[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Allstate

INDEX NO. 115347/06

MOTION DATE 5/8/07

- v -

MOTION SEQ. NO. 01

Onetti, 7

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

AUG 02 2007

COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of third-party defendant E. S. Barrekette, P.E., Ph.D., for an order dismissing the Amended Complaint of third-party plaintiffs Fabian Onetti and Maria Pia Onetti, as to defendant Barrekette, and their Eighth Cause of Action: Fraud, Deception, Concealment or Suppression, Omitted Material Facts in the Description of Property and Electrical Report, is granted. It is further

ORDERED that the motion of third-party defendant E. S. Barrekette, P.E., Ph.D., for an order dismissing the Amended Complaint of third-party plaintiffs Fabian Onetti and Maria Pia Onetti, as to defendant Barrekette, and their Ninth Cause of Action: Breach of Express Warranties in the Description of Property and Electrical Report, is granted without opposition and on consent. It is further

ORDERED that counsel for third-party defendant E. S. Barrekette, P.E., Ph.D. shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for third-party plaintiffs Fabian Onetti and Maria Pia Onetti.

CAROL EDMEAD J.S.C.

Dated: 7/31/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

ALLSTATE INSURANCE COMPANY a/s/o
WADE GRIGGS,

Index No. 115347/06

Plaintiff

-against-

FABIAN ONETTI and THE GATSBY CONDOMINIUM,

Defendants.

FABIAN ONETTI and MARIA PIA ONETTI,

Third-Party Plaintiffs,

Third-Party Index No.
591143/06

-against-

DECISION/ORDER

THE GATSBY CONDOMINIUM, INTELL 65 EAST 96, LLC, INTELL 96 MANAGERS, LLC, OMER REALTY, LLC, ALBERT ATTIAS, GARY BARNETT, OFER KALINA, E.S. BARREKETTE, P.E., Ph.D. and HALSTEAD MANAGEMENT, LLC,

Third-Party Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Third-Party defendant E.S. Barrekette, P.E., Ph.D. ("Barrekette") moves for an order, pursuant to CPLR 3211, dismissing the Third-Party Complaint of Third-Party plaintiffs Fabian Onetti ("Onetti") and Maria Pia Onetti (collectively "Third-Party plaintiffs"), as against Barrekette.

The Amended Third-Party Complaint

This is an action for property damage allegedly sustained by third-party plaintiffs as a result of a fire in their apartment located at 65 East 96th Street, Apartment 9B, New York, New

York (the "Apartment"). The Condominium Offering Plan for 65 East 96th Street, New York, New York (the "Building") was accepted for filing by the Office of the Attorney General of the State of New York on May 17, 2000 as amended from time to time (the "Plan" or "Offering Plan"). On page 126 of the Plan, the Sponsor, defendant Intell 65 East 96, LLC (the "Sponsor") states that Barrekette was the engineer of record for the Building, and that Barrekette, as an expert, had examined the physical condition of the Building and rendered the report that was relied upon by the Sponsor as a basis for the "Description of Property" attached to the Plan. The Description of the Property, with its Electrical Report, was dated April 11, 2000.

The "Description of Property" provided a description of the electrical systems throughout the Building (the "Report" or the "Electrical Report"). The Electrical Report did not identify any hazardous conditions relating to the Building's electric and gas meters. Rather, the Electrical Report stated, in part:

> The building is currently being rewired to take the loads of modern households. New service had been brought in from the street and enters through six new 24-volt 3-phase master switches are being installed....New Risers have been installed in all apartments. The risers are each protected by a 100 amp circuit breaker....

Barrekette specifically warranted, in the Offering Plan, under Article 23A of the General Business Law, that he had inspected the property and prepared the Offering Plan's "Description of Property," including the Electrical Report therein, and could certify, *inter alia,* that the Plan did not omit any material fact, contain any untrue statements of material fact, contain any fraud, deception or concealment, or contain any promise or representation beyond reasonable expectation. Barrekette personally signed this Certification on April 12, 2000 (the "Certification").

Notwithstanding the representations in the Plan's Electrical Report, the electrical wiring, at all relevant times hereto, was and remains defective in multiple Building units and was not installed, maintained and/or repaired in accordance with New York City Department of Buildings Code, and Rules and Regulations thereunder.

Another resident complained of faulty wiring and filed a complaint with the New York State Division Housing and Community Renewal, Office of Rent Administration ("DHCR"), and on or around January of 2005, the Sponsor represented that the wiring in that resident's unit was repaired.

During third-party plaintiffs' occupancy of the Apartment, neither the Gatsby Condominium (the "Gatsby"), nor the Sponsor-controlled Board, nor Halstead Management, LLC ("Halstead") took any steps to determine the extent of faulty wiring within the Building and to repair hazardous electrical conditions, despite being put on notice that the Building's electrical wiring was defective by virtue of the Electrical Report's identification of the Building's electrical service as aging, marginal in some apartments, and "overfused," as well as by the complaints, from the other resident in the Building.

On or about November 1, 2005 a fire occurred in the wall of the Apartment causing substantial damage (the "Fire").

Third-Party Plaintiffs' Eighth Cause of Action: Fraud, Deception, Concealment or Suppression, Omitted Material Facts in the Description of Property and Electrical Report

At the time the Description of Property and Certification were made, and at the time they were disseminated, they were known by Barrekette to be false and incomplete, and upon information and belief, were made for the purpose of concealing from perspective purchasers,

including the third-party plaintiffs, the true condition of the Building and its components and the hazardous conditions caused by the inadequate and improper wiring in the Apartment, and said false and fraudulent representations and omissions were made with intent to deceive, defraud and induce prospective purchasers, including the third-party plaintiffs, to purchase apartments, including the Apartment.

Third-Party Plaintiffs' Ninth Cause of Action: Breach of Express Warranties in the Description of Property and Electrical Report

Pursuant to the terms of the Offering Plan, Barrekette specifically warranted that the report he had prepared for the Plan, including the Electrical Report which had noticed several hazardous conditions existing in the Building's electrical systems, but did not identify any problems or hazards relating to electrical wiring in the Apartment, did not omit any material fact, contain any untrue statements of material fact, contain any fraud, deception or concealment, or contain any promise or representation beyond reasonable expectation. Barrekette in his Electrical Report, did omit material facts in that it failed to provide notice of the defective wiring located in walls of the Apartment. Barrekette knew or should have known of such defective wiring.

Barrekette's Contentions

As to the fraud cause of action, it should be dismissed because Onetti, a shareholder in a cooperative corporation, alleges facts which, at best, describe viable causes of action under the Martin Act. It is well settled that the Attorney General has exclusive jurisdiction of claims that fall under the Martin Act, and private causes of action for fraud are preempted by the Martin Act.

Furthermore, the fraud cause of action fails because the third-party Complaint fails to set forth the circumstances giving rise to the alleged fraud in sufficient detail, as required by CPLR

3016(b).

Further, the fraud claims should also be dismissed because a cause of action for fraud must be commenced within six years from the date the cause of action accrued or within two years from the date the facts giving rise to the fraud were actually discovered, whichever is longer. The six year statute of limitations for fraud begins to run on the date the document containing the allegedly fraudulent statements was executed. Therefore, using the six-year limitations period, the fraud cause of action accrued at the latest May 17, 2000, the date the Offering Plan was accepted by the Attorney General for filing, and expired on May 17, 2000, well before the Third-Party Summons and Complaint were filed on December 5, 2006.

The two-year imputed discovery statute of limitations is also unavailing to the Onettis. The Electrical Report, prepared in 1999 and the Certification issued in 2000, both placed the third-party plaintiffs on notice of any alleged fraud more than five years before the third-party action was commenced.

As to the engineering malpractice cause of action, it should be dismissed because this cause of action is time barred. The three-year statute of limitations for engineering malpractice began to accrue at the latest on May 17, 2000, which is the date the Attorney General accepted the Offering Plan for filing. The third-party Complaint was not filed until December 5, 2006, more than six and one-half years after the accrual date. [1]

As to the breach of warranty cause of action, in New York there is no recognized cause of

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[1]The court notes that third-party plaintiffs do not assert a cause of action for Engineering Malpractice. Further, based on a telephonic conference with counsel representing both the third-party plaintiffs and Barrekette, on July 30, 2007, counsel for third-party plaintiffs agreed with the court that there is no cause of action for Engineering Malpractice asserted against third-party defendant Barrekette. As such, the court will not address this issue.

action for breach of implied warranty against an architect or engineer and no express warranties were made by Barrekette.

Barrekette was retained by Intell Management, LLC ("Intell") pursuant to a written agreement ("Agreement") to visually inspect the Building and prepare the Report on its physical condition which was to be included in the Offering Plan. It was understood according to the Agreement that "some aspects of the physical condition of the [Building] cannot be ascertained by visual inspection alone." Barrekette visually inspected the Building on June 15, 17 and 19, 1999 and prepared the Report on the physical condition of the Building. His Report was based on a visual inspection of nine apartments at the Building. Because Barrekette's contractual obligations were limited to visual inspection alone, no tests or penetration into walls, ceilings, floors, etc.. were conducted. Moreover, it was understood that not all aspects of the physical condition of the property could be ascertained from a visual inspection alone. In this regard, the Report specifically provided that, unless otherwise stated in the Report, the scope of the inspection did not include any "tests or penetrations into walls, ceilings, floors, etc. or removal of any structural or mechanical elements [and that] it is understood that not all aspects of the physical condition of the [Building] can be ascertained from visual inspection alone . . . ." The Report further provided that it was not a "comprehensive detailed list of every space and piece of equipment [at the Building] or of their condition."

The Report further noted that the Building was being rewired to take the loads of modern households. Significantly, however, Barrekette had no involvement whatsoever with the preparation of plans or specifications regarding the rewiring and Barrekette did not perform any inspection or tests regarding the rewiring.

The Report provides, in part, as follows:

> This report is not to be construed as a guarantee or warranty. It is not intended or prepared for the purpose of fixing a value to the Property or as an opinion as to the advisability or inadvisability to purchase the Property or acquire any of the units being offered pursuant to the Sponsor's Offering Plan.

The Engineer's Certification prepared by Barrekette provides in part:

> (viii) It is to be understood that all aspects of the physical condition of the property cannot be determined by a visual inspection and that all statements contained in this certification are premised on and limited to such visual inspection.

Third-Party Plaintiffs' Contentions

Third-party plaintiffs oppose Barrekette's motion only to the extent that he seeks dismissal of the fraud cause of action based on arguments that the third-party plaintiffs fail to sufficiently plead their cause of action sounding in fraud.

The third-party plaintiffs consent solely to that portion of the motion that seeks dismissal of their cause of action alleging breach of warranty.

Notwithstanding the caveats asserted by Barrekette in his Report and Certification, the final report certified as accurate misrepresented the Building's condition at the time he inspected it inasmuch as (among other defects), while the final report described new rewiring throughout the Building (implying that Barrekette had tested materials inside walls as regards electrical systems) which was presumably safe, the actual electrical wiring contained in multiple Building units was made of combustible material and this defective wiring was not installed, maintained and/or repaired in accord with New York City Department of Buildings Code.

Further, in order to state a cause of action for common-law fraud, it is sufficient for plaintiff to allege that defendant knowingly uttered a falsehood intending to deprive the plaintiff

of a benefit and that the plaintiff was thereby deceived and damaged. Under this standard, the affirmative statements Barrekette made in the Certification itself, which Barrekette expressly acknowledged would be incorporated into the Offering Plan, so that prospective purchasers may rely on his final report, constitute sufficient evidence that he knowingly uttered falsehoods intending to deprive the Onettis' of a benefit as is alleged in the third-party Complaint.

Third-party plaintiffs assert that they have sufficiently pled fraud establishing that they reasonably relied on the representations of Barrekette in purchasing their home.

Third-party plaintiffs concede that slightly more than six years elapsed between the publication of Barrekette's misrepresentations and the filing of the Third-Party Complaint; however, the Onettis nonetheless have complied with the two-year discovery limitations period, as they first became aware of the facts giving rise to their fraud claim in November 2005 when they learned of the defective wiring in the immediate aftermath of the Fire.

A review of the final report and Final Certification, be it in December 2000 (when the Onettis' purchased their Apartment) or any time else, would in no way aid them in the discovery of fraud. To the contrary, Barrekette's statements in the Final report, that the entire building was being "rewired to take the loads of modern households" (replacing earlier concerns found in the Red Herring Report about overfusing) concealed his fraud and lulled the Onettis into a false sense of security about the safety of the electrical systems in the Apartment they had decided to purchase. The Final report, read together with the Final Certification suggests: that Barrekette generally didn't perform testing inside walls, but that he had done so or had otherwise learned about rewiring inside the walls of all the apartments in the Building; that he made no representations as to future changes to the electrical wiring; and that he certified that his

statements were accurate and intended to provide an accurate description of the physical condition of the premises, if not to provide investment advice. These statements provide no clue that the wiring in the walls was or might be made of combustible material. Thus, the statements could not possibly trigger any duty on the third-party plaintiffs' part to investigate further, as Barrekette incorrectly argues. Regrettably, the first time the Onettis had any inkling that their Apartment wall contained defective wiring was after the Fire, when a professional fire investigator so advised them. As the Onettis filed the present claim within two years of the discovery of the fraud, their case against Barrekette should not be dismissed on limitations grounds.

Barrekette's Reply

Third-party plaintiffs attempt to assert a private cause of action for common law fraud. However, this cause of action should be dismissed because it is based solely upon the contents of the Offering Plan, and the Attorney General has exclusive jurisdiction to assert claims for fraud arising out of the contents of an Offering Plan. Significantly, the Third-Party-Complaint and the Amended Third-Party Complaint make no allegations that the Onettis' have any other basis to assert a fraud claim against Barrekette other than the contents of the physical conditions report and his Certification, which are both part of the Offering Plan. Accordingly, since the Offering Plan serves as the sole basis for the claims against Barrekette, the Third-Party Complaint against Barrekette should be dismissed in its entirety since third-party plaintiffs lack standing to assert any such claims.

Analysis

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one"

(*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank,i* 301 AD2d 373, 375 [2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

Defendant, by contrast, is subject to a strict pleading provision.

Th Martin Act

The Court of Appeals has stated, in *Kralik v 239 East 79th Street Owners Corp.*, 5 NY3d 54, 58, 799 NYS2d 433, 435 (2005)

> The Martin Act governs the offer and sale of securities in and from New York State, including securities representing "participation interests" in cooperative apartment buildings. The Attorney General bears sole responsibility for implementing and enforcing the Martin Act, which grants both regulatory and remedial powers aimed at detecting, preventing and stopping fraudulent securities practices (*see CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 514 N.E.2d 116 [1987]). According to the Attorney General, ...his duties under the Martin Act with respect to cooperative apartments are twofold. First, he reviews the disclosures required by General Business Law § 352-e for sufficiency. Second, he may investigate and initiate civil or criminal actions where he believes there is fraud (*see* General Business Law §§ 352, 352-c, 353, 354).

All sides agree that pursuant to the Martin Act (General Business Law § 352-e [1][b]), the Attorney General has sole and exclusive jurisdiction to prosecute sponsors and the like 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 N.Y.2d 1114, 1116 [1991]; *CPC Intl. v McKesson Corp.*, 70 N.Y.2d 268, 276 [1987]; *Keh Hsin Shen v Astoria Fed. Sav. & Loan,* 295 A.D.2d 319, 320 [2002]; *Thompson v Parkchester Apts. Co.,* 271 A.D.2d 311, 311 [2000]; *167 Housing Corp. v 167 Partnership,* 252 A.D.2d 397, 398 [1998]; *Thompson v Parkchester Apts. Co.,* 249 A.D.2d 68, 68 [1998]; *Whitehall Tenants Corp. v Estate of Olnick,* 213 A.D.2d 200, 200 [1995]; *Rego Park Garden Owners v Rego Park Gardens Assocs.*, 191 A.D.2d 621, 622 [1993]; *Board of Managers of Fairways at North Hills Condominium v Fairway at North Hills,* 150 A.D.2d 32, 38-39 [1989]; *Rubenstein v East River Tenants Corp.*, 139 A.D.2d 451, 454-455 [1988]; *Kramer v. Zeckendorf,* 10 Misc.3d 1056[A], *5, 2005 N.Y.

Slip Op. 51990[U]).

"In order to establish a viable independent claim for deception and false representation, plaintiff must plead ... a unique set of circumstances whose remedy is not already available to the Attorney General." *Thompson v Parkchester Apts. Co.,* 249 A.D.2d 68, 68 (1st Dept), *lv dismissed* 92 N.Y.2d 946 (1998); *15 E. 11th Apt. Corp.,* 220 A.D.2d at 296. Third-party plaintiffs have failed to establish any obligations under Barrekette's Description of Property, Electrical Report and Certification, incorporated into the Offering Plan that are not within the purview of the Attorney General, and, thus, have no standing to bring an action for fraud under the Offering Plan. *Whitehall Tenants Corp.,* 213 A.D.2d at 200; *see generally CPC Intl. Inc. v McKesson Corp.,* 70 N.Y.2d 268, 277-278 (1987); *but see Caprer v Nussbaum,* 2006 WL 2963128, *17, 2006 N.Y.App.Div. LEXIS 12491, *53-54 (2nd Dept, October 17, 2006) (where fraud goes "far beyond the mere breach of the offering plan," and enriches individuals, it is a viable cause of action).

Therefore, the Amended Third-Party Complaint as to defendant Barrekette, and the Eighth Cause of Action are dismissed in that said cause of action is preempted by the exclusive jurisdiction of the Attorney General of claims that fall under the Martin Act.

Common-Law Fraud

Assuming Arguendo that the Eighth Cause of Action was not preempted by the Martin Act, said cause of action would still fail. Third-Party Plaintiffs argue that their claim is one in common-law fraud, which is not foreclosed by the Martin Act.

To state a cause of action for fraud, a Plaintiff must allege misrepresentation of a material fact by defendant, knowledge by defendant of the falsity of such representation when made,

justifiable reliance by the plaintiff and resulting injury. *Kaufman v Cohen* 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep't 2003); *see Monaco v New York Univ. Med. Ctr.,* 213 A.D.2d 167, 623 N.Y.S.2d 566, lv. denied, 86 N.Y.2d 882, 635 N.Y.S.2d 944, 659 N.E.2d 767 (1995). However, it should be noted, that where the defendant has a duty to disclose significant information, a fraud cause of action may also be predicated on an omission or concealment rather than upon a direct representation. *Kaufman* at 119, 165. Viewing the claims set forth in the Amended Complaint in the most liberal light, the third-party plaintiffs have failed to allege a cause of action for fraud.

"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 N.Y.2d 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 A.D.2d 355, 357 [2000]; *Zanani v Savad,* 228 A.D.2d 584, 585 [1996]; *Residential Bd. of Managers of Zeckendorf Towers,* 190 A.D.2d 637-638).

Third-party plaintiffs argue that the affirmative statements Barrekette made in the Certification itself, which Barrekette expressly acknowledged would be incorporated into the Offering Plan, so that prospective purchasers may rely on his final report, constitute sufficient evidence that he knowingly uttered falsehoods intending to deprive the Onettis' of a benefit as is alleged in the third-party Complaint.

Plaintiff's fraud claim is premised upon alleged false and fraudulent representations

relating to the Electrical Report 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 Barrekette 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). However, the third-party plaintiffs fail to adequately plead that [or how] they reasonably relied upon any alleged misrepresentations contained in the Electrical Report or Certification by Barrekette (*see generally Oko v Walsh,* 28 AD3d 529, 529 [2d Dep't, 2006]).

Thus, the Amended Third-Party Complaint as to defendant Barrekette, and the Eighth Cause of Action are also dismissed on the ground of failing to state a cause of action for common-law fraud.

Statute of Limitations

CPLR § 213(8) provides, in pertinent part, that a cause of action for fraud must be commenced within six years from the date of the alleged act or within two years from the date the plaintiff discovered the fraud or could, with due diligence, have discovered it. see, *Kaufman v Cohen* at 122, 167. Plaintiffs concede that "slightly more than six years elapsed between the publication of Barrekette's misrepresentations and the filing of the Third-Party Complaint,..." (Ashley E. Normand, Esq. Affirmation, ¶ 23) however the Onettis nonetheless have complied with the statute of limitations by filing their Third-Party Complaint within the two-year discovery limitations period, as they first became aware of the facts giving rise to their fraud claim in November 2005 when they learned of the defective wiring in the immediate aftermath of the Fire.

Barrekette counters arguing that the Description of Property and Electrical Report prepared in 1999 and the Certification issued in 2000, both placed the third-party plaintiffs on

notice of any alleged fraud more than five years before the third-party action was commenced. And, the third-party plaintiffs were placed on notice that: (1) Barrekette's limited visual inspection of the Building did not include any tests or penetrations into walls; and (2) unless an adequate maintenance program was put in place, "the building cannot be expected to remain in the condition as described herein which is current only as to the date of the inspection." Significantly, the inspection was conducted in June, 1999, over six years before the Fire occurred. This court agrees.

In fact, in the Amended Third-Party Complaint, third-party plaintiffs chastise Gatsby, the Sponsor-controlled Board, and Halstead for failing to take any steps to determine the extent of faulty wiring within the Building and to repair hazardous electrical conditions, despite being put on notice that the Building's electrical wiring was defective by virtue of the Electrical Report's identification of the Building's electrical service as aging, marginal in some apartments, and "overfused," as well as by the complaints, from the other resident in the Building. If third-party plaintiffs believe these parties should have been on notice at that time, with a minimum of due diligence, third-party plaintiffs too should have been on notice.

As such, the Amended Third-Party Complaint as to defendant Barrekette, and the Eighth Cause of Action are also dismissed on Statute of Limitations grounds.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of third-party defendant E. S. Barrekette, P.E., Ph.D., for an order dismissing the Amended Complaint of third-party plaintiffs Fabian Onetti and Maria Pia Onetti, as to defendant Barrekette, and their Eighth Cause of Action: Fraud, Deception,

Concealment or Suppression, Omitted Material Facts in the Description of Property and Electrical Report, is granted. It is further

ORDERED that the motion of third-party defendant E. S. Barrekette, P.E., Ph.D., for an order dismissing the Amended Complaint of third-party plaintiffs Fabian Onetti and Maria Pia Onetti, as to defendant Barrekette, and their Ninth Cause of Action: Breach of Express Warranties in the Description of Property and Electrical Report, is granted without opposition and on consent. It is further

ORDERED that counsel for third-party defendant E. S. Barrekette, P.E., Ph.D. shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for third-party plaintiffs Fabian Onetti and Maria Pia Onetti.

This constitutes the decision and order of this court.

Dated: July 31, 2007

Carol Robinson Edmead, J.S.C.