SHORT FORM ORDER

INDEX
NO.: 43653-08

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 1-26-12
SUBMITTED: 2-2-12
MOTION NO.: 002-MOT D
003-MOT D
004-MOT D; ACAP

SUNKEN POND ESTATES HOMEOWNERS ASSOCIATION, INC., SUNKEN POND ESTATES CONDOMINIUM I, SUNKEN POND ESTATES CONDOMINIUM II and SUNKEN POND ESTATES CONDOMINIUM III,

Plaintiffs,

-against-

SUNKEN POND ESTATES, INC., ROBERT HAVASY, JOSEPH FORGIONE and BRIAN FULLERTON,

Defendants.

SUNKEN POND ESTATES, INC., ROBERT HAVASY, JOSEPH FORGIONE and BRIAN FULLERTON,

Third-Party Plaintiffs,

-against-

LUCIA ADRIAN, FREDERICK SCHMIDT, LOUIS MILIA, VINCENT GRASSI, WHITNEY DOWDALL and RAYMOND CORRISS,

Third-Party Defendants.

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Upon the following papers numbered 1-108 read on these motions for summary judgment and cross-motion to amend ; Notice of Motion and supporting papers 1-21; 38-79 ; Notice of Cross Motion and supporting papers 22-31 ; Answering Affidavits and supporting papers 32-37; 80-97 ; Replying Affidavits and supporting papers ___; Other 98-108 ; it is,

ORDERED that the defendants' motion for summary judgment is granted to the extent of dismissing the second, fourth, sixth, eighth, and ninth causes of action, and the defendants' motion is otherwise denied; and it is further

ORDERED that the branch of the motion by the plaintiffs and the third-party defendants which is for partial summary judgment is denied, and the branch of the same motion which is for dismissal of the third-party action is granted; and it is further

ORDERED that the branch of the plaintiffs' cross motion to amend the complaint which is to substitute the respective boards of managers for the plaintiffs Sunken Ponds Estates Condominium I, Sunken Ponds Estates Condominium II, and Sunken Ponds Estates Condominium III is granted, and the cross motion is otherwise denied; and it is further

ORDERED that the caption shall hereafter read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

_____X

SUNKEN POND ESTATES HOMEOWNERS ASSOCIATION, INC., BOARD OF MANAGERS OF SUNKEN POND ESTATES CONDOMINIUM I on behalf of the Condominium and all unit owners, BOARD OF MANAGERS OF SUNKEN POND ESTATES CONDOMINIUM II on behalf of the Condominium and all unit owners, BOARD OF MANAGERS OF SUNKEN POND ESTATES CONDOMINIUM III on behalf of the Condominium and all unit owners,

Plaintiffs,

against

SUNKEN POND ESTATES, INC., ROBERT HAVASY, JOSEPH FORGIONE and BRIAN FULLERTON,

Defendants.

_____X.

Sunken Pond Estates consists of three related condominium developments located in Riverhead, New York, the plaintiffs Sunken Pond Estates Condominium I ("Condo I"), Sunken Pond Estates Condominium II ("Condo II"), and Sunken Pond Estates Condominium III ("Condo III"). Although each condominium has its own offering plan, governing documents, and board of

managers, they share certain common properties, including roadways, a clubhouse, and a pool. The plaintiff homeowners association (the "HOA") owns and operates such common properties and is responsible for their maintenance and repair. The HOA is also responsible for the maintenance and repair of the common elements of each condominium, which include the exterior facades and roofs, among other things. The HOA is a not-for profit corporation governed by a board of directors.

The defendant Sunken Pond Estates, Inc. (the "sponsor"), was the sponsor and developer of Condos I, II, and III. The defendant Robert Havasy was a principal of the sponsor and served as a sponsor-designated member of the boards of Condos I, II, and III. He also served as a sponsor-designated member of the board of the HOA. The defendant Brian Fullerton was employed by the sponsor as a project manager and also served as a sponsor-designated member of the condo boards and the HOA board. The defendant Joseph Forgione was a principal of the sponsor and was named in the offering plans as a sponsor-designated member of the condo and HOA boards. However, he was never a member of any board at Sunken Pond Estates. The sponsor-designated members of the boards of Condos I and II resigned on January 30, 2004, and the sponsor relinquished control of the board of the HOA in May 2005. The sponsor-designated members of the board of Condo III resigned on June 15, 2005.

The plaintiffs commenced this action on December 9, 2008. The amended complaint contains four causes of action against the sponsor for breach of contract and/or breach of warranty; four causes of action against Havasy, Fullerton, and Forgione for breach of fiduciary duty; and one cause of action to recover reimbursement for additional property taxes paid by the HOA. The gravamen of the complaint is that the defendants failed to construct and complete the common properties and common elements of Sunken Pond Estates in conformance with the offering plans, the plans and specifications filed with the Town of Riverhead, and local standards. Specifically, the plaintiffs allege that the anti-backflow or RPZ devices installed in the condo buildings were improperly installed, that the railings on the front porches were made of spruce or pine rather than cedar, that many of the roofs leaked, that the windows and the siding were improperly installed, that the asphalt driveways were improperly graded, and that the driveways were constructed with one parking space rather than two, among other things. The first six causes of action asserted by Condos I, II, and III, respectively, relate to the common elements of Sunken Pond Estates. The seventh and eighth causes of action asserted by the HOA relate to the common properties. The defendants assert a third-party action for indemnification and contribution against six homeowners elected to the condo boards and/or the HOA board.

Discovery is now complete, and the defendants move for summary judgment dismissing the complaint. The plaintiffs oppose the defendants' motion and cross move for leave to serve and file a second amended complaint. The plaintiffs and the third-party defendants move for partial summary judgment and for dismissal of the third-party complaint.

The Second, Fourth, Sixth and Eighth Causes of Action

The second, fourth, and sixth causes of action for breach of fiduciary duty are asserted by Condos I, II, and III, respectively, against Havasy, Forgione, and Fullerton,

collectively. The defendants contend that they are time-barred because the three-year statute of limitations found in CPLR 214 (4) applies to breach-of-fiduciary-duty claims. The plaintiffs, relying on **Roslyn Union Free School District v Barken** (16 NY3d 643) argue that the six-year limitations period found in CPLR 213 (7) applies. The plaintiffs also argue that the plaintiffs should be estopped from asserting the statute of limitations as a defense.

New York law does not provide any single limitations period for breach-of-fiduciary-duty claims (**Kaufman v Cohen**, 307 AD2d 113, 118). Generally, the applicable statute of limitations depends upon the substantive remedy sought (**Id.**). When the relief sought is equitable in nature, the six-year limitations period found in CPLR 213 (1) applies (**Id.**). On the other hand, when lawsuits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging injury to property to which the three-year statute of limitations found in CPLR 214 (4) applies (**Id**). A claim for breach of fiduciary duty accrues, and the statute of limitations begins to run, upon the date of the alleged breach. The statute of limitations may be tolled while a relationship of trust and confidence exists between the parties (**Ciccone v Hersh**, 530 F Supp 2d 574, 579, *affd* 320 Fed Appx 48 [2nd Cir]). In such cases, the statutory period does not begin to run until the fiduciary relationship is openly repudiated or otherwise ended (**Steele v Anderson**, US Dist Ct, NDNY, Jan. 8, 2004, Mcavoy, Senior J. [2004 WL 45527], *citing* **Westchester Religious Inst. v Kamerman**, 262 AD2d 131).

The plaintiffs in this case seek only money damages. Therefore, the three-year statute of limitations applies. It began to run when the fiduciary relationship ended, i.e., when the sponsor-designated members of the condo boards resigned on January 30, 2004, and June 15, 2005, respectively. The statute of limitations expired three years later on January 30, 2007, and June 15, 2008, respectively. This action was commenced on December 9, 2008, after the statute of limitations had expired. Accordingly, the court finds that the second, fourth, and sixth causes of action are time-barred.

Roslyn Union Free School District v Barken (*supra*), upon which the plaintiffs rely, is limited to its facts. In that case, the Court of Appeals applied the six-year statute of limitations found in CPLR 213 (7) to a breach-of-fiduciary-duty claim by a school district against a former member of the school board who, along with other board members, was allegedly lax in overseeing the school district's finances. CPLR 213 (7) extends the limitations period to six years for an action by or on behalf of a corporation against a present or former officer to recover damages for waste or injury to property or for an accounting in conjunction therewith. The issue was whether the school district was a "corporation" within the meaning of CPLR 213 (7). The Court found that it was because General Construction Law § 65 (a) (1) defines a "corporation" as, inter alia, a "public corporation," which includes a "municipal corporation" under General Construction Law § 65 (b) (1) and § 66 (1), and a "municipal corporation" expressly embraces a "school district" (General Construction Law § 66 [2]). Because a school district is both a municipal corporation and a public corporation, it falls within the ambit of the term "corporation" in CPLR 213 (7) (**Roslyn Union Free School District v Barken,** supra at 649).

Contrary to the plaintiffs' contention, statutes of limitation are to be narrowly construed. It is well settled that a statute of limitations should not be applied to cases not clearly

within its provisions, nor should it be extended by construction (**New York Medical & Diagnostic Center, Inc. v Shah**, 941 NYS2d 460, 468 [2012 NY Slip Op 22052], *citing* **American Can Co. v State Tax Commn.**, 13 AD2d 175, 178). The Court of Appeals in **Roslyn Union Free School District v Barken** (*supra*) merely held that a school district qualifies as a corporation within the meaning of CPLR 213 (7) by referencing the General Construction Law. The Court's holding was based on a straighforward statutory analysis of terms found in General Construction Law § 65 and defined in General Construction Law § 66. The term "condominium" does not appear in either General Construction Law § 65 or § 66, nor is it defined in the Condominium Act (*see*, Real Property Law § 339-e). A condominium, unlike a corporation, is not an entity recognized at law. It is simply a method for describing a form of ownership of property in which the participants own individual units in a multiple unit building (*see*, **Board of Managers of Plaza 230 v Reuss**, NYLJ, Oct. 28, 1992, at 25, col 5 [1992 WL 12664261]). Since a condominium is not a corporation, the court declines to apply the six-year statute of limitations found in CPLR 213 (7) to the second, fourth, and sixth causes of action for breach of fiduciary duty. Accordingly, they are time-barred.

The plaintiffs contend that the defendants should be estopped from asserting the statute of limitations as a defense. New York courts have long had the power to preclude a defendant from using the statute of limitations as a defense when the defendant's affirmative wrongdoing has produced a long delay between the accrual of the cause of action and the institution of the legal proceeding (**Costello v Verizon, N.Y., Inc.**, 77 AD3d 344, 367, *mod* 18 NY3d 777). A defendant may be estopped from pleading the statute of limitations when the plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action (**Id.**). Courts may also look to whether the defendant engaged in conduct that was calculated to mislead the plaintiff and whether the plaintiff, in reliance thereon, failed to commence a timely action (**Id.**). When a plaintiff claims that a defendant should be equitably estopped from asserting a statute of limitations, the plaintiff must show due diligence in bringing the action (**Zumpano v Quinn**, 6 NY3d 666, 683). Due diligence means that the plaintiff must seek to bring an action against the defendant as soon as the plaintiff learns of the misrepresentation (**Id.**).

The record reveals that the sponsor repaired and corrected some of the conditions of which the plaintiffs complained. The plaintiffs contend that, although the sponsor continued to express a willingness to make repairs in response to their demands, the sponsor stopped performing remediation work and was in complete breach of its obligation to correct construction defects by the spring of 2007. In a letter dated March 26, 2007, the HOA advised Havasy that no warranty work was being done, despite the fact that problems continued to exist, and that the HOA expected the sponsor to honor its warranties. Havasy responded by a letter dated April 9, 2007, in which he advised the HOA that his review of the closing dates for the units that had recently been submitted for warranty work revealed that all of the units were past the one-year warranty period, that a number of units were approaching four years' occupancy, and that some

were at the end of their second year of occupancy[1]. He advised the HOA that, notwithstanding the formal warranty periods, the sponsor had continued to work with homeowners well past the initial one-year warranty period, but that the sponsor's willingness to make repairs beyond the formal warranty period "should not be confused with our obligation to do same." According to the plaintiffs, what followed was a long series of correspondence between the parties regarding ongoing defects in the community and the sponsor's refusal to correct them. The plaintiffs retained the services of an engineer in 2007 to inspect and report on the quality of the construction. The engineer issued three reports in November 2007. The plaintiffs commenced this action on December 9, 2008.

The statute of limitations expired on the plaintiffs' breach-of-fiduciary-duty claims for Condos I and II on January 30, 2007. The plaintiffs do not allege, nor have they produced any evidence, that the defendants engaged in deceptive conduct or made specific misrepresentations prior to January 30, 2007. The plaintiffs merely contend that the defendants obviously cooperated in the correction of defects in order to avoid litigation. The court finds that this conclusory assertion is insufficient to establish that the defendants' cooperation was calculated to mislead the plaintiffs or to induce them to postpone bringing suit and that the defendants were not simply fulfilling their contractual obligations. Accordingly, the court declines to estop the defendants from asserting the statute of limitations as a defense to the second and fourth causes of action.

The statute of limitations on the plaintiffs' breach-of-fiduciary-duty claim for Condo III expired on June 15, 2008. The court finds that the plaintiffs had sufficient knowledge to commence an action based on the defendants' failure to honor the warranties and to make repairs as early as the spring of 2007. The plaintiffs acknowledge that the defendants were in complete breach of their obligation to make repairs by the spring of 2007. The record reflects that the plaintiffs continued to notify the defendants of defective conditions and that the sponsor continued to make only those repairs that it considered its responsibility. While the plaintiffs tried to get the sponsor to make additional repairs or to pay for repairs that the sponsor did not consider its responsibility, the plaintiffs have failed to establish any specific misrepresentations to them by the defendants or any deceptive conduct sufficient to constitute a basis for equitable estoppel. Moreover, by waiting until December 9, 2008, to commence this action, the plaintiffs failed to exercise due diligence in bringing the action. Accordingly, court declines to estop the defendants from asserting the statute of limitations as a defense to the sixth cause of action.

The eighth cause of action for breach of fiduciary duty is asserted by the HOA, which is a not-for-profit corporation. A not-for-profit corporation is classified as a corporation in General Construction Law § 65 and defined in General Construction Law § 66. Under **Roslyn Union Free School District v Barken** (*supra*), it is a "corporation" within the meaning of CPLR 213 (7), and the six-year statute of limitations found therein applies. Accordingly, the eighth

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[1]The warranty periods are one year for basic coverage, two years for major systems such as electrical and plumbing, and six years for major structural defects beginning on the date that the purchaser first occupies the home or the date of delivery of the deed, whichever occurs first.

cause of action is not time-barred.

Under New York law, in order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary duty, which the defendant breached, resulting in damages (**JFK Family Ltd. Partnership v Millbrae Natural Gas Dev. Fund**, 89 AD3d 684, 685). A fiduciary breaches his duty when he acts in bad faith for his own personal benefit (**Id.**; **Lirosi v Elkins**, 89 AD2d 903, 906; *see also*, **Kurtzman v Bergstol**, 40 AD3d 588, 590).

As the defendants correctly contend, the record does not reflect that Havasy, Forgione, or Fullerton engaged in willful misconduct for their own personal benefit as members of the HOA and condo boards (**JFK Family Ltd. Partnership**, *supra*). The plaintiffs contend that Havasy, Forgoine, and Fullerton were principals and/or agents of the sponsor and that they breached their fiduciary duties as members of the HOA and condo boards by failing to act in a way that would have caused the sponsor to remedy defects, thereby increasing their share of the profits. It is undisputed that Forgione was never a member of any board at Sunken Pond Estates. Fullerton was employed by the sponsor as a project manager, and he was a member of the HOA and condo boards. However, the record does not reflect that he was a principal of the sponsor or that he would have shared in the sponsor's profits. Only Havasy was both a principal of the sponsor and a member of the HOA and condo boards. Absent an allegation of independently tortious conduct, Havasy cannot be held liable for breach of fiduciary duty (**Berenger v 261 West LLC**, 93 AD3d 175, 185). The plaintiffs make no such allegation, and their contention that Havasy failed to remedy defects in order to increase his share of the sponsor's profits is entirely speculative.

The business judgment rule protects individual board members from being held liable for decisions, such as those concerning the manner and extent of repairs that are within the scope of their authority (**Id.** at 184). The record does not reflect, nor do the plaintiffs contend, that decisions concerning repairs and remediation work were outside the scope of the individual defendants' authority as members of the HOA and condo boards. Their decisions are, therefore, shielded from judicial review (**Id.** at 185). Accordingly, the eighth cause of action is dismissed.

In sum, the court finds that the second, fourth, and sixth causes of action are time barred. The court also finds that the defendants' have established, prima facie, their entitlement to judgment as a matter of law on the eighth cause of action and that the plaintiffs have failed to raise a triable issue of fact in opposition thereto. Accordingly, the defendants' motion for summary judgment is granted to the extent of dismissing the second, fourth, sixth, and eighth causes of action; the branch of the motion by the plaintiffs and the third-party defendants which is for partial summary judgment on those causes of action insofar as they are asserted against Havasy is denied; and the branch of the plaintiffs' cross motion which is for leave to serve and file a second amended complaint is denied insofar as the plaintiffs seek to amend the eighth cause of action to include defective conditions of the common elements as well as the common properties of Sunken Ponds Estates.

The First, Third, Fifth, and Seventh Causes of Action

The first, third, and fifth causes of action are asserted by Condos I, II, and III respectively, against the sponsor for its alleged failure to construct and complete the common elements of Sunken Pond Estates in conformance with the offering plans, the plans and specifications filed with the Town of Riverhead, and local standards. The seventh cause of action is asserted by the HOA against the sponsor for the same alleged failure.

The defendants seek to dismiss the first, third, and fifth causes of action on the grounds that Condos I, II, and III are not proper plaintiffs and that, pursuant to Real Property Law § 339-dd, this action should have been brought by the boards of managers of Condos I, II, and III. The plaintiffs oppose dismissal on such grounds and cross move to amend the complaint, inter alia, to substitute the respective boards of managers for Condos I, II, and III.

CPLR 3025 (b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just." Thus, motions for leave to amend are to be liberally granted absent prejudice or surprise resulting directly from the delay in seeking the amendment (**Vista Properties, LLC v Rockland Ear, Nose & Throat Assocs.**, P.C., 60 AD3d 846, 847; **Mackenzie v Croce**, 54 AD3d 825, 826). Mere lateness is not a barrier to an amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the latches doctrine (**Edenwald Contr. Co. v City of New York**, 60 NY2d 957, 959; **Abdelnabi v New York City Transit Auth.**, 273 AD2d 114, 115). There must be some indication that the defendants have been hindered in the preparation of their case or prevented from taking some measure in support of their position (**Loomis v Civetta Corinno Constr. Corp.**, 54 NY2d 18, 23; **Abdelnabi v New York City Transit Auth.**, *supra* at 115). The defendants' conclusory assertion that the proposed amendment is unfair because it is made almost on the eve of trial and will cause unreasonable expense and delay if it leads to additional discovery is insufficient to make such a showing. Accordingly, the branch of the defendants' motion which is to dismiss the first, third, and fifth causes of action on the grounds that Condos I, II, and III are not proper plaintiffs is denied, and the branch of the plaintiffs' cross motion which is to amend the complaint to substitute the respective boards of managers for Condos I, II, and III is granted.

The defendants seek dismissal of the first, third, fifth, and seventh causes of action to the extent that they assert breach-of-warranty claims. The defendants contend that the plaintiffs failed to comply with the notice requirements of, and conditions precedent to, the limited warranty found in the offering plans. The defendants contend that the plaintiffs failed to give the sponsor timely notice of their claims, that they failed to give the sponsor an opportunity to inspect and cure the alleged defects, and that they failed to follow the step-by-step claims procedure.

The offering plans provide that the limited warranty is given by the sponsor to the purchasers of new homes at Sunken Ponds Estates. The offering plans also provide that, to the extent that coverage under the limited warranty applies to the common elements of the condominium or the common areas of the HOA, such coverage is given to the board of managers of the condominium or the board of directors of the HOA. The warranty covering the common elements and common areas is not subject to the same time limitations and notice requirements as

the warranty associated with the individual units or homes (*see*, **Board of Directors of the Maidstone Landing Homeowners Assoc., Inc. v Maidstone Landing, LLC., Sup. Ct., NY County**, April 9, 2012, Shulman, J. [2012 WL 1360935], at 4, 8). Accordingly the defendants' reliance on the time limitations and notice requirements of the warranty for the individual units or homes is misplaced.

The offering plans provide that the sponsor will correct any defects in the construction of the common elements or common areas, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or materials substantially at variance with the offering plans provided and on the condition that the sponsor is notified of or becomes aware of such defects within 12 months from the date of substantial completion of the defective portions of the common elements and/or common areas. The record does not reflect when the common elements and common areas were substantially completed, and there are questions of fact as to when the sponsor was notified of, or became aware of, the alleged defects. Accordingly, the court declines to dismiss the first, third, fifth, and seventh causes of action insofar as they assert breach-of-warranty claims

The defendants seek dismissal of the first, third, fifth, and seventh causes of action to the extent that they assert breach-of-contract claims. The defendants contend that, since the plaintiffs never signed any purchase agreements, they do not have privity of contract with the sponsor. The plaintiffs also contend that there is no private right of action for failing to comply with the building code.

The court has granted the plaintiffs leave to amend the complaint to substitute the boards of Condos I, II, and III for the plaintiff condominiums. Pursuant to Real Property Law § 339-dd, the boards of Condos I, II, and III may bring any cause of action relating to the common elements or more than one unit (*see*, **Tiffany at Westburn Condominium v Marelli Dev. Corp.**, 40 AD3d 1073, 1074). Moreover, the relationship between the sponsor and the HOA is established by the offering plan (*see*, **Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.**, 12 Misc 3d 1182 [A] at *12, *affd* 65 AD3d 1284), which is a contract (*see*, **511 W. 232nd Owners Corp. v Jennifer Realty Co.**, 285 AD2d 244, 247, *affd* in part 98 NY2d 144). Thus, the plaintiffs may assert breach-of-contract claims against the sponsor.

Contrary to the defendants' contention, the plaintiffs are not seeking to enforce the building code. The first, third, fifth, and seventh causes of action are based on the sponsor's alleged failure to construct Sunken Ponds Estates in conformance with the offering plan, the plans and specifications filed with the Town of Riverhead, and local standards. The offering plan provides that the homes and common elements will be substantially constructed in the manner set forth in the building plans filed with the Town of Riverhead. The offering plan also provides that the homes, buildings and other improvements will comply with all applicable rules, regulations, laws, and other requirements of all governmental authorities having jurisdiction including, but not limited to, the building code of the Town of Riverhead. Accordingly, the court finds that the plaintiffs may maintain the first, third, fifth, and seventh causes of action insofar as they assert breach-of-contract claims against the sponsor for its alleged failure to comply with the offering plan.

Finally, triable issues of fact preclude the granting of summary judgment to either the plaintiffs or the defendants on the merits. Accordingly, the defendants' motion for summary judgment dismissing the amended complaint is denied as to the first, third, fifth, and seventh causes of action, and the branch of the motion by the plaintiffs and the third-party defendants which is for partial summary judgment on the first, fifth, and seventh causes of action is denied.

The Ninth Cause of Action

The ninth cause of action seeks to recover reimbursement for additional property taxes paid by the HOA in 2005 and 2006 due to the sponsor's use of one lot for a sales trailer. Both sides move for summary judgment on this cause of action.

Contrary to the plaintiffs' contention, the offering plans specifically reserve to the sponsor the right to continue to use the common elements of the condominium and the common areas of the HOA, **without charge**, in its efforts to market homes and for exhibitions or other promotional functions until all of the homes in the development have been sold. It is undisputed that the sales trailer was removed from the premises on May 5, 2005, several months before the last home was sold on December 7, 2005. Accordingly, the defendants' motion for summary judgment is granted to the extent of dismissing the ninth cause of action, and the branch of the plaintiffs' motion which is for summary judgment on the ninth cause of action is denied.

The Third-Party Action

The defendants concede that the third-party complaint should be dismissed if the second, fourth, and sixth, and eighth causes of action are dismissed. The second, fourth, sixth, and eighth causes of action have been dismissed (*see*, *supra*). Accordingly, the branch of the motion by the plaintiffs and the third-party defendants which is for dismissal of the third-party action is granted.

Conclusion

In sum, the defendants' motion for summary judgment is granted to the extent of dismissing the second, fourth, sixth, eighth, and ninth causes of action, and the defendants' motion is otherwise denied. The branch of the motion by the plaintiffs and the third-party defendants which is for partial summary judgment is denied, and the branch of the same motion which is for dismissal of the third-party action is granted. The branch of the plaintiffs' cross motion to amend the complaint which is to substitute the respective boards of managers for Condos I, II, and III is granted, and the cross motion is otherwise denied.

Dated: June 21, 2012

HON. ELIZABETH HAZLITT EMERSON

J.S.C.