Bowery 263 Condominium Inc. v D.N.P. 336 Convent Ave. LLC
2017 NY Slip Op 31366(U)
June 26, 2017
Supreme Court, New York County
Docket Number: 153614/15
Judge: David B. Cohen

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

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BOWERY 263 CONDOMINIUM INC.,

Plaintiff,

Index No.: 153614/15
DECISION/ORDER

-against-

D.N.P. 336 CONVENT AVENUE LLC, NEXUS BUILDING DEVELOPMENT GROUP INC., EYAL DAVIDAS and YANIV COHEN,

Defendants.

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HON. DAVID B. COHEN, J.S.C.:

In this action for breach of contract and related relief, several of the defendants move for partial summary judgment to dismiss a portion of the complaint as against them (motion sequence number 004). For the following reasons, this motion is granted in part and denied in part.

BACKGROUND

Plaintiff Bowery 263 Condominium Inc. (Bowery 263), a condominium corporation, is the owner of a mixed use residential/commercial condominium building (the building) located at 263 Bowery in the County, City and State of New York. *See* Forestal affirmation in opposition, ¶ 4. This action was commenced by Bowery 263's board of managers (the board), whose counsel, Colin Forestal (Forestal), is also a member of the board. *Id.*, ¶ 1. Defendant D.N.P. 336 Convent Avenue LLC (D.N.P. 336) was the building's sponsor, and defendants Eyal Davidas (Davidas) and Yaniv Cohen (Cohen) are its sole two members. *Id.*, ¶ 5. Defendant Nexus Building Development Group Inc. (Nexus) was the construction manager that oversaw the building's construction, and Cohen is its principal. *Id.*, ¶ 6. The instant summary judgment motion is

brought by Nexus and Cohen.

The crux of Nexus and Cohen's motion is their assertion that Bowery 263's claims against them must fail, because they long ago ceased to have any contractual relationship with the building. Nexus and Cohen first recount that Nexus executed a construction management agreement (the construction management agreement) with D.N.P. 336 on March 12, 2008. *See* notice of motion, Epstein affirmation, ¶ 9, exhibit A. Article 1 of the construction management agreement recites that:

> "The construction manager [i.e., Nexus] accepts the relationship of trust and confidence established with the owner [i.e., D.N.P. 336] by this agreement, and covenants with the owner to furnish the construction manager's reasonable skill and judgment and to cooperate with the architect in furthering the interests of the owner. The construction manager shall furnish construction administration and management services and use the construction manager's best efforts to perform the project in an expeditious and economical manner consistent with the interests of the owner. The owner shall endeavor to promote harmony and cooperation among the owner, construction manager and other persons or entities employed by the owner for the project."

Id., exhibit A. Articles 4, 5 and 11 of the construction management agreement provide for Nexus to receive monetary compensation for its services as the building's construction manager; however, they do *not* provide for Nexus to assume any ownership interest in the building. *Id.* Interestingly, although Nexus took great pains to style itself as the building's "construction manager," its duties apparently included the hiring and supervision of subcontractors, much like any general contractor. Further, Nexus is listed as the building's "contractor" on at least one subcontracting agreement. *Id.*, exhibit C. It is thus clear that the terms "construction manager" and "general contractor" functionally describe the same role in this matter, despite defendants' attempts to arbitrarily distinguish the two.

After the building was completed, Bowery 263 was formed pursuant to an offering plan (the offering plan) dated March 17, 2011. *See* Forestal affirmation in opposition, ¶ 3. Subsequently, the building's four residential units were all sold, pursuant to the offering plan, between April 2011 and January 2012. *Id.*, ¶¶ 7-15. The building's commercial units were not sold, but were leased at that same time. *Id.* The offering plan recites that D.N.P. 336 is the building's sponsor, and also provides, in relevant part, as follows:

"Rights and Obligations of Sponsor

"Sponsor's Obligations with Respect to the Building

"Subject to the terms and conditions of the Plan, Sponsor [D.N.P. 336] shall have the following obligations, and all Purchasers upon execution of their respective Purchase Agreements will be deemed to have accepted, approved and agreed to abide by and be bound by the following:

"(a) Each Unit and the fixtures and personal property contained therein, are being sold and delivered as described in the Plan, subject to the issuance of a temporary Certificate of Occupancy for the Building, unless Sponsor and Purchaser otherwise agree. Sponsor will maintain each Unit and the fixtures and personalty contained therein, up to the time of the transfer of the Unit in question. The Purchaser of a Unit may inspect such Unit prior to the Closing Date.

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"(l) Sponsor may dissolve or liquidate at any time after the transfer of 20 percent or more of the total number of Units of the Condominium. Sponsor's obligations under the Plan will be assumed by financially responsible persons or entities who will assume the status and all of the obligations of the Sponsor for those Units under the Offering Plan, applicable laws or regulations.

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"(o) If Sponsor fails to obtain a permanent Certificate of Occupancy for the Building prior to the First Closing, Sponsor will be obligated to hold and maintain all monies received pursuant to the Purchase Agreements . . . in the special trust account required by the General Business Law of the State of New York, Sections

352-e (2) (b) and 352 (h), originally established for the purpose of holding such deposits, provided, however, that if an architect or engineer chosen by Sponsor certifies that a lesser amount than the amount held in the special trust account is reasonably necessary to complete the work needed to obtain a permanent Certificate of Occupancy , then the amount exceeding the sum so certified by Sponsor's architect or engineer shall be released from the special escrow account. Sponsor expects to obtain a permanent Certificate of Occupancy for the entire project within two (2) years subsequent to the First Closing, or at such sooner time as the Temporary Certificate of Occupancy, as same may be renewed, replaced or extended, expires.

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"Control By Sponsor

"Sponsor shall have the right to vote all of the Common Interests attributable to Unsold units when voting for members of the Condominium Board. At all elections held after the expiration of the period ending on the earlier of: (I) the Closing of Title with Purchasers under the Plan to Units having more than 75 percent of the aggregate Common Interests pertaining to all Units, or (ii) five (5) years after the First Closing ('the Sponsor Control Period'), not more than one (1) of the members of the Condominium Board may be elected or designated by Sponsor or the then owner of the Unsold Units. After the end of the Sponsor Control Period, a majority of the Condominium Board must be owner-occupants of the Building."

See, Forestal affirmation in opposition, exhibit A. The New York City Department of Buildings (DOB) issued a temporary certificate of occupancy for the building on April 13, 2011, which contained an expiration date of July 12, 2011. *Id.*, Forestal affirmation in opposition, ¶ 11; exhibit B. The amended complaint alleges that this temporary certificate of occupancy was renewed twice, and that the DOB issued a permanent certificate of occupancy on December 4, 2012. *See* notice of motion, exhibit F (amended complaint), ¶¶ 34, 38-39, 41, 46-48. The closings on the building's four residential units took place between April 14, 2011 and January 17, 2012. *See* Forestal affirmation in opposition, ¶¶ 12-15; exhibits C-F. Thereafter, on July 16, 2012, Cohen contracted with nonparty Yokehill Trading Ltd. (Yokehill) to sell his 49.9% interest

in D.N.P. 336 (the Yokehill agreement). *See* notice of motion, Cohen aff., ¶ 4. The relevant portions of the Yokehill agreement provide as follows:

"RECITALS

"(A) Seller [Cohen] is presently the holder of a membership interest equal to 49.9% of the outstanding membership interests ('the Seller's Interest') in [D.N.P. 336], a New York limited liability company ('the Company');

"(B) The Company developed property located at 263 Bowery ('the Property') as a mixed-use Condominium containing four (4) residential units and three (3) commercial units;

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"(E) Seller's affiliate, [Nexus] was retained by the Company to serve as construction manager for the Project pursuant to a construction management agreement ('the CMA') and Nexus is required, pursuant to the terms of the CMA, to obtain a permanent certificate of occupancy for the Project (the PCO);

"(F) As of the date hereof, the Company has (i) sold all of the residential units; and (ii) has entered into lease agreements for two of the three commercial units;

"(G) Seller desires to sell, and Purchaser [Yokehill] desires to purchase, Seller's 49.9% membership interest in the Company ('the Transferred Interest'), pursuant to the terms and provisions of this agreement.

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"Article I - Interest To Be Purchased

"Subject to the terms and conditions in this Agreement, at the Closing, as hereafter defined, Seller shall sell to Purchaser and Purchaser shall purchase from Seller, the Transferred Interest.

"Article II - Closing Purchase Price

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"2.3 Entire Interest. Seller agrees and confirms that as of the date hereof which

is concurrent with the assignment and transfer of the Transferred Interest, (I) Seller no longer holds any interest in the Company and is no longer a member and/or a manager of the Company or a member of the Company, and (ii) without the written consent of Purchaser, Seller is not to have any correspondence or interaction with any third party, including, without limitation, any lender, tenant or member of the Company, in connection with any pending matters relating to the Company (provided, however, this prohibition shall exclude any matters which arise with respect to the completion of the outstanding items as required pursuant to the CMA).

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"Article III - Covenants, Warranties and Representations

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"3.1.5 Seller's Responsibility to Nexus. Seller assumes full responsibility and guarantees that Nexus will perform all its obligations to the Company pursuant to the CMA. Seller further agrees to reimburse the Company and the Purchaser for all expenses incurred by [them] in the event that Nexus fails to perform its obligations pursuant to the CMA.

"3.1.6 Amounts Due Pursuant to the CMA. Purchaser, together with the Company, confirms that the Company shall remain liable for all amounts due and owing to Nexus to the extent that the same have not yet been incurred, specifically including, all amounts due and owing with respect to the expenses of obtaining the PCO and the payment of the 'retainage' due to Nexus pursuant to the CMA in the amount of $25,000.00. In the event that there is any dispute regarding the payment of bills incurred to obtain the PCO, the parties agree that Gagay Azovsky [sic] shall arbitrate such dispute."

See, notice of motion, exhibit B. In the instant motion, Cohen denies that Nexus (of which he was a principal) ever owned any interest in either D.N.P. 336 or the building, and insists that Nexus was, instead, merely the construction manager that D.N.P. 336 (of which he was part owner) had retained. *Id.*, Cohen aff., ¶¶ 10-13. Cohen also insists that, after he executed the Yokehill agreement, he too ceased to have any interest in D.N.P. 336. *Id.*, ¶¶ 4, 14.

For its part, Bowery 263 alleges that the period of time between April 14, 2011 (when the

building's first unit was sold) and May 24, 2012 (when "defendants voluntarily relinquished control of the Board") was the "Sponsor Control Period" defined in the offering plan, and that, during this period, Cohen acted as the sole member of the building's board of managers. *See* Forestal affirmation in opposition, ¶¶ 16-23. Bowery 263 also alleges that, commencing in 2011, the building's residential unit owners began contacting D.N.P. 336 to complain of "deficiencies" in the building, and that D.N.P. 336 failed to remediate these problems. *Id.*, ¶¶ 17-22, exhibits G, H. Bowery 263 next alleges that, on May 24, 2010, D.N.P. 336 "voluntarily relinquished control of the board . . . in an attempt to shield itself from any potential liability" that might result from its failure to act. *Id.*, ¶ 23. Bowery 263 has presented copies of the reports of several experts that it retained to examine the building's elevator system, certain alleged structural deficiencies and water/flooding issues. *Id.*, ¶¶ 24-33, exhibits I-Q. Bowery 263 states that it levied a special assessment on the building's residential and commercial unit owners to raise money to pay for the repairs that these reports indicated were necessary. *Id.*, ¶¶ 34-42. Bowery 263 claims that Nexus and Cohen are liable for these assessments in their capacity as "owners" of the building's commercial units (which were leased, but never sold) during the "sponsor control period." *Id.* Bowery 263 finally notes that it has made the assessments the subjects of two liens (the liens) that it filed against Nexus and Cohen, which Nexus and Cohen have refused to pay, despite due demand having been made. *Id.*, exhibits T-V.

The board originally commenced this action on April 13, 2015, and later served an amended complaint, dated February 1, 2016, that sets forth causes of action for: 1) breach of contract (against the sponsor, Davidas and Cohen); 2) [stricken]; 3) breach of warranty (against all defendants); 4) fraud (against all defendants); 5) [stricken]; 6) trespass (against all

defendants); 7) nuisance (against all defendants); 8) negligence (against all defendants); 9) breach of fiduciary duties (against all defendants); and 10) lien foreclosure (against the sponsor, Davidas and Cohen). *See* notice of motion, exhibit F. Nexus and Cohen filed an answer to the amended complaint on February 18, 2016. *Id.*, exhibit G. Now before the court is Nexus and Cohen's joint motion for summary judgment to dismiss the board's first, third, fourth, sixth, seventh, eighth, ninth and tenth causes of action (motion sequence number 004).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003).

Before considering each of Bowery 263's causes of action, the court will address Nexus and Cohen's primary argument - that all claims against Cohen must fail, as a matter of law, because there are no grounds for Bowery 263 to pierce Nexus's corporate veil and pursue personal liability against Cohen. In *Millennium Constr., LLC v Loupolover* (44 AD3d 1016 [1st Dept 2007]), the Appellate Division, First Department, discussed the circumstances under which it is permissible to "pierce the corporate veil":

"A party seeking to pierce the corporate veil must establish that '(1) the owners

> exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury.' 'The party seeking to pierce the corporate veil must [further] establish that the [controlling corporation] abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.' 'The concept is equitable in nature, and the decision whether to pierce the corporate veil in a given instance will depend on the facts and circumstances.' Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use."

44 AD3d at 1016-1017 (internal citations omitted). Here, before analyzing the above factors, it would be well to review the roles and relationships of the parties in this action.

In the first place, the documentary evidence makes it clear that Nexus was never a member of, and never possessed an interest in, D.N.P. 336. *See* notice of motion, exhibit A. Instead, Nexus was merely an entity with which D.N.P. 336 executed a contract; i.e., the construction management agreement. *Id.* Therefore, the most that Bowery 263 may claim is that Nexus breached that contract.[1] However, "'a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil.'" *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 7 (1st Dept 2016), *quoting Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 (2d Dept 2013). As a result, the court agrees that there are no grounds for piercing Nexus's corporate veil herein.

In the second place, the documentary evidence also reveals that, although Cohen was the principal of Nexus, he only held a 49.9 % ownership interest in D.N.P. 336. *See* notice of motion, exhibit B. This is plainly a minority interest. As a result, it was not possible for Cohen

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[1] As will be discussed, Bowery 263 does not claim that Nexus breached the construction management agreement, however,

to have "completely dominated" D.N.P. 336 during the period when he retained his ownership interest in it. Bowery 263 claims that "the individual defendants [i.e., Cohen and Devidas] collectively controlled [D.N.P. 336] and . . . Cohen was a principal of [Nexus]." *See* plaintiff's reply memorandum at 10. However, this claim of "collective control" is firstly a conclusory allegation which - as such - is insufficient to support a request to pierce a company's corporate veil. *See Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings LLC*, 149 AD3d 472, 475 (1st Dept 2017), *citing Board of Mgrs. of the Gansevoort Condominium v 325 W. 13th, LLC*, 121 AD3d 554, 554-555 (1st Dept 2014); *20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735 (1st Dept 2013). Secondly, Bowery 263's claim of "collective control" is premised on the allegation that Devidas (the majority shareholder) and Cohen (the minority shareholder) once owned D.N.P. 336 in common. However, "common ownership" alone is not sufficient to show domination. *172 Van Duzer Realty Corp. v 878 Educ., LLC*, 142 AD3d 814, 819 (1st Dept 2016), *citing Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443 (1st Dept 2012). Here, Bowery 263 presents no evidence beyond the information that Devidas and Cohen were once common owners of D.N.P. 336. Therefore, the court agrees that there are no grounds for piercing D.N.P. 336's corporate veil as against Cohen. Because all of Bowery 263's claims against Cohen are premised upon the theory of alter ego liability, and because that theory fails, as a matter of law, the court finds that defendants' motion should be granted to the extent of awarding summary judgment dismissing the amended complaint as against Cohen.

The court now turns to the issue of the viability of Bowery 263's claims as against Nexus. As was previously stated, the first of those claims alleges breach of contract. The proponent of a

breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Here, the contract alleged to have been breached was the offering plan. *See* notice of motion, exhibit F, ¶¶ 78-86. However, Nexus was not a party to the offering plan, but only to the construction management agreement. It is axiomatic that a breach of contract claim cannot be maintained against a defendant who was not a party to the agreement in question. *See Blank v Noumair*, 239 AD2d 534, 534 (2d Dept 1997). Therefore, the court finds that Bowery 263's breach of contract claim against Nexus fails, as a matter of law, and accordingly also finds that so much of defendants' motion as seeks summary judgment dismissing this claim as against Nexus should be granted.

Bowery 263's next claim against Nexus alleges breach of warranty; specifically, the "limited warranty" set forth in paragraph 15 of section 1 of the offering plan ("special risks"). *See* notice of motion, exhibit F, ¶¶ 87-91. Although, Nexus was not a party to the offering plan, the language of that contractual provision recites that "sponsor's contract with [Nexus] provides that [Nexus] warrants against all construction defects for a period of one (1) year following the issuance of a temporary certificate of occupancy," and that "at closing, sponsor shall assign the aforementioned warrant[y] to the board of managers." *See* notice of motion, exhibit E at 8. The DOB issued a temporary certificate of occupancy for the building on April 13, 2011. *See* Forestal affirmation in opposition, ¶ 11, exhibit B. As a result, the warranty period ran through April 13, 2012. The foregoing "assignment of warranty provision" in the offering plan is

sufficient to defeat Nexus's argument that there was no privity between it and Bowery 263.[2] *See* defendants' memorandum of law at 14-18. Further, Bowery 263 has presented copies of complaints that were made by condominium unit owners during that time period regarding such structural problems as water leakage, etc. *Id.*, exhibits G, H. Bowery 263 has also presented copies of the liens that it filed to secure the expenditures that it made to remediate these problems which it had raised via special assessments against said unit owners. *Id.*, exhibits T, U, V. As a result, Bowery 263 has established the existence and terms of a valid, binding contract, its breach, and resulting damages. *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, *supra*. Accordingly, the court finds that so much of defendants' motion as seeks summary judgment dismissing Bowery 263's breach of warranty claim against Nexus should be denied.

Bowery 263's next cause of action alleges fraud. *See* notice of motion, exhibit F, ¶¶ 92-102. The proponent of a claim for fraud "must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and

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[2] The court here notes that Cohen asserted that defendant "Nexus Building Development Group Inc." is an "entirely different entity" from "Nexus Development, LLC," which executed the construction management agreement. *See* notice of motion, Cohen aff, ¶ 12. The court observes, however, that the building's offering plan recites that the construction management agreement was executed by "Nexus Building Development Corp.," which "is owned by Yaniv Cohen, a principal of sponsor," rather than by "Nexus Development, LLC." *Id.*, exhibit E. The court also notes that "Nexus Development" is listed as the "contractor" on the subcontracting agreement with non party J.C. Contracting of Woodside Corp., rather than either "Nexus Building Development Group Inc.," "Nexus Building Development Corp.," or "Nexus Development, LLC." *Id.*, exhibit C. All of these contracts appear to use the term "Nexus" interchangeably to refer to the same, Cohen owned, entity. Cohen has failed to produce any documentary evidence that any of the foregoing iterations of "Nexus" actually refers to a separate, duly licensed corporation and/or partnership. Cohen has also failed to produce any documentary evidence that such entities, should they exist, ever effected any transfer or assignment of their contractual rights and obligations as between themselves. The court therefore discounts Cohen's assertion as both unsupported and self serving.

resulting injury." *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1st Dept 2006). Here, Bowery 263 alleges that:

> "Upon information and belief, beginning in 2008 with the commencement of construction of the building and continuing through the end of the sponsor control period, defendants, by themselves, and through their agents and employees, falsely, purposefully and knowingly concealed from, and failed to disclose to the residential unit owners, that the building, specifically the common elements, had been and were being improperly and inadequately constructed and completed in an incompetent and unworkmanlike manner, with material design and construction defects, all in gross disregard for the offering plan, all as more particularly alleged, and causing the building issues."

See notice of motion, exhibit F, ¶ 93. Nexus argues that this claim should be dismissed as duplicative, since it does not allege any tortious conduct separate or distinct from Bowery 263's breach of warranty claim. *See* defendants' memorandum of law at 21-23. Well settled New York law does recognize this as grounds for dismissal of a claim. *See e.g. 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735 (1st Dept 2013). Bowery 263 responds that "it is clear that plaintiff's fraud claim arises out of a tort independent of the defendants' violation of a legal duty created by contract." *See* plaintiff's memorandum of law at 16-18. However, Bowery 263's argument then goes on to conflate Cohen and Nexus, alleging that "defendants, while acting as the board, knew of and concealed defects from the residential unit owners even though defendants were aware of the duty they owed." *Id.* However, as has previously been discussed, Nexus was never a member of the building's board, and the complaint against Cohen has been dismissed. Bowery 263 has failed to state what tortious activity Nexus committed apart from its alleged failure to abide by the warranty set forth in the construction management agreement (which was later assigned via the offering plan). As a result, the court finds that Nexus is entitled to summary judgment dismissing Bowery 263's fraud claim as

duplicative of its breach of warranty claim.

Bowery 263's next cause of action alleges trespass. *See* notice of motion, exhibit F, ¶¶ 103-116. The Appellate Division, First Department, discussed this tort in *Berenger v 261 W. LLC* (93 AD3d 175 [1st Dept 2012]), noting that:

> "Trespass is the invasion of a person's right to exclusive possession of his land, and includes the entry of a substance onto land. Trespass does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion. Thus, 'the act done must be such as 'will to a substantial certainty result in the entry of the foreign matter.'
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> ". . . the Court [of Appeals] stated that in order to hold a defendant liable for trespass, 'the intrusion must at least be the immediate or inevitable consequence of what [defendant] willfully does, or which [defendant] does so negligently as to amount to willfulness.'"

93 AD3d at 181 (internal citations omitted). Here, Bowery 263's amended complaint alleges that:

> "As a result of defendants' various substantially improper workmanship and/or construction practices of the building, specifically in the common elements, defendants directly affect the residential unit owners' use and quiet enjoyment of their respective residential units and was a blatant trespass onto their residential units."

See notice of motion, exhibit F, ¶ 108. Defendants first argue that "based upon the absence of the required knowledge or expectation that would possibly give rise to trespass claims, the cause of action should be dismissed." *See* defendants' memorandum of law at 25. However, pursuant to the *Berenger* holding, this argument is unavailing because "[t]respass does *not* require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion." 93 AD3d at 181, 183 (emphasis added). Therefore, the court rejects this argument. In their reply papers, defendants also argue that Bowery 263's trespass claim is

duplicative of its breach of warranty claim. *See* defendants' reply memorandum at 13. Although the case law that defendants cited to support this argument was not on point, the court notes that it is indeed the case that New York law mandates dismissal where a "trespass claim is . . . duplicative of [a] breach of contract claim[] since it is founded on the same allegations that form the basis of the claim[] for breach of contract." *Eden Roc, LLLP v Marriott Intl., Inc.*, 116 AD3d 486, 487 (1st Dept 2014). Here, Bowery 263's trespass claim and its breach of warranty claim are clearly based on the same allegations of poor workmanship. Therefore, the court finds that Bowery 263's trespass claim is duplicative of its breach of warranty claim, and grants so much of Nexus's motion as seeks summary judgment dismissing said trespass claim on that ground.

Bowery 263's next cause of action alleges nuisance. *See* notice of motion, exhibit F, ¶¶ 117-125. The Appellate Division, First Department, also discussed this tort in *Berenger*, noting that:

> "a claim of private nuisance arises from an interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.' Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct.
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> * * *
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> "In order to bring a cause of action for private nuisance, a plaintiff must also show that the defendant's interference was intentional. An interference is intentional when 'the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct.'"

93 AD3d at 182 (internal citations omitted). Defendants argue that Bowery 263 has failed to provide any evidence that their conduct was "intentional," and has, instead, only made conclusory statements to that effect. *See* defendants' memorandum of law at 26. Bowery 263

responds that "there is not a scintilla of evidence in support of the moving defendants' allegations." *See* plaintiff's memorandum of law at 27. This argument both fails to address the legal definition of "wilfulness" and misconceives which party bears the burden of proving it. It is incumbent on Bowery 263 to demonstrate "willfulness," and Bowery 263 has failed to do so. Therefore, the court rejects Bowery 263's argument, and grants so much of Nexus's motion as seeks summary judgment dismissing Bowery 263's nuisance claim.

Bowery 263's next cause of action alleges negligence. *See* notice of motion, exhibit F, ¶¶ 126-132. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). It is also well settled that a negligence claim will be dismissed where it is merely duplicative of a breach of contract claim and fails to allege that a legal duty independent of the subject contract has been violated. *See Wildenstein v 5H&Co, Inc.*, 97 AD3d 488, 491-492 (1st Dept 2012). Nexus argues that this rule applies to this claim. *See* defendants' memorandum of law at 28-29. Here, the amended complaint specifically alleges that:

> "Despite actual notice of the building issues and specific residential unit owners' complaints about the building issues almost immediately after the residential unit owners took possession of their respective residential units, the defendants refused to cure the building issues and thus the building issues are continuing to spread throughout the building and continue to harm the residential unit owners and threaten the safety of the building."

See notice of motion, exhibit F, ¶ 130. Nexus argues that the foregoing is "insufficient to support a negligence claim beyond the contract" (i.e., the construction management agreement). Bowery 263 responds that "defendants had a duty to manage, supervise and attend to all issues with the construction of the building in the same manner as a reasonably prudent person in their position

would." *See* plaintiff's memorandum of law at 22. This argument in no way states a duty of care independent of the one circumscribed in the construction management agreement. Therefore, the court concludes that Bowery 263's negligence claim fails as a matter of law, and grants so much of defendants' motion as seeks summary judgment dismissing that claim against Nexus.

Bowery 263's next cause of action alleges breach of fiduciary duties. *See* notice of motion, exhibit F, ¶¶ 133-142. To state a claim for breach of fiduciary duty, a plaintiff must plead the existence of a fiduciary relationship, the defendant's breach thereof, and resulting damages. *See e.g. Kurtzman v Bergstol*, 40 AD3d 588 (2d Dept 2007). Both parties' briefs set forth arguments on the issue of whether or not Cohen had undertaken fiduciary duties as a sponsor/board member. See defendants' memorandum of law at 29-31; plaintiff's memorandum of law at 29-30. Neither party raises any arguments with respect to Nexus. *Id.* The court's research has not disclosed any case law holding that a construction manager stands in a fiduciary relationship to a building's unit owners. In any case, the court has already determined that Nexus was never a member of either the sponsor or of the board of managers. As a result, the court finds that Nexus is entitled to summary judgment dismissing this claim as against it. The court notes that sponsor D.N.P. 336 clearly *did* stand in a fiduciary relationship to the building's unit owners during the period when it was functioning as the building's initial board of managers. *See e.g. Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322 (2d Dept 1993). However, the court reiterates its earlier finding that there are no grounds for piercing D.N.P. 336's corporate veil against Cohen to impose personal liability against him for the breach of fiduciary duties that his limited liability corporation is alleged to have committed.

Bowery 263's final cause of action is for lien foreclosure. *See* notice of motion, exhibit

F, ¶¶ 143-168. The complaint alleges that Nexus and Cohen were the "owners" of the building's (leased, but unsold) commercial condominium units during the "sponsor control period.." *Id.* However, the court has already determined that Nexus was never a member of the building's sponsor or board of managers, and that Nexus never had any ownership interest in the building. Because Nexus is not a unit owner, it cannot be held responsible for the payment of common charges, nor can it be obligated to discharge a lien for unpaid common charges. Therefore, the court finds that Nexus is entitled to summary judgment dismissing Bowery 263's final cause of action.

The final portion of Bowery 263's amended complaint asserts that it is entitled to recover punitive damages from the defendants herein. *See* notice of motion, exhibit F, ¶ 169. The balance of defendants' motion is given over to the argument that such damages are improper. *See* defendants' memorandum of law at 32-34. However, this argument clearly applies to the damages phase of this action, but no issues regarding liability (if any) have been determined as of yet. As a result, defendants' arguments are premature, and the court declines to address them at this juncture.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Nexus Building Development Group Inc. and Yaniv Cohen (motion sequence number 004) is granted to the extent that the amended complaint is dismissed as against defendant Yaniv Cohen with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants Nexus Building Development Group Inc. and Yaniv Cohen (motion sequence number 004) is also granted to the extent that the first, fourth, sixth, seventh, eighth, ninth and tenth causes of action[3] in the amended complaint are dismissed as against defendant Nexus Building Development Group Inc., but that branch of the motion is denied with respect to the third cause of action; and it is further

ORDERED that the balance of this action shall continue on the remaining causes of action in the amended complaint.

Dated: New York, New York
June 26, 2017

ENTER:

Hon. David B. Cohen, J.S.C.

[3] The second and fifth causes of action in the amended complaint were dismissed by an order of this court (Katz, J.), dated January 29, 2016, that disposed of defendants' earlier motion pursuant to CPLR 3211 (motion sequence number 002).