At an IAS Term, Part Com-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of December, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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MICHAEL KATZENELLENBOGEN AND
ESTHER WILENKIN,

Plaintiffs,

- against -

Index No. 500793/14

ISSAC AARONOV AKA ISKYA ARONOV AKA ISKYO ARONOV, LL ORGANIZATION INC., AND HIGH POWER CONSTRUCTION CORP.,

Defendants

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The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers Memorandum of Law	4

Upon the foregoing papers, defendants Isaac Aronov (also known as Iskyo Aronov and Iskya Aronov) and LL Organization (collectively defendants) move, for an order

dismissing the complaint pursuant to CPLR 3211 (a) based on documentary evidence, failure to state a cause of action, and lack of personal jurisdiction.

Background

This action arises out of a residential contract for sale of property (the contract) located at 650 Maple Street in Brooklyn (the premises). On or about December 12, 2012, plaintiffs entered into the contact with LL Organization to purchase the premises. Defendant Aronov is the president of LL Organization. The contract was executed in four parts: the printed contract and three separate riders that were incorporated into the agreement and the contract amount was $687,000. On or about January 30, 2014, defendants commenced the instant litigation alleging causes of action for: breach of contract, negligence, unjust enrichment, fraudulent/negligent representation, fraud in the inducement, rescission and disgorgement; breach of fiduciary duty; breach of good faith and fair dealing; breach of housing merchant implied warranty; fraud; and attorney's fees pursuant to General Business Law (GBL) §349 (h) .

Defendants' Motion

Defendants Aronov and LL Organization (collectively defendants) move, for an order dismissing the complaint pursuant to CPLR 3211 (a) based on documentary evidence, failure to state a cause of action, and lack of personal jurisdiction. Defendants argues that plaintiffs agreed to purchase the premises in "as is" condition and failed to raise any issues or concerns at the closing.. Defendants maintain that there have never been any agreements obligating

them to conduct any construction or repairs to the premises and that plaintiffs were given a $25,000 repair credit at the closing.

Discussion

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Bokhour v GTI Retail Holdings, Inc.,* 94 AD3d 682, 682 [2012] quoting *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2010]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol,* 74 AD3d at 1181[internal quotation marks omitted]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus' " (*Sokol,* 74 AD3d at 1181, *quoting EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). In addition, when deciding a motion to dismiss under CPLR 3211 (a) (7), the court may consider documents referenced in or attached to the complaint (*see Manchester Equip. Co. v Panasonic Indus. Co.*, 141 AD2d 616 [1988], *lv denied* 73 NY2d 703 [1988]).

A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Faith Assembly v Titledge of N.Y. Abstract, LLC,*

106 AD3d 47, 57-58 [2013] *quoting Cervini v Zanoni*, 95 AD3d 919, 920-921[2012]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]).

Finally, "[t]o dismiss a complaint pursuant to CPLR 3211(a)(8) on the ground that the court lacks jurisdiction CPLR 3211 (a) (8) provides for dismissal of an action where the court lacks personal jurisdiction over the defendant. The burden of proof rests upon the party asserting personal jurisdiction (*see Armouth Intl. v Haband Co.*, 277 AD2d 189, 190 [2d Dept 2000]; *Roldan v Dexter Folder Co.*, 178 AD2d 589, 590 [2d Dept 1991]; *Spectra Prods. v Indian Riv. Citrus Specialties*, 144 AD2d 832, 833 [3d Dept 1988]). Where a defendant submits facts that would negate a court's power to obtain jurisdiction over it, the plaintiff is required "to come forward with evidence to support the existence of a basis upon which to predicate the exercise of personal jurisdiction . . . or to at least show that such evidence may exist" (*Roldan*, 178 AD2d at 590; *see also Weiss v Chou*, 234 AD2d 539, 540 [2d Dept 1996]; *Spectra Prods.*, 144 AD2d at 833).

Breach of contract

"The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and resulting damages." (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 150 [1st Dept 2013]; see *Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*,

84 AD3d 122, 127 [2d Dept 2011]; *see JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2d Dept 2010]).

Plaintiffs' complaint alleges that defendants had a duty to perform various services pursuant to the contract and that they materially breached the contract by failing, neglecting, and refusing to perform the work in a good and workmanlike manner and performing the work negligently by using inferior, unsuitable and defective materials and installation methods causing plaintiffs damages in an amount believed to be not less than $200,000. Plaintiffs allege that they performed their duties under the contract.

Defendants argue that the documentary evidence, in the form of the contract itself, refutes plaintiffs' breach of contract claim. Specifically defendants argue that pursuant to paragraph 12 of the contract plaintiffs acknowledged that they were accepting the premises in "as is" condition and were fully aware of the physical condition and state of repair of the premises. Additionally they point out that the first rider to the contract whereby plaintiffs again acknowledge that they were aware of the condition of the premises and had inspected the premises with an engineer or a professional of their choice and that premises was being sold ""as is" where is, with all faults and defects." Defendants maintain that the contract and riders reveal that defendants did not have obligations nor represent that they were going to perform any "work" or construction to the premises. Defendants point out that plaintiffs were further put on notice as to the condition of the premises when they were given a $25,000 repair credit at the closing.

In opposition, plaintiffs argue that defendants are relying on a selective reading of the contract provisions in an effort to absolve them of any wrongdoing. Plaintiffs point to paragraph 1 of the second rider which relevantly states that "[i]f this rider conflicts in any way with the printed form Contract of Sale and/or Rider(s) attached thereto, then this rider shall control." Next, they point to Paragraph 2 of the Second Rider which states in relevant part that "[s]eller also represents that any worked performed or to be performed on or at the premises during Seller's period of ownership has been or will be performed in accordance with all state and local building codes and, where applicable, the necessary permits and/or certificates have been or will be issued." Additionally, plaintiffs claim that defendants are misrepresenting the repair credit which plaintiffs claim was actually given because they had requested that the kitchen be relocated to a different part of the premises which defendants did not do but rather issued plaintiffs the $25,000 credit.

Here the court finds that in plaintiffs' complaint they properly plead the existence of the contract, their performance under the contract and defendants breach of said contract through its use of inferior and defective work on the premises prior to handing it over to plaintiffs. Finally, plaintiffs assert that they have sustained damages of approximately $2000,000 as a result of said breach, such amount representing what it will cost to bring the house up to code in order to obtain a certificate of occupancy. Accordingly, the court finds that plaintiffs have stated a cause of action for breach of contract and thus the branch of defendants's motion seeking to dismiss this cause of action is denied.

Negligence

Defendants argue that plaintiffs' negligence claims should be dismissed as there is no allegation of any breach of duty outside of the contract and thus this is just a reiteration of the breach of contract claim.

Plaintiffs complaint alleges that defendants held themselves out as skillful and competent homebuilders and represented in the contract that the wok performed on the premises would be done with the appropriate level of skill and customary standards consistent with the prevailing industrial standards free of material defects. However, plaintiffs claim the work was performed carelessly and negligently below the requisite standards resulting in losses and damages to plaintiffs in an amount estimated to be approximately $200,000.

"[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]; *see Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 684 [2012]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390, [1987]; *Chiarello v Rio*, 101 AD3d 793, 796 [2012]). In the instant case, the court finds that the cause of action sounding in negligence was "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract" (*Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co.*, 109 AD3d 953, 954 [2013]

quoting Clark-Fitzpatrick, Inc, 70 NY2d at 390). Thus that branch of defendants motion seeking to dismiss plaintiffs' negligence claim is granted.

Unjust enrichment

Defendants argue that the cause of action alleging unjust enrichment should be dismissed as it is also duplicative of the breach of contract claim. Defendants argue that a claim for unjust enrichment is only applicable in situations where there is not an express agreement governing the subject matter. Plaintiffs' complaint alleges that defendants have been unjustly enriched because they received payments totaling $687,500 from plaintiffs but failed to perform their obligations under the contract.

The theory of unjust enrichment lies as a quasi-contract claim (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). "It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Here it is undisputed that a valid contract exists between these parties. Therefore, plaintiffs' cause of action for unjust enrichment is precluded by the existence of a valid agreement, i.e., the contract and riders, which governs this transaction related to the sale of the property (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19

NY3d 937 [2012]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 289 [1987]). "[U]njust enrichment is not a catchall cause of action to be used when others fail," but, rather, "[i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello*, 18 NY3d at 790). Moreover, a claim for unjust enrichment claim cannot be maintained when it is duplicative of a breach of contract claim (*see id.*; *Clark-Fitzpatrick, Inc.*, 70 NY2d at 388-389 [1987]). Thus, dismissal of plaintiff's unjust enrichment claim is also mandated due to its failure to state a viable cause of action (*see* CPLR 3211 [a] [7]).

Fraud/Fraudulent/Negligent Representation and Fraud in the Inducement

Defendants argue that plaintiffs' claims alleging fraud, fraud in the inducement and negligent/fraudulent misrepresentation must be dismissed on three grounds: 1) that plaintiffs failed to plead fraud with sufficient specificity to satisfy the pleading requirements of CPLR 3016 (b); 2) that the documentary evidence demonstrates that plaintiffs reliance on alleged misrepresentations made by defendants was not justified or reasonable and 3) plaintiffs are barred from rephrasing a claim for breach of contract. Defendants claim that plaintiffs'

complaint fails to identify the alleged statements or representations made by defendants that plaintiffs reasonably or justifiably relied upon.

In opposition, plaintiffs maintain that their complaint has the requisite specificity in that they plead that defendants knowingly concealed from, and failed to disclose to the plaintiffs that the premises was inadequately constructed and that the work was performed in contravention of the building code.

A plaintiff in a fraud action must show "'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also Salazar v Sacco & Fillas, LLP*, 114 AD3d 745, 746 [2014]; *Curtis-Shanley v Bank of Am.*, 109 AD3d 634, 636 [2013], *lv denied* 22 NY3d 1133 [2014]). "In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]; *see also Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 44 [1980]; *Great Eagle Intl. Trade, Ltd. v Corporate Funding Partners, LLC*, 104 AD3d 731, 732 [2013]).

CPLR 3016 (b) requires that a plaintiff plead the circumstances of any purported fraud "in detail," and the Appellate Division, Second Department, has treated this as requiring that

"fraud must be pleaded with particularity so as to inform the defendant of the alleged wrongful conduct and give notice of the allegations plaintiff intends to prove" (*McDonnell*, 109 AD3d 592, 593 [2013; *see also Greenberg v Blake*, 117 AD3d 683, 684 [2014]; *House of Spices [India], Inc. v SMJ Servs., Inc.*, 103 AD3d 848, 850 [2013]).

"To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury" (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [2002]; *see also Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 118-119 [1969]).

In order to make out a prima facie case of negligent misrepresentation, the plaintiff must show "(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"(*U.S. Express Leasing, Inc. v. Elite Technology (NY) Inc.*, 87 AD3d 494 [2011), *citing J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). "[A] misrepresentation of a material fact which is collateral to the contract and serves as an inducement to enter into the contract is sufficient to sustain a cause of action sounding in fraud" (*Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2010]; *Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1399 [2011]; *see Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave.*, LLC, 71 AD3d 935, 936 [2010]

However, it is well established that " "a cause of action to recover damages for fraud will not arise where the only fraud charged relates to a breach of contract"" (*Weinstein v Natalie Weinstein Design Assocs., Inc.*, 86 AD3d 641, 642-643 [2011], *quoting Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2009], *quoting Mastropieri v Solmar Constr. Co.*, 159 AD2d 698, 700 [1990] "[A] cause of action alleging breach of contract may not be converted to one for fraud merely with an allegation that the contracting party did not intend to meet its contractual obligations" (*Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 914 [2d Dept 2011]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Clark-Fitzpatrick, Inc.*, 70 NY2d at 389). Here, the court again finds that plaintiffs' claims sounding in fraud, fraudulent inducement and negligent misrepresentation should be dismissed inasmuch as the fraud alleged solely relates to the breach of contract claim and is thus duplicative.

Rescission & Disgorgement

Defendants argue that plaintiffs have failed to properly state a cause of action for rescission and disgorgement as they have not alleged the elements of fraud with sufficient particularity and argue that the contract shows that plaintiffs were not justified in relying on defendants alleged misrepresentations when they clearly acknowledged that they were accepting the premises "as is" and that the contract expressed their full agreement.

In opposition, plaintiffs argue that recission may be granted where there is fraud in the making of the contract and, where as here, they have pled that defendants fraudulently

induced plaintiffs into entering the contract with regard to defendants filings with the DOB. Plaintiffs point out that the purpose that they entered into the contract was to obtain a home for their family to live in has been defeated by defendants' fraudulent conduct and thus, rescission is an adequate remedy.

As a general rule, rescission of a contract is permitted for such a breach as substantially defeats the purpose for entering into the contract initially. It is not permitted for a slight, casual or technical breach, but only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract'" (*Wiljeff, LLC v United Realty Management Corp.*, 82 AD3d 1616 [2011], *quoting Lenel Sys. Intl., Inc. v Smith*, 34 AD3d 1284, 1285 [2006] [internal quotation marks omitted]; *see Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]; *Lenel Systems Intern., Inc. v Smith*, 106 AD3d 1536 [2013]; *Smolev v Carole Hochman Design Group, Inc.*, 79 AD3d 540 [2010]; *RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652 [2005]). A finding of a material breach must be based upon proof that the departure from the terms of the contract or defects in its performance pervaded the whole of the contract so as to defeat the object that the parties intended (see *Miller v Benjamin*, 142 NY 613, 617 [1894]; *Fitzpatrick v Animal Care Hosp., PLLC.*, 104 AD3d 1078 [2013]; *Robert Cohn Assoc., Inc. v Kosich*, 63 AD3d 1388, 1389 [2009]; *Mortgage Elec. Registration Sys., Inc. v Maniscalco*, 46 AD3d 1279 [2007]; *O'Herron v Southern Tier Stores, Inc.*, 9 AD2d 568 [1959]). The remedy of rescission is thus an "extraordinary

remedy" that is only appropriate "when a breach may be said to go to the root of the agreement between the parties (*see MBIA Insurance Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 [2013]).

Here the court finds that plaintiffs have adequately plead the elements of a rescission claim inasmuch as they plead that defendants made material false representations regarding the condition of the work performed on the premises knowing that plaintiffs would rely on such statements and that plaintiffs have been damaged as a result. Namely, that they cannot live in the house they purchased which was the purpose of the contract. As such, the court finds that plaintiffs have adequately pled a rescission cause of action and that branch of defendants' motion seeking to dismiss the rescission cause of action is denied. Conversely, the court finds that that branch of defendants' motion seeking dismissal of plaintiffs' disgorgement claim is granted.

Breach of Fiduciary Duty

Defendants argue that plaintiffs' breach of a fiduciary duty claim should also be dismissed because the cause of action has not been plead with sufficient detail and that plaintiffs have failed to establish that a fiduciary duty existed between plaintiffs and defendants.

Plaintiffs claim states that defendants had a heightened relationship of trust and confidence with plaintiffs constituting a fiduciary relationship through which defendants indicated that they had furnished their best skills and judgment and performed their services

in the most expeditious manner consistent with plaintiffs' interests. Thus, plaintiffs claim that defendants failure to perform their task related to the home construction in a workmanlike manner was a breach of their fiduciary duties.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct'" (*Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 61-62 [2013]; *Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684 [2011]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2010]; *Fitzpatrick House III, LLC v Neighborhood Youth & Family Services*, 55 AD3d 664 [2008]; *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2007]). "A fiduciary relationship arises where 'one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party,' and the defendant was 'under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*Anwar v Fairfield Greenwhich Ltd.*, 728 F Supp 2d 372, 415 [2010]).

However, in the instant case, plaintiffs' "breach of a fiduciary duty claim is based upon the same facts and theories as their breach of contract claim and should be dismissed as duplicative" (*Brooks v Key Trust Co. Natl. Assn.*, 26 AD3d 628, 630 [2006]; *see Kaminsky v FSP, Inc.*, 5 AD3d 251, 252 [2004]; *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [2000]; *see also Brasseur v Speranza*, 21 AD3d 297, 298 [2005]; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269[2003]).

Breach of Good Faith & Fair Dealing

Defendants argue that plaintiffs' claim for breach of good faith and fair dealing should also be dismissed because it is duplicative of their breach of contract claim as they have not alleged any new facts that would separate it from the breach of contract claim. In opposition, plaintiffs contend that defendants, as homebuilders, made certain representations in their filings with the Department of Buildings regarding the work that they had performed on the premises and that said work was performed according to the applicable Codes governing such work. Thus, plaintiffs maintain that in making representations both on the public record and in their dealings with plaintiff, defendants negotiated in bad faith and plaintiffs relied upon these misrepresentations.

Where a claim for breach of the implied covenant of good faith and fair dealing, is duplicative of a contract claim, it should be dismissed since both claims "arise from the same facts and seek the identical damages for each alleged breach" *(Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433 [2013]; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [2010] *lv denied*, 15 NY3d 704 [2010]). Here , plaintiffs' claim for breach of good faith and fair dealing contains the same allegations as their breach of contract claim regarding defendants failure to perform their work in a skillful manner and seeks the same damages. Accordingly, the court finds that this claims is duplicative of plaintiffs' breach of contract and should therefore be dismissed. Thus, that branch of

defendants' motion seeking dismissal of plaintiffs' breach of good faith and fair dealing claim is granted and said claim is hereby dismissed.

Breach of Housing Merchant Implied Warranty

Plaintiffs complaint includes a claim that defendants breached the Housing Merchant Implied Warranty in failing to construct the premises is a skillful manner free from material defects.

Defendants argue that this claim should be dismissed because pursuant to General Business Law (GBL) Article 36-B §777-a, a housing merchant implied warranty is implied only when it concerns the sale of a newly constructed home. Defendants claim that the premises at issue was not a newly constructed home and thus, plaintiffs' claim should be dismissed for failure to state a cause of action.

In opposition, plaintiffs argue that defendants misstate the statute and point out that under GBL §777- a(1) this warranty is implied in the contract for the sale of a new home and shall survive the passing of title. They point out that GBL §777 (6) defines the term "builder" as meaning any entity contracting with an owner for the construction or sale of a new home. Plaintiffs further point to GBL§ 777 (6) defines the term "owner" as "the first person to whom the home is sold and, during the unexpired portion of the warranty period, each successor in title to the home and any mortgagee in possess. Owner does not include the builder of the home or any firm under common control of the builder." Based upon the foregoing, plaintiffs maintain that the transaction at issue in which the defendants (builders)

transferred the property to plaintiffs (owners) constitutes they type of transaction contemplated under GBL 777-a and thus the housing merchant implied warranty is applicable. They further argue that defendants are in violation of this warranty since the premises were not built to Code which is prima facie evidence that it was not constructed in a skillful manner pointing out that GBL §777 (3) defines "constructed in a skillful manner" as workmanship and materials that "meet or exceed the specific standards of the applicable building code."

"By looking at the history of the housing merchant implied warranty statute, the case law interpreting it and the wording of the statute itself, the court finds that the statute only applies to contracts or agreements that involve the sale of new homes" (*Watt v Irish*, 184 Misc. 2d 413, 414-415 (N.Y. Sup. Ct. 2000); *see Caceci v Di Canio Constr. Corp.*, 72 NY2d 52 [1988]; *Matter of Roberts Real Estate v New York State Dept. of State, Div. Of Licensing Servs.*, 80 NY2d 116, 122 [1992]; *Fumarelli v Marsam Dev.*, 92 NY2d 298, 302 [1998]; *Chan v Rose Constr. Corp.*, 211 AD2d 872 [1995]; *Pitcherello v Moray Homes*, 150 AD2d 860 [1989]; General Business Law, art 36-B, § 777 et seq.) In the instant case, the record reveals that defendants began their project of performing a gut renovation of the premises on or about July 16, 2012, which demonstrates that the premises was not a newly constructed home protected under the housing merchant implied warranty. As such, that branch of defendants' motion seeking dismissal of this cause of action is granted and said claim is hereby dismissed.

General Business Law § 349 (h)

Plaintiffs' complaint alleges that plaintiffs as consumers of defendants' services were the victims of materially deceptive and misleading acts which were done with the intent to deceive. Plaintiffs are seeking treble damages and attorneys' fees pursuant to GBL §349 (h). Defendants seek dismissal of this claim arguing that the sale of a home does not involve consumer goods or services.

General Business Law § 349 (a) renders unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Although § 349 primarily discusses enforcement by the Attorney General, subsection (h) explicitly permits an individual injured by a § 349 violation to bring a private action seeking injunctive relief or damages. Such a plaintiff must demonstrate that the defendant engaged in a consumer-oriented act or practice, that such act or practice was materially deceptive or misleading and that it caused the plaintiff injury (*see David v #1 Mktg. Serv., Inc.*, 113 AD3d 810, 811 [2014]; *Beneficial Homeowner Serv. Corp. v Williams*, 113 AD3d 713, 714 [2014]; *see generally Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24-26 [1995]). Practices treated as deceptive are limited to "representations or omissions . . . likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26; *see also David*, 113 AD3d at 811-812).

Courts have consistently held that in order to plead and prove a claim under GBL 349, a plaintiff must make a threshold showing that the challenged act or practice was consumer oriented, that is, it must have a broad impact on consumers at large (*U.W. Marx, Inc. v. Bonded Concrete, Inc.*, 7 AD3d 856, 858 [2004]; *Oswego*, 85 NY2d at 25-27; *Green Harbour Homeowners' Assn. v G.H. Dev. & Constr.*, 307 AD2d 465, 468 [2003], *lv dismissed* 100 NY2d 640 [2003]; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 145 [1995], *lv dismissed and denied* 87 NY2d 937 [1996]). In contrast, private contract disputes which are unique to the parties do not fall within the ambit of the statute. Here, the plaintiffs do not allege that the defendants engaged in deceptive business practices directed at members of the public general and thus, they do not state a valid claim under the statute (*see Flax v Lincoln Natl. Life Ins. Co.*, 54 AD3d 992, 994-995 [2008]). Accordingly, that branch of defendants motion seeking dismissal of plaintiffs' claim alleging a violation of GBL §349 and seeking damages under §349 (h) is granted and said claim is dismissed.

Finally, defendants argue that all of plaintiffs' claims should be dismissed as asserted against Aronov as the court lacks personal jurisdiction over him. Defendants argue that LL Organization was the sole party to the contract with plaintiffs and, thus, Aronov should not be held personally liable. The argue that in order to hold him personally liable, plaintiffs must plead and meet the high standard for piercing the corporate veil. In their complaint, plaintiffs allege that LL is the alter ego for Aronov.

Piercing the corporate veil generally requires a showing that: (1) the owner exercised complete domination of the corporation in respect to the transaction attacked, and (2) such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*see Morris v. State Dep't of Taxation & Fin.*, 82 NY2d 135,141 [1993], *citing Matter of Guptill Holding Corp v State of New York*, 33 AD2d 362, 364-365 [1993]).

The contract, on its face, demonstrates that Aronov executed the contract, on behalf of LL, in his corporate capacity as its president, and that he did not purport to bind himself individually under the contract (*see Khiyayev v MikeSad Enters., Inc.*, 66 AD3d 845, 846 [2d Dept 2009]). Nowhere in the contract is there any indication that it was the intent of the parties that Aronov was to be held liable in an individual capacity (*see Gottehrer v Viet-Hoa Co.*, 170 AD2d 648, 648 [2d Dept 1991]). There are also no specific allegations by plaintiffs that show that Aronov, in any way, utilized his position as president of LL Organization to perpetuate a fraud upon plaintiffs, and, in any event, a simple breach of contract, without more, cannot constitute a fraud or wrong which could warrant a piercing of the corporate veil (*see Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2013]; *Treeline Mineola, LLC v Berg*, 21 AD3d 1028, 1028-1029 [2005]).

Accordingly, that branch of defendants motion seeking to dismiss all claims asserted against Aronov in his individual capacity is granted.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID I. SCHMIDT