SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

BOARD OF MANAGERS OF OCEAN ONE CONDOMINIUM, Plaintiff, -against- OCEAN ONE CONDOMINIUM, INC., ROSEMILL LLC, A.R. RENAISSANCE CORP., SESSA PLASTERING CORP. JOSEPH ANTHONY PLASTERING CORP., SURF GLASS CORP., FM HOME IMPROVEMENT 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.	Index No. 704031/2013

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of Defendants Ocean One Condominium, Inc. ("Ocean One" or "Sponsor"), Rosemill LLC ("Rosemill"), Jonathan T. Miller ("Miller"), and Allan V. Rose ("Rose") (collectively "Defendants"), in support of their respective motion pursuant to CPLR sections 3211 (a)(1), (3), (5), (7), and (8) for dismissal of the Amended Complaint and cross-claims, and this action against them. In sum and substance, this action constitutes a desperate attempt by Plaintiff Board of Managers of Ocean One Condominium ("Plaintiff" or the "Board") following Super Storm Sandy to blame others, rather than itself or nature, for alleged water infiltration at a forty-unit, beach-front condominium building located in Rockaway, New York (the "Building") and to force Ocean One to undertake "warranty" repairs of the Building long after the expiration the warranty period provided for under the Offering Plan or related documents.

This action was commenced by a Summons with Notice dated September 23, 2013, eleven months after Super Storm Sandy and nearly three years to the day of the issuance of a certificate of occupancy for the Building. During that time, the Board, upon information and belief, failed to institute any repairs to the exterior of the Building following the storm or seek warranty service under a then-existing and in-force warranty from Defendant Dryvit System, Inc., manufacturer of the Building's Exterior Insulation and Finish System ("EIFS"). Rather, the Board has commenced this action in a shotgun-like fashion against Ocean One, the Sponsor of the condominium offering plan, Rosemill, the general contractor of the project, various subcontractors of the major elements of the exterior of the Building, including the roof, windows, PTAC and HVAC units, and the Building's architect, alleging claims under theories of specific performance, breach of contract, breach of alleged warranties, implied and express, and

negligence/professional malpractice against the architect.

Six months after the filing and service of the Summons with Notice, in response to demands for a complaint, the Board filed an unverified complaint ("Complaint") containing 17 causes of action, and five days later thereafter filed a Supplemental Summons. The Complaint and Supplemental Summons named Miller and Rose, principals of Ocean One, as defendants, even though neither Miller nor Rose were named or served with the Summons with Notice or served with the Supplemental Summons. One month later, the Board filed an Amended Complaint in response to a motion to dismiss by the architect, which Amended Complaint is also unverified and which contains 21 causes of action, including a breach of contract claim against Miller and Rose. No claims or allegations of fraud are contained in either of unverified original Complaint or unverified Amended Complaint.

Defendants Sessa Plastering, Inc. ("Sessa"), Joseph Anthony Plastering Corp. ("Joseph Anthony"), Bass Plumbing & Heating Corp. ("Bass"), & Dryvit Systems, Inc. ("Dryvit"), each filed an answer to the Amended Complaint asserting cross-claims against Defendants for indemnification and contribution. Defendant A.R. Renaissance Corp. ("A.R.") filed an answer to the Complaint asserting cross-claims for indemnification and contribution, but did not answer the Amended Complaint.

Ocean One, Rosemill, Miller, and Rose now move for dismissal of the Amended Complaint and cross-claims, and this action against them.

STATEMENT OF FACTS

a. Applicable Facts.

The relevant facts to this memorandum, as required in a motion to dismiss, are set forth in the allegations of the Amended Complaint, and to the extent necessary to introduce documentary evidence, in the Affidavits of Sanford Strenger, Esq., dated October 6, 2014 ("Strenger Affidavit"), Jonathan T. Miller dated October 6, 2014 ("Miller Affidavit"), and Allan V. Rose dated October 3, 2014 ("Rose Affidavit"), submitted herewith. The reference to the allegations contained in the Amended Complaint for this motion does not constitute an agreement by Ocean One, Rosemill, Miller, or Rose that those allegations are accurate.

This action stems from the construction of an 11-story, 40-unit condominium building located at 151 Beach 96th Street, Rockaway Beach, New York (the "Building"). (¶ 25.)[1] The Building was constructed by Ocean One pursuant to the terms of an Offering Plan accepted by the Attorney General on July 26, 2007 ("Offering Plan"). (¶ 25.) The Offering Plan provides at Article XVI, paragraph 11, in pertinent part:

> At the Closing of Title, the Sponsor will deliver the certificates and warranties delivered to it and transferable to Purchaser. Sponsor's liability pursuant to any manufacturers' warranties covering heating, appliances, electricity, plumbing and roofing are limited solely to the extent that such warranties are delivered to Sponsor, transferable to the Purchaser or to the Condominium Board of Managers and then only as against such manufacturer. 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, in 13 NYCRR, Part 20 (the regulations of the Attorney General of the

1 Reference to ¶ #'s refers to the paragraphs set forth in the Amended Complaint of Plaintiff dated April 30, 2014, attached as Exhibit D to the affidavit of Sanford Strenger, Esq., sworn to October 6, 2014 ("Strenger Affidavit").

State of New York governing the acceptance for filing of this Plan) and in General Business Law Section 352-e to survive delivery of the deed. . .

In view of the fact the Condominium will consist of a Building containing more than five (5) stories the Housing Merchant Implied Warranty Law contained in Article 36-B of the General Business Law is not applicable. Notwithstanding said fact, the Sponsor will correct any defects in the construction of the Residential Unit or in the installation or operation of any mechanical equipment therein due to materials or improper workmanship substantially at variance with the plans and specifications, as may have been changed by Sponsor from time to time provided that it is notified of such defects in writing by certified mail within one (1) year from the Closing Date to the Residential Unit in which the alleged defect exists ("Limited Warranty"). If a defect occurs in an item which is covered by this warranty, the Sponsor or Sponsor's contractors will (a) repair or (b) replace the defective item. The choice between repair or replacement is strictly the Sponsors.

Purchaser should note that:

(a) No steps taken by Sponsor or Sponsor's contractors to correct a defect shall act to extend the warranty period.

(b) Sponsor accepts no responsibility for any warranty obligation for incidental or consequential damage caused by any defect.

(c) The Limited Warranty is extended to the initial Residential Unit Owner and is not extended to any subsequent purchaser, owner, or any tenant, or mortgage lender who takes possession of a Residential Unit.

(d) The Limited Warranty shall be void if the initial Residential Unit Owner or any tenant or occupant of the initial Residential Unit Owner misuses, abuses or otherwise interferes with or changes Sponsor's original construction or installations, or if the initial Residential Unit Owner or any tenant or occupant of the initial Residential Unit Owner hires any outside contractor to do any work during the warranty period.

(e) Sponsor is not responsible for any work or material ordered directly by Purchasers from Sponsor's contractors or suppliers, or

other outside suppliers and contractors.

> Regarding the Common Elements of the Condominium the Sponsor will correct any defects in the construction of the Common Elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with this Offering Plan as may be changed by Sponsor from time to time provided and on condition that Sponsor is notified of or becomes aware of such defect(s) within twelve (12) months from the Closing Date of the first Residential Unit. In no event will Sponsor be liable for consequential damages (whether based on negligence, breach of contract, warranty, or otherwise), it being intended that Sponsor's sole obligations under the Plan will be to repair or, at Sponsor's option, replace (or cause to be repaired or replaced) any defective item of construction (whether arising as a result of defects in material or improper workmanship or material substantially at variance with the Plans and Specifications), subject to the terms and conditions (and within the time limits) set forth in this paragraph. The quality of construction shall be comparable to local standards customary in the particular trade and in accordance with the plans and specifications.
>
> In no event will Sponsor be responsible for any condition resulting from (i) normal wear and tear or natural deterioration or from the normal movement, settlement and/or shrinkage of the Building and/or Building materials[.]

(¶ 45, 48; *See* Exhibit H of Miller Affidavit.)

The Offering Plan, as required by Attorney General regulations, contains a certification pursuant to 13 NYCRR 20.4 (b) by Ocean One, Miller, and Rose, dated May 3, 2007 ("Sponsor's Certification"). (¶55.) The Sponsor's Certification states that:

> [T]he Offering Plan and that the documents submitted hereinafter by us which amend or supplement the Offering Plan will;
>
> (i) set forth the detailed terms of the transaction and be complete, current and accurate;
>
> (ii) afford potential investors, purchasers and participants an adequate basis upon which to found their judgment;

(iii) not omit any material fact;

(iv) not contain any untrue statement of a material fact;

(v) not contain any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;

(vi) not contain any promise or presentation as to the future which is beyond reasonable expectation or unwarranted existing circumstances;

(vii) not contain any representations or statement which is false, where we: (a) knew the truth; (b) with reasonable effort could have known the truth; (c) made no reasonable effort to ascertain the truth; (d) did to have knowledge concerning the representation or statement made.

(*See* Exhibit I of Miller Affidavit.)

The Offering Plan also contains a report dated April 9, 2007, and a certification by Defendant William Leggio Architect, LLC, dated April 10, 2007, which certification states in pertinent part:

We Certify that the Report:

(i) sets forth in narrative form the description of the entire property as it will exist upon the completion of the construction, provided that the construction is in accordance with the plans and specifications that we examined;

(ii) in our professional opinion affords potential investors, purchasers and participants an adequate basis upon which to found their judgment concerning the description of the property as it will exist upon completion of construct on, provided that construction is in accordance with the plans and specifications that we examined:

(iii) does not omit any material fact;

(iv) does not contain any untrue statement of a material fact;

(v) does not contain any fraud, deception, concealment or suppression;

(vi) does not contain any promise or presentation as to the future which is beyond reasonable expectation or unwarranted existing circumstances;

(vii) does not contain any representations or statement which is false, where we: (a) knew the truth; (b) with reasonable effort could have known the truth; (c) made no reasonable effort to ascertain the truth; (d) did to have knowledge concerning the representation or statement made.

(*See* Exhibit J of Miller Affidavit.)

The Architect's Report included within the Offering Plan states in pertinent part at H (a):

All exterior walls will be constructed of assemblies of incombustible materials such as Masonry, steel studs, fire rate gypsum sheathing, wallboard and EFIS finish mounted to two (2) inch insulation board. Color choices will be made at time of application. All steel studs will be six (6") inches thick. Gypsum sheathing will be a minimum of 5/8" thick. The interior side of the exterior wall will be finished with 5/8" gypsum board.

(*See* Exhibit J of Miller Affidavit.)

The Offering Plan also included a sample contract for purchase of the units ("Purchase Agreement"), which provides at paragraph 3 in pertinent part:

Purchaser acknowledges having received and read the Plan at least three (3) business days prior to signing this Purchase Agreement and having had full opportunity to examine all papers and documents and investigate all matters set forth in the Plan.

(*See* Exhibit K of Miller Affidavit.)

The Purchase Agreement provides at paragraph 17 in pertinent part:

SELLER'S OBLIGATIONS END AT CLOSING - 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.

(*See* Exhibit K of Miller Affidavit.)

The Purchase Agreement also provides at paragraph 44 in pertinent part:

> **PURCHASER GENERAL REPRESENTATIONS** - Purchaser represents that Purchaser has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties or statements, written or oral, of any nature, including but not limited to, any of the above relating to the description or physical condition of a Building or the above described Residential Units or the Property, the size or the dimensions of the Residential Unit or the rooms therein contained or any physical characteristics thereof, the Building services, the estimated Common Charges or any other matter or estimate not set forth herein and in the Plan. Purchaser further acknowledges having had full opportunity to examine all documents and investigate all facts referred to and stated herein and in the Plan. Purchaser agrees that the Seller shall have no liability or responsibility to Purchaser and that Purchaser will not be relieved from his or her obligations hereunder, by reason of any inaccuracy or error in the layout or dimensions of the Residential Unit so long as the layout and specifications as they may be changed or amended are in accordance with the provisions of the Plan.

(*See* Exhibit K of Miller Affidavit.)

The Purchase Agreement further provides at paragraph 45 in pertinent part:

> **LIMITED WARRANTY - AT THE CLOSING OF TITLE, THE SELLER WILL DELIVER THE CERTIFICATES AND WARRANTIES DELIVERED TO IT AND TRANSFERABLE TO PURCHASER AND IT IS FURTHER AGREED THAT TITLE WILL NOT CLOSE UNTIL A TEMPORARY CERTIFICATE OF OCCUPANCY HAS BEEN ISSUED COVERING THE RESIDENTIAL UNIT OR BUILDING IN WHICH THE RESIDENTIAL UNIT IS LOCATED. IN THE EVENT A TEMPORARY CERTIFICATE OF OCCUPANCY IS ISSUED, SELLER SHALL KEEP THE TEMPORARY CERTIFICATE OF OCCUPANCY IN FULL FORC AND EFFECT UNTIL A PERMANENT CERTIFICATE OF OCCUPANCY IS ISSUED. SELLER'S LIABILITY PURSUANT TO ANY MANUFACTURERS' WARRANTIES COVERING**

HEATING APPLIANCES, ELECTRICITY AND PLUMBING ARE LIMITED SOLELY TO THE EXTENT THAT SUCH WARRANTIES ARE DELIVERED TO SELLER, TRANSFERABLE TO THE PURCHASER OR TO THE CONDOMINIUM AND THEN ONLY AS AGAINST SUCH MANUFACTURER. IN ADDITION, HOWEVER, SELLER WILL CORRECT ANY DEFECTS IN THE CONSTRUCTION OF THE RESIDENTIAL UNIT OR 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 ONLY THAT IT IS NOTIFIED OF SUCH DEFECTS IN WRITING BY CERTIFIED MAIL WITHIN ONE (1) YEAR FROM THE DATE OF CLOSING OF TITLE TO THE RESIDENTIAL UNIT IN WHICH THE ALLEGED DEFECT EXISTS. IF A DEFECT OCCURS IN AN ITEM WHICH IS COVERED BY THIS WARRANTY, THE SELLER OR SELLER'S CONTRACTORS WILL (A) REPAIR OR (B) REPLACE THE DEFECTIVE ITEM. THE CHOICE BETWEEN REPAIR OR REPLACEMENT IS THE SELLER'S.

PURCHASER SHOULD NOTE THAT:

A. NO STEPS TAKEN BY SELLER OR SELLER'S CONTRACTORS TO CORRECT A DEFECT SHALL ACT TO EXTEND THE WARRANTY PERIOD.

B. SELLER ACCEPTS NO RESPONSIBILITY FOR ANY WARRANTY OBLIGATION FOR INCIDENTAL OR CONSEQUENTIAL DAMAGE CAUSED BY ANY DEFECT.

. . . G. IN NO EVENT WILL SPONSOR BE RESPONSIBLE FOR ANY CONDITION RESULTING FROM (i) NORMAL WEAR AND TEAR OR NATURAL DETERIORATION OR FROM THE NORMAL MOVEMENT, SETTLEMENT AND/OR SHRINKAGE OF THE BUILDING AND/OR BUILDING MATERIALS; . . . (viii) AIR INFILTRATION AND WATER INFILTRATION FROM WINDOWS IN ACCORDANCE WITH CUSTOMARY PRACTICE AND PROFESSIONAL STANDARDS . . ;(xiii) REPAIR OF CHIPS, SCRATCHES, MARS, BREAKS, DENTS, CRACKS OR OTHER DEFECTS IN: EXTERIOR STONE; WINDOWS, WINDOW GLASS, FRAMES AND

HARDWARE; INSULATION ATTACHED TO THE CURTAIN WALL; SLIDING GLASS DOORS, FRAMES, DOOR GLASS AND HARDWARE; LOUVERS . . . ; (xv) LEACHING OR COLOR VARIATION IN COLOR MORTAR AND COLORED BRICK, AND DIMENSIONAL VARIATIONS IN BRICK JOINTS, AND MORTAR DROPPINGS ON BRICKS; (xvi) PONDING AND/OR CONTROLLED DRAINAGE ON THE ROOF SURFACE; . . .THE ITEMS AND CONDITIONS DESCRIBED IN THIS PARAGRAPH ARE NOT DEFECTS AND MAY BE FOUND IN ANY NEWLY CONSTRUCTED BUILDING. PURCHASERS WHO PURCHASE A RESIDENTIAL UNIT IN THE BUILDING OR IN ANY OTHER NEWLY CONSTRUCTED BUILDING MAY EXPERIENCE SOME OR ALL OF THESE ITEMS AND CONDITIONS IN THEIR RESIDENTIAL UNIT, THE COMMON ELEMENTS OR ELSEWHERE IN THE BUILDING. SPONSOR HAS NO OBLIGATION TO CORRECT OR REPAIR ANY OF THESE ITEMS AND CONDITIONS AND WILL NOT BE LIABLE TO ANY PURCHASER OR THE BOARD THEREOF. IF PURCHASERS OR ANY BOARD DESIRES TO CORRECT OR REPAIR ANY OF THESE ITEMS OR CONDITIONS, TO THE EXTENT THEY CAN BE CORRECTED OR REPAIRED, THEY WILL HAVE TO PROCEED AT THEIR SOLE COST AND EXPENSE BY THEMSELVES AND/OR UNDER ANY WARRANTIES OR UNDERTAKINGS ASSIGNED TO THEM BY SPONSOR.

H. THESE WARRANTIES ARE SPECIFICALLY IN LIEU OF ANY OTHER GUARANTEE OR WARRANTY, EXPRESS OR IMPLIED INCLUDING ANYWARRANTYOF MERCHANTABILITY, HABITABILITY OR WORKMANLIKE CONSTRUCTION.

(*See* Exhibit K of Miller Affidavit.)

Among the construction contracts entered into for the construction of the Building was one entered into between Ocean One and Rosemill, dated July 25, 2007 ("Construction Contract"). (¶ 8; *See* Exhibit L of Miller Affidavit.) A certificate of occupancy was filed for the Building on September 24, 2010 (¶ 40), and the first unit in the Building was sold on October 20, 2010 (¶ 41). Sponsor turned over control of the Board to the unit owners in mid-October 2012.

(¶ 84.)

In late October 2012, Super Storm Sandy hit and, upon information and belief, the ocean-front Building suffered extensive damage, including but not limited to being hit by boardwalk.

Plaintiff alleges that "Before Sponsor handed over control of the Building in October 2012, water infiltration had begun to occur, causing damage to the common elements and in multiple residential units". (¶ 85.) The Amended Complaint does allege that "Despite attempted repairs of various Defects, which were made, upon information and belief, both before Sponsor relinquished control of the Board in October 2012, as well as afterward, nearly all Unit Owners report that water continues to enter their units through the walls, windows, ceiling, roof, PTAC units and/or doors, causing ongoing damage" (¶ 89), thereby affirmatively acknowledging that Sponsor had undertaken action at some point in time. Plaintiff further alleges that by August 2013, "a majority of Unit Owners had experienced water infiltration during rain events" and "ongoing active leaks in their units" of various types. (¶ 86.) The Amended Complaint fails to set forth that specific written notice by certified mail, within the applicable time frames set forth above, as required under the Offering Plan or Purchase Agreement, was given to any of the Defendants. This information and documentation is fully within the control of the Board and the individual unit owners.

Plaintiff alleges the heart of its claim as follows:

> 95. Upon information and belief, water is penetrating the improperly designed, manufactured, and/or installed EIFS siding and likely collecting between the exterior and interior walls, where it will cause rot and mold over time.
>
> 96. Upon information and belief, the Building is experiencing water infiltration from multiple sources, caused by the improper design, manufacture, construction, and/or installation of the EIFS siding system, the windows, the PTAC units, and/or the roof.

> 97. Upon information and belief, the water infiltration was also caused by the construction manager Rosemill's and WLA's failure to properly supervise the construction work on the Building.
>
> 98. The severe and ongoing water infiltration has caused damage to the common elements of the Building as well as a majority of the residential units.

In sum and substance, Plaintiff asserts in a pleading drafted nearly three years after the sale of the first unit was closed in the Building on October 20, 2010 (¶ 41), that it is displeased with the design, manufacture, construction and/or supervision of construction of the Building, acts specifically waived under the explicit terms of the very documents it relies upon to impose liability against Defendants. Importantly Plaintiff fails to allege what steps it has taken since it assumed control of the Building to affirmatively address the conditions it cites exists other than look to Sponsor to repair what Plaintiff asserts should be warrantied.

b. Procedural History.

Plaintiff commenced this action on September 23, 2013, by filing a Summons with Notice ("Summons"). (*See* Exhibit A to Strenger Affidavit.) An open-ended extension of time to demand a complaint was given to Ocean One and Rosemill. Such Summons did not name nor was served upon either Miller or Rose.[2] An unverified Complaint dated March 19, 2014 ("Complaint") and Supplemental Summons dated March 24, 2014 ("Supplemental Summons), was thereafter filed, naming for the first time as defendants Miller and Rose.[3] (*See* Exhibits B and C to Strenger Affidavit.) An open-ended extension of time to answer or move was given to Ocean One and Rosemill. No service of the Supplemental Summons was made on Miller or

2 The efile docket shows an affidavit of service of the Summons on Rosemill by service on the Secretary of State on December 20, 2013. No affidavit of service on Ocean One is filed.

3 The efile docket in this matter does not contain an affidavit of service of the Complaint or Supplemental Summons upon any party in this action.

Rose, nor was the Complaint served on Miller or Rose. The Complaint had 17 causes of action sounding in specific performance, breach of contract, breach of warranty, express and implied, and with respect to the architect, negligence and malpractice. The architect moved to dismiss the Complaint, and in response to that motion, Plaintiff filed an Amended Complaint dated April 30, 2014 ("Amended Complaint"). (*See* Exhibit D to Strenger Affidavit.) The architect then filed a new motion to dismiss addressed to the Amended Complaint. The architect's motion to dismiss is still pending. Plaintiff's extension of time for Ocean One and Rosemill to answer or move was continued. Neither Miller nor Rose was personally served with the Amended Complaint.[4] Sessa, Joseph Anthony, Bass, and Dryvit each filed an answer to the Amended Complaint asserting cross-claims against Defendants for indemnification and contribution. A.R. Renaissance filed an answer to the Complaint asserting cross-claims for indemnification and contribution, but did not answer the Amended Complaint.

This motion to dismiss on behalf Ocean One, Rosemill, Miller, and Rose follows.

STANDARD OF LAW

CPLR section 3211(a) permits a party to move for judgment dismissing one or more causes of action against him on a number of grounds, including, as is relevant here, CLPR sections 3211(a)(1), (3), (5), (7), and (8).

CPLR section 3211(a)(1) permits a party to move for such judgment where "a defense is founded upon documentary evidence." A motion to dismiss pursuant to this section should be granted where the documentary evidence submitted in support of the motion conclusively

4 The efile docket in this matter contains an affidavit of service by mail of the Amended Complaint upon the Law Office of Salamon Gruber Blaymore and Strenger, PC on behalf of Miller and Rose. No authorization was provided for Salamon, Gruber, Blaymore & Strenger, P.C. to accept service personally on behalf of Miller or Rose of the Amended Complaint.

resolves all factual issues and establishes a defense as a matter of law. See Goshen v Mutual Life Ins. Co., 98 NY2d 314, 326 (2002); Leon v Martinez, 84 NY2d 83, 88 (1994).

CPLR section 3211(a)(3) permits the court to dismiss an action when the party bringing it lacks the legal capacity to bring the action. See Vermeer Owners, Inc. v Guterman, 78 NY2d 1114 (1991).

On a motion to dismiss pursuant to CPLR section 3211(a)(5), based on the expiration of the relevant statute of limitations, the defendant must establish prima facie that the time in which to sue has expired. See In re Schwartz, 44 AD3d 779, 779 (2d Dept 2007). "The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies." Texeria v BAB Nuclear Radiology, P.C., 43 AD3d 403, 405 (2d Dept 2007).

A motion to dismiss a pleading for failure to state of cause of action pursuant to CPLR section 3211(a)(7), based upon the plaintiff's failure to state a cause of action, should fail only "if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." Palo v Cronin & Byczek, LLP, 43 AD3d 1127, 1127 (2d Dept 2007). However, "bare legal conclusions are not presumed to be true and are not accorded every favorable inference." Kupersmith v Winged Foot Golf Club, Inc., 38 AD3d 847, 848 (2d Dept 2007).

CPLR section 3211(a)(8) permits a court to dismiss an action where "the court has not jurisdiction of the person of the defendant."

THE AMENDED COMPLAINT

At bar Plaintiff has characterized each of its causes of action setting forth the specific type of claim it is asserting against the respective defendants. The causes of action that are the subject of the instant motion to dismiss are as follows. (*See* Exhibit D to Strenger Affidavit.)

Causes of Action First, Second, Third, and Fourth are stated to be against the Sponsor, Ocean One, and are respectively stated to be:

> FIRST CAUSE OF ACTION: "Specific Performance" of Sponsor's obligations under the Offering Plan to "properly construct the Building and to correct the identified Defects." (¶ 102-107.)
>
> SECOND CAUSE OF ACTION: In the alternative to the First Cause of Action, "Breach of Express Warranty" with respect to the Common Elements, owing to Sponsor's alleged failure and refusal to "correct any defects in the construction of the Common Elements, or in the installation or operation of any mechanical equipment therein, due to the improper workmanship or material substantially at variance with this Offering Plan . . . provided and on condition that Sponsor is notified of or becomes aware of such defect(s) within twelve (12) months from the Closing Date of the First Residential Unit" as provided for in the Offering Plan. (¶ 108-114.)
>
> THIRD CAUSE OF ACTION: In the alternative to the First Cause of Action, "Breach of Express Warranty" with respect to the "Residential Units", owing to Sponsor's alleged failure and refusal to "correct any defects in the construction of the Residential Unit or 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 in writing by certified mail within one (1) year from the Closing Date to the Residential Unit in which the alleged defect exists" as provided for in the Offering Plan. (¶ 115-121.)

FOURTH CAUSE OF ACTION: In the alternative to the First Cause of Action, "Breach of Contract" owing to Sponsor's alleged failure and refusal to construct the Building in compliance with applicable building codes and in conformity with the Offering Plan, and to repair the alleged Defects in the Building. (¶ 122-127.)

Causes of Action Fifth, Sixth, Seventh, and Eight are stated to be against the Rosemill, and are respectively stated to be:

FIFTH CAUSE OF ACTION: "Specific Performance" of Rosemill's obligations under the construction contract entered into with Ocean One, of which Plaintiff alleges that it is a third-party beneficiary, to construct the Building free from material defects. (¶ 128-133.)

SIXTH CAUSE OF ACTION: In the alternative to the Fifth Cause of Action, "Breach of Express Warranties" given by Rosemill alleged to exist in the construction contract between Rosemill and Ocean One for the Building, which warranties were allegedly assigned to the Unit Owners pursuant to the Offering Plan, and which warranties Plaintiff is alleged to be a third-party beneficiary of, owing to Rosemill's alleged failure to correct "defective, deficient, and incomplete elements and systems of the Building." (¶ 134-139.)

SEVENTH CAUSE OF ACTION: In the alternative to the Fifth Cause of Action, "Breach of Implied Warranties" relating to the construction of the Building by

Rosemill's alleged failure to correct "defective, deficient, and incomplete elements and systems of the Building." (¶ 140-144.)

EIGHT CAUSE OF ACTION: In the alternative to the Fifth Cause of Action, "Breach of Contract" owing to Rosemill's alleged failure to "construct the Building free from material defects" as it is allegedly required to do pursuant to the terms of the construction contract between Rosemill and Ocean One, which contract Plaintiff alleges it is a third-party beneficiary of. (¶ 145-150.)

Cause of Action Twenty First is stated against Miller and Rose, and is respectively stated to be:

TWENTY FIRST CAUSE OF ACTION: "Breach of Contract" against Miller and Rose owing to their alleged breach(es) of the representations and warranties made by them in a certification contained in the Offering Plan that the Offering Plan would "not omit any material fact" or "contain any untrue statement of a material fact"; for failing to construct the Building in compliance with the plans and specifications; for failing and refusing to honor warranties; and for representing that the Sponsor was unaware of any material defects or the need for major repairs at the Building, which representation is alleged to be an untrue statement that misled the Unit Owners. (¶ 250-256.)

POINT I

PLAINTIFF'S TWENTY-FIRST CAUSE OF ACTION AGAINST DEFENDANTS JONATHAN T. MILLER AND ALLAN V. ROSE MUST BE DISMISSED.

a. This Court Lacks Personal Jurisdiction of both Miller and Rose Because Plaintiff Failed to Serve Any Summons Upon Them.

Plaintiff did not to name Miller or Rose as defendants in its Summons with Notice, serve that Summons upon Miller or Rose, or assert any claim against them therein. (*See* Exhibit A Strenger Affidavit.) Furthermore, Plaintiff, although having named Miller and Rose as defendants in its Complaint, Amended Complaint, and Supplemental Summons, failed to personally serve those pleadings on Miller or Rose. (*See* Miller Affidavit at ¶¶ 11-13; Rose Affidavit at ¶¶ 3-6.) As a result, this action has not properly been commenced against either Miller or Rose, and must be dismissed pursuant to CPLR section 3211(a)(8) as against them.

An action is commenced in New York State by filing a summons and complaint or summons with notice in accordance with CPLR section 2102, and service of such papers must be made upon the parties named therein within 120 days of such service. CLPR §§ 304(a), 306-b. "If service is not made upon a defendant within the time provided . . . the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." CPLR 306-b. The CPLR further provides that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at any time before the period for responding to that summons expires or within twenty days after service of a pleading responding to it." CPLR § 1003.

Here, the record is clear that neither Miller nor Rose were served with any summons in

this action. Neither was served with, or even named as a party in, the original Summons, which the efile docket reflects was the only pleading actually served upon any defendant by service of process. Neither Miller nor Rose were served with the Supplemental Summons dated and filed five days after the filing of the Complaint. (*See* Miller Affidavit at ¶¶ 11-13; Rose Affidavit at ¶¶ 3-6, and the efile docket of this action.)

In fact, Plaintiff's filing of the Complaint adding additional parties without the simultaneous filing of a supplemental summons is procedurally improper, and grounds for dismissal of that pleading as to the added party. CPLR section 305(b) provides in pertinent part that, "[i]f the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought . . . ." The Supplemental Summons naming Miller and Rose as defendants postdates the Complaint, and does not contain the wording required by the CPLR. It is clear that the Supplemental Summons was an afterthought and attempt by counsel to correct its error in filing a Complaint adding new parties without a revised summons. Even if Plaintiff were now to serve Miller and Rose with the Supplemental Summons and Complaint, that service would be ineffective because more than 120 days have passed since the filing of the Supplemental Summons. Qing Dong v Chen Mao Kao, 115 AD3d 839 (2d Dept 2014). Based upon the forgoing, it is respectfully submitted that this Court does not have personal jurisdiction over Miller or Rose, nor were they properly added as defendants in the Complaint, and they should be dismissed from this action as named parties pursuant to CPLR section 3211(a)(8).

In addition, as set forth in more detail below, no good cause exists, nor is it in the interest of justice, to absolve Plaintiff *nunc pro tunc* from its procedural errors and permit it to serve the Supplemental Summons and now Amended Complaint upon Miller or Rose. Ocean One and

Rosemill were both served with the Summons, and Plaintiff either intentionally or accidently did not include Miller or Rose as defendants therein. Following service of the Summons with Notice, an open-ended agreement to extend the time for Ocean One and Rosemill to answer or move was entered into. When Plaintiff served its Complaint naming Miller and Rose as additional parties, its counsel forgot to include a supplemental summons doing the same. When counsel then attempted to correct this error by filing such Supplemental Summons five days later, it made no attempt to serve either Miller or Rose with it. While it is not disputed that Ocean One and the Board have spent the past year exploring avenues in hopes of amicably resolving their disputes, Plaintiff continued to advance this action. Nothing prevented Plaintiff during that time from serving Miller or Rose as it had Ocean One and Rosemill. Law office failure is not considered good cause under CPLR 306-b. See Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 104-105 (2001).

Furthermore, the claim against Miller and Rose in the Amended Complaint, as set forth in more detail below, is based upon a legally-baseless theory where Miller and Rose are to be held personally liable for an alleged breach of contract of Ocean One, a business corporation of which they are principals. No allegations of fraud are set forth in the Amended Complaint. And as detailed below, the alleged act that Plaintiff asserts gives rise to the liability of Miller and Rose also occurred more than six-years prior to the attempted commencement of a claim against them, beyond the applicable statute of limitation. In sum and substance, Plaintiff has no true legally cognizable gripe against Miller or Rose, but rather for strategic purposes wants to make its claims personal as against them. For the above reasons and those below, dismissal with prejudice of this action against Miller and Rose should be granted.

b. <u>The Claim Against Miller and Rose Is Time-Barred.</u>

It is undisputable that the only claim asserted against Miller or Rose in the Amended Complaint is one sounding in breach of contract owing to their certification, on May 3, 2007, of the Offering Plan. In fact, Plaintiff even titles its Twenty-First Cause of Action as "Breach of Contract Against Jonathan T. Miller and Allan V. Rose." Because this action was commenced more than six years' since such Sponsor's Certification was executed, it must be dismissed pursuant to CPLR section 3211(a)(5).

Plaintiff in its unverified Amended Complaint pleads as follows with respect to Miller and Rose:

> 251. The Offering Plan is a valid, binding, and existing contract between Sponsor Defendants and the Unit Owners, both on its own and by its incorporation into each Purchase Agreement, and it also establishes the legal relationship between Sponsor and the Board.
>
> 252. In the Offering Plan, Jonathan Miller and Allan Rose certified, in their roles as Sponsor's principals, that the Offering Plan and its amendments would be "complete, current and accurate," would "afford [the Unit Owners] an adequate basis upon which to found their judgment," and would "not omit any material fact" or "contain any untrue statement of a material fact," among other promises. (Part II, Schedule M-1.)
>
> 253. The representations and warranties made by Jonathan Miller and Allan Rose in the Offering Plan have been breached. In particular, the Building's construction was substandard and not in compliance with the applicable codes or the Building's plans and specifications. Sponsor Defendants did not perform the Building's construction according to these standards at its own cost, as promised, and also have failed and refused to honor their warranties by performing repairs of the Defects.
>
> 254. Moreover, the Offering Plan, which was incorporated into each Purchase Agreement, represented that the Sponsor was unaware of any material defects or need for major repairs to the Building, which was an untrue statement that misled the Unit Owners.

(*See* Exhibit D to Strenger Affidavit.)

A cause of action for breach of contract accrues at the time of the breach. See Ely-Cruikshank Co., Inc. v Bank of Montreal, 81 NY2d 399, 402 (1993). "[T]he Statute runs from the time of the breach though no damage occurs until later." Id. The statute of limitations for a breach of contract action is six years. CPLR § 213(2).

Here, the "Certification by Sponsor and Sponsor's Principals Pursuant to 13 NYCRR 20.4(b)" that was included in the Offering Plan pursuant to the requirements of the Attorney General, was signed by Miller and Rose on May 3, 2007 ("Sponsor's Certification"). The Offering Plan in which it was included became effective as of July 26, 2007. (¶ 25; *See* Exhibits H and I of Miller Affidavit.) Based upon the above stated allegations of Plaintiff, the alleged breach by Miller and Rose occurred at the time they signed the Sponsor's Certification. Therefore, to be timely, Plaintiff must have brought its instant claims against Miller and Rose no later than May 2, 2013. The first filing in this action, however, was the Summons with Notice filed September 23, 2013 – more than four months past the expiration of the statute of limitation. As set forth above, the Summons with Notice did not even name or include any claims against Miller or Rose. The first document that asserted a claim against Miller or Rose was the Complaint filed on March 19, 2014, ten months past the expiration of any possible statute of limitation.

Based upon the foregoing, even if Plaintiff had properly filed a Complaint and Supplemental Summons and served those documents on Miller and Rose, the claims asserted therein were already time-barred at all relevant procedural times applicable to this matter. Therefore, Miller and Rose are entitled to a dismissal with prejudice of this action against them pursuant to CPLR section 3211(a)(5).

c. Defendants Miller and Rose Cannot Be Held Liable For Breach Of Contract In Their Individual Capacities Predicated Upon the Sponsor's Certification They Executed As Principals of Sponsor.

As set forth above, the only claim asserted against Miller or Rose in the unverified Amended Complaint, or in predecessor unverified Complaint, is one sounding in breach of contract based solely upon their execution of the Sponsor's Certification. As set forth above, Plaintiff pleads as follows against Miller and Rose:

> 252. In the Offering Plan, Jonathan Miller and Allan Rose certified, in their roles as Sponsor's principals, that the Offering Plan and its amendments would be "complete, current and accurate," would "afford [the Unit Owners] an adequate basis upon which to found their judgment," and would "not omit any material fact" or "contain any untrue statement of a material fact," among other promises. (Part II, Schedule M-1.)
>
> 253. The representations and warranties made by Jonathan Miller and Allan Rose in the Offering Plan have been breached. In particular, the Building's construction was substandard and not in compliance with the applicable codes or the Building's plans and specifications. Sponsor Defendants did not perform the Building's construction according to these standards at its own cost, as promised, and also have failed and refused to honor their warranties by performing repairs of the Defects.

(*See* Exhibit D to Strenger Affidavit.)

From these allegations, it is clear that the sole connection of Miller and Rose individually to this proceeding is their execution of the Sponsor's Certification, which was annexed as Schedule M-1 to the Offering Plan. Plaintiff does not seek to pierce the corporate veil, or allege that Miller or Rose did any acts that would give rise to individual liability. "One of the primary and completely legitimate purposes of incorporating is to limit or eliminate the personal liability of corporate principals." Matter of Goldman v Chapman, 44 AD3d 938, 939 (2d Dept 2007). As is relevant here, it is only where a principal "exercises complete domination of the corporation"

and uses that domination "to commit a fraud or wrong" should a court permit a cause of action against a corporate principal to go forward. Id. No such claims are presented in the Amended Complaint. Plaintiff solely seeks to hold Miller and Rose personally liable based upon their "Certification" of the Offering plan. As set forth in the statement of facts, Plaintiff's chief aim at bar is to force Ocean One to honor its alleged warranties. There is simply no cognizable basis to hold Ocean One's principals derivatively liable for an alleged contract breach of their corporate entity.

It is respectfully submitted that case law clearly holds "that the Non-Sponsors may not be held individually liable for any of plaintiff's claims premised solely on alleged violations of the offering plan and certification." Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC, 106 A.D.3d 542 at 544 (1st Dept 2013).

In Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC, *supra,* the First Department, in pertinent part, affirmed the trial court's granting of a motion to dismiss the causes of action against brought against non-sponsor parties that were premised merely upon their execution of the Certification required under the Attorney General regulations. The First Department stated:

> The statements made by defendants in the certification and the plan were mandated by the Martin Act (see *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership,* 12 NY3d 236, 246 [2009]), and plaintiff does not posit any basis of liability outside of that statute, nor assert that the Non-Sponsors are liable under an alter-ego or other veil-piercing theory.

Id. at 544.

Similarly in the action at bar, that mere execution of a "Certification" given pursuant to Attorney General regulations does not create privity of contract between its signatories and

purchasers of units, or a board standing in unit owners' shoes.

In Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, 12 NY3d 236 (2009), the Court of Appeals examined the history of the Martin Act (General Business Law art 23-A) and the Attorney General's implementing regulations (13 NYCRR part 20). The question before the Court of Appeals was whether Kerusa, a purchaser of a unit, had any common-law claim for fraud against the building's sponsor when that fraud was predicated solely upon alleged material omissions from the offering plan amendments mandated by the Martin Act. The Court of Appeal's held Kerusa did not. Id. at 245. The Court of Appeals concluded that no private right of action arises under a violation of the Martin Act or the Attorney General's implementing regulations. *Id*, 12 NY3d 236 at 247.

In Hamlet On Olde Oyster Bay Home Owners Association, Inc., v Holiday Organization, 65 A.D3d 1284 (2d Dept 2009), the Second Department affirmed the trial court judge, Justice Leonard Austin, dismissal of claims brought against various defendants that were predicated solely upon the certifications in the offering plan given by those defendants. The Second Department, relying on Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, *supra*, held that "The certifications in the offering plans executed by these defendants were pursuant to the Attorney General's implementing regulations and, as such, may not be the basis of private causes of action against them (id. at 236)." Id. at 1287-88.

Similarly, the First Department in Berenger v 261 W. LLC, 93 A.D.3d 175 (1st Dept 2012) reversed the trial court's denial of summary judgment to defendants of claims that were predicated only on fraud, misrepresentations, and omissions in the offering plan, holding:

> Here, as the defendants correctly assert, the gravamen of the plaintiffs' claims for commonlaw fraud and misrepresentation is predicated on alleged omissions in the offering plan as to

> the location and operation of the cooling tower. Because disclosures concerning the cooling tower are specifically required under the Martin Act (see13 NYCRR 20.7), the plaintiffs' claims for fraud and misrepresentation against 261 West must be dismissed.

Id. at 184.

As set forth above the gravamen of Plaintiff's claims against Miller and Rose are predicated upon their execution of the Sponsor's Certification at Schedule M-1 of Part II to the Offering Plan, which they executed *in their capacity as principals*, pursuant to the requirements of 13 NYCRR 20.4(b), and solely for that purpose. The language in the Sponsor's Certification mirrors the language found in the statute and follows precisely the form delineated therein, and is required by statute to be submitted to the Attorney General in Part II and in the exhibits of the Offering Plan. Based upon the foregoing and the clear law that no private right of action may be asserted utilizing as its predicate a certification provided solely for purposes of the Martin Act and the Attorney General's regulations, the cause of action against Miller and Rose, non sponsors, must be dismissed. See e.g., Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC, 106 A.D.3d 542 at 544.

Based upon the foregoing, there is no basis in the interest of justice to excuse Plaintiff's numerous procedural failures with respect to Miller and Rose, and, therefore, this action should be dismissed against them.

POINT II

PLAINTIFF'S CLAIMS AGAINST DEFENDANT ROSEMILL LLC MUST BE DISMISSED.

a. Plaintiff Is Not In Privity With Rosemill To Support A Breach Of Contract Claim.

Plaintiff asserts four causes of action against Rosemill, the Fifth (Specific Performance) (¶¶ 128-133), Sixth (Breach of Express Warranty) (¶¶ 134-139), Seventh (Breach of Implied Warranty) (¶¶ 140-144), and Eighth (Breach of Contract) (¶¶ 145-150). Each of these causes of action are predicated on the allegation that the unit owners at the Building are third-party beneficiaries of the Construction Contract entered into between Ocean One and Rosemill, and that Rosemill breached certain express and implied warranties given in that contract. (¶¶ 128-150.) However, Plaintiff is mistaken that they have standing as third-party beneficiaries to assert any claims against Rosemill. As such, Plaintiff's claims against Rosemill must be dismissed pursuant to CPLR sections 3211(a)(1) and (3).

In order to plead the requisite elements of a cause of action to recover damages 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." JP Morgan Chase v J.H. Elec. of NY, Inc., 69 AD3d 802, 803 (2d Dept 2011).

Liability for breach of contract will lie where there is proof of a contractual relationship or privity between the disputing parties. A party not in privity with a defendant has no viable cause of action for breach of contract unless the party was an intended third-party beneficiary of that contract. See CDJ Builders Corp. v Hudson Group Cons. Corp., 67 AD3d 720, 722 (2d Dept 2009). "Parties asserting third-party beneficiary rights under a contract must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was

intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost.'" Mendel v Henry Phipps Plaza West, Inc., 6 NY3d 783 (2006), quoting Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 336 (1983).

Generally, however, a plaintiff who purchases a condominium unit is merely an incidental third-party beneficiary to the contracts between the sponsor and service providers which participated in the development of the condominium, and, thus, has no standing to bring a breach of contract claim against such contractors. See Leonard v Gateway II, LLC, 68 AD3d 408, 408-409 (1st Dept 2009); Board of Managers of Riverview at College Point Condominium III v Schorr Brothers Development Corp., 182 AD2d 664 (2d Dept 1992). Indeed, it is only where the contract at issue is expressly intended to benefit the third party and the third party relied upon the contractor's obligations under the contract will liability lie. Caprer v Nussbaum, 36 A.D.3d 176 (2d Dept 2008).

Here, there is no contract between the unit owners and Rosemill, nor is there any provision in the construction contract between Ocean One and Rosemill acknowledging the unit owners as intended beneficiaries thereunder. (*See* Exhibit L of Miller Affidavit.) As Plaintiff is wholly unable to establish privity between Plaintiff and Rosemill, no cause of action for specific performance, breach of express or implied warranty, or breach of contract action against Rosemill can lie. Leonard v Gateway II, LLC, 68 AD3d 408, 408-409 (1st Dept 2009); Board of Managers of Riverview at College Point Condominium III v Schorr Brothers Development Corp., 182 AD2d 664 (2d Dept 1992). Based upon the foregoing, all causes of action asserted against Rosemill, Plaintiff's Fifth, Sixth Seventh, and Eight, should be dismissed pursuant to CPLR sections 3211(a)(1) and (3).

b. <u>There Are No Warranties in the Construction Contract.</u>

Plaintiff also alleges that, even if it was not a party to the Construction Contract or an intended third-party beneficiary giving rise to specific performance or breach of contract claims, it may nevertheless maintain an action against Rosemill for breach of warranties provided for in the Construction Contract because such warranties were assigned to the unit owners. These claims, too, must fail.

A reading of the Construction Contract confirms that no express warranties are given therein. (*See* Exhibit L of Miller Affidavit.) Therefore, no express warranty could be available to Plaintiff. The Sixth Cause of Action thus has no factual basis, and should be dismissed.

Nor are there implied warranties of any kind applicable in this matter. Article XVI, paragraph 11 of the Offering Plan expressly disclaims the applicability of any and all implied warranties, and states:

> In view of the fact the Condominium will consist of a Building containing more than five (5) stories the Housing Merchant Implied Warranty Law contained in Article 36-B of the General Business Law is not applicable.

(*See* Exhibit H of Miller Affidavit.)

General Business Law Article 36-B at sections 777-a, -b, and –c delineates the only implied warranties attaching to the construction of a new home, and abrogates all common-law implied warranties for such construction. <u>See Fumarelli v Marsam Dev., Inc.</u>, 92 NY2d 298 (1998). A "New Home" is defined therein as "any single family house or for-sale unit in a multi-unit residential structure of five stories or less in which title to the individual units is transferred to owners under a condominium or cooperative regime." GBL § 777-a(5). The Building here towers eleven-stories – well beyond the limitation imposed by statute. As such, no implied

warranties for the Building's construction exist. See id.; Pine Street Homeowners Ass'n v 20 Pine Street LLC, 109 AD3d 733, 735 (1st Dept 2013) ("The statutory housing merchant warranty scheme . . . applies only to building less than five stories . . . . ."); 110 Central Park South Corp. v 112 Cent. Park South, LLC, 41 Misc3d 380, 386-387 (Sup. Ct., New York County [Jaffe, J., 2013). Therefore the Seventh Cause of Action must be dismissed.

Based upon the foregoing Plaintiff cannot state any cognizable claim against Rosemill, and, therefore, Rosemill should be dismissed as a defendant in this action.

POINT III

PLAINTIFF'S CLAIMS AGAINST DEFENDANT OCEAN ONE CONDOMINIUM, INC. ARE BARRED BY THE TERMS OF THE OFFERING PLAN AND PURCHASE AGREEMENT AND MUST BE DISMISSED.

Causes of Action First, Second, Third, and Fourth are asserted against the Sponsor, Ocean One, as follows: the First (Specific Performance) (¶¶ 102-107), Second (Breach of Express Warranty for Common Areas) (¶¶ 108-114), Third (Breach of Express Warranty for Residential Areas) (¶¶ 115-121), and Forth (Breach of Contract) (¶¶ 122-127). For the reasons stated below, each of these causes of action must be dismissed pursuant to CPLR sections 3211(a)(1), (5) and (7).

In the action at bar, the gravamen of Plaintiff's claim against Ocean One is a breach and/or breaches by Sponsor of its alleged obligations under the Offering Plan and individual purchase agreements of the unit owners which are incorporated into the Offering Plan. (¶ 42, 43, 103, 109, 116, 123.) In its First Cause of Action, Plaintiff pleads:

> 104. Sponsor covenanted and agreed to diligently 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.

105. Sponsor has failed and refused to abide by its obligations to properly construct the Building and to correct the identified Defects.

In its Second Cause of Action, Plaintiff pleads:

110. Sponsor covenanted and agreed to "correct any defects in the construction of the Common Elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with this Offering Plan as may be changed by Sponsor from time to time provided and on condition that Sponsor is notified of or becomes aware of such defect(s) within twelve (12) months from the Closing Date of the first Residential Unit." (Offering Plan Part I, Section XVI(11).)

111. Upon information and belief, Sponsor was notified of or became aware of theDefects in the Common Elements within twelve months from the closing date of the first residential unit.

112. Sponsor has failed and refused to correct the Defects in the construction of the common elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with the Offering Plan.

In its Third Cause of Action, Plaintiff pleads:

117. Sponsor covenanted and agreed to "correct any defects in the construction of the Residential Unit or 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 in writing by certified mail within one (1) year from the Closing Date to the Residential Unit in which the alleged defect exists ('Limited Warranty')." (Offering Plan, Part I, Section XVI(11).)

118. Upon information and belief, Sponsor was notified of Defects in more than one residential unit in writing by certified mail and/or by substantially equivalent notice within one year from the closing date of the residential units in which the Defects exist.

119. Sponsor has failed and refused to correct the Defects in the construction of more than one residential unit or in the installation or operation of any mechanical equipment therein due to materials or improper workmanship substantially at variance with the plans and specifications.

In its Fourth Cause of Action, Plaintiff pleads:

123. The Offering Plan is a valid, binding, and existing contract between Sponsor and the Unit Owners, both on its own and by its incorporation into each Purchase Agreement, and it also establishes the legal relationship between Sponsor and the Board.

124. In the Offering Plan, Sponsor covenanted and agreed, among other things, to construct the Building in compliance with the applicable building codes of New York City and State (Part I, Section III), "substantially in the manner set forth in the building plans filed with Building Department of the City of New York and any amendments or changes thereto," though the "plans will not be changed or amended so as to materially adversely affect the Residential Unit Owners." (Id) The Sponsor further covenanted and agreed to "diligently, expeditiously and at its own cost, complete all construction of the Condominium substantially in accordance with the plans and specifications described [in the Offering Plan]," to "diligently perform all of its obligations set forth in this Offering Plan," and if substituting materials, to only "substitute materials, fixtures, appliances and equipment of equal or better quality or design for any of those set forth" in the Offering Plan. (Part I, Section XVI(9).) The Sponsor also represented that it had "no knowledge of any material defects or need for major repairs" to the Building. (Part I, Section XXX.)

125. The Sponsor has failed and refused to comply with its obligations under the Offering Plan. In particular, as non-limiting examples, Sponsor has failed to construct the Building in compliance with applicable building codes and/or substantially in accordance with the building plans or Offering Plan. The Sponsor has also refused to diligently, expeditiously, and at its own cost 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, as more fully set forth above.

(*See* Exhibit D of Strenger Affidavit.)

Based upon the foregoing, it is clear that the Offering Plan and Purchase Agreements are viewed by the Plaintiff as unambiguous and of undisputed authenticity conclusively providing Plaintiff rights that it seeks to enforce in this action. As such, the Offering Plan and Agreements are deemed to be documentary evidence under CPLR section 3211(a) (1). See Goshen v Mutual Life Ins. Co., 98 NY2d 314, 326 (2002). It is well established that dismissal is warranted "where documentary evidence conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 N.Y.2d 83 at 88.

a. Plaintiff's Breach of Contract Claims are Not Viable.

Plaintiff states in its First and Fourth Causes of Action claims for breach of contract owing to Ocean One's alleged failure to construct the Building in compliance with the terms of the Offering Plan. Specifically, as set forth above, Plaintiff alleges in pertinent part:

> 105. Sponsor covenanted and agreed to diligently construct the Building, at its own cost, in compliance with the applicable building codes and the Offering Plan, and to correct the defects in the construction of both Common Elements and Residential Units upon proper notice, which, upon information and belief, was provided.
>
> 124. In the Offering Plan, Sponsor covenanted and agreed, among other things, to construct the Building in compliance with the applicable building codes of New York City and State . . . "substantially in the manner set forth in the building plans filed with Building Department of the City of New York and any amendments or changes thereto," though the "plans will not be changed or amended so as to materially adversely affect the Residential Unit Owners." The Sponsor further covenanted and agreed to "diligently, expeditiously and at its own cost, complete all construction of the Condominium substantially in accordance with the plans and specifications described [in the Offering Plan]," to "diligently perform all of its obligations set forth in this Offering Plan," and if substituting materials, to only "substitute materials,

> fixtures, appliances and equipment of equal or better quality or design for any of those set forth" in the Offering Plan. . . . The Sponsor also represented that it had "no knowledge of any material defects or need for major repairs" to the Building.

(*See* Exhibit D of Strenger Affidavit.) These claims, however, are barred by the express terms of the Offering Plan and Purchase Agreement.

Article XVI, paragraph 11 of the Offering Plan provides, in relevant 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 [Offering] Plan . . . .

(*See* Exhibit H of Miller Affidavit.)

Furthermore, paragraph 17 of the Purchase Agreement provides, in relevant 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 . . . .

(*See* Exhibit K of Miller Affidavit.)

As a result, each unit owner, at the time of closing of the respective units and delivery and acceptance of the deed thereto, by such acceptance, relinquished any claim against Ocean One for a breach of the Offering Plan. Therefore, Plaintiff's claims against Ocean One for breach of the Offering Plan are barred, and must be dismissed pursuant to CPLR section 3211(a)(1).

b. <u>The Warranty Claims Stated In Plaintiff's Second and Third Causes of Action are Time-Barred And Constitute a Redundant Repleading of the Contract Claims.</u>

Plaintiff's Second and Third Causes of Action for, respectively, breach of warranty for

the common elements of the Building and the Residential Unit, are a redundant pleading of those claims for breach of contract in the First and Fourth Causes of Action, and must be dismissed. Furthermore, such warranty claims are time-barred.

Plaintiff in its Amended Complaint with respect to its Second Cause of Action pleads as follows:

> 109. The Offering Plan is a valid, binding, existing contract between Sponsor and the Unit Owners, both on its own and by its incorporation into each Purchase Agreement, and it also establishes the legal relationship between Sponsor and the Board.
>
> 110. Sponsor covenanted and agreed to "correct any defects in the construction of the Common Elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with this Offering Plan as may be changed by the Sponsor from time to time provided and on condition that Sponsor is notified of or become aware of such defect(s) within twelve (12) months from the Closing Date of the First Residential Unit."
>
> 111. Upon information and belief, Sponsor was notified or became aware of the Defects in the Common Elements within twelve months from the closing date of the first residential unit.
>
> 112. Sponsor has failed and refused to correct the Defects in the construction of the common elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with the Offering Plan.

Plaintiff in its Amended Complaint with respect to its Third Cause of Action pleads as follows:

> 116. The Offering Plan is a valid, binding, existing contract between Sponsor and the Unit Owners, both on its own and by its incorporation into each Purchase Agreement, and it also establishes the legal relationship between Sponsor and the Board.
>
> 117. Sponsor covenanted and agreed to "correct any defects in

> the construction of the Residential Unit, or in the installation or operation of any mechanical equipment therein due to improper materials or workmanship substantially at variance with the plans and specifications . . . provided that it is notified of such defectsin writing by certified mail within one (1) year from the Closing Date to the Residential Unit in which the alleged defect exists ('Limited Warranty')."
>
> 118. Upon information and belief, Sponsor was notified of Defects in more than one residential unit in writing by certified mail and/or by substantially equivalent notice within one year from the closing date of the residential units in which the Defects exist.
>
> 119. Sponsor has failed and refused to correct the Defects in the construction of more than one residential unit or in the installation or operation of any mechanical equipment therein due materials or improper workmanship substantially at variance with the plans and specifications.

(*See* Exhibit D of Strenger Affidavit.)

A reading of these causes of action, and the First and Fourth as stated above, reveals that they are wholly duplicative. Claims Second and Third arise from the same facts and alleged damages as those contained in First and Fourth – that Ocean One failed to erect the Building in compliance with the plans and specifications or correct any defects in its construction. Accordingly, it is submitted that Plaintiff's Second and Third causes of action be dismissed. See Board of Mgrs. of Woodpoint Plaza Condominium v Woodpoint Plaza LLC, 23 Misc3d 1233 (A) (Sup Ct Kings County 2009); see also Daniels v Lebit, 299 AD2d 310 (2d Dept 2002).

In any event, the Offering Plan, which is incorporated by reference into the Purchase Agreement(s), expressly limits the warranty period relating to the construction of the common elements of the Building to one year from the closing date of the first residential unit, and specifically states that sponsor:

> [W]ill correct any defects in the construction of the Common

> Elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or material substantially at variance with this Offering Plan as may be changed by Sponsor from time to time provided and on condition that Sponsor is notified of or becomes aware of such defect(s) within twelve (12) months from the Closing Date of the first Residential Unit.

(*See* Exhibit H of Miller Affidavit.)

The closing date of the first residential unit took place on October 20, 2010. (¶ 41.) Plaintiff merely alleges in conclusory fashion at paragraph 111 that "Upon information and belief, Sponsor was notified of or became aware of the Defects in the Common Elements within twelve months from the closing date of the first residential unit." It is respectfully submitted this conclusory allegation is insufficient to establish the condition precedent to invoke the express warranty of the Offering Plan. Unit owners have within their control the ability to know if any of them provided notice.

Similarly, the Purchase Agreement, which incorporated by reference the Offering Plan, expressly limits the warranty period relating to the construction of any individual residential units to one year from the closing date of the effected residential unit, and specifically states:

> SELLER WILL CORRECT ANY DEFECTS IN THE CONSTRUCTION OF THE RESIDENTIAL UNIT OR IN THE INSTALLATION OR OERATION OR ANY MECHANICAL EQUIPMENT THEREIN DUE TO MATERIALS OR IMPROPER WORKMANSHIP SUBSTANTIALLY AT VARIANCE WITH THE PLANS AND SPECIFICATIONS, PROVIDED ONLY THAT IT IS NOTIFIED OF SUCH DEFECTS IN WRITING BY CERTIFIED MAIL WITHIN ONE (1) YEAR FROM THE DATE OF CLOSING OF TITLE TO THE RESIDENTIAL UNIT.

(*See* Exhibit K of Miller Affidavit.) Plaintiff fails to plead except in conclusory fashion that the condition precedent of written notice was given by any unit owner, a fact wholly in control of

Plaintiff.

Furthermore, the Purchase Agreement expressly limits the "defects" that Ocean One can be held responsible for, and provides, as is relevant here, that:

> . . . G. IN NO EVENT WILL SPONSOR BE RESPONSIBLE FOR ANY CONDITION RESULTING FROM (i) NORMAL WEAR AND TEAR OR NATURAL DETERIORATION OR FROM THE NORMAL MOVEMENT, SETTLEMENT AND/OR SHRINKAGE OF THE BUILDING AND/OR BUILDING MATERIALS; . . . (viii) AIR INFILTRATION AND WATER INFILTRATION FROM WINDOWS IN ACCORDANCE WITH CUSTOMARY PRACTICE AND PROFESSIONAL STANDARDS . . ;(xiii) REPAIR OF CHIPS, SCRATCHES, MARS, BREAKS, DENTS, CRACKS OR OTHER DEFECTS IN: EXTERIOR STONE; WINDOWS, WINDOW GLASS, FRAMES AND HARDWARE; INSULATION ATTACHED TO THE CURTAIN WALL; SLIDING GLASS DOORS, FRAMES, DOOR GLASS AND HARDWARE; LOUVERS . . . ; (xv) LEACHING OR COLOR VARIATION IN COLOR MORTAR AND COLORED BRICK, AND DIMENSIONAL VARIATIONS IN BRICK JOINTS, AND MORTAR DROPPINGS ON BRICKS; (xvi) PONDING AND/OR CONTROLLED DRAINAGE ON THE ROOF SURFACE; . . .THE ITEMS AND CONDITIONS DESCRIBED IN THIS PARAGRAPH ARE NOT DEFECTS AND MAY BE FOUND IN ANY NEWLY CONSTRUCTED BUILDING. PURCHASERS WHO PURCHASE A RESIDENTIAL UNIT IN THE BUILDING OR IN ANY OTHER NEWLY CONSTRUCTED BUILDING MAY EXPERIENCE SOME OR ALL OF THESE ITEMS AND CONDITIONS IN THEIR RESIDENTIAL UNIT, THE COMMON ELEMENTS OR ELSEWHERE IN THE BUILDING. SPONSOR HAS NO OBLIGATION TO CORRECT OR REPAIR ANY OF THESE ITEMS AND CONDITIONS AND WILL NOT BE LIABLE TO ANY PURCHASER OR THE BOARD THEREOF. IF PURCHASERS OR ANY BOARD DESIRES TO CORRECT OR REPAIR ANY OF THESE ITEMS OR CONDITIONS, TO THE EXTENT THEY CAN BE CORRECTED OR REPAIRED, THEY WILL HAVE TO PROCEED AT THEIR SOLE COST AND EXPENSE BY THEMSELVES AND/OR UNDER ANY WARRANTIES OR UNDERTAKINGS ASSIGNED TO THEM BY SPONSOR.

(*See* Exhibit k of Miller Affidavit.)

Lastly, the Offering Plan here included a valid and specific limited warranty in accordance with the provisions of General Business Law section 777–b, which, as provided in General Business Law article 36–B, entitled Ocean One to exclude or modify all express warranties, including the preclusion of any claim for damages based on their breach. See Pine St. Homeowners Ass'n v 20 Pine St. LLC, 109 AD3d 733, 735 (1st Dept 2013).

Based upon the foregoing, the action at bar should be dismissed against Ocean One.

POINT IV

THE CROSS-CLAIMS FOR INDEMNIFICATION AND CONTRIBUTION ASSERTED BY DEFENDANTS DRYVIT SYSTEMS, INC., SESSA PLASTERING CORP., JOSEPH ANTHONY PLASTERING CORP., AND BASS PLUMBING & HEATING CORP. MUST BE DISMISSED

a. No Duty to Indemnify Exists.

Defendants Dryvit Systems, Inc. ("Dryvit"), Sessa Plastering Corp., ("Sessa"), JosephAnthony Plastering Corp. ("Joseph Anthony"), and Bass Plumbing & Heating Corp. ("Bass") (collectively "cross-claiming defendants") each asserts claims against Ocean One, Rosemill, Miller, and Rose for common-law indemnification. Each of these claims, however, must fail.

"The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party." Curreri v Heritage Prop. Inv. Trust, Inc., 48 AD3d 505, 507 (2d Dept 2008). Absent a duty of the alleged tortfeasor to the injured party, however, such claims must fail. Id.

Here, each of the cross-claiming defendants failed to allege that such a legal duty exists

sufficient to establish a cause of action for indemnification against Ocean One, Rosemill, Miller, or Rose. And, for the reasons stated in Points I, II, and III above, nor can it. Furthermore, to the extent Sessa alleges a contractual-indemnification claim against Ocean One, Rosemill, Miller, and Rose, this claim, too, must fail. Sessa has failed to identify any alleged indemnification agreement between it and Defendants. Bare legal conclusions to the contrary are not to be presumed true. Kupersmith v Winged Foot Golf Club, Inc., 38 AD3d 847, 848 (2d Dept 2007). Thus, even affording the pleadings of the cross-claiming defendants every possible favorable inference, they nevertheless fail to sufficiently state a cause of action and should be dismissed pursuant to CPLR § 3211(a)(7). See Palo v Cronin & Byczek, LLP, 43 AD3d 1127, 1127 (2d Dept 2007).

b. No Claim for Apportionment Exists in an Action for Breach of Contract.

The New York State Court of Appeals has made clear that no claim for apportionment of liability exists in claims arising from breach of contract. Specifically, in Bd. of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 28 (1987), the Court stated:

> To permit apportionment of liability, pursuant to CPLR 1401, arising solely from breach of contract would not only be at odds with the statute's legislative history, but also do violence to settled principles of contract law which limit a contracting party's liability to those damages that are reasonably foreseeable at the time the contract is formed.

Here, each of the cross-claiming defendants has asserted a contribution claim against Ocean One, Rosemill, Miller, and Rose, in defense of Plaintiff's allegations of breach of contract and warranty claims against them. However, as stated above, such claims are prohibited under

New York State law. It is therefore respectfully submitted that such cross-claims for contribution against Ocean One, Rosemill, Miller, and Rose be dismissed in their entirety pursuant to CPLR section 3211(a)(7).

CONCLUSION

For the reasons stated, it is respectfully submitted that the causes of action against Defendants Ocean One Condominium, Inc., Rosemill LLC, Jonathan T. Miller, and Allan V. Rose, and all cross-claims, be dismissed in their entirety.

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SALAMON, GRUBER, BLAYMORE
& STRENGER, P.C.
By: _____
Sanford Strenger
Victoria Rosner
Attorneys for Defendants Ocean One Condominium, Inc., Rosemill LLC, Jonathan T. Miller & Allan V. Rose
97 Powerhouse Road, Suite 102
Roslyn Heights, NY 11577
(516) 625-1700