

**Board of Mgrs. of Water Edge Condominium v
Arverne/Briarwood II, LLC**

2017 NY Slip Op 31333(U)

May 16, 2017

Supreme Court, Queens County

Docket Number: 705758/15

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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**THE BOARD OF MANAGERS OF WATER
EDGE CONDOMINIUM,**

Plaintiff,

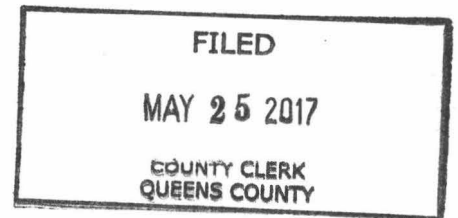
-against-

**ARVERNE/BRIARWOOD II, LLC, VINCENT
L. RISO, RAYMOND RISO, HOWARD
GOODMAN, BRIARWOOD PROPERTIES,
INC., FAKLER ELIASON & PORCELLI, AIA
ARCHITECTS & ASSOCIATES, LLP and
EDWARD ELIASON,**

Defendants,

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Index No.: 705758/15
Motion Date: 12/15/16
Mot. Cal. No.: 29
Mot. Seq. 1



The following papers read on this motion by defendants **FALKER, ELIASON & PORCELLI, AIA ARCHITECTS & ASSOCIATES, LLP, AND EDWARD C. ELIASON** (collectively referred to as moving defendants) to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7).

**PAPERS
NUMBERED**

Notice of Motion - Affidavits - Exhibits	EF 24-29
Memorandum of Law.....	EF 30
Answering Affidavits - Exhibits	EF 35
Memorandum of Law.....	EF 36
Reply Memorandum of Law.....	EF 37

Upon the foregoing papers it is ordered that the motion is denied, as follows:

This is an action for breach of contract, breach of express warranty, fraud, negligent misrepresentation, statutory violations, and breach of fiduciary duty arising out of the construction and sale of condominium units. Plaintiff The Board of Managers of Waters Edge at Arverne Condominium, governs the condominium, located at or around Beach 59, 60, 61, and 62 Streets, Arverne, in the County of Queens. Defendant Arverne/Briarwood II, LLC was allegedly the owner of the subject premises. The plaintiff has alleged causes of

action against the moving defendants, in particular, for breach of contract, fraud and/or negligent misrepresentation.

Moving defendants have moved to dismiss these causes of action pursuant to CPLR 3211 (a)(1) and (7). CPLR 3211(a)(1) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence...” “To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’” (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Lakhi Gen. Contractor, Inc. v. N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]).

CPLR 3211 (a)(7) provides that a party may move to dismiss an action on the ground that “the pleading fails to state a cause of action.” “On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction” (*Kempf v Magida*, 37 AD3d 763, 764 [2d Dept 2007]; see *Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d 1168, 1170 [2d Dept 2010]). “The court must accept the facts as alleged in the complaint as true, accord the plaintiff[] the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory” (*id.*; see *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]). In general, “[t]he court is limited to ‘an examination of the pleadings to determine whether they state a cause of action’” (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; see *Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]).

The record contains, among other things, a copy of the verified complaint, a copy of a written agreement between Falker, Eliason & Porceli, AIA Architects & Associates, LLP, and Avene/Briarwood II, LLC, dated June 17, 2004, and a copy of a “Sponsor’s Engineer or Architect’s Certification Pursuant to 13 NYCRR 20.4 (c)”, dated March 26, 2007, executed by moving defendants.

After careful consideration of the documentary evidence presented, the Court has determined that the documentary evidence has failed to conclusively dispose of the plaintiff's claim for breach of contract (CPLR 3211 [a][1]; *see AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900). Furthermore, after a reading of the allegations contained in the complaint, and giving the plaintiff the benefit of every possible favorable inference, the Court finds that the plaintiff's "complaint adequately alleges all of the essential elements of a cause of action to recover damages for breach of contract, to wit: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; CPLR 3211 [a][7]; *see Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d at 1170). Therefore, the moving defendants are not entitled to dismissal of the plaintiff's cause of action for breach of contract.

As to plaintiff's causes of action sounding in fraud and/or negligent misrepresentation, the moving defendants have argued, among other things, that the plaintiff has failed to sufficiently allege that any fraudulent statements were made and that any representations alleged to have been made may not be the basis of a fraud claim.

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*McMorrow v Angelopoulos*, 113 AD3d 736, 739–740 [2d Dept 2014], quoting *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]). Any cause of action for fraud must be pled with particularity (CPLR 3016 [b]; *see Greenberg v Blake*, 117 AD3d 683, 684 [2d Dept 2014]; *McDonnell v Bradley*, 109 AD3d 592, 593 [2d Dept 2013]). "[I]n order to prevail on a cause of action sounding in negligent misrepresentation, a plaintiff is required 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'" (*Ramsarup v Rutgers Cas. Ins. Co.*, 98 AD3d 494, 496 [2d Dept 2012], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

After a careful reading of the allegations contained in the complaint, and giving the plaintiff the benefit of every possible favorable inference, the Court has concluded that the

plaintiff has sufficiently alleged facts to support the requisite elements for causes of action for fraud and/or negligent misrepresentation against moving defendants (CPLR 3211 [a][7]; see *Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d at 1170). In light of the above, the moving defendants are not entitled to the dismissal of the plaintiff's causes of action for fraud and/or negligent misrepresentation.

Moving defendants's remaining contentions, as to the timeliness and the underlying merits of plaintiff's causes of action against them, are not properly before this Court on a motion made pursuant to CPLR 3211 (a)(1) or (7) (see *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d at 902; *Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d at 967).

Accordingly, it is

ORDERED, that the motion by moving defendants Falker, Eliason & Porceli, Aia Architects & Associates, LLP, and Edward C. Eliason is denied.

The foregoing constitutes the decision and order of this Court.

Dated: May 16, 2017


TIMOTHY J. DUFFICY, J.S.C.

FILED
MAY 25 2017
COUNTY CLERK
QUEENS COUNTY