

Board of Mgrs. of Soma Condominium v Yanko

2013 NY Slip Op 32758(U)

October 23, 2013

Sup Ct, New York County

Docket Number: 150973/13

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: MELVIN L. SCHWETZER
Justice

PART 45

BOARD OF MANAGERS OF SOMA CONDOMINIUM

INDEX NO. 150973/13

-v-

MOTION DATE _____

MICHAEL YANKO + ERAN CONFORTY et al

MOTION SEQ. NO. 001

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). _____

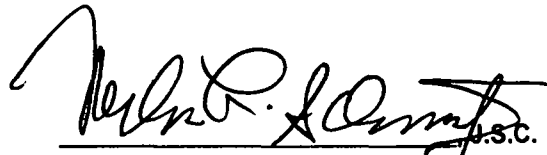
Upon the foregoing papers, it is ordered that this motion to by defendant Michael J. Macaluso + Associates to dismiss plaintiff's complaint as to it, and all cross claims asserted against it is GRANTED.

The action is severed and continued against the remaining defendants.

All as per the attached Decision and Order.

A Preliminary Conference is scheduled for 12-11 at 10AM at 60 Centre Street

Dated: October 23, 2013


MELVIN L. SCHWETZER
J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIV. PART 45

-----X
BOARD OF MANAGERS OF SOMA CONDOMINIUM :
ON BEHALF OF THE UNIT OWNERS, :

Plaintiff, :

-against- :

MICHAEL YANKO & ERAN CONFORTY, SOMA :
HUDSON BLUE LLC, SOMA HUDSON :
DEVELOPMENT LLC, CHELSEA CONDOS LLC, :
22ND STREET DEVELOPMENT LLC, HORIZON :
GLOBAL LLC, BY DESIGN LLC, NEW YORK :
ADVISORY SERVICE, INC., MICHAEL J. :
MACALUSO ASSOCIATES, GOLDSTEIN :
ASSOCIATES, & THE CORCORAN GROUP, :

Defendants. :

-----X

Index No. 150973/13

DECISION AND ORDER

Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This lawsuit is brought on behalf of the unit owners of a newly-constructed condominium building located at 116 West 22nd Street in Manhattan which was allegedly designed and constructed with numerous defects. Plaintiff has sued the owner of the building, the sponsor, and various other parties who were involved in the design and construction of the building, including the architectural firm of Michael J. Macaluso & Associates (MJM). This defendant now moves, pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss the plaintiff's complaint and all cross claims asserted against MJM. The motion is unopposed.

In its complaint, plaintiff asserts eleven causes of action, two of which are asserted against MJM, and one of which is asserted against all defendants. Plaintiff's seventh cause of action alleges that MJM made false representations, and omitted material facts, in the Offering

Plan, more particularly that “[t]he Architect Certification contained false statements concerning the quality of design of the Building” (Cmplt., ¶ 92). Plaintiff claims that the unit owners relied on these misrepresentations and omissions in purchasing their condominium units. Plaintiff’s eighth cause of action alleges that MJM negligently performed its architectural services on the construction project. The tenth cause of action alleges that all of the defendants violated Section 349 of the General Business Law (GBL) by making intentionally false and fraudulent misrepresentations in the Offering Plan “concerning the materials, design, construction and condition” of the building and units, and that the Offering Plan was used a “marketing tool” to sell condominium units to consumers at large (Cmplt., ¶¶ 111-119).

By plaintiff’s own allegations, the Offering Plan was accepted for filing by the New York State Attorney General’s Office on November 16, 2004 (Cmplt., ¶ 34). According to the documentary evidence submitted on this motion, MJM was retained in May of 2005 by defendant Horizon Global LLC (Horizon) to take over for the original architects on the project, non-parties Hb2 Architecture and Design, Kim Vauss, R.A., and Haym Gross (*see* Macaluso Aff., Ex. A). The Offering Plan identifies “Haym Salomon Gross” as “[t]he architect who prepared the plans and the specifications for the construction of the condominium” (Mellon Affirm., Ex. B at 96), and it was Haym Salomon Gross who signed the architect’s certification filed pursuant to GBL Article 23-A on July 7, 2004 (*id.* at 235, 237¹). Pursuant to an October 24, 2005 additional services agreement, Horizon retained MJM to provide additional services on the project (*see* Macaluso Aff., ¶ 4 & Ex. B). MJM contends that the last filing that it made with the Department

¹ Page 2 of the certification, which is page 236 of the Offering Plan, is missing from the copy submitted to the court as exhibit B to the moving affirmation of Raymond T. Mellon.

of Buildings (DOB) was submitted on July 20, 2006 and included amended architectural plans (*id.*, ¶ 13 & Ex. D), and that MJM's final invoice for its services was sent to Horizon in November 2006 (*id.*, ¶ 15 & Ex. C). The DOB issued a temporary certificate of occupancy for the condominium in January 2007 (*id.*, Ex. E).

This action was commenced on January 31, 2013. To date, only two defendants have filed answers to the complaint, defendant GACE Consulting Engineers, P.C., s/h/a Goldstein Associates [Doc. No. 2] and NRT New York, LLC d/b/a Corcoran Group Real Estate s/h/a The Corcoran Group [Doc. No. 21]. Both answers assert boilerplate cross claim against all defendants sounding in contribution and indemnification.

The complaint's eighth cause of action alleging negligence by MJM is dismissed as time-barred. In New York, an action to recover damages for architectural malpractice is governed by CPLR 214 (6)'s three-year statute of limitations (*Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542-543 [2004]), and "must be instituted within three years of the completion of the work involved" (*Reyes-Dawson v Goddu*, 74 AD3d 417, 418 [1st Dept 2010]). MJM completed its work no later than January 2007, and thus any negligence-based claims are time-barred.

The seventh and tenth causes of action are also dismissed, since they are predicated on alleged misrepresentations and false statements contained in the Offering Plan, a document with which MJM did not have any involvement. To the extent plaintiff alleges that the MJM omitted material facts in the Offering Plan, or any subsequent amendments thereto, plaintiff lacks standing to pursue such a claim (*see Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]; *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d

236, 239 [2009]; *Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 607-608 [1st Dept 2011]).

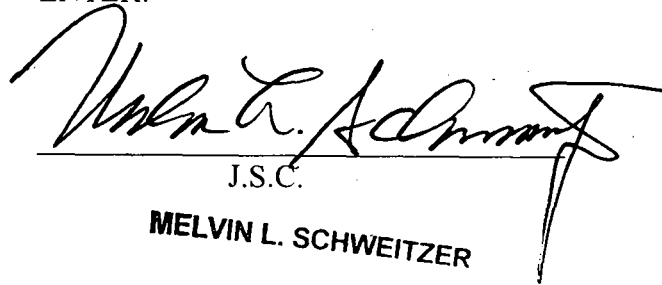
For the foregoing reasons, it is hereby

ORDERED that the motion of defendant Michael J. Macaluso & Associates to dismiss the complaint and all cross claims asserted against this defendant is granted, without opposition, and the complaint and all cross claims are dismissed against this defendant, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

Dated: October ~~2~~²³, 2013

ENTER:



J.S.C.
MELVIN L. SCHWEITZER