUST FBO HENNING F.  
 BLOMBACK AND REVOCABLE TRUST FBO CHIANG  
 CHING, HEATHER CURATOLO, ANDREW WISNEWSKI,  
 LUCIANO D'ADAMIO, GIOVANNA D'ANDREA,  
 FREDERICO DEVERA, PIU BANERJEE, ARNAB DEY,  
 LOUIS DILORENZO, CHARISSE MELOTO, APURVA  
 DIXIT, RUPALI DIXIT, LARRY J.B. EVANS,  
 PHYLLIS A. EVANS, NANCY H. FOGARTY, STACEY  
 L. HAEFELE, TAREK HALLABA, NAHED HALLABA,  
 THOMAS HEINZ, ROSSANA SHOKRIAN, ELLIOT  
 HEN-TOV, WILLIAM HYMAN, NANCY HYMAN, ROBERT  
 KARICOD, MONICA A. PAREKH, THOMAS A. KELLER,  
 TRUSTEE OF THE THOMAS A. KELLER LIVING  
 TRUST, CHARLES RICHTER KING, BARBARA BERRIE,  
 MAXIM A. KOGAN, WILLIAM D. KOULMENTAS, ELENI  
 KOULMENTAS, SAMUEL DREW LANG, GRACIELA  
 BERGNER, ROGER LEFEVRE, MARC SUTIN, ELIZABETH  
 MACKAY, NATALIE MARKOFF, JOSEPH PLUMMER, BIMAL  
 MASSAND, SEEMA MASSAND, ERICA K. OLIVEIRA,  
 HELGA PAULSEN, KEVIN A. RELIHAN, CAROLYN RELIHAN,  
 ERIK REYNOLDS, MARIA CLAUDIA R IBEIRO DE CASTRO,  
 WERNER STANZL, ALVIN L. ROYSE, NASSIR SHOKRIAN  
 AND SARAH L. SHOKRIAN, AS TRUSTEES OF THE  
 SHOKRIAN TRUST DATED 3-17-1999, THE RVS LIMITED  
 PARTNESHIP, NEIL S. SIMON, JOYCE KLEINBERG,  
 BRADLEY SOLOMON, JOHAN STYLANDER, STEPHANIE  
 PFRIENDER STYLANDER, GERRIE B. TEO, JOSHUA F.  
 WHITE, DONG DONG ZHOU, HUAKANG ZHOU, KEN WONG,  
 CHRISTINE LEE, RICHARD B. KANG, ALON ZIV,  
 and SUZIE H. KIM and LAURA SALTZMAN,

Plaintiffs,

-against-

20 PINE STREET LLC,

Defendant.

-----X

It is further,

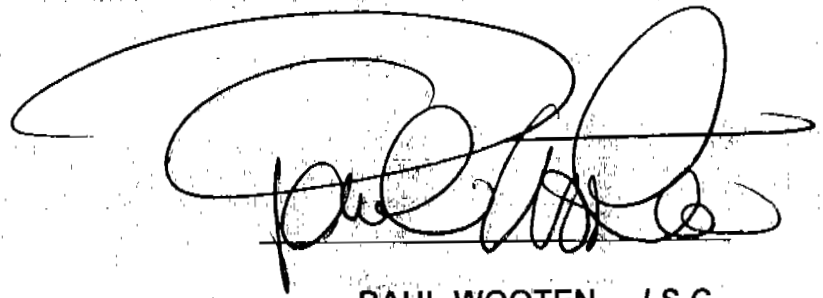
ORDERED that counsel for Boymelgreen Family LLC shall serve a copy of this Order

with Notice of Entry upon all parties and upon the County Clerk and the Clerk of the Trial Support Office, who are directed to enter judgment accordingly and to mark the court's records to reflect the change in the caption herein, within 30 days of entry; and it is further,

ORDERED that all remaining parties are directed to appear for a Preliminary Conference at 2:30 p.m. on July 25, 2012 at New York County Supreme Court, 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

Dated: 5/2/2012



PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**FILED**

**MAY 16 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**