

**Board of Mgrs. of Lore Condominium v Gaetano**

2012 NY Slip Op 32654(U)

October 15, 2012

Supreme Court, New York County

Docket Number: 114515/11

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY  
J.S.C.  
*Justice*

PART 8

Index Number : 114515/2011  
BRD OF MANAGERS OF THE LORE  
vs.  
GAETANO, STEVEN  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. 114515/11  
MOTION DATE 5/18/12  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 18, were read on this motion to/for Dismiss  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of Law  
Answering Affidavits — Exhibits + Memo of Law  
Replying Affidavits \_\_\_\_\_


No(s). 1-11  
No(s). 12, 13  
No(s). 14-18

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION  
FILED**

OCT 19 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/15/12

  
JOAN M. KENNEY, J.S.C.  
J.S.C.

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

- 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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 8

-----X  
THE BOARD OF MANAGERS OF THE LORE CONDOMINIUM,  
Plaintiff,

-against-

DECISION & ORDER  
Index No. 114515/11

STEVEN GAETANO and LORE GAETANO,  
Defendants.

**FILED**

OCT 19 2012

NEW YORK  
COUNTY CLERK'S OFFICE

**Kenney, J.:**

Defendants, Steven and Lore Gaetano move, pursuant to CPLR 211 (a) (1), (3), and (7), to dismiss the Board of Managers of the Lore Condominium's verified third-party complaint.

**FACTUAL BACKGROUND**

The following factual allegations are set forth in the verified third-party complaint.

Plaintiff is the unincorporated board of managers of a condominium building known as Lore Condominium, located at 261 West 112<sup>th</sup> Street, New York, New York (the Lore Condominium). Defendant Steven Gaetano is a principal of Gateway IV, LLC (Gateway), the sponsor of the Lore Condominium, and his wife, defendant Lore Gaetano, is the president and sole shareholder of Manhattan Property Managers Realty, Inc. (MPMR), the managing agent for the Lore Condominium. Mr. Gaetano was also the architect for the Lore Condominium.

In Gateway's offering plan for the Lore Condominium (the Offering Plan), Mr. Gaetano made affirmative contractual representations that the Condominium would be constructed with a construction quality comparable to prevailing local standards, in accordance with all applicable laws and code requirements, and in accordance with the filed plans for the Condominium. Specifically, in the architect certification included in the Offering Plan, Mr. Gaetano represented that a report prepared by him: (1) adequately described the construction of the Lore Condominium; (2) would be relied on; (3) did not omit material facts; (4) did not contain any untrue statements of material fact;

(5) did not contain statements of fraud, deception, concealment, or suppression; (6) did not contain promises beyond reasonable expectation or unwarranted by existing circumstances; and (7) did not contain any representation or statement which is false, where he knew the truth or reasonably should have known the truth.

Mr. Gaetano also executed a Certification of Sponsor and Sponsor's Principal, certifying that the Offering Plan: (1) set forth the detailed terms of the transaction and is complete, current, and accurate; (2) afforded potential investors, purchasers, and participants an adequate basis to form their judgment; (3) did not omit any material fact; (4) did not contain untrue statements of material fact; (5) did not contain fraud, deception, concealment, suppression, false pretense, or fictitious or pretended purchase or sales; (6) did not contain any promise or representation beyond reasonable expectation or unwarranted by existing circumstances; and (7) did not contain any representation or statement which is false, where he knew the truth or reasonably should have known the truth.

However, plaintiff asserts that the Condominium is not in compliance with the New York City Building Code and defects exist, such as water leaks from the roof. Plaintiff requested that Mr. Gaetano cure the defects and comply with all obligations under the Offering Plan to no avail. Also, in accordance with the Offering Plan, plaintiff seeks to recover monies owed to it by Mr. Gaetano for common charges on unsold units owned by Gateway.

Plaintiff brings causes of action for negligence, fraud, breach of contract, and unjust enrichment against Mr. Gaetano, as architect, as well as claims for breach of contract, fraud, and unjust enrichment against Mr. Gaetano as principal and alter ego of Gateway.

In addition to these claims, plaintiff seeks to hold Lore Gaetano personally liable, as the alter ego of MPMR, for breach of contract, breach of fiduciary duty, and unjust enrichment. In June 2010,

Mrs. Gaetano, on behalf of MPMR, entered into a management agreement with Mr. Gaetano, who, at that time, controlled the Lore Condominium's board of managers. As part of its duties, MPMR collected the common charges for the condominium units. After Mr. Gaetano turned over control of the board of managers in April 2011, the resident board of managers notified Mrs. Gaetano that she could no longer issue letters stating that common charges had been paid with respect to the unsold units owned by Gateway, because Mr. Gaetano was no longer paying such common charges. Plaintiff directed Mrs. Gaetano to recoup the common charges it was owed, but she refused to comply and resigned. Mrs. Gaetano also refused to turn over receipts for all financial transactions entered into by MPMR on behalf of the Lore Condominium.

In August 2011, in two separate actions, *Gateway IV, LLC v The Lore Condominium*, Index No. 108845/2011 and *Manhattan Property Managers Realty, Inc. v The Lore Condominium*, Index No. 108846/2011, Gateway and MPMR sued the Lore Condominium and its board of managers to recover money for several alleged breaches of contract (the Gaetano Company Actions). In the Gaetano Company Actions, the board of managers asserted various counterclaims, including breach of the Offering Plan. On December 28, 2011, the board of managers filed this separate action against defendants Steven and Lore Gaetano, personally, and designated the complaint as a third party complaint arising out of the Gaetano Company Actions. Defendants now move to dismiss.

## DISCUSSION

### Negligence Claim Against Steven Gaetano as Architect

Plaintiff alleges that Mr. Gaetano, as architect, owed it a duty to perform the construction and design of the Lore Condominium with reasonable care in a good, suitable, and workmanlike manner, free of material defects, pursuant to accepted industry standards and practices, and in compliance

with all applicable governmental requirements, and that Mr. Gaetano breached this duty by performing the construction, or permitting such construction to be performed on his behalf, in a negligent fashion resulting in unsafe conditions and defects, as well as non-compliance with applicable laws and government requirements.

“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract”

(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [internal citations omitted]).

Here, plaintiff's allegations of negligence are restatements of the contractual obligations asserted in plaintiff's third cause of action for breach of contract. “Simply alleging a duty of care does not transform a breach of contract [claim] into a tort claim” (*Clemens Realty, LLC v New York City Dept. of Educ.*, 47 AD3d 666, 667 [2d Dept 2008][internal quotation marks and citation omitted]), and there is no particular situation or statutory duty alleged that would convert an alleged breach of contract into a tort claim or permit the existence of both (*see Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]). Essentially, plaintiff is seeking enforcement of the bargain, and that proceeds under a contract theory (*id.* at 552).

Plaintiff argues that this cause of action is not duplicative of the contract claim, because it is against Mr. Gaetano in his capacity as architect. However, the report and certification that plaintiff bases this cause of action on pertain to representations contained in the Offering Plan, as the reports and certifications are incorporated into such. Any negligence claims based on these allegations arise out of the Offering Plan, and thus, are duplicative of the cause of action against Mr. Gaetano, as architect, for breach of the Offering Plan (*Board of Mgrs. of the Arches at Cobble Hill Condominium*

[\* 6]  
*v Hicks & Warren, LLC*, 18 Misc 3d 1103[A], 2007 NY Slip Op 52386[U], \*9 [Sup Ct, Kings County 2007]).

Further, Mr. Gaetano's architect certification clearly indicates that he disclaimed any duty to ensure that the Lore Condominium was constructed in accordance with his report and the certification of that report. The architect certification clearly states that the report sets forth the description and/or physical condition of the property as it will exist upon completion of the construction, "provided that construction is in accordance with the plans and specifications that I examined" (Affirmation of David Feureisen, Exhibit B). Further, the certification states that it "is not intended as a guarantee or warranty of the physical condition of the property" (id.). Thus, the Mr. Gaetano, as architect, cannot be liable for negligent construction where he has only certified the plans and specifications relied on for his report (*Board of Mgrs. of Woodpoint Plaza Condominium v Woodpoint Plaza LLC*, 24 Misc 3d 1233[A], 2009 NY Slip Op 51715[U], \*8 [Sup Ct, Kings County 2009]). Therefore, the first cause of action is dismissed.

#### Fraud and Breach of Contract Claims Against Steven Gaetano as Architect

In its second cause of action, plaintiff alleges that Mr. Gaetano, as architect, made express representations in his report and certification that the Lore Condominium would be a quality construction compared to prevailing local standards, and in accordance with applicable laws and governmental requirement, and he knew or should have known such representations were false, as the Lore Condominium did not comply with laws and governmental regulations and has defects.

This claim is dismissed as it is preempted by General Business Law Article 23-A (the Martin Act). Mr. Gaetano argues that plaintiff lacks standing to assert its fraud claim, because such a claim will not lie where it is based on duties and disclosures required by the Martin Act, as pursuant to the

Act, the New York State Attorney General is vested with exclusive authority to litigate the rights of persons claiming fraudulent or misleading conduct with respect to the offerings of securities, including new condominiums.

In *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236, 239 [2009]), the Court of Appeals held that “a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building’s sponsor when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act.” Two years later, in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.* (18 NY3d 341, 353 [2011]), the Court of Appeals clarified its decision in *Kerusa*, explaining that,

“a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies.”

However, it has been held that “a fraud cause of action can be precluded by the Martin Act, if it is primarily based upon the mandatory certifications filed ‘pursuant to the Attorney General’s implementing regulations’” (*Board of Mgrs. of 374 Manhattan Ave. Condominium v Harlem Infil LLC*, 2010 NY Slip Op 31518[U], \*45 [Sup Ct, NY County 2010], citing *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Organization, Inc.*, 65 AD3d 1284, 1287-88 [2d Dept 2009]). Here, the plaintiff’s fraud claim is based on Mr. Gaetano’s report and certification, which were required to be filed pursuant to the Act (*id.*).

Plaintiff’s third cause of action for breach of the Offering Plan against Mr. Gaetano, as architect, is also dismissed. Mr. Gaetano, as architect, cannot be held liable for breach of the



Offering Plan. This cause of action alleges that Mr. Gaetano, as architect, breached the Offering Plan by failing to obtain a permanent certificate of occupancy and failing to construct the Condominium in accordance with the Offering Plan and in compliance with all laws and government regulations. Mr. Gaetano, in his role as architect, was retained by Gateway to prepare the construction report and sign the architect certification. There is no contractual relationship between the architect hired by a sponsor to complete a report and certify such and the condominium's board of managers (*see Board of Mgrs. of 374 Manhattan Ave. Condominium v Harlem Infil LLC*, 2010 NY Slip Op 31518[U], \*43 [Sup Ct, NY County 2010]). Plaintiff's allegations supporting this claim are really based on Mr. Gaetano's liability as principal of Gateway, and not in his role as architect, even though the cause of action is labeled such. Plaintiff makes no allegation of an existing contract between itself and Mr. Gaetano, requiring that, as architect, he secure a permanent certificate of occupancy and construct the Lore Condominium in accordance with the Offering Plan. The second and third causes of action against Mr. Gaetano, as architect, are dismissed.

#### Fraud Claim Against Steven Gaetano as Alter Ego of Gateway

Plaintiff's fraud claim against Mr. Gaetano, as principal of Gateway, is duplicative of its breach of contract claim against him, as principal of Gateway, because "it is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages" (*Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1<sup>st</sup> Dept 2010]). Plaintiff's fraud claim arises from the same allegations as its breach of contract claim that Mr. Gaetano, as Gateway's principal, represented that he would construct the Lore Condominium in accordance with the Offering Plan and applicable laws, codes, and regulations, and he did not. Therefore, the second cause of action against Mr.

Gaetano, as principal of Gateway, is dismissed.

Breach of Contract Claims Against Steven Gaetano as Alter Ego of Gateway

Plaintiff brings two causes of action for breach of contract against Mr. Gaetano as principal and alter ego of Gateway. Plaintiff's third cause of action for breach of contract alleges that Mr. Gaetano failed to obtain a permanent certificate of occupancy and failed to construct the Condominium in accordance with the Offering Plan and in compliance with all laws and government regulations. Plaintiff's fourth cause of action for breach of contract alleges that Mr. Gaetano failed to pay common charges, special assessments, and real estate taxes on unsold units owned by Gateway.

Mr. Gaetano argues that plaintiff has failed to allege sufficient facts to pierce the corporate veil of Gateway, and thus, the third and fourth causes of action should be dismissed. However, the court need not address whether the plaintiff has alleged facts sufficient to pierce the corporate veil, because a plaintiff may seek damages against the individual principals of a sponsor for breach of contract based upon the certification of the offering plan and the incorporation of the offering plan's terms into the purchase agreement (*The Board of Mgrs. of the 231 Norman Ave. Condominium v 231 Norman Ave. Prop. Dev., LLC*, 36 Misc 3d 1232[A], 2012 NY Slip Op 51573[U], \*10 [Sup Ct, Kings County 2012], citing *Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave. LLC*, 71 AD3d 935 [2d 2010]; *Sternstein v Metropolitan Ave. Dev. LLC*, 32 Misc 3d 1207[A], 2011 NY Slip Op 51206[U] [Sup Ct, Kings County 2011]; *Board of Mgrs. of the Crest Condominium v City View Gardens Phase II, LLC*, 35 Misc 3d 1223[A], 2012 NY Slip Op 50826[U], at \*4 [Sup Ct, Kings County 2012]; *Kikirov v 355 Realty Assoc. LLC*, 31 Misc 3d 1212 [A], 2011 NY Slip Op 50600[U] [Sup Ct, Kings County 2010]).

Mr. Gaetano does not dispute that the sponsor certification he executed created personal liability for alleged misrepresentations in the Offering Plan. Mr. Gaetano argues, however, that these claims must be dismissed, because the claims are barred by the “as is” disclaimers in the Offering Plan and plaintiff failed to provide timely written notice under the Offering Plan. As stated above, the third-party complaint alleges two different causes of action for breaches of the Offering Plan. First, it alleges that Mr. Gaetano breached the Offering Plan by failing to obtain a permanent certificate of occupancy and failing to construct the Lore Condominium in accordance with the Offering Plan and in compliance with applicable laws. Second, it alleges that Mr. Gaetano breached the Offering Plan by failing to pay common charges, special assessments, and real estate taxes on the unsold units owned by Gateway. Mr. Gaetano’s arguments, if valid, only apply to the claim based on the allegations that he failed to construct the Lore Condominium in accordance with the Offering Plan and in compliance with applicable laws, as the two provisions that Mr. Gaetano relies on are only applicable to the construction of the Condominium. Thus, plaintiff has stated a claim for breach of contract based on the allegations of Mr. Gaetano’s failure to obtain a permanent certificate of occupancy and failing to pay common charges, special assessments, and real estate taxes on the unsold units owned by Gateway.

Mr. Gaetano argues that plaintiff failed to provide timely written notice of defects as required by the Offering Plan. However, this argument rests upon on the factual issue as to whether plaintiff gave written notice of defects in the Lore Condominium, which cannot be determined on this pre-answer motion to dismiss (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1<sup>st</sup> Dept 2011]).

Mr. Gaetano also argues that the “as is” provision in the Offering Plan bars plaintiff’s breach of contract claim. The “as is” clause states that “each unit offered hereby...are being sold and

delivered 'AS IS', as described in the [offering plan] at the time of transfer of title to such Unit..." (Affirmation of David Feureisen, Exhibit B, p.53). This provisions makes clear that the units are sold as is, as described in the Offering Plan, and whether they were delivered as described in the Offering Plan is, once again, a factual issue. Thus, plaintiff has stated causes of action for breach of contract against Mr. Gaetano as principal of Gateway.

Unjust Enrichment Claims Against Steven Gaetano, as architect and alter ego of Gateway

Plaintiff has not stated a cause of action for unjust enrichment against Mr. Gaetano in his capacity as architect. Plaintiff's claim alleges that Mr. Gaetano benefitted while plaintiff was deprived the benefit of a properly constructed condominium. Again, Mr. Gaetano, in his role as architect, was not responsible for overseeing the construction of the Lore Condominium. He cannot be liable for depriving plaintiff of the benefit of proper construction as alleged.

As for Mr. Gaetano's liability as principal of Gateway, there is a valid written contract governing the subject matter for which plaintiff is seeking recovery for under an unjust enrichment theory, and such precludes recovery in quasi contract for events arising out of the same subject matter (*Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 489 [1<sup>st</sup> Dept 2012]). Thus, this claim against Mr. Gaetano, as both architect and principal of Gateway, is dismissed.

Breach of Contract, Breach of Fiduciary Duty, and Unjust Enrichment Claims Against Lore Gaetano as Alter Ego of MPMR

"In order for a plaintiff to state a viable claim against [an officer] of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the [officer] exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice' (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141-142 [1993]). Since, by definition, a corporation acts through its officers and directors,

to hold [an officer]...personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation"

(*E. Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]).

There is no dispute that Mrs. Gaetano controls MPMR, so the first prong of alleging domination and control over MPMR has been satisfied. Thus, plaintiff must sufficiently allege that Mrs. Gaetano abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice, alleging more than engaging in improper acts or acting in bad faith. Here, plaintiff alleges that Mrs. Gaetano uses MPMR to commit breach of contract, fraud, and other dishonest acts. Specifically, the third-party complaint alleges that Mrs. Gaetano, as alter ego of MPMR, breached numerous duties owed to the plaintiff by failing to collect the common charges owed by Mr. Gaetano, failing to follow written instructions from the plaintiff, failing to turn over the Lore Condominium's books and records on demand, and improperly terminating the management agreement she signed. These are not allegations which indicate an abuse of the corporate form. There are no allegations, for example, of Mrs. Gaetano using MPMR for personal use, or that MPMR was undercapitalized, jeopardizing the management of the Lore Condominium, or that funds were being commingled, or corporate formalities were disregarded (see *Fantazia Intl. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1<sup>st</sup> Dept 2009]). Plaintiff, at the most, alleges that Mrs. Gaetano acted in 'bad faith' while representing the corporation, and that is not enough to pierce the corporate veil (*E. Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d at 776). Thus, the causes of action for breach of contract, breach fiduciary duty, and unjust enrichment against Mrs. Gaetano, as alter ego of MPMR, are dismissed.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted to the extent that the first, second, fifth, sixth, and seventh causes of action in the third-party complaint are dismissed in their entirety; and it is further

ORDERED that the third cause of action is dismissed as to Steven Gaetano in his capacity as architect; and it is further

ORDERED that defendant Steven Gaetano is directed to serve an answer to the third- party complaint within 20 days after the date of this order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 304, 71 Thomas Street, on December 6, 2012, at 9:30 a.m..

Dated: October 15, 2012

ENTER:



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**JOAN M. KENNEY**  
J.S.C.