

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of February, 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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BOARD OF MANAGERS OF THE ARCHES AT
COBBLE HILL CONDOMINIUM,

Index No. 19643/06

Plaintiff,

- against -

HICKS & WARREN, LLC, et al.,

Defendants.

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The following papers numbered 1 to 8 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-2 5-6
Opposing Affidavits (Affirmations)_____	3 7
Reply Affidavits (Affirmations)_____	4 8
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers in this action by plaintiff Board of Managers of the Arches at Cobble Hill Condominium (plaintiff) alleging 18 causes of action, defendant The Stegla Group, Inc./White Rose Contracting, Inc. (Stegla) moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing plaintiff's complaint as against it.

Defendants St. Peters, LLC and Stanley Listokin (Listokin) move, pursuant to CPLR 3211 (a) (3) and (7) and 3016 (b), for an order dismissing plaintiff's complaint as against them.

On June 29, 2001, defendant Triangle Equities Development Company, LLC (Triangle) formed defendant Hicks & Warren, LLC (H & W) for the purpose of acquiring real property located at 397 Hicks Street and 101-117 Warren Street, in Brooklyn, New York. The sole members of H & W are defendant 397 Hicks Street, LLC and defendant St. Peters, LLC. The majority member of 397 Hicks Street, LLC is Lester Petracca (Petracca). The sole member of St. Peters, LLC is Listokin. The real property acquired by H & W consisted of a rehabilitated church structure, a rectory, and a nursing academy. In order to reconstruct the premises into a residential complex, containing 59 units located on the basement through fifth floors with a street level lobby and three shared garden courtyards, H & W, as owner, entered into a construction contract, dated October 18, 2002, with Stegla, as contractor, for such renovation of the premises. Defendant Scarano & Associates (Scarano) was the architect for the project.

H & W prepared and submitted an Offering Plan for the purpose of converting the premises to condominium ownership. The Offering Plan was accepted for filing with the Attorney General in October 2003. H & W was the sponsor and selling agent for the premises, pursuant to the Offering Plan for the sale of the residential units, which was dated October 20, 2003 and subsequently amended. On October 23, 2003, H & W

presented the Offering Plan to proposed purchasers and commenced the offering for sale of the 59 residential units at the premises. Title to the first unit was transferred on or about January 24, 2005.

Plaintiff is the Board of Managers which represents the condominium unit owners. Under Real Property Law § 339–dd, plaintiff, as the Board of Managers of the condominium, is empowered to maintain an action on behalf of the condominium owners with respect to “any cause of action relating to the common elements of more than one unit” (*Residential Bd. of Managers of Zeckendorf Towers v Union Sq.-14th St. Assocs.*, 190 AD2d 636, 636 [1993]). On June 30, 2006, plaintiff filed this action as against H & W; 397 Hicks Street, LLC; St. Peters, LLC; Listokin; Petracca; Triangle; Stegla; Scarano; and others. Plaintiff’s 74-page complaint alleges 18 causes of action, seeking monetary damages. The first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action are asserted as against both “the Sponsor” and “the Developer.” The term, “the Sponsor,” is used by plaintiff to be inclusive of H & W, as well as St. Peters, LLC; Listokin; 397 Hicks Street, LLC; and Petracca. The term “the Developer” is used by plaintiff to mean Triangle and Petracca. The tenth cause of action is asserted solely as against the Sponsor. The eleventh, twelfth, thirteenth, and fourteenth causes of action are asserted as against Scarano, the architect. The fifteenth and sixteenth causes of action are asserted as against Stegla. The seventeenth and eighteenth causes of action are asserted as against the managing agent (i.e., TKR Property Services, Inc., Marc. H. Kurs, and

Jordan Kurs, who are also defendants herein).

Stegla's motion seeks dismissal of the fifteenth and sixteenth causes of action, which (as noted above) are the sole two causes of action asserted as against it. Plaintiff's fifteenth cause of action alleges a breach of contract claim as against Stegla. Specifically, plaintiff asserts that H & W entered into a contract with Stegla, under which Stegla was to construct the premises in accordance with the specifications set forth in the architect's report. Plaintiff claims that Stegla, however, failed to construct the premises in accordance with such specifications, but constructed a condominium which was defective in numerous ways. Plaintiff alleges that by doing so, Stegla breached its contractual obligation to it, as a third-party beneficiary of the contract between Stegla and H & W.

It is well established that "a third party may sue as a beneficiary on a contract made for [its] benefit" (*Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 655 [1976]). "However, '[g]enerally it has been held that the ordinary construction contract - - i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party- -does not give third parties who contract with the promisee the right to enforce the latter's contract with another'" (*Board of Managers of Riverview at College Point Condominium III v Schorr Brothers Dev. Corp.*, 182 AD2d 664, 665 [1992], quoting *Port Chester Elec. Constr. Corp.*, 40 NY2d at 656; see also *Hamlet on Olde Oyster Bay Home Owners Assn. v Holiday Organization*, 12 Misc 3d 1182 [A], *22, 2006 NY Slip Op. 51378 [U] [2006]). "Such third parties are generally considered mere

incidental beneficiaries” (*Board of Managers of Riverview at College Point Condominium III*, 182 AD2d at 665, quoting *Port Chester Elec. Constr. Corp.*, 40 NY2d at 656). Moreover, “[w]here a provision exists in an agreement expressly negating an intent to permit enforcement by third parties . . . that provision is decisive” (*Nepco Forged Products v Consolidated Edison Co. of N.Y.*, 99 AD2d 508, 508 [1984]; see also *Board of Managers of Alexandria Condominium v Broadway/ 72nd Assoc.*, 285 AD2d 422, 424 [2001]).

Here, the contract between H & W and Stegla contains no provision expressly stating an intention to benefit plaintiff (see *Regatta Condominium Assn. v Village of Mamaroneck*, 303 AD2d 739, 739 [2003]). Instead, article 1.1.2 of the General Conditions of the Contract for Construction between Stegla and H & W expressly provides:

“1.1.2 THE CONTRACT

The Contract Documents form the contract for Construction . . . The Contract Documents shall not be construed to create a contractual relationship of any kind . . . between any person or entities other than the Owner and Contractor.”

Thus, Stegla’s contract contains an explicit provision which specifically negates an intent to permit enforcement by third parties (see *Board of Managers of Alexandria Condominium*, 285 AD2d at 424; *Nepco Forged Products*, 99 AD2d at 508).

Plaintiff contends, however, that the broader circumstances show that the condominium purchasers were the intended beneficiaries of the construction contract, notwithstanding this express disclaimer to the contrary. Plaintiff argues that there are ambiguities present in the construction contract since section 1.1.2 conflicts with other portions of the construction contract, and that these other clauses in the construction contract show that the condominium unit owners were intended to receive the contract's benefits.

Plaintiff points to article 2 of the Construction Contract's Standard Form of Agreement Between Owner and Contractor, under which Stegla agreed to perform all the work shown or reasonably inferable from the Contract Documents, which "generally includes site work and building construction required for the renovation and rehabilitation of existing space previously used as a Church, rectory, and school into a residential condominium complex." Plaintiff also relies upon the construction contract's General Conditions of the Contract of Construction, under which Stegla agreed that it had reviewed plans, drawings, specifications, and other contract documents, illustrating the exact work which was to be performed at the premises, and that it would follow these plans, drawings, specifications, and other documents. Plaintiff alleges that there is no reason to believe that the exact work described in these plans, drawings, specifications, and other contract documents did not describe the same work to be performed as outlined in the Architect's Report described in the Offering Plan. Plaintiff argues that, therefore,

according to the general scheme of the construction contract, it is inconceivable that Stegla did not intend for the residents who would occupy the condominium complex to be the beneficiaries of the work performed by Stegla under this contract.

Plaintiff further relies upon Stegla's warranties to H & W and to the architect, in sections 3.5.1 and 3.5.2, that its work would be free from defects and that it would remedy at its own cost and expense any defects in the work for any part of the project due to faulty materials or workmanship. It contends that since these warranties were effective during the time the individual unit owners were viewing the premises, signing contracts, closing title, and moving into individual units, Stegla must have intended that the purchasers of units should benefit from its contract with H & W and receive all appropriate repairs and replacement of its intended work.

Plaintiff also points to sections of the construction contract under which Stegla agreed to indemnify H & W for all claims arising from the work performed by it and its promise to purchase insurance coverage relating to its work. Plaintiff argues that these indemnification and insurance provisions show that Stegla agreed to protect the condominium residents from the results of any construction defects and evidence that Stegla's work was performed for their benefit as third-party beneficiaries. In addition, plaintiff asserts that Stegla made representations describing the new building project to the general public on its website, and provided information to Triangle and Scarano for use on their websites. Plaintiff contends that these promotional materials show that the

work which Stegla performed was for the benefit of the persons purchasing the residences described therein.

Plaintiff argues that the court should assess the construction contract as a whole and consider the above facts and circumstances of Stegla's performance of work under the construction contract and, based thereon, find that the condominium unit owners, who it represents, were the intended beneficiaries of the contract. Plaintiff's argument must be rejected. "[I]t is a court's task to enforce a clear and complete agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1,6 [2004]). Here, there is no ambiguity in the terms of the contract since there is an express disclaimer of third-party beneficiary status to plaintiff (*see Nepco Forged Products*, 99 AD2d at 508; *Board of Managers of Alexandria Condominium*, 285 AD2d at 424).

An intention to benefit plaintiff cannot be inferred from the general scheme of the construction contract since this would be in contravention of the explicit disclaimer (*see Board of Managers of Alexandria Condominium*, 285 AD2d at 424). The cited warranties, indemnification, and insurance provisions relied upon by plaintiff simply relate to claims vis-a-vis H & W and Stegla and do not confer third-party beneficiary status upon plaintiff (*see Regatta Condominium Assn.*, 303 AD2d at 739). Furthermore, mere promotional materials cannot be reasonably construed as conferring third-party

beneficiary status upon plaintiff in the face of an express disclaimer in the actual contract. The plain express language of the construction contract definitively contradicts plaintiff's factual allegation that it is an intended third-party beneficiary of the construction contract.

While plaintiff relies upon *Board of Managers of the Alfred Condominium v Carol Management, Inc.* (214 AD2d 380, 382 [1995]) to support its contention that it can pursue its breach of contract claim as against Stegla as a third-party beneficiary of the contract between Stegla and H & W, that case is readily distinguishable from the case at bar. In that case, the Appellate Division, First Department, found that the unit owners were third-party beneficiaries to an agreement between a construction manager and a sponsor, notwithstanding a disclaimer of any obligations to third parties stated in the body of the agreement, due to a rider to the contract which “explicitly refer[red] to the unit owners as beneficiary parties to that agreement” (*id.*). That rider specifically stated:

“WARRANTIES. The warranties provided under the Contract Document shall be for the benefit of and enforceable by . . . any tenant of the project” (Record on Appeal).

Similarly, in *Board of Managers of Astor Terrace Condominium v Schuman, Lichtenstein, Claman & Efron*, 183 AD2d 488, 489 [1992] (cited by plaintiff), the Appellate Division, First Department, did not look only to facts and circumstances

surrounding the contracts to ascertain third-party beneficiary status, but looked to the contract's "express language." Furthermore, in *Key International Manufacturing, Inc. v Morse Diesel, Inc.* (142 AD2d 448, 455 [1988]), also relied upon by plaintiff, the Appellate Division, Second Department, in finding third-party beneficiary status to exist, based such status on the fact that the promisee, by its officer, had "unequivocally stated that it intended that its contracts would benefit the party claiming third-party beneficiary status." Here, there is no such admission by Stegla, but only an express disclaimer in the contract (*see Port Chester Elec. Constr. Corp.*, 40 NY2d at 655).

Thus, inasmuch as the contract between H & W and Stegla, by its own terms, expressly negates enforcement by third-parties, this provision is controlling (*see Board of Managers of Alexandria Condominium*, 285 AD2d at 424). Therefore, the documentary evidence demonstrates that plaintiff was only an incidental, not intended beneficiary, of Stegla's contract with H & W (*see Residential Bd. of Managers of Zeckendorf Towers*, 190 AD2d at 636; *Board of Managers of Riverview at College Point Condominium III*, 182 AD2d at 664).

"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" (*Berardino v Ochlan*, 2 AD3d 556, 557 [2003]).

Consequently, since there is no privity of contract, plaintiff has no right to recover from Stegla for breach of contract, and its fifteenth cause of action as against Stegla must be

dismissed (*see* CPLR 3211 [a] [1]).

Plaintiff's sixteenth cause of action as against Stegla seeks to recover damages for negligence. It alleges that Stegla caused the construction work at the premises to be performed negligently, resulting in numerous defects in the construction of the premises. It asserts that such defects have created dangerous conditions, whereby unit owners risk injury due to existing mold contamination, potential fire hazards, and falling roof tiles.

It is well settled that "plaintiff cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship" (*Residential Bd. of Managers of Zeckendorf Towers*, 190 AD2d at 636; *see also Board of Managers of Riverview at College Point Condominium III*, 182 AD2d at 665-666). Thus, since plaintiff is only an incidental, not intended beneficiary of the contract between H & W and Stegla, it may not recover damages for negligent construction (*see Residential Bd. of Managers of Zeckendorf Towers*, 190 AD2d at 636).

Moreover, "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated" (*Board of Managers of Riverview at College Point Condominium III*, 182 AD2d at 665-666, quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Here, plaintiff has failed to establish that a legal duty of care was owed to the condominium unit owners independent of the contractual duty allegedly arising from the agreement between H & W and Stegla, in which they were not intended third-party beneficiaries (*see Board of Managers of*

Riverview at College Point Condominium III, 182 AD2d at 666).

Plaintiff's further argument that Stegla assumed a duty of care when it entered into its contract with H & W to render services, thereby giving rise to tort liability, is rejected. Plaintiff relies upon the rule of law espoused in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136, 140 [2002] [internal citations omitted]) that a duty is assumed "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launches a force or instrument of harm,' (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

Plaintiff's reliance upon the *Espinal* rule is misplaced. While plaintiff argues that Stegla created and exacerbated hazardous conditions at the premises, there is no allegation of a personal injury which resulted from Stegla's failure to exercise due care from which it could be deemed that Stegla launched a force or instrument of harm (*see Espinal*, 98 NY2d at 140).

Plaintiff's argument that it relied upon Stegla's performance due to the indemnification and insurance provisions in the construction contract, is also unavailing. As plaintiff was not a third-party beneficiary of this agreement, it could not reasonably rely upon these terms. In addition, since, by letter dated February 17, 2005, Stegla was terminated by H & W, it cannot be said that Stegla's lack of continued performance was

the proximate cause of plaintiff's alleged damages.

Plaintiff also points to section 3.3.1 of the construction contract, under which Stegla agreed to be responsible for "any loss, damage, liability, or cost of correcting defective work," and contends that this shows that Stegla entirely displaced H & W's obligations. Such contention is devoid of merit. H & W's obligations to maintain the premises safely were not displaced in any measure by such section (*see Espinal*, 98 NY2d at 140; *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 68 [2004]). Consequently, plaintiff's sixteenth cause of action must be dismissed (*see CPLR 3211 [a] [1], [7]*).

The court now turns to the motion by St. Peters, LLC and Listokin. St. Peters, LLC and Listokin, in support of their motion, point out that only H & W, and not either of them, was the sponsor for the condominium. Rather (as noted above), St. Peters, LLC was a member of H & W, and Listokin was the sole member of St. Peters, LLC. It is well established that a member of a limited liability company is statutorily exempted from individual liability for the contractual obligations of the limited liability company (*see Limited Liability Company Law § 609; Retropolis, Inc. v 14th Street Development, LLC*, 17 AD3d 209, 210 [2005]; *Collins v E-Magine, LLC*, 291 AD2d 350, 351 [2002]; *Hamlet on Olde Oyster Bay Home Owners. Assn.*, 12 Misc 3d at *15). Thus, since H & W was a properly formed limited liability company, St. Peters, LLC, as its member, cannot be held liable for H & W's contractual obligations, and Listokin, who is even further removed from H & W, as St. Peters, LLC's member, also cannot be held liable for H & W's

contractual obligations. Consequently, inasmuch as St. Peters, LLC and Listokin were not parties to the purchase agreements with the residential owners of the condominium units represented by plaintiff, there is no privity of contract between these parties and plaintiff.

Plaintiff argues that St. Peters, LLC and Listokin may be held liable under a contract theory based upon the fact that St. Peters LLC, by Listokin, and Listokin, individually, both executed the Sponsor's Certification of the Offering Plan. This argument must be rejected. The certification was required to be included in the Condominium Offering Plan pursuant to regulations promulgated by the Attorney General (*see* General Business Law § 352-e [6]; 13 NYCRR 20.1 [c] [1] [2]; 13 NYCRR 20.2 [c] [5] [i] [A-1]; 13 NYCRR 20.4 [b]; 13 NYCRR 22.2 [c] [6] [i] [a]][A-1]; 13 NYCRR 22.4 [b]). Such certifications do not establish the requisite privity upon which to predicate any contract-based claims (*see Hamlet on Olde Oyster Bay Home Owners Assn.*, 12 Misc 3d at *10).

Plaintiff's sixth cause of action purports to allege a claim for breach of contract as against St. Peter, LLC and Listokin based upon a breach of the purchase agreement entered into by each unit owner of the condominium. Plaintiff's seventh cause of action seeks to assert a claim for breach of express warranty against St. Peters, LLC and Listokin based upon the representations made in the Offering Plan, which were incorporated into the purchase agreements. Plaintiff's eighth cause of action purports to

allege a claim for breach of implied warranty against St. Peters, LLC and Listokin based upon implied warranties under General Business Law § 777a, which, it alleges, these defendants were obligated to provide, as part of the individual unit owners' purchase agreements. In the absence of contractual privity, however, plaintiff cannot maintain its sixth cause of action for breach of contract or its seventh and eighth causes of action for breach of express warranty and breach of implied warranty, respectively (*see Residential Bd. of Managers of Zeckendorf Towers*, 190 AD2d at 637; *Board of Managers of Riverview College Point Condominium III*, 182 AD2d at 665; *Dalton Farms Homeowners Assn. v New Deal Dev.*, 14 Misc 3d 1204 [A], *1, 2006 NY Slip Op. 52407 [U] [2006]).

Plaintiff's ninth cause of action alleges a breach of the covenant of good faith and fair dealing. It asserts that by refusing to repair and correct the alleged defects found in the buildings and by failing to provide items promised in the Offering Plan and/or promotional materials, St. Peters, LLC and Listokin have breached this covenant. However, "all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). Thus, such claim, in essence, is tantamount to a cause of action for breach of contract and is redundant of such a claim. Therefore, as with plaintiff's breach of contract claim, plaintiff's ninth cause of action cannot withstand the motion to dismiss by St. Peters, LLC and Listokin, and dismissal of this cause of action is mandated (*see CPLR 3211 [a] [7]*).

Plaintiff's third cause of action alleges a claim for breach of fiduciary duty, waste, and mismanagement. Such claim is based upon the failure to repair construction defects. Thus, such claim also sounds in contract and, as discussed above, St. Peters, LLC and Listokin may not be held liable for such breach as they were not the sponsor. Furthermore, while a board member has a fiduciary duty to the residential unit owners (*see Board of Managers of Acorn Ponds at North Hills Condominium I v Long Pond Investors*, 233 AD2d 472, 472-473 [1996]; *Board of Managers of Fairways at North Hills Condominium v Fairways at North Hills*, 193 AD2d 322, 324-325 [1993]), plaintiff concedes that the Offering Plan Amendment, dated January 20, 2005, does not identify Listokin as a member of the Board of Managers. Consequently, dismissal of this cause of action as against St. Peters, LLC and Listokin is warranted (*see CPLR 3211 [a] [7]*).

Plaintiff's first cause of action, which asserts a claim of fraud, deceit and misrepresentation, states that St. Peters, LLC and Listokin, as sponsors, actively misrepresented conditions at the premises and failed to comply with their obligations under the Offering Plan. It alleges that the Offering Plan was incomplete and inaccurate; omitted material facts; contained untrue facts; contained fraud and deception with concealment and suppression; contained promises or representations as to the future beyond reasonable expectations or unwarranted by existing circumstances; and contained representations or statements which were false. Specifically, plaintiff asserts that the Architect's Report in the Offering Plan made a number of statements which were

demonstrably false, and which misrepresented the condition of the premises. Plaintiff claims that St. Peters, LLC and Listokin knew the truth or with reasonable effort could have known the truth, but failed to disclose material facts so as to conceal from the prospective purchasers of the condominium units the true condition of the premises and to induce them to purchase these units.

Pursuant to the Martin Act (General Business Law § 352-e [1] [b]), the Attorney General has sole and exclusive jurisdiction to prosecute sponsors who make false statements in Offering Plans and it is well-settled that there is no private cause of action available to enforce the Act (*see Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]; *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 276 [1987]; *Keh Hsin Shen v Astoria Fed. Sav. & Loan*, 295 AD2d 319, 320 [2002]; *Thompson v Parkchester Apts. Co.*, 271 AD2d 311, 311 [2000]; *167 Housing Corp. v 167 Partnership*, 252 AD2d 397, 398 [1998]; *Thompson v Parkchester Apts. Co.*, 249 AD2d 68, 68 [1998]; *Whitehall Tenants Corp. v Estate of Olnick*, 213 AD2d 200, 200 [1995]; *Rego Park Garden Owners v Rego Park Gardens Assocs.*, 191 AD2d 621, 622 [1993]; *Board of Managers of Fairways at North Hills Condominium v Fairway at North Hills*, 150 AD2d 32, 38-39 [1989]; *Rubenstein v East River Tenants Corp.*, 139 AD2d 451, 454-455 [1988]; *Kramer v Zeckendorf*, 10 Misc 3d 1056 [A], *5, 2005 NY Slip Op. 51990 [U]). Plaintiff argues, however, that its claim is one in common-law fraud, which is not foreclosed by the Martin Act.

Plaintiff contends that the certifications of the Offering Plan by St. Peters, LLC and Listokin individually establish a basis upon which to premise a common-law fraud claim against them. “To recover for fraud in New York, ‘[t]here must be a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury’”. *Louros v Kreicas*, 367 F. Supp. 2d 572, 594 (SDNY 2005), quoting, *JoAnn Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112, 119 (1969). It has been held that a defendant may be personally liable where he or she executes a certification in his or her individual capacity and knowingly and intentionally advances alleged misrepresentations (*see Birnbaum v Yonkers Contracting Co.*, 272 AD2d 355, 357 [2000]; *Zanani v Savad*, 228 AD2d 584, 585 [1996]; *Residential Bd. of Managers of Zeckendorf Towers*, 190 AD2d 637-638).

Plaintiff’s fraud claim is premised upon alleged false and fraudulent representations relating to materials and design contained in the Offering Plan which were known to be false and were intended to deceive prospective buyers, the accuracy of which was certified by defendants St. Peters, LLC and Listokin personally. On a motion to dismiss pursuant to CPLR 3211, the allegations must be accepted. *EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). The Purchase Agreement acknowledges that purchasers relied upon information contained in the Offering Plan and the complaint

alleges that had the purchasers “ known the truth, they would not have purchased”(¶ 103). Plaintiff has thus alleged facts sufficient to survive the instant motion to dismiss as to the First Cause of Action alleging common law fraud. See *CPC International, Inc.v McKesson Corp.*, 70 NY2d 268, 284-86 (1987), implicitly recognizing that a common-law fraud claim is not precluded under the Martin Act, and *Scalp & Blade, Inc.v Advest, Inc.*, 281 AD2d 882, 883 (4th Dep’t, 2001), in which the Appellate Court observed: “Nothing in the Martin Act, or in the Court of Appeals cases construing it, precludes a plaintiff from maintaining common-law causes of action based on such facts as might give the Attorney General a basis for proceeding civilly or criminally against a defendant under the Martin Act” (*citing CPC and Vermeer*).

However, to the extent that its First Cause of Action is not wholly premised upon the allegedly false representations contained in the Offering Plan, but is also based upon allegedly false representations contained in the promotional materials disseminated by St. Peters, LLC and Listokin, plaintiff’s claim is devoid of merit. The Offering Plan, in pertinent part, states:

“31. GENERAL

* * *

e. Plan as Fair Summary

. . . Any information or representation made, but not contained in this Offering Plan must not be relied upon . . . No person

has been authorized to make any statement or representation or provide any information which is not expressly contained herein. Any information, data, or representations not contained herein or in the documents and exhibits referred to herein must not be relied upon. This Plan may not be changed or modified orally.”

In addition, the Purchase Agreement provides:

“No Representations.

Purchaser acknowledges that the information he has relied upon in making his decision to sign this Agreement is solely that contained in this Agreement and the [Offering Plan]. He has not relied upon any architect’s plans, sales plans, selling brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral . . . including, but not limited to, any relating to the description or physical condition of the Unit, Building or Condominium. . .”

Thus, based upon these provisions, plaintiff cannot show that it reasonably relied upon any alleged misrepresentations contained in the promotional materials (*see generally*

Oko v Walsh, 28 AD3d 529, 529 [2d Dep't, 2006]).

Plaintiff's second cause of action alleges a claim of negligence in that St. Peters, LLC and Listokin purportedly negligently disseminated the Offering Plan, the Architect's Report and certification, and the promotional materials, which were allegedly inaccurate with respect to the condition of the premises. These allegations of negligent conduct pertain to representations contained in the Offering Plan and are barred by the Martin Act (*see Rego Park Gardens Owners v Rego Park Gardens Assocs.*, 191 AD2d 621, 622 [1993]). To the extent that plaintiff has any claim regarding the promotional materials, this cause of action would be subsumed within its fourth and fifth causes of action of which this cause of action would be duplicative. There is otherwise no evidence of a duty running from these defendants to plaintiff independent of the contractual obligations deriving from the Purchase Agreements for which there is no privity between plaintiff and St. Peters, LLC and Listokin. See, *Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382, 389 (1987). Consequently, dismissal of plaintiff's second cause of action is warranted (*see CPLR* 3211 [a] [3] , [7]).

Plaintiff's fourth cause of action alleges deceptive trade practices under General Business Law § 349 based upon the dissemination of the promotional materials to potential purchasers of the condominium units. It asserts that the representations in the promotional materials were false and misleading. Plaintiff's

fifth cause of action alleges a claim for false advertising under General Business Law § 350 due to the dissemination of the promotional materials. It asserts that the omissions and statements in the promotional materials constituted false advertising.

St. Peters, LLC and Listokin argue that the court should dismiss these claims because General Business Law § 349 aims at consumer-oriented transactions of modest proportion where damages are the greater of \$50 or actual damages. They state that here, in contrast, the actions described in the complaint are substantial, private, single-shot contractual transactions, resulting in \$5,000,000 in alleged damages.

This argument lacks merit. These consumer protection statutes apply to virtually all economic activity, not just consumer-oriented activity of modest proportion (*see Blue Cross & Blue Shield of N.J. v Philip Morris USA Inc.*, 3 NY3d 200, 205 [2004]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002]; *Karlin v IVFAM.*, 93 NY2d 282, 290 [1999]). Moreover, it has been expressly held by the Appellate Division, Second Department, in *Board of Managers of Bayberry Greens Condominium v Bayberry Greens Condominium* (174 AD2d at 596), that General Business Law § 349 permits the maintenance of a private cause of action for deceptive practices in the advertisement and sale of condominium units (*see also B.S.L. One Owners Corp. v Key Intl. Mfg.*, 225 AD2d 643, 644 [1996]; *Breakwaters Townhomes Assn. of Buffalo v Breakwaters of Buffalo*, 207 AD2d 963, 964 [1994];

Hamlet on Olde Oyster Bay Home Owners Assn., 12 Misc 3d at *11). The Martin Act does not bar such a claim (see *Board of Managers of Bayberry Greens Condominium*, 174 AD2d at 596).

St. Peters, LLC and Listokin argue that this court should not follow the *Board of Managers of Bayberry Greens Condominium* (174 AD2d at 596) decision. Such argument must be rejected. While the court notes that this decision is contrary to the holding of the Appellate Division, Third Department, in *Green Harbour Homeowners' Association, Inc. v G. H. Development and Construction, Inc.* (307 AD2d 465, 468-469 [2003]), this court is bound to follow the controlling precedent in the Appellate Division, Second Department (see *Hamlet on Old Oyster Bay Home Owners Assn.*, 12 Misc 3d at *11). Consequently, dismissal of plaintiff's fourth and fifth causes of action must be denied. See, *Solomon v Bell Atlantic Corp.*, 9 AD3d 49, 52 (1st Dep't, 2004) (any victim of misrepresentation or false advertising has claim under GBL §§ 349 and 350.)

Plaintiff's tenth cause of action alleges a claim for breach of Real Property Law § 339-p, which requires that the floor plans of the building must be filed in the office of the recording officer, simultaneously with the recording of the declaration of condominium, showing the layout, location, and approximate dimensions of the unit. Plaintiff alleges that these plans have never been filed and that St. Peters, LLC and Listokin have, therefore, violated Real Property Law § 339-p. Since St. Peters, LLC

and Listokin are neither the sponsor nor the developer, they had no obligation to file such floor plans. Moreover, any such failure to file does not create a private right of action to sue for damages against St. Peter, LLC or Listokin. Consequently, this cause of action must be dismissed (*see* CPLR 3211 [a] [7]).

Accordingly, Stegla's motion for an order dismissing plaintiff's complaint as against it, is granted. The motion by St. Peters, LLC and Listokin for an order dismissing plaintiff's complaint as against them is granted with respect to plaintiff's second, third, sixth, seventh, eighth, ninth, and tenth causes of action, and is denied with respect to plaintiff's first, fourth and fifth causes of action.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.