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## MULTI-FAMILY HOUSING

*Even those who purchase upscale condominiums may find themselves at a disadvantage in seeking remedies when contractors deliver defective units. In this article the authors review two cases that illustrate how differences in the wording of a Condominium Offering Plan can have a decisive impact on the outcome of a suit.*

### When Purchasing a Newly Constructed Condominium Unit, Let the Buyer Beware



BY JEFFREY R. METZ AND ADAM LEITMAN BAILEY

**T**he real estate crisis has hit home for thousands of buyers of newly constructed condominium properties. Negligently built units with serious construction problems have forced homeowners to look for a real estate superhero to come to the rescue. But many builders have simply run out of money and then have hidden behind shell corporations.

Lawsuits are more expensive than ever and the New York Attorney General lacks the resources to be a viable alternative. Given this situation, and the lack of assistance from the legislature or governmental agencies, condominium boards or unit owners have been forced to sue the building vendors—the contractors, architects, engineers, and heating, ventilation, and air conditioning (HVAC) designers. But recently, the Court of Appeals rendered a decision that shuns these victims and narrows the opportunity for much-needed relief. First some background.

**Negligent Misrepresentation.** Construction vendors may be found liable to third parties for reports or acts they have performed for their sponsor clients. But for a unit owner to claim that a vendor's negligent misrepresentations resulted in compensable harm to them, they must show either actual privity of contract with the vendor or a relationship so close as to approach that of privity. The Court of Appeals created a three-prong test to make such determination, including, (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by

the defendants linking them to the party or parties and evincing defendant's understanding of their reliance.

**Sykes v. Cosentini.** In the recently decided case of *Sykes v. Cosentini* (15 N.Y.3d 370 (2010)), Plaintiffs sued a mechanical engineering company alleging that it had negligently misrepresented in the Condominium Offering Plan the capabilities of the HVAC system it designed for the use in the Plaintiffs' unit. The unit was actually too small and it never sufficiently heated in the winter or cooled in the summer.

The Court of Appeals found that the complaint failed to state a cause of action against the engineering firm. Relying upon the three-prong test, the Court found that the owners did not sufficiently allege that they were a 'known party' notwithstanding that the engineering firm "obviously knew in general that prospective purchasers of apartments would rely upon the offering plan. Accordingly to the Court, because the engineering firm "did not know the identity of the specific nonparty party who would be relying, the complaint falls short. . ."

*Sykes* is problematic because when a purchaser goes to contract in the pre-construction phase of the building of a new luxury condominium, the purchaser sees only a spot on a map or a hole in the ground. Thus, the purchaser is completely reliant upon the promises made by the developer and its engineering team. So, in this economic atmosphere where many development companies are mere shells and often not around to honor their obligations, without key sources of recovery for promises not kept, the purchaser is especially vulnerable.

**Purchaser as Third-Party Beneficiary: *Bridge Street*.** However, when a building professional makes a Certification in the Offering Plan for the benefit of prospective purchasers, relief may be obtained against a vendor.

In *Bridge Street Homeowners Ass'n v. Brick Condominium Developers, LLC* (18 Misc.3d 1128(A) (Sup. Ct. Kings Cty. 2008)), several purchasers of units in a newly constructed building brought suit against the architect who executed an Engineer's Certificate in the Offering Plan. After moving in, plaintiffs discovered numerous defects in the design and construction of the building. Remediation costs were in excess of \$18 million.

In *Bridge Street*, the architect certified in the Offering Plan "for the benefit of all persons to whom this offer is made," that, among other things the Offering Plan was complete and truthful and did not contain any fraud, deception, concealment, or suppression.

Plaintiffs sued the architect for malpractice claiming that they were the third-party beneficiaries of the contract that the Architect made with the Sponsor. The architect moved to dismiss the plaintiffs' lawsuit but, given the Certification, the Court denied the motion.

**Conclusion.** Purchasers need to carefully review Offering Plans to determine whether relief may be available against the engineering team in a newly constructed condominium.

In light of *Sykes*, claims of negligent misrepresentation against a vendor will not survive a motion to dismiss unless the purchaser will be able to establish that he or she was a known party. Intended third-party beneficiary claims will likely fare no better unless there is a certification made by a professional and the certificate contains the proper language that it is for the benefit of the persons to whom the offer is made.

So even though the purchase of a luxury condominium may be involved, the old adage "buyer beware" still applies. That is unless the State Legislature steps in and passes laws that start to protect homeowners at newly constructed homes. Illustratively, a developer must be required to keep a reserve fund whereby money is retained after the building has been sold to cover possible problems. Also, a second amount should be retained and only released after an engineer certifies that the building has a clean bill of health. Initially, the owners of the building must control the condominium board within two years or as soon as 50 percent of the building has been sold so they can control the building affairs.

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