

*To be Argued by:*  
GREG S. ZUCKER, ESQ.  
(*Time Requested: 15 Minutes*)

Appellate Division Docket Nos.: 2022-08550, 2023-01748

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**NEW YORK SUPREME COURT**

**Appellate Division – Second Department**

LIN CHEN and GABRIEL GUNTHER-BROWN,

*Plaintiffs-Appellants,*

-against-

ZUM DEVELOPMENT INC., EHSAN ELNAGHAVE a/k/a Frederick  
Elnaghve a/k/a Fred Elnaghve and ALBERT SALEM a/k/a Albert Salim  
a/k/a Alan Salim,

*Defendants-Respondents.*

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**BRIEF FOR DEFENDANTS-RESPONDENTS ZUM DEVELOPMENT INC.  
and EHSAN ELNAGHAVE**

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## QUESTIONS PRESENTED

1. Did the lower court correctly dismiss all of Appellants' fraud-based claims against Respondents Zum Development Inc. ("Zum") and Ehsan Elnaghave ("Ehsan") because such claims were barred by the specific disclaimers in the parties' contract?

Answer: Yes.

2. Did the lower court correctly dismiss all of Appellants' fraud-based claims against Zum and Ehsan because the Limited Warranty states that Appellants purchased a "*substantially redone home*," and the word "new" was crossed out?

Answer: Yes.

3. Did the lower court correctly dismiss all of Appellants' fraud-based claims against Zum and Ehsan because Appellants admitted in their Complaint that they could obtain and did obtain publicly available plans that indicated that the subject property's foundation was not new?

Answer: Yes.

4. Did the lower court correctly dismiss all of Appellants' fraud-based claims against Zum and Ehsan because the subject property's publicly available certificate of occupancy indicated that the subject property's foundation was not new?

Answer: Yes.

5. Did the lower court correctly dismiss Appellants' fraud-based claims against Zum and Ehsan that were premised on the allegation that Zum promised to fix the foundation, but failed to do so, as duplicative of Appellants' breach of contract claim?

Answer: Yes.

6. Did the lower court correctly dismiss Appellants' fraud-based claims against Zum and Ehsan that were premised on Respondents' alleged concealment of construction defects as duplicative of Appellants' breach of contract claim?

Answer: Yes.

7. Did the lower court correctly dismiss Appellants' quasi-contractual claims for promissory estoppel and unjust enrichment because the parties' relationship was governed by a valid and binding contract?

Answer: Yes.

8. Did the lower court correctly dismiss Appellants' claim for legal fees because no such cause of action exists under New York law?

Answer: Yes.

## **PRELIMINARY STATEMENT**

Plaintiffs-Appellants Lin Chen and Gabriel Gunther Brown (collectively, “Appellants” or “Purchaser”) purchased the property located at 66 Essex Road, Great Neck, New York (the “Property”) from Defendant-Respondent Zum Development Inc. (“Zum” or “Seller”), pursuant to a Contract of Sale (the “Contract,” R. 19-36) dated February 23, 2021.<sup>1</sup> Appellants were not negotiating blindly – they were represented by counsel in connection with their purchase of the Property. R. 26 (identifying Appellants’ counsel).

Appellants had the Property inspected prior to executing the Contract, and their inspector prepared a 49-page report. R. 61-109 (inspection report dated February 14, 2021). Appellants’ inspector was generally satisfied with the condition of the home but identified several issues that he believed needed to be addressed. Based upon that report, the parties executed a Rider to the Contract, which obligated Zum to address certain additional items prior to the closing. R. 35-36.

For example, Appellants’ inspector observed minor cracks in the foundation (R. 64) and recommended that “[t]he ground around the house should be sloped to encourage water to flow away from the foundations. Gutters and downspouts should act to collect roof water and drain the water at least five (5) feet from the

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<sup>1</sup> References to “R. \_\_\_” are citations to the record on appeal.

foundation, or into a functional storm sewer. Downspouts that are clogged or broken below grade level, or that discharge too close to the foundation, are the most common source of basement leakage.” R. 81. Accordingly, in the Rider, among other things, Zum “agree[d] to ensure the property is graded properly to ensure proper drainage away from the [Property].” R. 35 (No. 6).

The parties also entered into a Limited Warranty, pursuant to which Zum agreed to rectify certain construction defects (subject to the terms of the Limited Warranty) for up to one year. Appellants claim that Zum breached the Contract, Rider, and Limited Warranty because, after the closing, Appellants discovered certain alleged defects (including water infiltration in the Property’s basement and garage) that (according to Appellants) Zum failed to sufficiently address. Zum denies that it breached the Contract, Rider, and/or Limited Warranty in any respect. Thus, this is a breach of contract case between Appellants and Zum (and the action below is moving forward on that claim), and Appellants’ remedy is against Zum alone.

In order to assert leverage, however, Appellants improperly dragged the individual Defendants-Respondents (including Defendant-Respondent Ehsan Elnaghve (“Ehsan”)) into the case. Appellants manufactured fraud-based claims (*i.e.*, the second cause of action for fraud, the third cause of action for negligent misrepresentation, the fourth cause of action for fraudulent concealment, and the

fifth cause of action for fraudulent inducement) against Respondents, even though this is a garden-variety breach of contract case. Appellants also asserted quasi-contractual claims (*i.e.*, the sixth cause of action for promissory estoppel and the seventh cause of action for unjust enrichment), even though there is no dispute that Appellants and Zum entered into the Contract, which governs their relationship.<sup>2</sup>

Respondents moved to dismiss all of Appellants' claims against Zum and Ehsan, except for the breach of contract claim. On September 27, 2022, the lower court issued a Decision/Order (the "Decision") granting that motion in its entirety. R. 5-7. That Decision was correct and should be affirmed.

Appellants' fraud-based claims are primarily based on their allegation that Respondents allegedly told them that the project involved the installation of a new foundation when, in reality, the old foundation was expanded. According to Appellants, that led to construction defects (including water infiltration issues) and damages that Appellants claim were wrongfully concealed from them. The lower court correctly determined that all of Appellants' fraud-based claims fail.

Indeed, Appellants (who, again, were represented by counsel) expressly acknowledged in the Contract itself they did not rely on any representations about the Property. Section 12 of the Contract states that Appellants entered into the Contract "based solely upon [their] inspection and investigation [of the Property]

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<sup>2</sup> In the eighth cause of action, Appellants sought to recover their legal fees.

and *not upon any ... statements or representations, written or oral, as to the physical condition, state of repair, ... or any other matter related to the [Property], given or made by Seller or its representatives, and shall accept the same 'as is' in their present condition and state of repair.*" R. 23 (§ 12) (emphasis added). *See also* R. 25 (§ 28(a)) (merger clause).

As a matter of law, such a specific disclaimer bars fraud claims unless Appellants could plead and prove that the truth regarding the Property's foundation was peculiarly within Respondents' knowledge. The lower court correctly found that was not the case here.

The Contract does not state that Appellants were purchasing a new home with a new foundation. On the contrary, the Limited Warranty states that Appellants were purchasing a "*substantially redone home.*" R. 110 (emphasis added). *In fact, the word "new" is crossed out. Id.* That could not be clearer.

In addition, Appellants' Complaint expressly alleged that Appellants obtained the publicly available plans for the project from the Village of Great Neck, which "*indicate[d] that [Respondents] did not replace the old foundation from the previous structure on the Property.*" R. 46 (¶¶ 58-60) (emphasis added). *Thus, Appellants admitted that the alleged representations they claim to have relied upon were contradicted by publicly available documents. That is dispositive.*

Other publicly available documents also showed that the foundation was not new. The certificate of occupancy for the project described the work as: “*Enlarge and alter existing first floor and add second floor – finish basement.*” R. 60 (emphasis added).

Given all of that, it is incredible for Appellants to argue that they had no way of knowing that the Property’s foundation was not new.

Moreover, Appellants cannot claim that water infiltration was hidden from them when their own inspector observed cracks in the foundation and noted that water infiltration could be possible if the ground around the house was not sloped correctly. As mentioned, in the Rider, Zum agreed to address that issue (and agreed in the Limited Warranty to address certain defects that were discovered within a year). Zum’s position is that it complied with those *contractual* obligations. At best, Appellants’ allegation that Zum allegedly failed to do so is a breach of contract claim, not a fraud claim.

Notably, Appellants are not seeking to void the Contract, recover the purchase price they paid, or recover any other fraud damages that are separate and apart from their breach of contract claim. Rather, Appellants are seeking to recover the costs they incurred (which they claim are “estimated to exceed \$125,000”) because they had to retain other contractors to perform repairs, purportedly because (according to Appellants), Zum failed to comply with its

*contractual* obligations. R. 48 (¶¶ 79-80). Appellants are seeking to recover those exact same *contractual* damages in connection with their fraud-based claims. *See* R. 50 (¶ 91); R. 52 (¶ 103); R. 53 (¶ 114); R. 55 (¶ 124). Appellants know this is a breach of contract case, and that is the claim that is currently being litigated in the lower court.

Appellants’ quasi-contractual claims also fail because, as the lower court correctly held, Appellants’ “claims for unjust enrichment and promissory estoppel must be dismissed as duplicative and because there is a contract governing the parties’ dispute.” R. 5.<sup>3</sup>

The lower court’s Decision did not leave Appellants without a remedy. Appellants are currently pursuing their breach of contract claim against Zum, which is the only party they should have sued in the first place. The lower court correctly held that there is no basis for Ehsan (who is not a party to the Contract) to be in the case. The Decision should be affirmed in all respects.

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<sup>3</sup> The lower court also issued a Decision/Order dated January 11, 2023, which granted the motion of Respondent Albert Salim (“Salim”) to vacate his default and dismissed all of the claims against Salim. R. 10-12. Pursuant to [22 NYCRR § 1250.9\(f\)\(3\)](#), Appellants perfected their appeals of both of the lower court’s decisions together, upon a single record and brief.

## **LEGAL ARGUMENT**

### **POINT I**

#### **MOTION TO DISMISS STANDARD**

Although a court deciding a motion to dismiss must take the facts pleaded as true, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration, nor to that arguendo advantage.” *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999) (internal quotation marks and citations omitted).

In addition, where, as here, the elements of the causes of action are not properly pleaded, the claims must be dismissed. See *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dep’t 2011) (explaining that to survive a motion to dismiss, a complaint “must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory”).

Pursuant to CPLR 3211(a)(1), dismissal may be “granted only where the documentary evidence [tendered by defendant] utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Gomez-Jimenez v. New York L. Sch.*, 103 A.D.3d 13, 16 (1st Dep’t 2012) (cleaned up).

## POINT II

### ALL OF APPELLANTS' FRAUD-BASED CLAIMS ARE BARRED BY THE CONTRACT

The lower court correctly held that all of Appellants' fraud-based claims (*i.e.*, the second cause of action for fraudulent misrepresentation, the third cause of action for negligent misrepresentation, the fourth cause of action for fraudulent concealment, and the fifth cause of action for fraudulent inducement) are barred by the Contract.

#### **A. Section 12 Of The Contract Bars Plaintiff's Fraud-Based Claims**

Section 12 of the Contract states, in relevant part:

**12. Condition of Property.** Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the [Property], based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and *not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair, use, cost of operation or any other matter related to the [Property], given or made by Seller or its representatives, and shall accept the same "as is" in their present condition and state of repair....*

R. 23 (§ 12) (emphasis added). *See also* R. 25 (§ 28(a)) (merger clause).

The lower court held that this "specific and comprehensive disclaimer clause barred [Appellants] from claiming that they were fraudulently induced into entering the contract because of the alleged misrepresentations." R. 5. That

holding was correct. Such “specific disclaimers directly addressing the physical conditions of premises ... defeat plaintiffs’ allegations that they relied upon defendant’s oral representations as to these physical conditions.” *Couch v. Schmidt*, 204 A.D.2d 951, 952 (3d Dep’t 1994).

In support of its holding, the lower court cited (among other cases) this Court’s decisions in *Salerno v. D’Alessandro*, 213 A.D.2d 391 (2d Dep’t 1995), and *Busch v. Mastropierro*, 258 A.D.2d 492, 493 (2d Dep’t 1999), both of which are directly on point.

In *Salerno*, this Court held that a disclaimer in a real estate contract that contained language very similar to Section 12 of the Contract barred a fraudulent inducement claim:

*[T]he buyers agreed ... that they were fully acquainted with the physical condition of the premises based on their own inspection and investigation, that they entered into the contract based solely on their own inspection and investigation, that they did not rely upon any representations written or oral as to the physical condition of the premises, that they were accepting the premises “as is”, and that as to the property neither party was relying on any statement not specifically contained in the contract.*

*Salerno*, 213 A.D.2d at 392 (emphasis added) (fraud claim barred by specific disclaimer).

Similarly, in *Busch*, the Court held that the plaintiffs’ fraud claims were barred because:

*The subject contract contained a provision that the purchasers were fully aware of the physical condition and state of repair of the premises based on their own inspection and investigation, and not based upon any information, data, statements or representations, written or otherwise as to the physical condition, state of repair or any other matters related to the premises given or made by the seller. The rider to the contract provided that the purchasers inspected the premises and accepted them in “as is” condition. These clauses are sufficiently specific to bar the plaintiffs from claiming that they were fraudulently induced into entering the contract because of oral representations to the contrary.*

*Busch*, 258 A.D.2d at 493 (emphasis added). See also *Landes v. Sullivan*, 235 A.D.2d 657, 659 (3d Dep’t 1997) (fraudulent inducement claim barred by contractual disclaimer stating that “defendants had an opportunity to inspect the premises, that they were taking the unit ‘as is’ and that they had not relied upon any representations by plaintiff as to the physical condition of the premises”).

Appellants argue that *Salerno* and *Busch* are distinguishable because the fraud claims in those cases were dismissed at the summary judgment stage rather than on motions to dismiss. That “distinction” is irrelevant. *In those cases, this Court held that the specific disclaimers in the parties’ contracts barred any fraud claim.* A court can make that finding on a motion to dismiss just as easily as it can on a motion for summary judgment.

*In fact, Appellants themselves cited a case in which the First Department did exactly that.* In *MBIA Ins. Corp. v. Merrill Lynch*, 81 A.D.3d 419, 419 (1st Dep’t

2011), the First Department affirmed the trial court’s decision granting the defendants’ *motion to dismiss* the plaintiffs’ fraud claims, finding that “Plaintiffs’ fraud-related claims failed to state a cause of action in light of the specific disclaimers in the contracts, executed following negotiations between the parties, all sophisticated business entities, providing that plaintiff Lacrosse would not rely on defendants’ advice, that it had the capacity to evaluate the transactions, and that it understood and accepted the risks.”

Other courts have also repeatedly held, in connection with *motions to dismiss*, that fraud claims were barred by sufficiently specific disclaimers in contracts. For example, in one case, this Court held:

In the matter at bar, the contract for the purchase of certain property, in addition to stating that *all prior writings were merged therein, provided that no representations would survive the closing contract; that the purchasers had inspected the property and were entering into the contract based upon the purchasers’ own investigation; and that the purchasers were taking the property as is, without any reliance upon, inter alia, any oral representations.* Finally, the contract provided that acceptance of the deed was to be considered full performance of all obligations. *These clauses are sufficiently specific to bar the allegations of the plaintiff purchasers that they were induced to enter into this agreement by oral misrepresentations about the status of the property immediately adjacent to the premises.*

*Taormina v. Hibsher*, 215 A.D.2d 549, 549–50 (2d Dep’t 1995) (affirming trial court’s order granting *motion to dismiss*) (emphasis added). See also *Ryan v.*

*Pascale*, 58 A.D.3d 711, 7126 (2d Dep’t 2009) (reversing trial court’s denial of *motion to dismiss* because “[t]he causes of action asserted in the complaint were barred by the specific disclaimer provisions contained in the contract of sale.”); *Roland v. McGraime*, 22 A.D.3d 824, 824 (2d Dep’t 2005) (affirming trial court’s order granting *motion to dismiss* “the plaintiffs’ fraud cause of action, to the extent it was predicated on alleged oral representations made by the defendant before the 1995 conveyance, as such cause of action was clearly barred by the specific disclaimer provisions contained in the contract of sale”). The same reasoning applies here.

Notably, when Appellants negotiated and signed the Contract containing the specific disclaimer, they were represented by counsel. R. 26 (the Contract identifies Appellants’ counsel).

**B. Appellants’ Fraud-Based Claims Are Not Based On Matters Peculiarly Within Respondents’ Knowledge**

Appellants cite a number of cases (which are discussed below), which state that a specific disclaimer does not bar a fraud claim if the information at issue was peculiarly within the defendant’s knowledge.

Here, however, the alleged misrepresentations here (about the condition of the foundation) *did not* concern a matter that was peculiarly within Respondents’ knowledge. On the contrary, the foundation’s condition was clear and

ascertainable both from the clear and unequivocal language of the Limited Warranty and from public records that Appellants *admitted* they obtained.

The Limited Warranty states that Appellants purchased a “*substantially redone home.*” R. 110 (emphasis added). *Notably the word “new” was crossed out. Id.* That could not be clearer. As a matter of both law and common sense, Appellants cannot have reasonably relied upon any oral representation that contradicted the plain language of the Limited Warranty. *See Stone v. Schulz, 231 A.D.2d 707, 707-08 (2d Dep’t 1996)* (“Where, as here, there is a meaningful conflict between an express provision in a written contract and a prior alleged oral representation, the conflict negates a claim of a reasonable reliance upon the oral representation.”). *See also Hong Qin Jiang v. Li Wan Wu, 179 A.D.3d 1041, 1043 (2d Dep’t 2020)* (same).

The foundation’s condition was also readily ascertainable from publicly available plans. This is clear from Appellants’ own Complaint, in which they expressly alleged that: (i) “[Appellants] acquired a copy of the Plans from the Village of Great Neck Building Department”;<sup>4</sup> (ii) “*the Plans indicate that the [Respondents] did not replace the old foundation from the previous structure on the Property*”; and (iii) “*the Plans indicate that all the [Respondents] did was*

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<sup>4</sup> The “Plans” are defined in the Complaint as “the building plans, including blue prints, for the Property.” R. 46 (¶ 55).

*expand the previous foundation, adding additional square footage building new foundation walls in one section of the basement/foundation on to the previously existing old foundation.”* R. 58-60 (emphasis added).

In addition, the certificate of occupancy issued by the Village of Great Neck (which was also publicly available) for the project stated:

Description of Work: *Enlarge and alter existing first floor and add second floor – finish basement.*

R. 60 (emphasis added).<sup>5</sup> *Thus, multiple publicly available documents state that the project did not involve the installation of a new foundation.*

Clearly, publicly available plans that Appellants could obtain *and did obtain* cannot be peculiarly within Appellants’ knowledge. *See Chapman v. Jacobs*, 197 A.D.3d 851, 852 (2d Dep’t 2021) (fraud claims failed because “the status of the certificate of occupancy was readily ascertainable from the public record”) (cleaned up); *Matos v. Crimmins*, 40 A.D.3d 1053, 1055 (2d Dep’t 2007) (“Notwithstanding the plaintiffs’ contention that the existence of the easements was concealed by the presence of certain items in the backyard, including a swing-

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<sup>5</sup> Appellants argue that the lower court should have ignored the certificate of occupancy because it is not certified. App. Br. at 31. But Appellants have provided no reason to doubt the certificate’s genuineness or accuracy – therefore, the Court should consider it. *See Dixon v. 105 W. 75th St. LLC*, 148 A.D.3d 623, 630 (1st Dep’t 2017) (“[T]hat the certificates of occupancy ... may not have been certified is of [no] moment. [P]laintiff offers no reason for us to doubt [its] basic authenticity.”); *Berliner v. Northwell Health*, No. 714432/2018, 2021 WL 11683032, at \*2 (Sup. Ct. Queens County Oct. 27, 2021) (“Plaintiff’s claim that defendant’s certificate of occupancy was not certified and therefore not admissible is without merit, as plaintiff failed to cite to any case law that rejects the consideration of a self-authenticating certificate of occupancy in a summary judgment motion.”).

set and a fenced-in dog run, the plaintiffs concede that the existence of the easements was readily ascertainable from the public record.”); *Jordache Enterprises, Inc. v. Gettinger Assocs.*, 176 A.D.2d 616, 617 (1st Dep’t 1991) (“[T]he terms of the certificate of occupancy, a public record, were not within the exclusive knowledge of the defendant.”); *Harmit Realities LLC v. 835 Ave. of the Americas, L.P.*, No. 651931/2013, 2015 WL 3490754, at \*6 (Sup. Ct. N.Y. County June 2, 2015), *aff’d*, 135 A.D.3d 564 (1st Dep’t 2016) (“[I]t is undisputed that there existed at least two Certificates of Occupancy (COs) which are publicly filed documents ... There are no allegations that Carlisle was unable to access this information or made diligent efforts to access this information but could not attain it.”) (emphasis added); *Sheffield v. Pucci*, 63 Misc. 3d 1216(A), 2019 WL 1612695, at \*12 (Sup. Ct. N.Y. County April 15, 2019) (reliance unreasonable “[s]ince the CO is a public record and plaintiff does not allege defendants’ exclusive possession of the record”); *Currid v. 360 Brooklyn Invs., LLC*, 25 Misc. 3d 1242(A), 2009 WL 4876055, at \*4 (Sup. Ct. Kings County Dec. 9, 2009) (“A Temporary Certificate of Occupancy is a public record which was accessible to the plaintiff; accordingly, her alleged reliance on its existence was unreasonable.”).

Appellants claim that the inspector they hired was unable to examine the Property’s foundation, purportedly because the basement was finished, and the foundation walls were covered by sheetrocked, plastered, and painted walls. App.

Br. at 23-24. This is a red herring. The foundation's condition was evident from the Limited Warranty, the publicly filed plans that Appellants could have obtained (and did obtain), and the certificate of occupancy. As the First Department explained in an illustrative case:

Plaintiff's argument that defendants sheetrocked the entrance to the eighth floor, programmed the elevator to skip that floor, and installed a deceptive elevator floor designation panel that omitted the eighth floor, is unavailing.<sup>6</sup> *Plaintiff should have been alerted to the building's structure by, among other things, comparing the building's 15 temporary C of Os to the "as-built" plans, because the temporary C of Os all showed that the building had eight stories while the "as-built" plans indicated that the building had only seven stories.*

*B & C Realty, Co. v. 159 Emmut Properties LLC*, 106 A.D.3d 653, 655 (1st Dep't 2013) (emphasis added). The same reasoning applies here.

Further, the possibility of water infiltration was certainly not solely within Respondents' knowledge. On the contrary, as mentioned, Appellants' inspector observed minor cracks in the foundation (R. 64) and recommended that "[t]he ground around the house should be sloped to encourage water to flow away from the foundations. Gutters and downspouts should act to collect roof water and drain the water at least five (5) feet from the foundation, or into a functional storm sewer. Downspouts that are clogged or broken below grade level, or that discharge

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<sup>6</sup> Appellants have not alleged that Respondents have done anything akin to programming an elevator to skip floors or installing deceptive floor designations.

too close to the foundation, are the most common source of basement leakage.” R. 81. Because the parties were aware of that issue, in the Rider, Zum “agree[d] to ensure the property is graded properly to ensure proper drainage away from the [Property].” R. 35 (No. 6). Nothing was hidden from Appellants.

**C. The Cases Cited By Appellants Do Not Support Their Position**

Appellants cite a number of cases in which defendants argued that fraud claims were barred by contractual disclaimers. Those cases, however, either support Respondents’ position or are distinguishable.

Indeed, in five of those cases, the courts (including the Court of Appeals and this Court) *enforced* the specific disclaimers at issue and dismissed the fraud claims. See *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 93 (1985) (“[T]he language of disclaimer in the guarantee is sufficiently specific to foreclose as a matter of law the defenses and counterclaims based on fraud, negligence or failure to perform a condition precedent asserted against plaintiff banks.”) (cleaned up); *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320-21 (1959) (“[P]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff’s complaint that the agreement was executed in reliance upon these contrary oral representations.”); *DiBuono v. Abbey, LLC*, 95 A.D.3d 1062, 1064–65 (2d Dep’t 2012) (agreement “contained provisions

stating that Palisades had examined, and was fully familiar with, the physical condition of the demised premises, including the subsurface conditions, and that no representations or warranties, whether expressed or implied, had been made regarding the condition of the demised premises. These provisions were sufficiently specific to bar Palisades' claim that LMC fraudulently induced it into entering the contract"); *MBIA Ins. Corp.*, 81 A.D.3d at 419 (affirming trial court's dismissal of fraud-related claims); *Callahan v. Miller*, 194 A.D.2d 904, 906 (3d Dep't 1993) (enforcing specific disclaimer and dismissing fraud claim because information about water supply on property was not peculiarly within defendants' knowledge).

Other cases Appellants cited involved *general* disclaimers (which do not bar fraud claims), not a specific disclaimer like Section 12 of the Contract. See *Gizzi v. Hall*, 300 A.D.2d 879, 881 (3d Dep't 2002) ("a *general* merger clause, such as the one contained in the contract of sale herein, is insufficient to preclude the use of parol evidence to prove a claim of fraud") (emphasis added); *Dyke v. Peck*, 279 A.D.2d 841, 842 (3d Dep't 2001) (holding that "the language of the real estate contract lacks the specificity which is necessary to bar the use of parol evidence to prove a claim of fraud in the inducement, since the clauses in this contract amount to nothing more than general merger or 'as is' clauses which do not serve to exclude parol evidence of fraud in the inducement," but dismissing the fraud claim

because plaintiff's reliance on the alleged misrepresentation was not reasonable under the circumstances); *Schooley v. Mannion*, 241 A.D.2d 677, 678 (3d Dep't 1997) (“[A]lthough the contract in question indicated that plaintiffs were taking the property ‘as is’, it did not indicate that plaintiffs had inspected the property; nor did it specify that they were *not* relying upon any representations as to the physical condition of the property.”); *George v. Lumbrazo*, 184 A.D.2d 1050, 1050 (4th Dep't 1992) (“The ‘as is’ and *general* merger clauses in the purchase contract are not specific disclaimers, and do not preclude an examination into whether there was fraud in the inducement of the contract.”) (emphasis added).<sup>7</sup>

Appellants also cited several cases in which the disclaimers at issue did not encompass the alleged misrepresentations that were made. In *S & A Realty Mgmt. Corp. v. Mario Prestigiaco*, *Senack Realty*, 306 A.D.2d 339, 340 (2d Dep't 2003), the plaintiff purchased a building and claimed that the defendant real estate agents had misrepresented (both orally and in certain documents) the building's rental income. The agents argued that the plaintiff's fraud claims were barred by the disclaimer on the listing sheet. This Court disagreed because the disclaimer “*did not extend to cover the information contained in any and all documents given*

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<sup>7</sup> The court in *Schooley* stated in *dicta* that “even if the contract had contained specific disclaimers, the fact that the alleged defect regarding insulation was peculiarly within Circular's knowledge would be sufficient to salvage plaintiffs' cause of action.” *Id.* at 678. As discussed above, information regarding the condition of the foundation was *not* peculiarly within Respondents' knowledge at all. It was available on the face of the Limited Warranty and in the publicly available plans and certificate of occupancy.

to [the plaintiff]. The disclaimer was not broadly worded; it provided that no representation was made of ‘the figures set forth herein,’” and was “devoid of any express statement that [the plaintiff] was not relying upon any oral representations concerning the rental income on the property.” *Id.* (emphasis added). There is no dispute that the disclaimers in Section 12 of the Contract here covered any alleged misrepresentations about the condition of the foundation.

Appellants also cite *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 24 (S.D.N.Y. 2002), which is nothing like this case. As one court explained, “*JPMorgan* involved an unusual case of fraud at the extreme, embodied in the deceptive business practices of the now defunct Enron Corporation.” *Valley Nat. Bank v. Greenwich Ins. Co.*, 254 F. Supp. 2d 448, 460 (S.D.N.Y. 2003).

In *JPMorgan*, the defendants had issued bonds to guarantee what they believed were sales of gas and oil by Enron Corporation to Mahonia Limited and Mahonia Natural Gas Limited (“Mahonia”). In reality, the transactions were simple loans from plaintiff’s predecessor, Chase, to Enron that were disguised as asset sales so that Enron could book them as revenue. Chase loaned Mahonia the money to purchase the gas and oil from Enron, and Enron secretly agreed to repurchase the same gas and oil from Mahonia-controlled entities, at a price equal to what Mahonia owed Chase. Defendants claimed that only by disguising the loans could Chase and Mahonia induce them to guarantee the transactions. The

court held that broad disclaimers in the bonds did not waive this claim of fraudulent inducement, which were “premised on fraudulent misrepresentations in the Bonds themselves. Here each of the Bonds is expressly premised on Mahonia’s having entered with Enron into a gas or oil ‘Inventory Forward Sale Contract’ and expressly recites that once all the contracted-for gas or oil ‘is fully delivered’ the Sureties’ obligations will cease. Plainly implicit in these representations is the assertion that the Sureties are being asked to insure the sale and future delivery of a commodity, rather than being asked to insure, unlawfully, a disguised loan transaction.” *Id. at 27-28* (cleaned up).

Here, by contrast, Appellants have not alleged any sham transactions, nor have they alleged that there were any fraudulent statements in the Contract or in the Limited Guaranty themselves.

Appellants cite only one case in which the court refused to dismiss a fraud claim in the face of a specific disclaimer, but those facts bear no resemblance to this case. See *TIAA Glob. Invs., LLC v. One Astoria Square LLC*, 127 A.D.3d 75 (1st Dep’t 2015). In *TAA Glob.*, the plaintiff purchased a 115-unit apartment building. Shortly before the closing, plaintiff received a letter from 35 tenants complaining about excessive heating bills, excessive air infiltration, and inadequate heating. After the plaintiff inquired about the matter, the defendant’s principal stated in writing that the window insulation was code-compliant and that there was

no excessive air penetration from the exterior of the building. The defendant's principal also provided a letter from his contractor stating that the problem had related to defective valves in mechanical units, which had been fixed after the date of the tenants' letter. After taking over the building, the plaintiff discovered that the air infiltration problems were not due to defective valves, but to shoddy construction, along with a complete lack of insulation and improper connections of vertical interior walls.

The First Department held that the plaintiff's fraud claims should not be dismissed, even though the agreement it signed included specific disclaimers (and plaintiff conducted an inspect), because whether plaintiff's engineer could have discovered the building's shoddy construction with reasonable diligence was a disputed issue of fact.

Here, by contrast, there is no question that Appellants could have and did become aware of the foundation's condition. The Limited Warranty, the publicly available plans, and the certificate of occupancy all clearly disclosed that the foundation was not new. That is dispositive.

Accordingly, all of Appellants' fraud-based claims are barred by the Contract and were correctly dismissed as against Zum and Ehsan. The claims were also correctly dismissed for the additional reasons set forth below.<sup>8</sup>

### **POINT III**

#### **THE SECOND CAUSE OF ACTION, FOR FRAUDULENT MISREPRESENTATION, WAS CORRECTLY DISMISSED AS AGAINST ZUM AND EHSAN**

Appellants' second cause of action was for fraudulent misrepresentation. R. 49-50 (¶¶ 81-91). "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). Appellants failed to sufficiently allege those elements here.

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<sup>8</sup> Appellants argued to the lower court that Ehsan could not invoke the disclaimer because he is not a party to the Contract. Appellants did not raise that argument in their appellate brief and have therefore abandoned it. In any event, in Section 12 of the Contract, Appellants disclaimed reliance on any representations about the Property "given or made by Seller *or its representatives*." R. 23 (§ 12) (emphasis added). Permitting Appellants to sign such an agreement and then to sue those same "representatives" for alleged misrepresentations about the Property would directly contradict the express language of the Contract, contrary to law. See *Katz v. Image Innovations Holdings, Inc.*, No. 06 CIV.3707, 2008 WL 4840880, at \*7 (S.D.N.Y. Nov. 4, 2008) ("[C]orporate representatives may invoke the protection of a merger clause in an agreement between their corporation and a plaintiff who brings fraud claims against the officers.") (emphasis added); *Harmitt*, 135 A.D.3d at 565 (managing member "may invoke the contractual disclaimers as a defense"); *Vesey Assocs. Inc. v. Regime Realty Corp.*, 35 Misc. 2d 353, 355 (Sup. Ct. N.Y. County 1961), *aff'd*, 16 A.D.2d 920 (1st Dep't 1962) (officer of corporate seller could rely on contractual disclaimer).

**A. Appellants Failed To Plead The Element Of Justifiable Reliance**

Appellants claim that Respondents misled them by allegedly representing that the project involved new construction (including a new foundation), but then conducted the renovations with the old foundation still in place. But any reliance by Appellants on any such representations (which are denied in any event) was not reasonable.

“Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant’s misrepresentations.” *Stuart Silver Assocs., Inc. v. Baco Dev. Corp.*, 245 A.D.2d 96, 98-99 (1st Dep’t 1997). That is exactly the situation here. As explained above, it was clear from the Limited Warranty and multiple publicly available documents that the foundation was not new.

The Limited Warranty states that Appellants purchased a “*substantially redone home*,” and the Contract does not say otherwise. R. 110. Again, the word “new” home was crossed out by the parties. *Id.* Appellants cannot have reasonably relied upon any alleged representation that contradicted the Limited Warranty. See *Hong Qin Jiang*, 179 A.D.3d at 1043 (no reasonable reliance upon a representation that contradicts an express provision in a written contract); *Stone*, 231 A.D.2d at 707-08 (same). See also R. 25 (§ 28(a)) (“[N]either party [is]

*relying upon any statement made by anyone else that is not set forth in this contract*") (emphasis added).

In addition, the publicly available plans (which Appellants admit they obtained) and certificate of occupancy made clear that the project did *not* involve the installation of a new foundation. R. 46 (¶¶ 58-60); R. 60. Because the information about the foundation was publicly available, any reliance on alleged misrepresentations about the foundation was not reasonable. *See Chapman*, 197 A.D.3d at 852 (fraud claims failed because “the status of the certificate of occupancy was readily ascertainable from the public record”) (cleaned up); *Matos*, 40 A.D.3d at 1055 (fraud claims dismissed because “the existence of the easements was readily ascertainable from the public record”); *Jordache Enterprises, Inc.*, 176 A.D.2d at 617 (“[T]he terms of the certificate of occupancy, a public record, were not within the exclusive knowledge of the defendant.”); *Harmit*, 2015 WL 3490754, at \*6 (“[I]t is undisputed that there existed at least two Certificates of Occupancy (COs) which are publicly filed documents .... There are no allegations that Carlisle was unable to access this information or made diligent efforts to access this information but could not attain it.”) (emphasis added); *Sheffield*, 2019 WL 1612695, at \*12 (reliance unreasonable “[s]ince the CO is a public record and plaintiff does not allege defendants’ exclusive possession of the record”); *Currid*, 2009 WL 4876055, at \*4 (“A Temporary Certificate of Occupancy is a public

record which was accessible to the plaintiff; accordingly, her alleged reliance on its existence was unreasonable.”).

The cases that Appellants cite on this issue do not help them. To start with, in *Richardson v. United Funding, Inc.*, 16 A.D.3d 570, 571 (2d Dep’t 2005), the court *dismissed* a fraud claim, because “the plaintiff acknowledged that she did not have the house inspected prior to the closing, which established, as a matter of law, that she did not exercise reasonable diligence.” Clearly, that case does not support Appellants’ position.

The rest of the cases that Appellants cite are distinguishable.

The Third Department’s decision in *Commander Terminals, LLC v. Commander Oil Corp.*, 71 A.D.3d 623, 626 (3d Dep’t 2010), also supports Respondents. In that case, the Third Department held that the Supreme Court properly denied the *plaintiffs’* motion for summary judgment on their fraud claim because the plaintiffs “failed to prove that the defendants made a misrepresentation upon which the plaintiffs justifiably relied,” and “there were triable issues of fact as to whether ... the oil seepage at issue was something peculiarly within the knowledge of Commander Oil, and was something the plaintiffs could not have discovered and did not discover through the exercise of reasonable diligence.” Here, by contrast, the condition of the foundation was disclosed in the Limited Warranty and in publicly available documents, and Appellants’ own engineer saw

cracks in the foundation and noted the possibility of water infiltration (which the parties agreed in the Rider would be addressed).

In *Kurtz v. Foy*, 65 A.D.3d 741, 743 (3d Dep't 2009), the Third Department affirmed the denial of a motion to dismiss a fraud claim brought by plaintiffs who alleged they had bought property based on false assurances that a road running over the property was private. The court held that an application to declare the road abandoned by the town (which was denied), while technically publicly available, may have been peculiarly within the defendant's knowledge if the plaintiffs could prove that it was not readily obtainable. *Id.* Similarly, in *Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v. Holiday Org., Inc.*, 12 Misc. 3d 1182(A), 2006 WL 1982603, at \*12 (Sup. Ct. Nassau County July 7, 2006), *aff'd*, 65 A.D.3d 1284 (2d Dep't 2009), the plaintiffs (an HOA and its members) alleged certain defects in a condominium's common area *that could not have been discovered with reasonable diligence or inspection.*

By contrast, in this case, the plans (which described the condition of the foundation) were readily obtainable, *and Appellants – by their own admission in their Complaint – indisputably obtained them.* Indeed, the Third Department later distinguished *Kurtz* and dismissed a fraud claim in a case where the “subdivision application [at issue] was available to the public upon request.” *Hidden Pond Schodack, LLC v. Hidden Pond Homes, Inc.*, 189 A.D.3d 1792, 1796 (3d Dep't

2020) (distinguishing *Kurtz*). See also *W. Valley KB Venture, LLC v. ILKB LLC*, No. 20-CV-3278, 2021 WL 4171918, at \*8 (E.D.N.Y. Sept. 13, 2021) (distinguishing *Kurtz* and dismissing fraud claim because “[p]laintiff cannot plausibly allege justifiable reliance where, as here, Parrella’s bankruptcy case and an affiliate’s 2012 litigation were *matters of public record* and could have been uncovered with due diligence.”) (cleaned up). Here, the foundation’s condition was not only a matter of public record but was also disclosed on the face of the Limited Warranty.

**B. The Second Cause Of Action Is Duplicative Of Appellants’ Breach Of Contract Claim**

Appellants’ fraud claim is also duplicative of their breach of contract claim. Despite Appellants’ claim that they were allegedly damaged by having to purchase the Property for \$1,750,000, they are *not* seeking to undo the deal or to recover the purchase price. Rather, the damages that Appellants are seeking on the second cause of action (and on all of their fraud claims) are the costs Appellants allegedly incurred “to cure the Construction Defects *pursuant to the Limited Warranty*” that (according to Appellants) Zum allegedly failed to repair. R. 50 (¶ 90) (emphasis added).

Zum’s position is that it complied with the Contract, the Rider, and the Limited Warranty in all respects. But any alleged failure by Zum to make repairs that were required by the Limited Warranty would be a breach of contract, *not*

*fraud. See Heffez v. L & G Gen. Const., Inc.*, 56 A.D.3d 526, 527 (2d Dep’t 2008) (“[T]he plaintiffs, who entered into a contract for home reconstruction with the defendant ... did not allege or demonstrate that the defendants owed them a legal duty independent of the contractual duty. The allegations of negligence and fraud are the same as those underpinning the breach of contract cause of action, and allege[ ] nothing more than a breach of contract and [a breach of] any covenants implied.”) (cleaned up); *Renaissance Equity Holding, LLC v. Al-An Elevator Maint. Corp.*, 36 Misc. 3d 1209(A), 2012 WL 2731958, at \*7 (Sup. Ct. Kings County July 2, 2012), *aff’d*, 121 A.D.3d 661 (2d Dep’t 2014) (“[P]laintiff’s fraud claim is merely a disguised contract claim since the gravamen of the fraud claim is that defendants promised that Al’An would provide maintenance and repair services, and that it failed to do so.”) (emphasis added); *Tesoro Petroleum Corp. v. Holborn Oil Co.*, 108 A.D.2d 607, 607 (1st Dep’t 1985) (“A failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract.”) (emphasis added). *See also DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 325 (S.D.N.Y. 2002) (a fraud claim cannot be based on the alleged breach of a contractual warranty if the “claim is based on breaches of promises concerning future events”); *U.S. Network Servs., Inc. v. Frontier Commc’ns of W., Inc.*, 115 F. Supp. 2d 353, 356 (W.D.N.Y. 2000) (“The

gist of the claim is simply that Frontier falsely represented that it would provide a certain level of services in the future, and that it did not live up to that promise. This claim is duplicative of plaintiff's contract and warranty claims."); *Sass v. TMT Restoration Consultants Ltd.*, 100 A.D.3d 443 (1st Dep't 2012) (fraud claim failed because "the only harm alleged, defective workmanship, relates to plaintiff's claim for breach of contract").

Indeed, Appellants have alleged a breach of contract claim, and that claim includes allegations that Zum failed to perform contractually agreed upon repairs, including repairs to the foundation. R. 48 (¶¶ 75, 77, 79). The claims are identical.

Moreover, the claims are also duplicative because the damages that Appellants seek on their fraudulent misrepresentation claim (which they claim "are estimated to exceed \$125,000") are identical to the damages that Appellants seek on their breach of contract claim. *Compare* R. 48 (¶ 80) (damages on breach of contract claim) *with* R. 50 (¶ 91) (damages on fraudulent misrepresentation claim). *See FJ Vulis, LLC v. Val*, 166 A.D.3d 469, 470 (1st Dep't 2018) ("Moreover, the fraud claim seeks the same damages as the contract claim."); *Cronos Grp. Ltd. v. XComIP, LLC*, 156 A.D.3d 54, 65 (1st Dep't 2017) (fraud and contract claims were duplicative since "both claims seek compensatory damages for that loss in the very same principal dollar amount, to the penny").

For these reasons, the second cause of action was correctly dismissed as against Zum and Ehsan.

#### **POINT IV**

#### **THE THIRD CAUSE OF ACTION, FOR NEGLIGENT MISREPRESENTATION, WAS CORRECTLY DISMISSED AS AGAINST ZUM AND EHSAN**

The third cause of action was for negligent misrepresentation. R. 50-52 (¶¶ 92-103). The elements of a negligent representation claim are: “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information.” *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 840 (1st Dep’t 2011). Appellants failed to sufficiently allege those elements.

Appellants’ negligent misrepresentation claim asserted two alleged misrepresentations: (i) that the project would involve completely new construction, including the foundation (R. 50 (¶ 95)); and (ii) that Respondents allegedly “misrepresented to [Appellants] in the Limited Warranty that [Zum] would cure any defects in the construction concerning the foundation.” (R. 51 (¶ 98)).

**A. Appellants Failed To Plead Reasonable Reliance**

To the extent the negligent misrepresentation claim was based upon alleged representations about a new foundation, that claim fails for the same reason (set forth in Point III(A) above) that the second cause of action for fraudulent inducement fails – namely, that Appellants failed to plead reliance.

Appellants allege that Zum actively concealed the foundation’s condition from them, which Zum denies. But in all events, the negligent misrepresentation claim still fails because any alleged misrepresentation about the foundation was contradicted by the Limited Warranty and by publicly available documents (*i.e.*, the plans and the certificate of occupancy). *See Chapman, 197 A.D.3d at 852* (fraud claim failed because even if there was active concealment, “the status of the certificate of occupancy was readily ascertainable from the public record”) (cleaned up); *Matos, 40 A.D.3d at 1055* (fraud claim failed because even if the easements at issue were concealed, plaintiffs could have discovered them by reviewing public records).

**B. Appellants’ Negligent Misrepresentation Claim Was Really A Claim For Breach Of Contract**

As mentioned, Appellants also claimed that Respondents “misrepresented to [Appellants] in the Limited Warranty that [Zum] would cure any defects in construction concerning the foundation.” R. 51 (¶ 98).

Thus, Appellants alleged that Zum promised to fix the foundation, but failed to do so. But as explained in Part III(B) above, that is a breach of contract claim, not a fraud claim. See *Heffez*, 56 A.D.3d at 527 (“[T]he plaintiffs, who entered into a contract for home reconstruction with the defendant ... did not allege or demonstrate that the defendants owed them a legal duty independent of the contractual duty. The allegations of negligence and fraud are the same as those underpinning the breach of contract cause of action, and allege[ ] nothing more than a breach of contract and [a breach of] any covenants implied.”) (cleaned up); *Renaissance Equity Holding*, 2012 WL 2731958, at \*7 (“[P]laintiff’s fraud claim is merely a disguised contract claim since the gravamen of the fraud claim is that defendants promised that Al’An would provide maintenance and repair services, and that it failed to do so.”) (emphasis added); *Tesoro Petroleum Corp.*, 108 A.D.2d at 607 (“A failure to perform *promises of future acts* is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract.”) (emphasis added). See also *DynCorp*, 215 F. Supp. 2d at 325 (a fraud claim cannot be based on the alleged breach of a contractual warranty if the “claim is based on breaches of promises concerning future events”); *U.S. Network Servs., Inc.*, 115 F. Supp. 2d at 356 (“The gist of the claim is simply that Frontier falsely represented that it would provide a certain level of services in the future, and that it did not live

up to that promise. This claim is duplicative of plaintiff's contract and warranty claims."); *Sass*, 100 A.D.3d at 443 (fraud claim failed because "the only harm alleged, defective workmanship, relates to plaintiff's claim for breach of contract").

"Moreover, the fraud claim seeks the same damages as the contract claim." *FJ Vulis, LLC*, 166 A.D.3d at 470. See also *Cronos Grp. Ltd.*, 156 A.D.3d at 65 (fraud and contract claims were duplicative since "both claims seek compensatory damages for that loss in the very same principal dollar amount, to the penny"). Compare R. 48 (§ 80) (stating that the damages due to Zum's alleged "refusal to fulfill its obligations under the Limited Warranty" are "estimated to exceed \$125,000") with R. 52 (§ 103) (stating that the damages resulting from "[Appellants'] negligent misrepresentation" are "estimated to exceed \$125,000").

For all of these reasons, the third cause of action was correctly dismissed as against Zum and Ehsan.

#### **POINT V**

#### **THE FOURTH CAUSE OF ACTION, FOR FRAUDULENT CONCEALMENT, WAS CORRECTLY DISMISSED AS AGAINST ZUM AND EHSAN**

The fourth cause of action asserted a claim for fraudulent concealment. "To state a claim for fraudulent concealment, a plaintiff must allege that the defendant had a duty to disclose material information and failed to do so, that the omission

was intentional so as to defraud or mislead the plaintiff, that the plaintiff relied on the omission and that the plaintiff suffered damages.” *Gottbetter v. Crone Kline Rinde, LLP*, 162 A.D.3d 579, 580 (1st Dep’t 2018). Appellants failed to allege those elements here

Appellants asserted that Respondents allegedly failed to disclose to Appellants that: (i) Respondents’ representations to Appellants that a new foundation was being installed were false; and (ii) Respondents construction of the Property was faulty and that the Property contained certain construction-related defects (the “Construction Defects”). R. 52-53 (¶¶ 104-114). This claim failed for multiple reasons.

The portion of the claim related to the foundation was simply a rehash of Appellants’ second cause of action for fraudulent inducement under a new name. Respondents did not conceal anything with respect to the foundation. As discussed in Point III(A) above, the Limited Warranty expressly stated that Appellants purchased a “substantially redone home.” R. 110. Again, Respondents also filed plans and a certificate of occupancy with the Building Department, which made it clear that the project did include the installation of a new foundation. There is no dispute that those documents were publicly available and easily obtainable. Once again, Appellants admitted this in their Complaint. R. 46 (¶¶ 58-60). Moreover, the alleged issues that Appellants now raises (such as cracks in the foundation and

possible leaks) were identified in the inspection report and then the parties entered into the Rider, along with a Limited Warranty.

The allegation that Zum allegedly concealed the Construction Defects from Appellants is duplicative of Appellants' breach of contract claim. Indeed, Appellants expressly allege in their breach of contract claim that Zum was allegedly "in default of its obligations under the Limited Warranty *by failing to cure the Construction Defects.*" R. 48 (¶ 79) (emphasis added).

In the fourth cause of action, Appellants accuse Respondents of "intentionally concealing" the alleged Construction Defects they were purportedly contractually obligated to cure. R. 53 (¶ 110). The Complaint states that the damages for both claims are identical, namely "estimated to exceed \$125,000," which Appellants allege is the cost to cure the alleged defects. *Compare* R. 48 (¶ 80) (damages for breach of contract claim) with R. 53 (¶ 114) (damages that Appellants claim to have suffered from the alleged fraudulent concealment). The claims are duplicative.

This Court's decision in *Middle Country Cent. Sch. Dist. v. J.F. O'Healy Const. Corp.*, 230 A.D.2d 777, 778 (2d Dep't 1996), is instructive. In that case, the plaintiff school district hired a contractor to construct an elementary school. After the school was completed, defects caused by missing, improperly tightened and improper bolts were found in the structure of the school, and the plaintiff sued

the contractor, claiming that the contractor “committed fraud by misrepresenting the finished condition of the school and by concealing the defects in the steel structure.”

The Court held that “the wrongful acts alleged related to [the contractor’s] contractual obligations. *Indeed, the remedy sought by the plaintiff is the cost incurred in repairing the allegedly improper bolting of the steel structure which deviated from contract specifications.* Hence, the liability has its genesis in the parties’ contractual relation, and the action is, in essence, one sounding in contract.” *Id.* (emphasis added). *See also Borough Const. Group, LLC v. Red Hook 160 LLC*, No. 500308/19, 2019 WL 5963206, at \*3 (Sup. Ct. N.Y. County Nov. 8, 2019) (fraud claim based on “misrepresentations regarding self-performance of the work and concealing defects” in connection with construction a contract “does not include matters not already subject to the contract,” and was dismissed); *Bd. of Managers of 250 Bowery Condominium v. 250 VE LLC*, No. 656608/2016, 2018 WL 2761631, at \*3 (Sup. Ct. N.Y. County June 8, 2018) (claim that defendants made representations to induce owners to purchase apartments while concealing hidden and dangerous defects was duplicative of breach of contract claim because “plaintiff makes no argument as to how its fraud damages are different from its breach of contract damages claim”). That is exactly the situation here.

Appellants cited several cases in which fraudulent concealment claims were upheld, but those cases are distinguishable. See *Jablonski v. Rapalje*, 14 A.D.3d 484 (2d Dep't 2005) (allegedly concealed bat infestation); *George*, 184 A.D.2d at 1050 (cracks in walls); *17 E. 80th Realty Corp. v. 68th Assocs.*, 173 A.D.2d 245 (1st Dep't 1991) (absence of operable ventilation systems and the inadequate construction of certain interior walls); *Pesce v. Leimsider*, 59 Misc. 3d 23, 27 (App. Term. 2018) (water damage); *Werlinich v. Weissman*, No. 0063982010, 2011 WL 12677227 (Sup. Ct. Nassau County June 16, 2011) (toxic mold, water damage); *Haberman v. Greenspan*, 82 Misc. 2d 263 (Sup. Ct. Richmond County 1975) (cracks in foundation covered with plasterboard).

Unlike those cases, nothing was concealed from Appellants here. As mentioned, their inspector observed cracks in the foundation and the possibility of water infiltration if the ground was not sloped correctly.

Because of that, the parties agreed that Zum would have a *contractual* obligation (in the Rider) to address that issue prior to closing. If Appellants discovered any defects within one year after the closing, Zum had a *contractual* obligation under the Limited Warranty to address such issues (subject to the terms of the Limited Warranty). None of the cases that Appellants cited involved a situation where the purchaser had such a *contractual* remedy or warranty regarding defects that were allegedly concealed. Nor did the plaintiffs in any of those cases

assert the same amount of damages for fraud and breach of contract claims, as Appellants have done here. Indeed, it does not appear that the defendants in any of the cases that Appellants cited even argued that the fraud claims in those cases were really breach of contract claims.

For these reasons, the fourth cause of action was correctly dismissed as against Zum and Ehsan.

### **POINT VI**

#### **THE FIFTH CAUSE OF ACTION, FOR FRAUDULENT INDUCEMENT, WAS CORRECTLY DISMISSED AS AGAINST ZUM AND EHSAN**

The fifth cause of action for fraudulent inducement is little more than a mishmash of Appellants' other defective fraud claims. In this cause of action, Appellants allege that Respondents fraudulently induced them to enter into the Contract by falsely representing: (i) that the project would involve new construction; and (ii) that Appellants would perform the repairs required by the Contract, including the Limited Warranty. R. 54-55 (¶¶ 114-124). This claim also fails for several reasons.

The portion of this claim related to the foundation is duplicative of Appellants' second cause of action. Once again, Appellants cannot possibly have reasonably relied on any representations that a new foundation was being installed

when the Limited Warranty and multiple *publicly filed documents* (the plans and the certificate of occupancy) said otherwise.

As discussed in Points III(B) and IV(B) above in the context of the negligent misrepresentation claim, an alleged representation that Respondents would perform repairs required by the Contract *in the future* and that they failed to do so states a breach of contract claim, *not* a fraud claim.

For these reasons, the fifth cause of action was correctly dismissed as against Zum and Ehsan.

## **POINT VII**

### **THE SIXTH AND SEVENTH CAUSES OF ACTION FOR PROMISSORY ESTOPPEL AND UNJUST ENRICHMENT SHOULD BE DISMISSED**

The sixth and seventh causes of action assert quasi-contractual claims for promissory estoppel and unjust enrichment, based on the same facts asserted in the breach of contract claim. R. 55-56 (¶¶ 125-135). Those claims are barred because the parties' relationship is governed by the Contract. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 388 (1987).

Thus, "claims for promissory estoppel [and] unjust enrichment ... are precluded by the fact that a simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract—i.e., one arising out of

circumstances extraneous to, and not constituting elements of, the contract itself—has been violated.” *Brown v. Brown*, 12 A.D.3d 176, 176 (1st Dep’t 2004).

Appellants argue that they can assert these claims against Ehsan because he is not a party to the Contract. That is wrong. Appellants cannot bring quasi-contractual claims (such as promissory estoppel and unjust enrichment) against Ehsan that are based on the same facts as their breach of contract claim. See *FM Cost Containment, LLC. v. +42 W. 35th Prop. LLC*, 203 A.D.3d 426 (1st Dep’t 2022) (“[P]laintiff cannot maintain a quasi-contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim.”); *Bellino Schwartz Padob Advert., Inc. v. Solaris Mktg. Grp., Inc.*, 222 A.D.2d 313, 313 (1st Dep’t 1995) (“The existence of an express contract between Solaris and plaintiff governing the subject matter of the plaintiff’s claim also bars any quasi-contractual claims against defendant Titan, as a third party nonsignatory to the valid and enforceable contract between those parties.”). See also *Air Atlanta Aero Eng’g Ltd. v. SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185, 196 (S.D.N.Y. 2009) (promissory estoppel claim “against a third party must be dismissed when an undisputedly valid and enforceable written contract governs the same subject matter”); *Randall’s Island Aquatic Leisure, LLC v. City of New York*, No. 111146/09, 2010 WL 11713940, at \*3 (Sup. Ct. N.Y. County July 20, 2010) (“[Plaintiffs’ promissory estoppel claims must be dismissed because of the

existence of the Concession Agreement, which governs the subject matter of plaintiffs' claim, and to which RISF is not a party.”).

In other words, the law does not permit the enforcement of a contract against a non-party under the guise of a quasi-contractual claim. That rule makes sense, especially when corporate principals are involved. If corporate principals could be held liable (under quasi-contractual theories) for their company's breach of a contract, that would defeat one of the fundamental purposes of the statutes that permit incorporation. “As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and consequently, will not impose liability upon shareholders for the acts of the corporation. *Indeed, the avoidance of personal liability for obligations incurred by a business enterprise is one of the fundamental purposes of doing business in the corporate form.*” *Doe v. Bloomberg, L.P.*, 36 N.Y.3d 450, 461 (2021) (cleaned up) (emphasis added). *See also Franklin St. Realty Corp. v. NYC Env't Control Bd.*, 34 N.Y.3d 600, 604-05 (2019) (“[D]isregard of the dual personality of corporation and stockholder would ... defeat one of the principal purposes for which the law has created the corporation – the purpose of escaping personal liability.”).

This Court's decision in *Slocum Realty Corp. v. Schlesinger*, 162 A.D.3d 939, 942 (2d Dep't 2018), is distinguishable. Most notably, *Slocum* did not involve an attempt to hold corporate principals liable for their company's alleged

breach of a contract. Rather, in *Slocum*, the manager of a limited partnership (Schlesinger) wrongfully diverted approximately \$2.4 million of the partnership's funds to companies with which he was affiliated. The trial court dismissed the plaintiffs' unjust enrichment claim against the Schlesinger-affiliated entities, finding that the dispute was governed by the partnership agreement – even though the Schlesinger-affiliated entities were not parties to that agreement. This Court reversed, holding that “*under the facts of this case*, the cause of action alleging unjust enrichment is not duplicative of the breach of contract cause of action insofar as asserted against the defendants who were not parties to the [partnership agreement].” *Id.* at 945 (emphasis added). That holding was correct. The Schlesinger-affiliated entities received stolen funds that rightfully belonged to the plaintiffs and were disbursed in violation of a partnership agreement. The Schlesinger-affiliated entities should not get to keep that stolen money for themselves just because there were not parties to the agreement. Here, by contrast, there is no claim that Ehsan stole anything from Appellants or anybody else.

In *UETA Latinamerica, Inc. v. Zafir*, 129 A.D.3d 704, 706 (2d Dep't 2015), this Court upheld an unjust enrichment claim *after finding that there was no enforceable contract between the parties*. Here, of course, the parties are governed by the Contract.

*CIP GP 2018, LLC v. Koplewicz*, 194 A.D.3d 639, 640 (1st Dep’t 2021), stands for the unremarkable proposition that “where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies.” In this case, there is no bona fide dispute that the Contract exists and that it governs the conduct at issue in this action.

Accordingly, the sixth and seventh causes of action should be dismissed as against Zum and Ehsan.

### **POINT VIII**

#### **THE EIGHTH CAUSE OF ACTION, FOR ATTORNEYS’ FEES, WAS CORRECTLY DISMISSED AS AGAINST ZUM AND EHSAN**

The eighth cause of action seeks recovery of Appellants’ legal fees and costs in accordance with the prevailing party provision in the Limited Warranty. R. 56-57 (¶¶ 136-139). That is not a proper cause of action under New York law.

As a matter of law, Appellants “may not maintain a separate cause of action for attorneys’ fees, which are only recoverable as an element of contract damages if a breach of the [Limited Warranty] is proven.” *Pier 59 Studios L.P. v. Chelsea Piers L.P.*, 27 A.D.3d 217, 217 (1st Dep’t 2006). *See also La Porta v. Alacra, Inc.*, 142 A.D.3d 851, 853 (1st Dep’t 2016) (same). Appellants do not cite any authority to the contrary.

CONCLUSION

For all of these reasons, the lower court's Decision should be affirmed in all respects.

Dated: Uniondale, New York  
September 11, 2023

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September 11, 2023

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