[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 603482/2009
GRONTAS, PETER
VS.
KENT NORTH ASSOCIATES
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

FILED
SEP 26 2012
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
SEP 25 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT CIVIL

is decided in accordance with the annexed decision.

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

Dated: 9/25/12

PK , **J.S.C.**

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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

PETER GRONTAS and VALENTINA SCHEMBRI,

Plaintiffs,

Index No. 603482/09

-against-

DECISION & ORDER

KENT NORTH ASSOCIATES LLC, KENT WATERFRONT ASSOCIATES LLC, BFC KENT NORTH MANAGERS LLC, EAST RIVER HOLDINGS NORTH LLC, ALLSTATE REALTY ASSOCIATES, L&M DEVELOPMENT PARTNERS INC., BFC PARTNERS, L.P., L & M BUILDERS GROUP LLC, DONALD CAPOCCIA, BRANDON BARON, JOSEPH FERRARA, JOSEPH SPITZER, PWB MANAGEMENT CORP., CONSULTING ASSOCIATES OF NY, INC., KARL FISCHER ARCHITECTURE PLLC D/B/A KARL FISCHER ARCHITECT, GENE KAUFMAN, ARCHITECT, P.C., THE BOARD OF MANAGERS OF THE SCHAEFER LANDING NORTH CONDOMINIUM, and JOHN DOE #1-10 and XYZ CORP. #1-10,

Defendants,

-and-

THE SCHAEFER LANDING NORTH CONDOMINIUM,

A Nominal Defendant.

----------X

HON. CYNTHIA S. KERN, J.S.C.

This lawsuit concerns a newly constructed 25-story condominium apartment building with 135 residential units located at 440 Kent Avenue in the Williamsburg section of Brooklyn, New York, on the former site of the Schaefer Brewery (the Building), and apartment unit 22C, which is owned by the plaintiffs Peter Grontas and Valentina Schembri. Plaintiffs assert direct causes of action against the various defendants for breach of warranty, breach of contract,

negligence, negligent misrepresentation, breach of fiduciary duties, aiding and abetting the breach of fiduciary duties and violations of General Business Law §§ 349-350 (false advertising and deceptive consumer practices). They seek rescission of the purchase contract and/or money damages and declaratory and injunctive relief requiring repairs be made to their unit. Plaintiffs also purport to bring a derivative action on behalf of the condominium against its board of managers for breach of fiduciary duty and against the sponsor and its agents for aiding and abetting breach of fiduciary duty.

Defendants PWB Management Corp., The Board of Managers of the Schaefer Landing North Corp. and nominal defendant The Schaefer Landing North Condominium (collectively, the Condominium Defendants) move to dismiss the claims against them pursuant to CPLR 3211 (a) (1). Defendants Kent North Associates LLC (the Sponsor), Kent Waterfront Associates LLC, BFC Kent North Managers LLC, East River Holdings North LLC, Allstate Realty Associates, L & M Development Partners Inc., BFC Partners, L.P., L&M Builders Group LLC, Donald Capoccia, Brandon Baron, Joseph Ferrara, and Joseph Spitzer (collectively, the Sponsor-Affiliate Defendants) cross-move: (1) to dismiss the first, third, seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth causes of action, as well as the first derivative cause of action, pursuant to CPLR 3211 (a) (1), (3), (7) and CPLR 3016 (b); and (2) pursuant to CPLR 3212, granting summary judgment dismissing the complaint against all of the Sponsor-Affiliate Defendants. Defendant Consulting Associates of NY, Inc. cross-moves to dismiss the complaint pursuant to CPLR 3211 (a) (7), and all cross claims.[1] Defendants Gene Kaufman

[1]Since CANY fails to identify any of the cross claims it seeks to dismiss, this aspect of their motion is denied.

Architect, P.C. and Karl Fischer Architecture PLLC d/b/a Karl Fischer Architect (the Architect Defendants) each cross-move to dismiss the fifth and sixth causes of action pursuant to CPLR 3211 (a) (1), (7) and CPLR 3212.

On July 16, 2005, plaintiffs Peter Grontas and Valentina Schembri entered into a contract with the Sponsor to purchase unit 22C in the Building for the price of $1,425,000 (Purchase Agreement). In the complaint, plaintiffs allege that the Purchase Agreement was signed "on spec" and that the Building was then just a "hole in the ground" (Complaint, ¶ 57). On November 15, 2006, plaintiffs conducted a routine walk-through of their unit prior to closing. They claim to have:

> "noticed a plastic bag on the ceiling and bucket of water. When they inquired as to the nature of those items, however, they were assured by 'Jermain', a representative of Sponsor, that the Sponsor was merely making last-minute repairs and 'touch ups' and that the Unit would be ready for occupancy by the closing, scheduled for the next day"

(Complaint, ¶ 62). Satisfied with these representations, the plaintiffs closed on November 16, 2006, and moved in with their newborn daughter.

Shortly after plaintiffs moved in to unit 22C, they experienced significant and persistent water intrusion and leaks in the living room of the unit during a period of heavy rain (Complaint, ¶ 64). The leaks and water infiltration created damp, wet and uninhabitable conditions and caused damage to their personal property. Plaintiff allegedly promptly, regularly and repeatedly complained to the Sponsor. The Sponsor, Joseph Ferrara and PWB all allegedly admitted that the defects existed and required remediation. "During the more than two years following plaintiffs' initial complaint about the water intrusion problems, a parade of contractors, engineers, workers, and others came into the Premises to examine the defect and perform various

'experiments', none of which successfully cured the problems" (*id.*, ¶ 66). Plaintiffs were unable to use the dining and living room, which had been rendered a "permanent and unusable 'construction zone'" (*id.*, ¶ 67). It is alleged that other occupants of the Building were also experiencing chronic leaks. After two years, on October 1, 2008, plaintiffs vacated the unit and moved to an apartment in Manhattan.

Plaintiffs commenced this action on November 16, 2009, alleging that, despite numerous promises and requests for access to their unit by the Sponsor and its representatives, the water infiltration problem had not been satisfactorily remedied. Plaintiff Schembri contends that the problem remains six years later and that, as recently as April 22, 2012, the unit experienced a major flood after a rainstorm with wind, which resulted in several inches of water on the floor (Schembri 6/22/12 Aff., ¶ 4).

On May 21, 2010, the Board commenced its own litigation in Supreme Court, Kings County against the Sponsor, as well as a number of other entities. The Board also brought suit against the plaintiffs in Kings County for unpaid common charges. Another foreclosure action has been brought in Kings County against plaintiffs by the holder of their mortgage. The complaint in that action alleges that plaintiffs are in default of their mortgage loan as of January 1, 2011, and that the bank is owed over $1 million in principal and unpaid interest.

Defendant Kent North Associates LLC (Kent North or Sponsor) is the sponsor of the condominium offering. The Schaefer Landing North Condominium (Condominium) was declared a condominium by the New York State Attorney General on June 9, 2005. Defendant PWB Management Corp. (PWB) is the managing agent for the Condominium pursuant to a written agreement dated July 17, 2006 (Webler Aff., Ex. B). Defendant Karl Fischer

Architecture PLLC, d/b/a Karl Fischer Architect (Fischer) allegedly prepared the architectural designs, plans and drawings for the Building, while defendant Gene Kaufman, Architect, P.C. (Kaufman) prepared the building plans and submitted them to the city for approval. Defendant Kent Waterfront Associates LLC (Kent Waterfront) is defined in the complaint as "Developer" (Complaint, ¶ 10). Defendant BFC Kent North Managers LLC (BFC Kent) is identified as the Sponsor's managing member; and defendant East River Holdings North LLC (East River) as a member of Kent North. Defendant Allstate Realty Associates (Allstate Realty) is alleged to have "an identity of interest with East River, which in turn has an interest in the profits of the Sponsor" (Complaint, ¶ 16). Allstate Realty is also allegedly the managing agent for the Building and/or an agent of condominium's board of managers (*id.*). Defendant L & M Development Partners Inc. (L&M Development) is alleged to be the parent organization of the Sponsor, Kent Waterfront, BFC Kent, East River and Allstate Realty, and an affiliate of defendant BFC Partners, L.P., L & M Builders Group LLC, and/or PWB (*id.*, ¶ 18). Defendant BFC Partners, L.P. (BFC Partners) is allegedly "affiliated with L&M [Development] and has an ownership interest in the Condominium and/or Sponsor" (*id.*, ¶ 20). L & M Builders Group LLC (L&M Builders), defined in the complaint as "Builder," is alleged to be "an affiliate of L&M and 'the construction arm' thereof" (*id.*, ¶ 22). Finally, the four individual defendants -- Donald Capoccia, Brandon Baron, Joseph Ferrara and Joseph Spitzer -- are alleged to be principals of all or some of these entities (*id.*, ¶¶ 24-39).

The various Sponsor -Affiliate defendants have brought a motion for summary judgment dismissing the complaint against all of them on the ground that the only proper defendant here is the Sponsor itself - defendant Kent North. Summary judgment is granted dismissing East River,

Allstate Realty, L&M Development, BFC Partners, L&M Builders, Donald Capoccia, Brandon Baron, Joseph Ferrara, and Joseph Spitzer from the action and the motion is denied with respect to Kent Waterfront.It is well settled that a member of a limited liability company "cannot be held liable for the company's obligations by virtue of his status as a member thereof." *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]. There is no basis for liability as against East River and BFC Kent as they are only being sued in their capacity as the members of Kent North which is a limited liability company. Similarly, there is no basis for liability as against Defendants Capoccia, Baron, and Ferrara as they are only being sued in their capacity as members of BFC Kent . There is no basis for liability as against Spitzer as he is being sued as a member of East River.

Defendants L&M Development, L&M Builders, BFC Partners and Allstate Realty are also entitled to summary judgment dismissing the complaint against them. Initially, they have made a prima facie showing that they had no involvement whatsoever in this condominium project and that they did not act as sponsor, developer, general contractor, subcontractor, supplier, vendor or managing agent with respect to the construction or development of the Building or play any other role in connection therewith. In addition, the L&M defendants have established that they are not mentioned in the Offering Plan and New York State law requires offering plans to identify all participants in a condominium development project (*see* 13 NYCRR 20.3). In opposition, plaintiffs have failed to raise any disputed issue of fact as to the involvement of these defendants in the condominium project.

The motion by Kent Waterfront for summary judgment is denied as there are disputed factual issues as to whether this entity still owns the property and whether it played any role in

project. It alleges that it was the owner of the property located at 440 Kent Avenue prior to 2003 but had no involvement in the construction of the Building and the events giving rise to this action. However, the support for this statement is an affidavit submitted by defendant Capoccia back in 2010, wherein he states only that Kent Waterfront was owner of the property at 440 Kent Avenue "at the inception of the development" (*see* Adler Affirm., Ex. J: Capoccia 11/19/10 Aff., ¶ 7). No evidence is offered to support a change of ownership in 2003 and there is documentary evidence that Kent Waterfront hired the architects (*see* Shivnarain Affirm., Ex. D). Thus, defendants have not sustained their burden of proof, on summary judgment, for dismissal of the claims against Kent Waterfront.

The Sponsor has made a motion to dismiss the first cause of action against it for breach of the Housing Merchant Implied Warranty Law (GBL section 777-a) and contractual warranties. The first cause of action is dismissed only with respect to the claim for breach of any implied warranty pursuant to GBL § 777-a of the General Business law. GBL § 777-a states, in relevant part, that "a housing merchant implied warranty is implied in the contract or agreement for the sale of a *new home* and shall survive the passing of title" (emphasis added). GBL § 777 defines "new home" as "any single family house or *for-sale unit in a multi-unit residential structure of five stories or less* in which title to the individual units is transferred to owners under a condominium or cooperative regime" (emphasis added). Since the Building is a 25-story residential complex (Offering Plan, at 2), indeed plaintiffs' apartment is located on the 22nd floor, it is abundantly clear that any claim based on GBL § 777-a is legally insufficient.

The Sponsor has also made a motion to dismiss the breach of contractual warranty claim on the ground that plaintiff failed to plead compliance with the written notice requirements in the

Offering Plan–that they failed to allege that they provided timely written notice. The court finds that plaintiffs have sufficiently plead a cause of action for breach of the contractual warranty and have sufficiently alleged that they gave timely written notice of defects in their unit in accordance with the notice requirements of the Offering Plan. Section 8 of the plan requires written notice to the Sponsor within 30 days of closing for patent defects in the construction of the Building and the units and written notice within one year of the closing for latent defects. Plaintiffs Peter Grontas and Valentina Schembri have sufficiently alleged that they gave written notice to the Sponsor after the first occasion of flooding, which occurred about one month after they moved into the apartment on November 16, 2006 (Grontas Aff., ¶ 4; Schembri Aff., ¶ 4). They further aver that the Sponsor sent workmen to the unit to investigate the source of the leaks, and they did some grouting work and assured plaintiffs that the problem was fixed (*id.*). Over the next year, the leaks recurred frequently after rainstorms combined with wind (*id.*, ¶¶ 2, 4). The plaintiffs claim they repeatedly gave notice to the Sponsor in writing of the existence of the leaks, and the Sponsor continued to send workmen to the unit to make repairs, but none of the repairs have been effective to date, because it would require extensive repair work to the Building, i.e., a complete re-design of the airflow and vapor barriers of the Building (*id.*, ¶¶ 4, 16). In addition, according to the allegations of the Webler affidavit, submitted by PWB, the "Building has been plagued by exterior leaks" and the Sponsor "has acknowledged the water infiltration problem and sporadically has sought to implement repairs" (Webler Aff., ¶¶ 8, 9). Accordingly, the complaint, as supplemented by these affidavits, adequately pleads compliance with the notice requirements of the Offering Plan.

The court also grants the various motions of defendants to dismiss the third, fifth, seventh

and ninth causes of action on the ground that plaintiffs are not intended beneficiaries of any of these contracts upon which these claims are based. Plaintiffs purport to sue as third-party beneficiaries of various contracts involving the design, construction and management of the Condominium. Plaintiffs were not in privity with any defendant other than the Sponsor and they are merely incidental, not intended beneficiaries of any of these contracts. *See Leonard v Gateway II LLC*, 68 AD3d 408, 408-409 [1st Dept 2009]; *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 50 AD3d 503, 504 [1st Dept 2008]; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1st Dept 1993]; *Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159, 161-162 [3d Dept 1987]. As a result, they do not have a legal right to assert the third and seventh causes of action against the Kent Waterfront, L&M Builders, L&M Development, and BFC Partners, which allege that these defendants breached their contracts with the Sponsor by failing to properly construct, supervise, oversee and/or inspect the construction and renovation of the Building (Complaint, ¶¶ 109-112; 127-130). They also do not have a legal right to assert the fifth cause of action against the Architect Defendants which alleges that Kaufman and Fischer are in breach of their contracts with the Sponsor to provide appropriate architectural plans, specifications, and/or drawings for the Building and by failing to properly supervise and oversee the construction (*id.*, ¶¶ 118-121). They also do not have a legal right to assert the ninth cause of action against the Sponsor, Kent Waterfront, BFC Kent, East River, Allstate Realty, L&M Development, BFC Partners, L&M Builders, Cappocia, Baron, Ferrara, Spitzer, PWB, CANY and the Board for breach of "contract or contracts to manage the Building" (*id.*, ¶ 136) by failing to cure the water infiltration problems in the Building, including unit 22C (*id.*, ¶¶ 136-139).

In addition, defendant PWB is an agent of a disclosed principal -- the Condominium -- and cannot be held liable under a breach of contract theory. *See Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005]). Accordingly, the third, fifth, seventh and ninth causes of action are dismissed.

The sixth cause of action against the architect defendants based on negligence is dismissed. Dismissal is appropriate pursuant to CPLR 3211 (a) (7) because the complaint alleges only economic loss to the plaintiffs. There is no recovery solely for economic loss arising out of negligent construction of a condominium against the architect, builder or other professionals involved in the building process in the absence of a contractual relationship with the plaintiff. *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, *supra*, 50 AD3d at 504; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, *supra*, 190 AD2d at 637. For the same reasons, the tenth cause of action sounding in negligence is also dismissed as against CANY.

In his opposing affidavit, plaintiff Peter Grontas claims (for the first time) that toxic mold has developed in the unit (*see* Grontas Aff., ¶ 14). However he offers no details regarding when the mold was discovered and, more importantly, makes no claim of any personal injuries suffered as a result by any member of his family.

The tenth cause of action for negligence is also dismissed as against PWB who, as a managing agent, cannot be sued for nonfeasance by a third party to the management agreement absent an allegation that the agent exclusively controls the Building and thus was the party responsible for repairing the water infiltration problem. *See Caldwell v Two Columbus Ave. Condominium*, 92 AD3d 441, 442 [1st Dept 2012]; *Pelton v 77 Park Ave. Condominium*, 38

AD3d 1, 11 [1st Dept 2006], *overruled on other grounds Fletcher v Dakota*, ___ AD3d ___, 948 NYS2d 263 [1st Dept 2012]; *Brasseur v Speranza, supra*, 21 AD3d at 299. The express terms of the Management Agreement dated July 17, 2006 between PWB and the Board establish a lack of such control as PWB's duties are subject to review and approval by the Condominium, particularly the agent's ability to effect nonemergency repairs (*see* Webler Aff., Ex. B, § III [A] [4]).

The negligence claim against the Board must also be dismissed. "Where a unit owner challenges an action by a condominium Board of Managers, courts apply the business judgment rule." *Helmer v Comito*, 61 AD3d 635, 636 [2d Dept 2009], citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 539 [1990].

> "Under the business judgment rule, the court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws . . . and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision"

Schoninger v Yardarm Beach Homeowners' Assn., 134 AD2d 1, 9 [2d Dept 1987]. Pursuant to the business judgment rule, plaintiffs have failed to sufficiently allege a negligence claim against the Board.

The eleventh cause of action, which alleges a claim for negligent misrepresentation against the Sponsor, the Sponsor's principals (Capoccia, Baron, Ferrara, Spitzer) and the Sponsor's alleged agents (Kent Waterfront, BFC Kent, East River, Allstate Realty, L&M Development, BFC Partners, L&M Builders, PWB, CANY and the Board) for failing to provide true and accurate information regarding the nature and extent of the water leakage problem at the Building

and unit 22C both before and after the closing, is dismissed as to all defendants except the Sponsor. "'[A] claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.'" *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]. "[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]. "Whether the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact" (*id.* at 264). In *Caldwell v Two Columbus Ave. Condominium* (92 AD3d 441, *supra*), the First Department held that it was error to dismiss, on summary judgment, a claim by a condominium purchaser against the sponsor for negligent misrepresentation where the sales agent provided incorrect information about water infiltration problems in their unit. The court ruled that "there is a question of fact as to whether a special relationship existed between [the purchasers] and the sales agent who they allege was an agent of the Sponsor" (*id.* at 442).

In the present case, as in *Caldwell*, the Sponsor is not entitled to dismissal of the negligent misrepresentation claim as plaintiffs have sufficiently plead a negligent misrepresentation claim, including that there was a special relationship between plaintiffs and the Sponsor. Plaintiffs allege that, during the walk through, a representative of the Sponsor made specific misrepresentations about the plastic bag and bucket of water in their unit and that they

reasonably relied on the agent's representations in closing on the apartment the next day (*see* Complaint, ¶ 62). Plaintiffs also allege that, for years thereafter, the Sponsor misrepresented the true extent of the water infiltration problem (*id.*, 72; *see also* Grontas Aff., ¶ 20). A jury could conclude that the Sponsor possessed specialized knowledge about the true condition of the unit and the cause of the water infiltration problems, which plaintiffs were not in a position to discover for themselves. A claim for negligent misrepresentation against the Sponsor is sufficiently plead.

The negligent misrepresentation claim is dismissed as against CANY as CANY had no relationship with the plaintiffs and there is no allegation that CANY made any negligent misrepresentations about the construction, plaintiff's unit or the remedial work allegedly performed in 2010 and 2011. The negligent misrepresentation claim is also dismissed as against PWB as PWB is the agent of the Condominium and has a fiduciary duty to the Board, not to individual unit owners. *See* (*Caprer v Nussbaum*, 36 AD3d 176, 192 [2d Dept 2006]).

The eleventh cause of action for negligent misrepresentation is also dismissed as against the Board. The members of a board of managers owe a fiduciary duty to individual unit owners. *See Board of Mgrs. of Acorn Ponds at N. Hills Condominium I v Long Pond Invs.*, 233 AD2d 472, 472-473 [2d Dept 1996]; *Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 324-325 [2d Dept 1993]. The Board, however, is not responsible for any misrepresentations made to plaintiffs prior to them becoming unit owners in the Condominium. *Messner v 112 E. 83rd St. Tenants Corp.*, 42 AD3d 356, 357 [1st Dept 2007]. As for any post-closing conduct by the Board, the negligent misrepresentation claim does not meet the heightened pleading standard of CPLR 3016 (b), which requires that the circumstances

of a claim for misrepresentation be stated in detail. The complaint fails to specify who, on behalf of the Board, made any false statements to the plaintiffs about the nature or extent of the water infiltration problems after the closing. Plaintiffs merely allege that PWB, as the Board's agent: (1) advised residents of the Building, including plaintiffs, that the Sponsor has agreed to investigate and make necessary repairs; (2) sought access to individual units; and (3) advised when workers would be at the Building, etc. (*see* Complaint, ¶¶ 70 - 78). For these reasons, the eleventh cause of action is dismissed against CANY, PWB and the Board.

In their twelfth cause of action, plaintiffs allege that the Sponsor, Kent Waterfront, BFC Kent, East River, Allstate Realty, L&M Development, BFC Partners, L&M Builders, Capoccia, Baron, Ferrara, Spitzer, PWB, CANY and the Board "engaged in deceptive consumer practices and false advertising in violation of" GBL §§ 349 and 350 in connection with their sale of units in the Building (Complaint, ¶ 152). Plaintiffs' counsel has clarified, in their opposing memorandum of law, that this cause of action is not based on misrepresentations in the Offering Plan, but rather on misrepresentations made directly to the plaintiffs and other purchasers in order to induce them to purchase apartments and move into a building known to be subject to leaks (*see* Pls. Memo. of Law in Opp. to Sponsor Defs. Motion, at 12).

This claim is dismissed as against the Board, PWB and CANY since the complaint is barren of any allegations explaining how these defendants were engaged in the business of selling units in the Condominium.

The GBL violation claims are also dismissed as against the Sponsor because these claims do not sufficiently allege a broad impact on consumers at large. GBL § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce... ." The conduct

must have a broad impact on consumers at large (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). General Business Law § 350 prohibits false advertising. To be liable for a violation of GBL § 350, the advertisement must have been deceptive or misleading and must have had an impact on consumers at large. *See Andre Strishak & Assoc. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002].

In this case, plaintiffs have not sufficiently pled a cause of action for violations of GBL §§ 349 and 350. The allegations of the complaint are limited to what was told to the plaintiffs about the particular condition of their unit at the pre-closing walk through of their unit on November 15, 2006. *See Thompson v Parkchester Apts. Co.*, 271 AD2d 311 [1st Dept 2000] [what the individual plaintiffs were told about the condition of the plumbing when they purchased their individual units is unique to the plaintiffs and does not fall within the ambit of GBL § 349]; *see also Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89 [1st Dept 2012]. There are no factual allegations that the Sponsor made any materially misleading statements to other prospective purchasers about water infiltration in other units or the Building in general. To the extent that the claim is based on the Sponsor's omissions in failing to disclose in the Offering Plan, or an amendment thereto, known construction defects in the Building, such a claim would be pre-empted by the Martin Act. *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 246-247 [2009]; *Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607 [1st Dept 2011]; *Merin v Precinct Devs. LLC*, 74 AD3d 688, 688-689 [1st Dept 2010]. Accordingly, the twelfth cause of action must be dismissed as against the Sponsor.

The thirteenth cause of action, which alleges that the Board is in breach of its fiduciary duty to the plaintiffs in failing to disclose to plaintiffs the extent of the work needed to effectively

repair the water infiltration problem and to arrange for that work to be done, is dismissed as it fails to sufficiently plead a cause of action for breach of fiduciary duty. The thirteenth cause of action against the Sponsor and its principals and agents, in which plaintiff alleges that "the Sponsor, its principals, and its agents" aided and abetted the Board's breach of its fiduciary duties is also dismissed as insufficiently plead. Claims alleging a breach of fiduciary duty are subject to heightened pleading requirements of CPLR 3016 (b). *See Perl v Smith Barney*, 230 AD2d 664, 666 [1st Dept], *lv denied* 89 NY2d 803 [1996]. The complaint does not allege who on the Board's behalf failed to make the disclosures that plaintiffs contend were within the Board's knowledge and/or failed to take steps to address plaintiffs' complaints to their satisfaction. The complaint, even construed liberally in favor of the plaintiffs, fails to allege any instances of improper conduct on the part of the Board and fails to allege how the Sponsor or any of the other defendants aided and abetted the Board in this regard.

In their fourteenth and fifteenth causes of action, plaintiffs seek a declaratory judgment that the Sponsor and various of its affiliates, PWB, CANY and the Board have an obligation to repair and cure the water infiltration problem in unit 22C and an injunction requiring that the work be performed (Complaint, ¶¶ 162-163, 165-166). This claim is dismissed as against all defendants except for the Sponsor. Since all of the other causes of action have been dismissed as against the affiliates, the Board, PWB and CANY, there is no substantive basis for asserting a claim for declaratory or injunctive relief against them. With respect to the Sponsor, however, it would be premature to dismiss these claims as plaintiffs allege that flooding continues to this day in their unit even after the Sponsor performed remedial work in 2011 and plaintiffs still own the unit.

The sixteenth cause of action which seeks rescission of the Purchase Agreement for unit 22C is dismissed as there is an adequate remedy at law. The equitable remedy of rescission "is to be invoked only when there is lacking complete and adequate remedy at law and where the *status quo* may be substantially restored (citation omitted)" *See Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *see also Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 71 [1st Dept 2002] ["where restoration of the status quo ante is made impractical by a substantial change of position, or by the nature of the transaction at issue, the remedy of rescission will not be available"] [citations omitted]. Here, rescission of the Purchase Agreement is not feasible since the unit is now subject to liens by the Board for unpaid common charges and by the plaintiffs' lender for their mortgage default. Indeed, the bank would be a necessary party to this litigation in whose absence a claim for a transfer of title to the unit back to the Sponsor cannot proceed. Since the plaintiffs can be compensated by monetary damages and injunctive relief, the sixteenth cause of action is dismissed.

In addition to their sixteen direct causes of action, plaintiffs have brought a derivative cause of action "against the Board of Managers and/or Sponsor, its principals, and its agents" (Complaint, ¶ 173) alleging that the Board breached its fiduciary duty to the Condominium and has been acting for the benefit of the Sponsor and its principals by failing to remediate the water damage in the Building (*id.*, ¶¶ 175-176). Although an individual unit owner may maintain a derivative action against a condominium's board of managers on behalf of the condominium (*Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 637 [2d Dept 2009]; *Caprer v Nussbuam*, 36 AD3d at 187–190), the complaint fails to adequately plead a threshold requirement for a derivative claim, namely that an attempt was made to "secure the initiation of

such action by the board or the reasons for not making such effort" (BCL § 626 [c]). Plaintiffs merely plead that the Board is controlled by the Sponsor, who is the primary wrongdoer (Complaint, ¶ 180). According to the Court of Appeals, "[i]t is not sufficient, however, merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers. This pleading tactic would only beg the question of actual futility and ignore the particularity requirement of the statute." *Barr v Wackman*, 36 NY2d 371, 379 [1975]. The complaint here does not even identify the members of the Board or identify which members are controlled or affiliated with the Sponsor. Accordingly, the first derivative cause of action is dismissed.

In their memorandum of law in opposition to the Sponsor Defendants' motion to dismiss, plaintiffs' counsel contends that "[t]he Complaint alleges that the defendants inflicted emotional distress upon the plaintiffs over a long period of time (See Par. 80)" (Pls. Memo. in Opp., at 13) and that "[t]he complaint also states a cause of action for private nuisance (See Par. 66-67)" (*id.* at 15). While the complaint does allege that the plaintiffs "have sustained serious economic losses and emotional distress as a result" of the fact that their unit remains "uninhabitable and unmarketable" (Complaint, ¶ 80), it does not plead any of the elements of a claim for intentional infliction of emotional distress or private nuisance and plaintiffs have not sought leave of court pursuant to CPLR 3025 (b) to amend their pleading. The assertion of these claims for the first time in opposition to the defendants' motions is an impermissible tactic, designed to avoid the requirements of CPLR 3025 (b).]

For the foregoing reasons, it is hereby

ORDERED that the motion and the cross motions of the defendants to dismiss the

complaint and/or for summary judgment is granted to the following extent:

--summary judgment is granted pursuant to CPLR 3212 and the complaint is dismissed as against defendants BFC Kent North Managers LLC, East River Holdings North LLC, BFC Partners , LP,Allstate Realty Associates, L & M Development Partners Inc., L&M Builders Group LLC, Donald Capoccia, Brandon Baron, Joseph Ferrara, and Joseph Spitzer, and the Clerk is directed to enter judgment in favor of these defendants with costs and disbursements as taxed by the Clerk;

--the first cause of action is dismissed with respect to any claim for breach of the housing merchant implied warranty contained in GBL § 777-a;

--the third, fifth, sixth, seventh, ninth, twelfth, thirteen, and sixteenth causes of action, and the first derivative cause of action, are dismissed in their entirety;

--the tenth cause of action is dismissed as against PWB Management Corp., Consulting Associates of NY, Inc. and the Board of Managers of the Schaefer Landing North Condominium;

--the eleventh cause of action is dismissed as against PWB Management Corp., Consulting Associates of NY, Inc. and the Board of Managers of the Schaefer Landing North Condominium;

–the fourteenth and fifteenth causes of action are dismissed as against all of the defendants except the Sponsor; and it is further

ORDERED that the remainder of the action is severed and shall continue.

Dated: September 25 2012

CK

J.S.C.

FILED

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