Board of Mgrs. of the A Bldg. Condominium v 13th & 14th St. Realty, LLC
2013 NY Slip Op 32058(U)
August 29, 2013
Supreme Court, New York County
Docket Number: 100061/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Index Number : 100061/2011
BOARD OF MANAGERS
vs
13TH & 14TH STREET REALTY
Sequence Number : 008
DISMISS

INDEX NO. 100061/11
MOTION DATE
MOTION SEQ. NO. 008

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____
Answering Affidavits — Exhibits ____ | No(s). ____
Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: AUG 30 2013

BJ
BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

---x

THE BOARD OF MANAGERS OF THE A BUILDING CONDOMINIUM, *et al.*

Plaintiffs,

Index No. 100061/11

Mot. Seq. Nos. 008, 010, 012, 013

-against-

DECISION AND ORDER

13TH & 14TH STREET REALTY, LLC, *et al.*,

Defendants,

---x

13TH & 14TH STREET REALTY, LLC,

Plaintiff,

Index No. 651062/11

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP LLC, CRYSTAL CURTAIN WALL SYSTEM CORP., and CRYSTAL WINDOW & DOOR SYSTEMS, LTD.,

Defendants,

---x

HUDSON MERIDIAN CONSTRUCTION GROUP LLC,

Third-party plaintiff,

Third-party Index No. 590536/12

-against-

DEMAR PLUMBING CORP., *et al.*,

Third-party defendants.

---x

BARBARA JAFFE, J.:

Motion sequence numbers 008, 010, 012, and 013 are consolidated herein for disposition. In motion sequence number 008, defendant American Hydrotech Inc. (Hydrotech) moves to dismiss the complaint. In motion sequence 010, third-party plaintiff Hudson Meridian

Construction Group LLC (Hudson) moves for summary judgment dismissing plaintiffs' claims against it. In motion sequence number 012, plaintiffs Board of Managers of the A Building Condominium, *et al.*, move, by order to show cause, to consolidate *Villamar v Kaliner*, index No. 151913/13 (Villamar II Action), for all purposes, with this action. Finally, in motion sequence number 013, the Board moves, by order to show cause, to consolidate *13th and 14th Street Realty LLC v The Board of Managers of the Building A Condominium*, index No. 155269/13 (Note Action), with this action for all purposes.

I. OVERVIEW

In each of these cases, the Board of Managers (Board) of the A Building Condominium (Condominium), is plaintiff, for itself and on behalf of the individual unit owners of the Condominium, located at 425 East 13th Street, New York, NY. Much of the background to this matter has been set forth in prior decisions, and is repeated here to the extent necessary.

Defendants 13th & 14th Street Realty, LLC and the Ascend Group, LLC were sponsors of the condominium offering plan. Defendants Benjamin Shaoul and Robert Kaliner are the principals of the sponsors who, together with defendants 13th & 14th Street Realty, LLC, and the Ascend Group, LLC, are included in all references to sponsors herein. Defendant Hudson was the construction company retained by sponsors to construct the Buildings, and Hydrotech provided specific materials for use in constructing the Buildings.

The source of contention of all the complaints related to this action is the allegation that defendants knowingly and intentionally, and/or negligently, engaged in conduct constituting violations of the New York City Building Code, and failed to meet the standards of locally accepted building practices. Defendants' actions and inactions allegedly resulted in construction

defects, including defects in physical, structural, mechanical, and design elements of the buildings.

Under index No. 100061/11, plaintiffs seek monetary damages based on causes of action, among others, for negligence, professional malpractice, defective construction, breach of warranty, fraud and/or negligent misrepresentation, breach of contract, breach of fiduciary duty obligations, and conversion, and injunctive and declaratory relief. Under index No. 651062/11, plaintiffs seek, among other causes of action, to recover from Hudson for negligence and breach of contract. Under index No. 590536/12, Hudson seeks, among other causes of action, common-law and contractual indemnification, recovery for negligence, contribution, and breach of contract damages.

II. MOTION FOR CONSOLIATION

A. *Vilamar v Kaliner,* Index No. 151913/13 (Motion Seq. No. 012)

The first of the two actions that are the subject of the motions to consolidate is *Villamar v Kaliner,* index No. 151913/13 (hereinafter, *Villamar II*). By way of background, an action against the sponsors is currently pending in Part 11 of this court. (*See Giovanni Villamar and Julissa Cruz v 13th and 14th Street Realty LLC* [index No. 105759/10] [hereinafter *Villamar I*].) In *Villamar I*, plaintiffs Villamar and Cruz seek rescission of their original purchase agreement, and return of the amounts tendered for the purchase of their unit in the condominium, along with damages for breach of contract, fraud or fraudulent concealment, negligent misrepresentation, and deceptive trade practices. Allegedly, as a result of discovery in that matter, a second action was filed against the principals of the sponsor directly, seeking, among other causes of action, to pierce the corporate veil of the sponsor. That action is *Villamar II.*

By decision dated February 25, 2013, I denied a motion for an order consolidating *Villamar I* with the instant action, finding that although many of the issues in *Villamar I* paralleled issues here, the major goal of *Villamar I* was rescission of the Purchase Agreement, discovery was proceeding at a different pace, *Villamar I* had been pending for many years, and the rights of the *Villamar I* plaintiffs to continue their action apace outweighed any benefit to the instant defendants to avoid having to defend their positions in two venues.

In *Villamar II*, plaintiffs seek similar relief, namely, rescission or termination of their purchase agreement, a declaration of their entitlement to rescission and return of the purchase price for their unit, along with damages for breach of contract in constructing the unit, fraud and fraudulent concealment, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing. However, in *Villamar II*, plaintiffs also seek to pierce the corporate veil so as to impose personal liability on the principals of the sponsor, Kaliner and Shaoul.

Pursuant to CPLR 602 (a), "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, . . . may order the actions consolidated . . . ." The decision to consolidate matters is within the sound discretion of the court. (*Matter of Hill v Smalls*, 49 AD2d 724 [1st Dept 1975]). Consolidation is preferred where actions involve common questions of law or fact and judicial economy may be served. However, where the rights of a party are substantially prejudiced, consolidation is not favored. (*Matter of Progressive Ins. Co.* [*Vasquez – Countywide Ins. Co.*], 10 AD3d 518, 519 [1st Dept 2004]; *Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994].)

Here, there are areas of law and fact common to the two actions. They arise from the same series of transactions and occurrences, and, in both the instant action and the *Villamar*

actions, plaintiffs seek to impose personal liability on the principals of sponsors. Nonetheless, as the main goal of the *Villamar* actions is to obtain rescission of the purchase agreement, relief not sought here.

Moreover, in *Villamar I*, a motion for partial summary judgment is pending. Judicial economy is not served by consolidating the actions at this juncture, as it could raise complex issues of claim and issue preclusion, and lead to inconsistent verdicts.

B. *13th and 14th Street Realty LLC v The Board of Managers of the Building Condominium*, Index No. 155269/13 (Motion Seq. No. 013)

The second of the two actions that are the subject of the instant motions to consolidate is *13th and 14th Street Realty LLC v The Board of Managers of the Building Condominium*, index No. 155269/13. In this action, sponsors seek, pursuant to CPLR 3213, an order granting summary judgment in lieu of complaint based upon the Board's default under a five-year interest-only promissory note dated March 6, 2008 (Note) in the principal amount of $323,750, that accrued interest at a rate of 5.24 percent.

The precursor to the note (the original note) was apparently issued by the Board pursuant to the offering plan, under which the Board purchased the superintendent's apartment from the sponsor, with the purchase price to be paid to the sponsor through the note. When the note was executed, the sponsor was operating for the Board, and, thus, it was endorsed by Kaliner, one of the principals of the sponsor. The note derives from the splitting of the original note, issued to the sponsor for the amount of $1,295,000, into two parts, with the first part payable to the Bank of Smithtown in the amount of $971,250, and the second part, the remainder, payable to sponsor.

In the note, the Board agreed to pay $1413.71 monthly for 60 months, with the entire remaining balance becoming due as of March 20, 2013. Although the Board paid timely until the

note's maturity, admittedly declining to pay the principal balance given the costs of litigation, and fear that the sponsors will not have the assets to satisfy a judgment, if obtained here.

The Board argues that, because the sponsor's rights and obligations in both actions spring from the promises and requirements of the original condominium offering plan, and the damages in each action set each other off, consolidation is appropriate and will address all claims together. The sponsor, meanwhile, argues that note action is distinct.

In *Lorber v Morovati*, 83 AD3d 799 (2d Dept 2011), where the plaintiffs received $105,000 up front for the sale of a dental practice, leaving a promissory note for $125,000, along with a personal guarantee from each of the defendants, the Appellate Division, Second Department, reversed an award of summary judgment because the promissory note in issue was intertwined with the parties' purchase agreement. The court observed that:

> [w]hile generally the breach of a related contract cannot defeat a motion for summary judgment on an instrument for money only, that rule does not apply where, as here, the contract and instrument are intertwined. As the defendants' action to recover damages for breach of contract and fraud relating to the purchase agreement is sufficiently intertwined with the plaintiffs' action to recover on the promissory note, summary judgment should have been denied.

(*Lorber*, 83 AD3d at 800-801).

Here, by contrast, a separate action pends as to the note, and a motion for summary judgment in lieu of complaint, to which there has been no answer, is pending in that action, and not here. (*See* CPLR 3213). Additionally, in *Lorber*, the promissory note, on its face, named the overall transaction, whereas here, the note is not, on its face, intertwined with any other obligations or transactions. Rather, it only acknowledges a debt without mentioning the buildings or the purchase of the superintendent's apartment, and it splits that debt into subsidiary notes. Thus, while the original note may have arguably been intertwined with the original

transaction, the note in issue, which is a successor note, is removed from that exchange. (*Compare Zyskind v FaceCake Mktg. Tech.*, 101 AD3d 550, 551 [1st Dept 2012] [where note itself states holder made representations and warranties upon which maker relied, fraud in inducement is properly raised as defense to note]; *American Home Mtge. Servicing v Sharrocks*, 92 AD3d 620, 622 [2d Dept 2012] [fraudulent conveyance claims underlay foreclosure action warranting consolidation]; *but see Neuhaus v McGovern*, 293 AD2d 727, 728 [2d Dept 2002] [note payable absent condition precedent to its repayment]; *Boro P. Health Mgt., LLC v Boro for Health, LLC*, 39 Misc 3d 1229[A], 2013 NY Slip Op 50802[U], [Sup Ct, Kings County 2013] [where loan documents did not refer to, or expressly condition their performance on a purchase agreement's terms, they were not inextricably intertwined]).

And, the note, which the Board argues should be held in abeyance in pursuit of credit toward a hoped for judgment in this action, states that "[the Board] waives any and all rights to setoffs, counterclaims or abatements of any nature that [the Board] may have against [the sponsor] or the obligations of [the Board] hereunder or under any other circumstances or agreement between [the Board] and [the sponsor], whether now existing or arising hereafter." (*See* Note ¶ 10). Thus, I am not be inclined to obstruct the judicial process for the collection of the note, pre-answer. (*See e.g. Harris v Miller,* 136 AD2d 603, 603 [2d Dept 1988], *quoting* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3213:17, at 842 [where claim is unclear or unliquidated, as, for instance, based upon a judgment or an instrument, it is not generally interposable as a response to an action based upon CPLR 3213]).

And so, the "invocation of defenses based on facts extrinsic to an instrument for payment of money only does not preclude CPLR 3213 consideration [summary judgment in lieu of

complaint]." (*Phillips v Cioffi*, 204 AD2d 94, 95 [1st Dept 1994], *lv denied* 85 NY2d 810 [1995]).

III. AMERICAN HYDROTECH'S MOTION TO DISMISS

On a motion to dismiss for failure to state a claim (CPLR 3211 [a] [7]), the complaint is afforded a liberal construction (CPLR 3026), the facts alleged in the complaint are deemed true, and the plaintiffs are given the benefit of every possible favorable inference in an effort to determine solely whether the facts as alleged fit within any cognizable legal theory. (*See Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976]). In assessing such a motion, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint. (*Id.* at 635). The salient question is whether the proponent of the pleading has a cause of action, not whether one has been properly pleaded. (*See Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rovello*, 40 NY2d at 636). On a motion to dismiss based on documentary evidence (CPLR 3211 [a] [1]), a dismissal is appropriate only if the documentary evidence submitted conclusively establishes, as a matter of law, a viable defense to the asserted claims. (*See Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The claims against American Hydrotech Inc. (Hydrotech) stem from alleged breach of an express 20-year "Watertightness Warranty" issued by Hydrotech to the sponsor as of October 17, 2007, and assigned to the Board on or about June 13, 2011 (the Warranty). Per the complaint, under the warranty, Hydrotech warrantied that the buildings' roof membane (product) would remain watertight for at least 20 years, and it has not. Plaintiffs allege that the roof of the 13th Street Building (13th St. roof) reflects inconsistent roofing materials and flashing details, evidence of ponding, and failed waterproofing throughout that has caused interior leaks.

Hydrotech moves for an order dismissing the complaint on the ground that it satisfied all

of its obligations under the Warranty by electing to repay the amount paid for the product, which, under the terms of the Warranty, it had the option to do. It also observes that the complaint is bereft of any allegation that the product was defective in any way.

The Board maintains that it has pleaded facts sufficient to establish a claim of breach of warranty against Hydrotech, that Hydrotech has not established its entitlement to a dismissal pursuant to CPLR 3211 (a) (1), that Hydrotech's interpretation of the Warranty causes the Warranty to fail of its essential purpose, and that the proper measure of damages is at least the cost of the membrane materials and the cost of installation.

The complaint contains the following:

> 199. Existing terraces have a combination of apparent inconsistent roofing materials and flashing details, contrary to what was promised in the Offering Plan, which do not conform to any known manufacturer standard or system.
>
> 200. Existing roof surfaces have evidence of ponding water in violation of New York City Health Code Article 151, Section 151.03.
>
> 201. Inconsistent roofing materials and systems.
>
> 202. Failed waterproofing throughout the building causes leaks in the electrical equipment rooms each time it rains."
>
> 787. Defendant Hydrotech has issued to the Board an express written "Watertightness Warranty" dated October 17, 2007 under which Hydrotech warranted, under the terms and conditions thereof, that [the 13th St. Roof] would remain watertight.
>
> 788. The [13th St. Roof] covered by Hydrotech's Watertightness Warranty ha[s] not remained watertight in violation of the [W]arranty."

The Board argues that these allegations demonstrate that it has adequately pleaded that Hydrotech warrantied that the 13th St. roof would remain watertight for 20 years, and, as it has not remained in that condition, there is no basis to dismiss the action.

The documentary evidence, however, reflects that the Warranty is bare of any mention of the 13th St. roof, or any roof. In addition, it specifies that it covers the product, and not installation. It does not extend, on its face, to other damages, and it enumerates the types and amounts of recovery that may be had for breach.

Although the Board implies that the Warranty applies to the 13th St. roof, it provides that "Hydrotech shall not be responsible for the removal or cost of removal and/or replacement of any material(s) which may cover the Product," and that "Hydrotech's obligations under this Warranty shall not be in force or effect unless (a) the Product is installed in accordance with Hydrotech's then current published specifications by an applicator authorized by Hydrotech to install the Product," and that "[t]he foregoing is Hydrotech's sole Warranty with respect to the Product." (Warranty, ¶¶ 1, 2, 8). Consequently, it does not cover the roof. (*See e.g.* Uniform Commercial Code § 2-316 [1] ["[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other"]; *see also Pennsylvania Gas Co. v Secord Bros.*, 73 Misc 2d 1031, 1036 [Sup Ct, Chautauqua County 1973], *affd* 44 AD2d 906 [4th Dept 1974] ["disclaimer of express warranties and implied warranties, other than of merchantability and fitness, are unquestionably valid subject matter of a contract, . . . expressly permitted under the terms of the Uniform Commercial Code . . ., [and] need only be clearly stated to be proper contractual covenants"]).

Moreover, pursuant to Hydrotech's agreement with the product's installer, Bay Restoration Corporation, Hydrotech undertakes to "[p]rovide a warranty, the terms and conditions of which shall be determined by Hydrotech, to building owners on installation of its

Products approved and accepted by Hydrotech. Hydrotech reserves the right to refuse to issue a warranty on installation(s) of its Products not approved and accepted by it." (*See* American Hydrotech, Inc. Authorized Applicator Agreement, ¶ 2.3).

Therefor, the installation process was clearly contemplated as separate from the product, carrying the potential of its own, separate warranty, the terms of which were unknown at the time of sale of the product. Thus, the implication that the installation was warrantied is contradicted by documentary evidence.

Even if the Warranty somehow extended beyond its terms, it was limited, by election, to potential recovery in the form of repair, which presumably includes an option for replacement, or repayment. It provides that

> [i]n the event of the failure of the Product to perform as warranted, Hydrotech's sole responsibility hereunder shall be limited, in Hydrotech's discretion, to making or causing to be made such repairs as are necessary to enable the Product to perform as warranted or to repay to Owner the amount equal to the original cost of the Product. If Hydrotech elects to repay Owner the amount equal to the original cost of the Product, Hydrotech's liability hereunder shall immediately cease upon such repayment. Hydrotech shall not be responsible for the removal or cost of removal and/or replacement of any material(s) which may cover the Product.

(Warranty, ¶ 1; *see also West 63 Empire Assoc., LLC v Walker & Zanger*, 107 AD3d 586, 586 [1st Dept 2013] ["broad, express, and conspicuous disclaimer of all warranties" enforced]).

And, as noted above, the Warranty contains disclaimers, including exclusions for consequential or incidental economic loss, and it provides that a disclaimer is issued as against any other theories of liability. (Warranty, ¶¶ 3A, 7, 8).

The Board nonetheless maintains that the Warranty, if enforced according to its terms, fails of its essential purpose. Pursuant to section 2-719 (2) of the Uniform Commercial Code,

"[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." Here, a finding that the Warranty has failed of its essential purpose would permit the Board to pursue remedies under other provisions of the Uniform Commercial Code, as if the clause limiting the liability of Hydrotech did not exist. (*See Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5, 12 [4th Dept 1983]).

Although the question of whether a warranty has failed of its essential purpose is normally a question of fact for the jury (*id.* at 10-11), such a determination depends on a demonstration that "an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, as a result of later circumstances operates to deprive a party of a substantial benefit of the bargain." (*Id.*, *quoting Clark v International Harvester Co.*, 99 Idaho 326, 340, 581 P2d 784 [1978], and citing Uniform Commercial Code, § 2-719, Comment 1, and White & Summers, *Handbook of the Law under the Uniform Commercial Code*, 2d ed. § 12-10).

However, here, as noted above, the remedy of fixing an improper installation was never contemplated. Indeed, if the Warranty had the purpose proposed by the Board, there would have been no need for an undertaking in the Authorized Applicator Agreement to provide an additional warranty on installation. Thus, the Board's reliance on *Wilson Trading Corp. v David Ferguson, Ltd.*, 23 NY2d 398, 401-402 (1968), *Belfont Sales Corp. v Gruen Indus.*, 112 AD2d 96, 97 (1st Dept 1985), and *Siemens Credit Corp. v Marvik Colour*, 859 F Supp 686, 696 (SD NY 1994), all of which address actual product defects which were the specific subject of litigation, is misplaced.

Moreover, the Board itself states that the cost of the product is negligible in comparison to the amount of damages it seeks. Thus, as the Warranty specifically disclaims liability for

consequential damages (*see* Warranty ¶ 3A), and almost all of the damages claimed by the Board are consequential in nature, they "would not be recoverable under this contract even if the limitation of remedies did fail of its essential purpose." (*J.C. MacElroy Co. v Arben Corp.*, 276 AD2d 434, 435 [1st Dept 2000], citing *Daily News v Rockwell Intl. Corp.*, 256 AD2d 13 [1st Dept 1998]; *see also* UCC § 2-316 [4] ["[r]emedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719)"]; *Brampton Textiles v Argenti*, 162 AD2d 314, 314 [1st Dept 1990] ["nothing in [§ 2-719] precludes parties to a contract from disclaiming remedies, or more particularly, precludes a seller of goods from excluding implied warranties"]).

For these reasons, the Warranty does not apply to the 13th St. roof, and cannot be deemed, as a result, to have failed of its essential purpose. In addition, the Warranty indicates that it extends only to the product, and limits the available remedies by its own terms, and the Authorized Applicator Agreement addresses a warranty for the installation of the product prospectively, permitting the reasonable inference that no such warranty was in place before installation, which is the implication of the Board's arguments. (*See Herman v Greenberg*, 221 AD2d 251 [1st Dept 1995] [while on motion to dismiss "the facts pleaded are presumed to be true and given every favorable inference, bare legal conclusions and factual claims that are either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration"]).

Thus, the claims against, and on behalf of, Hydrotech raise no issues of fact. Indeed, neither party denies that the 13th St. roof leaks, that Hydrotech provided its product for use in the

roof area, or that there is a product warranty. And it is clear from the arguments and the documentary evidence presented that both the Board and Hydrotech have laid their proofs bare. As such, they have deliberately charted a course for summary judgment. (*See Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept 1987] ["[d]ocumentary evidence, proved or conceded to be authentic, may be considered by the court for fact-finding purposes prior to joinder of issue without CPLR 3211(c) notice first being given"]) As there are no other causes of action between the parties (*see Dunham v Hilco Const. Co.*, 89 NY2d 425, 429-30 [1996]), the court has searched the record, deems Hydrotech's motion as one seeking summary judgment, and determines that upon admissible evidence of a renewed proffer to discharge its obligations under the Warranty by payment tendered for the price of the product, and notice of entry, summary judgment dismissing the complaint is granted.

I also consider Hudson Meridian Construction's (Hudson) cross-claims against Hydrotech for contribution. According to Hudson, should it be held liable to the Board, it is entitled to recover on its cross claim for contribution from Hydrotech. This argument is without merit.

Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

Here, there is no claim for negligence against Hydrotech. While contribution under CPLR 1401 may extend to defendants found to be in breach of warranty (*see Noble v Desco Shoe Corp.*, 41 AD2d 908, 910 [1st Dept 1973] ["no distinction should be drawn between actions grounded in negligence and those based on breach of warranty"]), Hydrotech, having fully

discharged its duties under the Warranty, has not breached it. Thus, contribution may not be granted against it.

Having reviewed the evidence and the submissions, the instant motion is converted to one for summary judgment. (*See* CPLR 3211 [c].)

IV. HUDSON'S MOTION FOR SUMMARY JUDGMENT

Hudson also moves for an order granting it summary judgment (CPLR 3212) on the grounds that plaintiffs lack standing to bring their breach of contract claim against it, and that Hudson owed no duty of care to plaintiffs as to the construction of the buildings.

A party seeking summary judgment must demonstrate, *prima facie,* that it is entitled to judgment as a matter of law, by presenting sufficient admissible evidence to negate any material issues of fact. (*Forest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence demonstrating the existence of factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad,* 64 NY2d at 853).

A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. (*Forest*, 3 NY3d 314). Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment

by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). Rather, the plaintiff must show that "there is no defense to the cause of action or that the cause of action or defense has no merit." (CPLR 3212[b]).

Once this *prima facie* showing has been made, the burden shifts to the Board to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d at 562). And, on the instant motion, the Board is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. (*See Myers v Fir Cab Corp.*, 64 NY2d 806 [1985].)

Plaintiff alleges in its complaint that Hudson was the construction company retained by the sponsor in connection with the construction of the buildings. It submits a "Standard Form of Agreement between Owner and Construction Manager," dated September 16, 2005, reflecting that Hudson was to serve as construction manager on behalf of the sponsor. (Hudson contract).

The Board argues that the prospective purchasers of the units in the buildings were intended to be third-party beneficiaries of the Hudson contract, and that the construction pursuant to that contract deviated from the offering plan, the plans and specifications filed with the New York City Department of Buildings, the applicable Building Code, and various industry standards. On this basis, the Board seeks recovery for breach of contract.

It also maintains that even if it is not deemed a third-party beneficiary of the Hudson contract, then it is entitled to recover from Hudson on a theory of negligence based upon a

defective and non-conforming construction.

Hudson argues, in support of its motion for summary judgment, denies that the Board and the individual unit owners are third-party beneficiaries of the Hudson contract, and contends that its role in constructing the buildings does not extend beyond the terms of the contract, that there was no independent relationship with any plaintiffs, and that Hudson owed no duty of care to plaintiffs.

A. Third-party beneficiary claim

It is settled in New York that

> "[u]nless otherwise agreed . . . a beneficiary . . . is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

(Restatement [Second] of Contracts § 302 [1981]; *see also Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985] ["we think that analysis and exposition will be advanced by adopting the terminology and concepts of the Restatement"], citing *Matter of American Ins. Co.* [*Messinger – Aetna Cas. & Sur. Co.*], 43 NY2d 184, 189, n 2 [1977]).

As "the best evidence of what parties to a written agreement intend is what they say in their writing" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]), "the best evidence of the intent to bestow a benefit upon a third party is the language of the contract itself." (*243-249 Holding Co. v Infante*, 4 AD3d 184, 185 [1st Dept 2004]; *see also Alicea v City of New York*, 145 AD2d 315, 318 [1st Dept 1988]).

Pursuant to the Hudson contract "[t]he Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor [Hudson],

(2) between the Owner [sponsor] and a Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor." (*See* Hudson Contract, § 1.1.2).

In addition, section 15.3 of the Hudson contract stresses, with specific regard to third-party beneficiaries, that

> [t]he sole beneficiaries of this Agreement are the parties hereto, their lenders, member and partners, and this Agreement is not intended to confer any benefits or rights upon any other person or entities . . . In amplification of the foregoing, it is agreed between the Owner and Construction Manager that (i) neither the board of managers of any condominium created with respect to the Project nor any purchaser of any condominium unit is intended to be, nor shall any of them be, third party beneficiaries of this Agreement . . .

This provision manifests a clear intent to avoid any indication that there are third-party beneficiaries.

Nonetheless, "[a]n intent to benefit a third party can also be found when 'no one other than the third party can recover if the promisor breaches the contract . . . or . . . the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party.'" (*Alicea*, 145 AD2d at 318, quoting *Fourth Ocean Putnam Corp.*, 66 NY2d at 45). However, here, clearly, the sponsor is in a position to enforce the contract. (*See e.g.* Hudson Contract § 3.18.1; *see also Board of Mgrs. of Riverview at Coll. Point Condominium III v Schorr Bros. Dev. Corp.*, 182 AD2d 664, 665 [2d Dept 1992] [in ordinary construction contract, third parties who contract with a promisee do not have right to enforce promisee's contract with another against that other party]). Plaintiffs here are, at best, incidental beneficiaries (*see* Restatement [Second] of Contracts § 302 [2] [1981] ["[a]n incidental beneficiary is a beneficiary who is not an intended beneficiary"]), and, as such, are not entitled to sue Hudson for breach of contract.

B. Negligence claim

As an alternative, plaintiffs' claim against Hudson for common-law negligence arises from its duty to plaintiff to exercise reasonable care and skill in the construction of the buildings. Plaintiffs argue that Hudson's negligent performance of its construction duties created an unreasonable hazard to the life and safety of the residents, and continuously cause damage to the property of each plaintiff. Moreover, plaintiffs urge that "this hazardous condition should not be required to mature into serious injury or death to one or more of the Plaintiffs herein or any innocent bystander before Hudson can be held liable for its negligence in the construction of the Condominium." (Memorandum in Opposition at 13).

It is well established that where, as here, a plaintiff is an incidental, and not an intended, beneficiary, that "plaintiff cannot recover solely for economic loss arising out of negligent construction in the absence of a contractual relationship." (*Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1st Dept 1993]). Moreover, "[a]bsent [such] privity of contract, plaintiff has no right to recover from defendant . . . either for negligence or breach of contract." (*Id.*; *accord Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 50 AD3d 503, 504 [1st Dept 2008]; *see also Board of Managers of Riverview at Coll. Point Condominium III*, 182 AD2d at 665-66 ["a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract"]).

Thus, notwithstanding the seriousness of the allegations, plaintiffs have not indicated any obligations on Hudson's part that extended beyond the terms of the Hudson contract. Moreover,

there are no allegations that Hudson had an independent relationship with any plaintiffs. Finally, all duties of care claimed by plaintiffs are covered in the Hudson contract.

V. CONCLUSION

In sum, the motions for orders consolidating the actions *Villamar v Kaliner,* index No. 151913/13 (Motion Sequence Number 012) and *13th and 14th Street Realty LLC v The Board of Managers of the Building Condominium*, index No. 155269/13 (Motion Sequence Number 013) with the instant action are denied. American Hydrotech's motion to dismiss the complaint is converted to one for summary judgment (CPLR 3211 [c]), and summary judgment is granted, and the complaint dismissed pending discharge of remaining duties under the Watertightness Warranty as indicated hereinabove. The motion of Hudson Meridian Construction for an order granting it summary judgment is granted, and the complaint is dismissed as against that defendant. The parties are directed to appear for a status conference in Room 279, 80 Centre Street, on Sept. 25, 2013, at 2:15 ~~a.m.~~/p.m.

Settle order.

ENTER:

Barbara Jaffe, JSC

DATED: August 29, 2013
New York, New York