| **Board of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafayette St. LLC** |
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| 2013 NY Slip Op 32332(U) |
| September 25, 2013 |
| Supreme Court, New York County |
| Docket Number: 150397/11 |
| Judge: Barbara Jaffe |
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# SUPREME COURT OF THE STATE OF NEW YORK
## NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice PART 12

Index Number : 150397/2011
BOARD OF MANAGERS OF THE 129
vs.
129 LAFAYETTE STREET, LLC
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. 150397/11
MOTION DATE
MOTION SEQ. NO. 006

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgment

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9/25/13

, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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BOARD OF MANAGERS OF THE 129 LAFAYETTE STREET CONDOMINIUM,

Plaintiff,

- against -

129 LAFAYETTE STREET LLC, WILLIAM FEGAN, JAMES MOONEY, ADRIAN STROIE, BERG + FLYNN ARCHITECTURE PC, CHRISTOPHER BERG, MARINO GERAZOUNIS & JAFFE ASSOCIATES, INC., GILSANZ, MURRAY, STEFICEK, LLP, MORGAN CONSTRUCTION NY INC., TRIBEACH HOLDINGS, LLC, ETNA CONSULTING STRUCTURAL ENGINEERING P.C., and EDY ZINGHER,

Defendants.

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Index No. 150397/2011

Mot. seq. nos. 006, 007

**DECISION AND ORDER**

BARBARA JAFFE, J.:

| **For plaintiff:** | **For Morgan:** | **For ETNA:** |
|---|---|---|
| Luigi Rosabianca, Esq. | Constantine T. Tzifas, Esq. | Kenneth A. McLellan, Esq. |
| Rosabianca & Assoc., PLLC | Constantine T. Tzifas, PLLC | Winget, Spadafora, *et al.* |
| 40 Wall St. | 286 Madison Ave. | 45 Broadway |
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| 212-269-7722 | 212-557-5052 | 212-221-6900 |

Defendants Morgan Construction NY Inc. (Morgan), and ETNA Consulting Structural Engineering P.C. and ETNA principal Edy Zingher (collectively, ETNA) (collectively, movants), move pursuant to CPLR 3212 for orders dismissing the complaint. Plaintiff opposes.

## I. BACKGROUND

Plaintiff is the board of the condominium located at 129 Lafayette Street in Manhattan. Defendant 129 Lafayette Street, LLC is the condominium's sponsor. ETNA was retained by sponsor's alleged construction manager, Tribeach Holdings, Inc. (Tribeach), to inspect and repair the building's façade and to issue a technical report of the work to the Department of

Buildings. (NYSCEF 187, 188). Morgan was the general contractor for the building's construction pursuant to a contract dated April 26, 2004 whereby it succeeded T. Link Associates (T. Link) in that capacity. The contract provides that all guarantees and warranties made by T. Link in its original agreement with sponsor are undertaken by Morgan. (NYSCEF 144). Neither the Morgan contract nor the ETNA contract contains any mention of plaintiff or potential unit owners (NYSCEF 144, 188), and both Zingher and Morgan's president, signatories to their respective contracts, deny that plaintiff was a party to the agreement (NYSCEF 143, 172, 187).

In 2008, plaintiff commenced an action against sponsor and additional defendants, not including movants, entitled *Bd. of Mgrs. of the 129 Lafayette St. Condominium v 129 Lafayette St. LLC*, 103032/2008 (the prior action) alleging the existence of various building defects. By order dated May 29, 2009, another justice of this court dismissed the fraud, misrepresentation, and deceptive business practices causes of action, which had been premised on alleged false statements in the condominium offering plan (2009 order). (NYSCEF 167). By orders dated July 20 and November 16, 2011, the justice then dismissed the remaining causes of action against sponsor, including breach of contract, due to plaintiff's failure to comply with discovery orders (2011 orders). (NYSCEF 168, 169).

On or about October 7, 2011, plaintiff commenced the instant action against all but one of the same defendants in the prior action, and also against movants and Tribeach. As against Morgan, plaintiff alleges that it breached its agreement with sponsor, of which plaintiff asserts it is a third-party beneficiary. As against ETNA, plaintiff alleges that it breached its contract by failing to conduct competent inspections and falsely certifying that the façade was in good condition, fraud, for knowingly filing a false technical report certifying to the good condition of

the façade upon which purchasers detrimentally relied, and negligent misrepresentation, in that ETNA should have known that unit purchasers would rely on its representations and that ETNA breached its duty to convey accurate information owed to them when it filed a false technical report. As against Tribeach, plaintiff advances causes of action for breach of contract, gross negligence, negligent misrepresentation, and fraud, alleging that Tribeach breached its obligations to sponsor of which plaintiff alleges it is a third-party beneficiary, and alternatively, that Tribeach is a sponsor, co-owner or co-developer of the building along with sponsor, and is thus equally liable to plaintiff for the building defects. (NYSCEF 1).

By order dated July 12, 2012, the justice previously assigned to this part dismissed all claims brought against, as pertinent here, sponsor and Tribeach (2012 order). In dismissing the claims against sponsor, the court found that the 2009 and 2011 orders were on the merits and that the instant action arises from the same transaction. In dismissing the claims against Tribeach, it found that the condominium offering plan and incorporated purchasing agreement identify sponsor, not Tribeach, as owner and sponsor of the building, that the only party to the offering plan and purchasing agreement was sponsor, that there thus existed no contractual privity between plaintiff and Tribeach, and that in any event, the 2009 and 2011 dismissals bar claims against those parties in contractual privity with sponsor. The court also held that the "no representation" provision in the purchasing agreement, as well as the provision permitting purchasers to retain experts to inspect the premises, preclude plaintiff from establishing that it relied on representations made by Tribeach or any non-party to the plan and agreement. And, it found that plaintiff had failed to allege that any prospective owners were known to Tribeach or that Tribeach actively concealed defects from prospective owners, and that even if alleged, such claims are barred under the Martin Act. (NYSCEF 130).

## II. MORGAN AND ETNA'S MOTIONS FOR SUMMARY JUDGMENT

A party seeking summary judgment must demonstrate, *prima facie,* that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. (*Forest*, 3 NY3d 314). Moreover, to sustain its burden, a movant may not simply reveal gaps in its opponent's case, but must "affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]).

Summary judgment is not warranted when facts essential to oppose the motion have yet to be discovered. (*Procter & Gamble Distrib. Co. v Lawrence Am. Field Warehousing Corp.*, 16 NY2d 344, 362 [1965]; *Santorio v Diaz*, 86 AD2d 926 [3d Dept 1982]). In such circumstances, the court has discretion to deny the motion, order a continuance to permit further disclosure or issue any other order "as may be just." (CPLR 3212[f]; *Mazzaferro v Barterama Corp.*, 218 AD2d 643 [2d Dept 1995]).

A. Claim preclusion, issue preclusion, and law of the case

1. Contentions

Morgan and ETNA each contend that the 2009 and 2011 dismissals warrant a dismissal of the instant claims based on their alleged contractual privity with sponsor. (NYSCEF 139, 164). ETNA also maintains that given the 2012 order in which the court found that contractual privity between Tribeach and sponsor would preclude plaintiff's claims against Tribeach, all claims against ETNA should also be precluded given its privity with sponsor through Tribeach. (NYSCEF 164, 186). Plaintiff denies that any alleged privity warrants the preclusion of its claims here. (NYSCEF 148, 184).

2. Analysis

a. Claim preclusion

In the interests of providing finality to the resolution of lawsuits and assuring that parties not be troubled by further litigation, a valid judgment bars future actions between the same parties on the same cause of action. (*Landau, P.C. v Larossa, Mitchell & Ross*, 11 NY3d 8 [2008]; *Matter of Reilly v Reid*, 45 NY2d 24, 27-28 [1978]). Thus, where a claim has been litigated and resolved in a prior proceeding arising from the same facts or transaction, and should have or could have been resolved in the prior proceeding, it has been finally decided, or "res judicata," and is precluded. However, where two claims arise from one course of dealing, the second claim is not precluded if the elements of proof and the evidence necessary to prove those elements vary materially from the first claim. (*Matter of Reilly*, 45 NY2d at 30).

The bar arising from previous litigation of the same cause of action applies not only to parties to the prior litigation but also those in privity with them. (*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473-74 [1st

Dept 2011]). Privity arises when there exists a nexus between the parties such that the nonparty's interests "can be said to have been represented in the prior proceeding" (*Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]), such as when the non-party "substantially controlled" the litigation in the prior action (Restatement [Second] of Judgments § 41 [1982]; *see also Watts v Swiss Bank Corp.* 27 NY2d 270, 277 [1970]). Courts have discerned the existence of privity between a union-member and its union, an insured and its insurer, a creditor and a trustee in bankruptcy, and a shareholder and a corporation in a shareholders' derivative action. (*Green*, 70 NY2d at 253; *see generally* Restatement [Second] of Judgments § 41). Thus, privity entails a relationship so strong that it "enables the court to be perfectly comfortable in visiting the consequences of the first action on the party to the second one." (Siegel, NY Prac § 458 at 770 [4th ed 2005]).

Here, neither movant was a party in the prior action, and neither plaintiff nor movants allege that they were involved in the prior action. Nor are movants' connections with sponsor similar in nature and strength to those enumerated in *Green* such that it may be said that their interests were represented in the prior action. Consequently, there is no privity, and thus, the 2009 and 2011 dismissals impose no bar to the instant actions. (*See Farren v Lisogorsky*, 87 AD3d 713 [2d Dept 2011] [defendant employee not in privity with employer, as both could be sued in separate capacities]; *Matter of State of New York v Town of Hardenburgh*, 273 AD2d 769, 772 [3d Dept 2000] [claim preclusion inapplicable when claims involved different transaction and different parties]).

b. Issue preclusion

Absent privity, or when the causes of action are different, a prior determination on a specific issue in a prior proceeding will result in the preclusion of an issue when: 1) the issues in

both proceedings are identical; 2) the party actually litigated the issue in the prior proceeding; 3) the party had a full and fair opportunity to litigate the issue in the prior proceeding; and 4) resolution of the issue was essential to sustain a valid final judgment on the merits. (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]; *Gersten v 7th Ave. LLC*, 88 AD3d 189, 201 [1st Dept 2011]).

Here, the issues litigated by plaintiff in the prior action, and which the 2009 and 2011 orders resolved on the merits, concern sponsor's alleged violations of its duties under the offering plan and misrepresentations contained therein. The issue presented here, by contrast, is whether movants breached duties independent of sponsor's duties to plaintiff, which was not addressed in the 2009 or 2011 orders. Moreover, movants are not even mentioned therein. (NYSCEF 167, 168, 169). Consequently, absent a judicial determination as to whether movants breached their respective agreements or made misrepresentations to plaintiff, the issues of sponsor's liability and movants' liability are not identical, and thus, a determination of the former does not preclude plaintiff from litigating the latter.

c. Law of the case

When parties have had a full and fair opportunity to litigate, a legal determination resolved on the merits in a prior order in the same action constitutes the law of the case. (*People v Evans*, 94 NY2d 499, 502 [2000]); *South Point, Inc. v Redman*, 94 AD3d 1086 [2d Dept 2012]); *Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]). Thus, once a court judicially determines an issue, another court of coordinate jurisdiction should not revisit that determination. (*Holloway v Cha Cha Laundry, Inc.*, 97 AD2d 385 [1st Dept 1983]). As the law of the case applies only when the same question is at issue in the same case (*Erickson v Cross Ready Mix, Inc*, 98 AD3d 717 [2d Dept 2012]; *Martinez v Paddock Chevrolet, Inc.*, 85 AD3d

1691 [4th Dept 2011]), a court determining the preclusive effect of the determination must consider the procedural posture of the litigants (*Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012]).

However, the Court of Appeals has characterized and explained the law of the case as "necessarily amorphous, in that it directs a court's discretion, but does not restrict its authority." (*Evans*, 94 NY2d at 503). Similarly, the Appellate Division, First Department, more recently characterized the law of the case as "discretionary." (*Cobalt Partners, LP v GSC Capital Corp.*, 97 AD3d 35, 39 [1st Dept 2012]).

Here, the 2012 order concerning the preclusive effect of contractual privity between Tribeach and sponsor constitutes dicta as the court had already determined that there was no contractual privity between Tribeach and plaintiff. And absent any determination as to ETNA's privity with sponsor, the 2012 order does not constitute the law of the case as to plaintiff's ability to advance claims against ETNA. (*See Cohen v Crown Point Cent. School Dist.*, 306 AD2d 732, 734 [3d Dept 2003] [law of the case does not bar subsequent justice from reaching alternate conclusion following additional discovery]; *Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700, 701 [3d Dept 2003] [law of the case inapplicable to reasoning underlying a prior determination, as opposed to determination itself]; *People v Palumbo*, 79 AD2d 518, 519 [1st Dept 1980], *affd* 53 NY2d 894 [1981] [law of the case inapplicable when court's observation "was neither essential to, nor supportive of, its determination and was purely gratuitous."]).

B. Breach of contract claims

1. Contentions

Movants deny that plaintiff was a party or third-party beneficiary of their agreements and thus, absent privity of contract, the breach of contract causes of action fail. (NYSCEF 139, 164).

Plaintiff argues that movants could not have failed to foresee that plaintiff was an intended beneficiary of their work, and that privity of contract is in any event a question of fact. Additionally, as discovery has yet to commence, and because plaintiff lacks facts necessary to oppose the motion properly, the motion must be denied. Plaintiff also contends that Morgan's documentary evidence is inconclusive as to whether plaintiff is in privity with it absent the predecessor contract between sponsor and T. Link, which may contain warranties benefitting plaintiff. (NYSCEF 148, 184).

2. Analysis

The elements of a breach of contract claim are: 1) the existence of a contract between the plaintiff and the defendant, 2) the plaintiff's performance under the contract, 3) the defendant's breach of the contract, and 4) damages. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A third party seeking to enforce an agreement as a beneficiary must establish privity of contract, and does so by demonstrating that the contract was intended for its benefit. (*Port Chester Elec. Const. Co. v Atlas*, 40 NY2d 652, 655 [1976]; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636 [1st Dept 1993]). A court is to look at the agreement and circumstances surrounding it in determining whether the promisors intended to confer a benefit upon the third party, and whether those circumstances would render a beneficiary's reliance on those promises both reasonable and probable. (Restatement [Second] of Contracts § 302 [d] [1981]; *see Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc.*, 66 NY2d 38, 44 [1985]; *City of New York (Dept. of Parks & Recreation-Wollman Rink Restoration) v Kalisch-Jarcho, Inc.*, 161 AD2d 252, 253 [1st Dept 1990]).

Generally, purchasers of condominium units, who are incidental beneficiaries of agreements between sponsors and third parties, have no standing to sue. (*Leonard v Gateway II,*

*LLC*, 68 AD3d 408 [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*, 190 AD2d at 636). However, purchasers may be intended third-party beneficiaries when the pertinent contract reflects an intent to benefit the purchaser, and the purchaser relied upon the obligations set forth in the contract. (*See Caprer v Nussbaum*, 36 AD3d 176, 201 [2d Dept 2006]; *Bd. of Mgrs. of Crest Condominium v City View Gardens Phase II, LLC*, 2012 NY Slip Op 50826(U) [Sup Ct, Kings County 2012]).

Here, Morgan does not offer the original contract between sponsor and the original contractor, T. Link, as evidence of the obligations, if any, Morgan undertook to benefit plaintiff. Consequently, the replacement contract and the affidavit of Morgan's president stating that plaintiff was not a party to the replacement agreement do not establish, *prima facie*, that plaintiff has no rights under the original contract, particularly when discovery has not commenced. (CPLR 3212[f]; *see also Morse/Diesel, Inc. v Atlantic Richfield Co.*, 199 AD2d 83 [1st Dept 1993] [affirming denial of summary judgment when ambiguity existed regarding whether contracting parties intended to extend warranty to plaintiff claiming to be third-party beneficiary]; *Kikirov v 355 Realty Assoc., LLC*, 2011 NY Slip Op 50600(U) [Sup Ct, Kings County 2011] [denying dismissal of contract claim against non-sponsor defendants when discovery was necessary to determine if privity existed]).

The evidence submitted by ETNA, however, establishes, *prima facie*, that plaintiff was not a party to its contract with Tribeach. Plaintiff's contract cause of action is premised on ETNA's breach of its agreement with sponsor "and/or" plaintiff. (NYSCEF 1). ETNA, however, has demonstrated, *prima facie*, that plaintiff was not a party to or intended beneficiary of the agreement, and that ETNA was retained by Tribeach, not sponsor, and it was already determined

that there is no contractual privity between plaintiff and Tribeach. Nor did Tribeach assume any warranties. Thus, as ETNA's liability depends on Tribeach's, it cannot be held contractually liable to plaintiff. Plaintiff's anticipation that discovery will uncover an unspecified alternate set of facts is too speculative to warrant denial of the motion. (*See Billy v Consol. Machine Tools Corp.*, 51 NY2d 152, 163-64 [1980] [dismissal appropriate and discovery unwarranted when plaintiff fails to indicate what facts would be essential to justify denial of summary judgment pursuant to CPLR 3212[f]]; *Ravenna v Christie's Inc.*, 289 AD2d 15 [1st Dept 2001] [plaintiff's hope that discovery would yield evidence supporting his claims insufficient to avoid dismissal of defective cause of action]).

C. Remaining causes of action against ETNA

1. Fraud

To establish, *prima facie*, a cause of action for fraud, a plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages. (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here, plaintiff's claim is premised on representations made by ETNA in its technical report. However, pursuant to the 2012 order, disclaimers set forth in the purchasing agreement preclude purchasers from relying on representations from any party other than sponsor. (NYSCEF 130; *see also Bd. of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [1st Dept 2010] [disclaimers in offering plan and purchasing agreements bar plaintiff from establishing reliance]). As plaintiff is foreclosed from establishing reliance on any statements made by ETNA, its fraud claim fails.

2. Negligent misrepresentation

The elements of a cause of action for negligent misrepresentation are: 1) the existence of

a special or privity-like relationship which creates a duty to convey accurate information to the plaintiff, 2) that the information was false, and 3) that the plaintiff reasonably relied on the information. (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). Particularly with respect to commercial transactions, liability will only be imposed on a defendant in a "special position of confidence and trust" with a plaintiff (*Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2d Dept 2004]), in that it creates an "identifiable source of a special duty of care" (*Kimmel v Shaefer*, 89 NY2d 257, 260 [1996]). Special relationships do not arise from typical arms-length transactions (*Andres v Leroy Adventures*, 201 AD2d 262 [1st Dept 1994]), such as those between a sponsor and unit owners (*Bd. of Mgrs. of 374 Manhattan Ave. Condo v Harlem Infil. LLC*, 2010 NY Slip Op 31518[U] [Sup Ct, NY County 2010]).

Absent privity of contract between plaintiff and ETNA (*see supra*, II.B.2.), there is no special relationship of confidence and trust. Moreover, plaintiff is precluded from establishing reliance on ETNA's representations. (*See supra*, II.C.1.).

## III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Morgan Construction NY Inc.'s motion for an order dismissing plaintiff's complaint against it is denied without prejudice to renew upon submission of a copy of the T.Link contract; it is further

ORDERED, that defendants ETNA Consulting Structural Engineering P.C. and Edy Zingher's motion for summary judgment is granted and the complaint and cross claims against it are severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158).

ENTER:

Barbara Jaffe, JSC

DATED: September 25, 2013
New York, New York