Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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BOARD OF MANAGERS OF OCEAN ONE CONDOMIMIUM,

Plaintiff,

-against-

OCEAN ONE CONDOMINIUM, INC., ROSEMILL LLC, A.R. RENAISSANCE CORP., SESSA PLASTERING CORP., JOSEPH ANTHONY PLASTERING CORP., SURF GLASS CORP., FM HOME IMPROCEMENT INC., BASS PLUMBING & HEATING CORP., DRYVIT SYSTEMS, INC., STARLINE INDUSTRIES, EVERGREEN PRODUCTS, LLC, WILLIAM LEGGIO ARCHITECT, LLC, JONATHAN T. MILLER, ALLAN V. ROSE and JOHN DOES Nos. 1 through 10,

Defendants.
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Index Number 704031/ 2013

Motion Date February 2, 2015

Motion Seq. No. 6

The following papers numbered 1 to 13 read on this motion by defendants Ocean One Condominium, Inc. (Ocean One), Rosemill, LLC (Rosemill), Jonathan T. Miller (Miller), and Allan V. Rose (Rose) to dismiss the amended complaint and all cross claims against them pursuant to CPLR 3211(a)(1), (3), (5), (7), and (8); and on this cross motion by plaintiff to extend the time to serve the supplemental summons and amended complaint on Miller and Rose pursuant to CPLR 306-b and to compel Miller and Rose to accept service of the supplemental summons and amended complaint made on October 9, 2014 pursuant to CPLR 3012(d).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits...	5 - 8
Answering Affidavits - Exhibits.....	9 - 13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages for the alleged defective design and construction of a condominium building located at 151 Beach Street in Rockaway, New York. Ocean One is the sponsor of the initial offering of the condominium and Rosemill is an affiliate of the sponsor and acted as the general contractor and construction manager for the construction of the building. Miller and Rose are principals of Ocean One. The remaining defendants are corporations that allegedly manufactured or installed the siding, windows, and air conditioning systems at the building. A certificate of occupancy for the building was issued on September 24, 2010 and the first closing of a unit in the building occurred on October 20, 2010. It is alleged in the amended complaint that, before October 2012, water infiltration problems began to occur in the building, causing damage to the common elements and multiple residential units. Plaintiff alleges, among other things, that the building was not constructed in accordance with the plans and specifications set forth in the offering plan as well as applicable building codes. On September 23, 2013, plaintiff, the board of managers of the condominium consisting of a group of resident unit owners, commenced the within action by filing a summons with notice. Plaintiff subsequently filed a complaint on March 19, 2014 and an amended complaint on April 30, 2014, alleging causes of action for specific performance, breach of express and implied warranties, and breach of contract against Ocean One, Rosemill, Miller, and Rose.

Initially, the court will address that branch of the motion to dismiss the amended complaint insofar as asserted against Miller and Rose pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction and the cross motion by plaintiff pursuant to CPLR 306-b to extend the time to serve the supplemental summons and amended complaint on Miller and Rose. In support of their motion and in opposition to plaintiff's cross motion, Miller and Rose established that they were not served with a supplemental summons and amended complaint in this action until October 9, 2014, two days after the instant motion to dismiss was made. In opposition and in support of its cross motion, plaintiff failed to demonstrate good cause for an extension since it failed to exercise due diligence in attempting to serve the supplemental summons and amended complaint on Miller and Rose within 120 days. In addition, plaintiff failed to establish that an extension of time to effect service is warranted in the interest of justice since plaintiff served the supplemental summons and amended complaint on Miller and Rose more than five months after the amended complaint was filed, and did not seek an extension until two months after Miller and

Rose moved to dismiss the complaint for lack of jurisdiction (*see Bahadur v New York State Dept. of Correctional Servs.*, 88 AD3d 629 [2011]; *Braxton v McMillan*, 76 AD3d 607 [2010]; *Shea v Bloomberg, L.P.*, 65 AD3d 579 [2009]). As such, the branch of the motion to dismiss the amended complaint insofar as asserted against Miller and Rose is granted, and the cross motion by plaintiff to extend the time to serve the supplemental summons and amended complaint on Miller and Rose and for an order compelling Miller and Rose to accept service made on October 9, 2014 is denied.

Next, the court turns to those branches of the motion by Ocean One, Rosemill, Miller, and Rose to dismiss the amended complaint insofar as asserted against Rosemill. In the amended complaint, plaintiff asserts causes of action for specific performance, breach of express warranty, breach of implied warranty, and breach of contract against Rosemill, all of which are based on the allegation that plaintiff is a third-party beneficiary of the construction management contract between Ocean One and Rosemill. In support of their motion, Ocean One, Rosemill, Miller, and Rose contend that plaintiff does not have standing to maintain these causes of action against Rosemill because plaintiff lacks contractual privity with Rosemill and plaintiff is not a third-party beneficiary of Rosemill's construction management contract with Ocean One. A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit, and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*see State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427 [2000]). Generally, absent evidence of an express intent to benefit a plaintiff, a purchaser of a condominium unit is merely an incidental beneficiary to the contracts between the sponsor and service providers which participated in the development of the condominium (*see Leonard v Gateway II, LLC*, 68 AD3d 408 [2009]). Here, unlike the contract at issue in *Board of Mgrs. of Alfred Condominium v Carol Mgt.*, 214 AD2d 380 (1995), upon which plaintiff primarily relies to support its contentions, the construction management agreement between Ocean One and Rosemill does not contain a specific reference to eventual purchasers of the condominium units as intended beneficiaries of that contract (*see e.g. Amin Realty v K & R Constr. Corp.*, 306 AD2d 230 [2003]; *Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664 [1992]; *Board of Mgrs. of Olive Park Condominium v Maspeth Props. LLC*, 2014 NY Slip Op 33012[U] [Sup Ct, Kings County 2014]). As such, plaintiff is, at best, only an incidental beneficiary of the construction management agreement between Ocean One and Rosemill. In view of the foregoing, those

branches of the motion by Ocean One, Rosemill, Miller, and Rose to dismiss the amended complaint insofar as asserted against Rosemill are granted.

Ocean One, Rosemill, Miller, and Rose also move to dismiss the first and fourth causes of action asserted against Ocean One, which are founded on a breach of contract claim, pursuant to CPLR 3211(a)(1) and (a)(7). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). In addition, where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted (*see DiGiacomo v Levine*, 76 AD3d 946, 949 [2010]; *Berardino v Ochlan*, 2 AD3d 556, 557 [2003]).

Applying these principles to the case at bar, this court finds that the branches of Ocean One, Rosemill, Miller, and Rose's motion to dismiss the specific performance and breach of contract causes of action insofar as asserted against Ocean One are denied. To plead the requisite elements of a cause of action for breach of contract, the plaintiff must allege "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*see JP Morgan Chase v J.H. Elec. of NY, Inc.*, 69 AD3d 802, 803 [2010]). In the amended complaint, both the breach of contract and specific performance claims allege that the offering plan constituted a contract between Ocean One and the condominium's unit owners who purchased units from Ocean One and that the offering plan was also incorporated into each purchase agreement. Specifically, the first cause of action seeks specific performance, demanding a judgment requiring Ocean One to perform its obligations under the offering plan, namely "to construct the Building, at its own cost, in compliance with the applicable building codes and the Offering Plan, and to correct defects in the construction of both Common Elements and Residential Units upon proper notice, which, upon information and belief, was provided." In the alternative, the fourth cause of action seeks to recover money damages for the breach of Ocean One's obligations under the offering plan in failing to "construct the Building in compliance with applicable building codes and/or substantially in accordance with the building plans or Offering Plan" and refusing to "complete the construction and/or repair the Defects resulting from its failures to adequately and properly construct the building, to provide adequate and

competent tradespersons, and/or to supervise construction and installation by the subcontractors . . . ." The complaint further alleges, among other things, that Ocean One was notified of the "Defects in the common elements within twelve months from the closing date of the first residential unit, which was on or about October 20, 2010," and that Ocean One was "notified of Defects in more than one residential unit in writing within one year from the closing date of the residential units in which the alleged Defects exist." In support of their motion, Ocean One, Rosemill, Miller, and Rose argue that plaintiff's breach of contract claims are barred by the express terms of the offering plan and purchase agreements because any claims against Ocean One for a breach of the offering plan were relinquished at the time of the closing of the residential units and delivery and acceptance of the deeds. However, the documents offered on the motion fail to conclusively disprove plaintiff's breach of contract claims against Ocean One. In particular, movants point to Article XVI, paragraph 11 of the offering plan, which provides, in pertinent part, "The acceptance of a deed by a Purchaser will be deemed an acknowledgment that Sponsor has performed and discharged every agreement and obligation on the part of Sponsor to be performed under the Plan except those (if any) which may be expressly stated in the Plan, in the Purchase Agreement . . . . to survive delivery of the deed." Similarly, paragraph 17 of the purchase agreement states, in pertinent part, "The delivery of the deed for the Residential Unit to Purchaser or Purchaser's representative at Closing shall be deemed to mean that all things required to be done by Seller under this Purchase Agreement have been done and that Purchaser shall not claim otherwise except as to those things, if any, which are specifically stated in this Purchase Agreement or in a separate writing signed by Seller or Seller's attorney on Seller's behalf, to survive or continue beyond Closing or delivery of the deed." Notably, Article XVI, paragraph 11 of the offering plan goes on to state that, with respect to both the common elements and residential units, Ocean One will correct any construction defects or defects in the installation or operation of any mechanical equipment therein due to materials or improper workmanship substantially at variance with the plans and specifications provided that it is notified of such defects within 12 months from the closing date of the first residential unit, in the case of a defect in the common elements, or, with respect to an individual residential unit, within 12 months from the closing date of the residential unit in which the alleged defect exists. Paragraph 45 of the purchase agreement, which incorporates the terms of the offering plan, reiterates these obligations and, in addition, expressly states that "the provisions of this paragraph shall survive the closing of title and delivery of the deed."

Turning to the branches of the motion by Ocean One, Rosemill, Miller, and Rose to dismiss the causes of action for breach of express warranties asserted against Ocean One, said causes of action are dismissed as duplicative of the breach of contract and specific performance claims against Ocean One since they are based on the same construction defects and seek the same relief (*see e.g. Board of Mgrs. of 550 Grand St. Condominium v Schlegel LLC*, 2014 NY Slip Op 50576[U] [Sup Ct, Kings County 2014]).

The court will now address those branches of Ocean One, Rosemill, Miller, and Rose's motion to dismiss the cross claims for common-law indemnification and contribution by defendants Dryvit Systems, Inc. (Dryvit), Sessa Plastering Corp. (Sessa), JosephAnthony Plastering Corp (JosephAnthony), and Bass Plumbing & Heating Corp. (Bass) and for contractual indemnification by Sessa asserted against them. Inasmuch as the main action has been dismissed against Rosemill, Miller, and Rose, the cross claims for contribution, common-law indemnification, and contractual indemnification insofar as asserted against them are dismissed as academic (*see Hoover v IBM Corp.*, 35 AD3d 371 [2006]; *Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536 [2005]).

With respect to Ocean One, the cross claims for common-law indemnification against it must be dismissed. Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*see Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1985]). In the underlying claims for breach of contract and breach of express and implied warranties asserted against Dryvit, Sessa, JosephAnthony, and Bass and negligence against Sessa and JosephAnthony, plaintiff does not seek to hold said defendants vicariously liable for any negligence by Ocean One. Rather, plaintiff claims that the damages arose from Dryvit, Sessa, JosephAnthony, and Bass' own breach of their respective contracts and Sessa and JosephAnthony's own negligence. As such, Dryvit, Sessa, JosephAnthony, and Bass do not have viable claims for common-law or implied indemnification against Ocean One (*see Jones v Rochdale Vil., Inc.*, 96 AD3d 1014, 1019 [2012]; *Edgewater Constr. Co. v 81 & 3 of Watertown*, 252 AD2d 951 [1998]; *Mount Vernon Fire Ins. Co. v Mott*, 179 AD2d 626 [1992]; *Dormitory Auth. of State of N.Y. v Caudill Rowlett Scott*, 160 AD2d 179, 181 [1990]).

The cross claims for contribution against Ocean One are also dismissed. The right to contribution (CPLR 1401) is limited to actions sounding in tort (*see Richards v Passarelli*, 77 AD3d 905, 908 [2010];*Richards Plumbing & Heating Co., Inc. v Washington Group*

Intl., Inc.,59 AD3d 311 [2009]; *Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d 341 [1997]). It is well-settled that "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute" (*see Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 [1987]). Since plaintiff's remaining claims against Ocean One are for breach of contract for which plaintiff seeks damages for purely economic loss, Dryvit, Sessa, JosephAnthony, and Bass have no right to contribution from Ocean One.

Finally, this court finds that Sessa and JosephAnthony's answer to the amended complaint fails to sufficiently state a cross claim for contractual indemnification against Ocean One. A party seeking contractual indemnification must establish the existence of a written agreement between itself and the party from whom it is seeking indemnification (*see Moss v McDonald's Corp.*, 34 AD3d 656 [2006]). However, Sessa and JosephAnthony only make conclusory allegations as to their entitlement to contractual indemnification against Ocean One (*see Fowler v American Lawyer Media*, 306 AD2d 113 [2003]; *see e.g. Legnetti v Camp America*, 2012 NY Slip Op 33270[U] [Sup Ct, Nassau County 2012]; *Sclafani v Brother Jimmy's BBQ, Inc.*, 2010 NY Slip Op 31353[U] [Sup Ct, New York County 2010]). Thus, the cross claim for contractual indemnification against Ocean One is dismissed, and that branch of Ocean One, Rosemill, Miller, and Rose's motion to dismiss said cross claim is granted.

Accordingly, the motion by Ocean One, Rosemill, Miller, and Rose to dismiss the amended complaint and all cross claims asserted against them is granted only to the extent that the amended complaint against Rosemill, Miller, and Rose, the causes of action for breach of express warranties against Ocean One, and all cross claims against Ocean One, Rosemill, Miller, and Rose are dismissed. In all other respects, the motion is denied. The cross motion by plaintiff for an extension of time to serve the supplemental summons and amended complaint on Miller and Rose and for an order compelling Miller and Rose to accept service made on October 9, 2014 is denied.

Dated: June 16, 2015

J.S.C.