

<b>Board of Mgrs. of the 130 Fulton v Bewy Realty LLC</b>
2013 NY Slip Op 31182(U)
May 28, 2013
Sup Ct, New York County
Docket Number: 101747/12
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

THE BOARD OF MANAGERS OF THE 130 FULTON

INDEX No. 101747/12

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 004

BEWAY REALTY LLC, et al.,  
Defendants.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 2, 8

Answering Affidavits- Exhibits 3, 4, 5

Replying Affidavits 6, 7

CROSS-MOTION: \_\_\_\_\_ YES  NO

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

**FILED**

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

MAY 31 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/28/13

**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

**FILED**

INDEX NO.  
109258/11

MAY 31 2013

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THE BOARD OF MANAGERS OF THE 130  
FULTON STREET CONDOMINIUM,

COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff,

- against -

BEWAY REALTY, LLC, KOEPEL COMPANIES,  
LLC, et al.,

DECISION/ORDER

Defendants.  
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DONNA M. MILLS, J.:

In this action alleging defective design and construction of the 130 Fulton street Condominium (the "Condominium"), defendants F.J. Sciamè Construction Co., Inc., Sciamè Community Builders LLC, Sciamè Construction, LLC, Sciamè Development, Inc., Sciamè Global, LLC, Sciamè International, LLC, Sciamè Park Avenue, LLC, Sciamè Partners, LLC, and Sciamè St. Lucia, LLC (collectively, "Sciamè Defendants") move, pursuant to CPLR 3211 (a)(1), (a)(7), 3016(b) and 7501, to dismiss the complaint as against it.

The Condominium was sponsored by Beway Realty LLC (the "Sponsor"). It operates a building in New York County holding 21 residential units and two commercial units, as well as certain "common elements," such as, the underlying land and hallways. It is organized pursuant to an offering plan accepted for filing by the New York Attorney General on July 29, 2004. The first unit closed on June 20, 2006. Plaintiff, the Board of Managers of the 130 Fulton Street Condominium, is the representative of the Condominium's unit owners. It assumed control of the Condominium from the Sponsor in December 2006. The Sciamè Defendants were the construction manager/general

contractor for the Condominium. A Construction Management Agreement was entered into by and between the Defendant Sponsor, as Owner, and Defendant F.J. Sciame Construction Co. Inc, as Construction Manager, with respect to the building.

The amended complaint ("Complaint") states three causes of action against the Sciame Defendants. The Fourth Cause of Action for "Negligent Construction and Supervision", the Seventh Cause of Action for "Breach of Contract - Third Party Beneficiary" and the Tenth Cause of Action for "Aiding and Abetting Breach of Fiduciary Duty."

The Complaint charges that the Condominium suffers from, among other deficiencies, defects in the windows, roof, elevators, plumbing, insulation and electrical systems. Plaintiff claims that the Sciame Defendants, and other defendants, knew or should have known of the dangerous and defective conditions, as well as any design flaws in the building as early as 2006. Yet, they signed off on filings with the Department of Buildings that were either inaccurate, contained misrepresentations, and/or failed to disclose architectural and engineering defects in the building that did not comply with codes, laws, regulations, and industry standards, all in an effort to enrich themselves and their companies.

#### Applicable Law & Discussion

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1<sup>st</sup> Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163

AD2d 46, 48 (1<sup>st</sup> Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). However, where the allegation in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V., 258 AD2d 349 (1<sup>st</sup> Dept 1999).

The Fourth Cause of Action is against the Defendant Sponsor, Defendant Koepfel Companies, LLC and the Sciamé Defendants for “Negligent Construction and Supervision.” It alleges that said Defendants had a duty to construct, supervise and manage the building, that said Defendants failed to comply with the applicable plans, specifications and drawings in the offering plan, the laws, regulations, engineering designs and local industry standards; that said Defendants were reckless, careless and negligent in constructing, supervising and management of the building, resulting in significant defects and deficiencies; that the Defendants’ conduct were intentional and involved malice, fraud, bad faith and reckless and willful, wanton, and conscious disregard or interference with the rights of the Board and Unit Owners.

It is well settled that “plaintiff cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship” ( Residential Bd. of Managers of Zeckendorf Towers, 190 A.D.2d at 636; see also Board of Managers of Riverview at College Point Condominium III, 182 A.D.2d at 665–666). Thus, since plaintiff is only an incidental, not intended beneficiary of the contract between the Sponsor and the Sciamé Defendants, it may not recover damages for negligent construction ( see

Residential Bd. of Managers of Zeckendorf Towers, 190 A.D.2d at 636).

The Seventh Cause of Action is against Defendants Elliot Vilkas, A&E Consultants, T/S Associates, Dubinsky Consulting and the Scieme Defendants for “Breach of Contract-Third Party Beneficiary.” With respect to the Scieme Defendants, it alleges that said Defendants entered into an agreement with the Defendant Sponsor whereby the Scieme Defendants agreed to and did, construct and inspect the Building; that the Scieme Defendants breached this agreement as the Building was not constructed in accordance with industry standards, proper architectural practices or in compliance with the applicable codes, rules and ordinances, and that the Scieme Defendants failed to inspect defects and deficiencies in the building.

The Scieme Defendants contest the cause of action for breach of contract because, once again, Plaintiff is not an intended third-party beneficiary of Scieme’s contract with the Sponsor. “One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental” (Edge Mgt. Consulting, Inc. v Blank, 25 AD3d 364, 368 [1<sup>st</sup> Dept 2006]; Lake Placid Club Attached Lodges v Elizabethtown Bldrs., 131 AD2d 159, 162 [3d Dept 1987] (“construction contracts are not construed as conferring third-party beneficiary enforcement rights”). There are no fact-based allegations that the contract between a professional, such as the Scieme Defendants, and the Sponsor was intended to benefit plaintiff, and, therefore, it is in no position to profess breach of contract. As such, the Seventh Cause of Action for breach of contract shall be dismissed.

The remaining cause of action asserted against the Scieme Defendants is aiding

and abetting breach of fiduciary duty. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damages as a result of the breach" (Kaufman v Cohen, 307 AD2d 113, 125 [1<sup>st</sup> Dept 2003]). The Complaint does not allege any facts suggestive that the Sciame Defendants knowingly induced or participated in any breach of fiduciary duty by any of the other Defendants. Therefore, there is no bass for this cause of action agaisnt the Sciame Defendants for aiding and abetting breach of fiduciary duty, and it shall also be dismissed.

Accordingly, it is

ORDERED that the Sciame defendants' motion to dismiss the complaint is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: 5/28/13

**FILED**

MAY 31 2013

ENTER: COUNTY CLERK'S OFFICE  
NEW YORK  
*[Signature]*

J.S.C.  
CONNOR M. MILLS, J.S.C.