

RECEIVED NYSCEF: 07/09/2014  
 To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp \_\_\_ Dec x Seq. No. 2 Type dismiss

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X  
 DAVID SORBLUM and SUSAN SORBLUM,

Plaintiffs,

-against-

Index No. 65530/2013

CARROLLWOOD CONDOMINIUM I, CARROLLWOOD  
 CONDOMINIUM I BOARD OF MANAGERS,  
 CARROLLWOOD CONDOMINIUM I BOARD OF  
 MANAGERS, INDIVIDUALLY, et al.,

DECISION AND ORDER

Defendants.  
 -----X

The following papers numbered 1 to 6 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affidavit and Exhibits	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Reply Affidavit and Exhibits	5
Reply Memorandum of Law	6

Defendants Michael Klekman, Genieve Cameron, Bernice Margolis, Robert Feldman, Bridget McCarthy, Tiffanie Mooney, Stephanie Pisani, Caroline Hay and Thomas Bundarin (collectively, "Movants." All of the Movants but Bundarin are the "Board Movants.") bring this motion seeking to dismiss the Eighth and Ninth Causes of Action as to them. The Board Movants also seek

to dismiss the Eleventh Cause of Action as to them. The remaining defendants did not move. All of the Board Movants are present or former members of the Board of Managers (the "Board") of defendant Carrollwood Condominium I (the "condo"). Bundarin is an employee of defendant Quantum Property Management, Ltd. ("Quantum"), the managing agent of the condo.

#### Background

This case arises out of plaintiffs' continued problems with cracking and serious settling of their basement in their condominium. The by-laws of the condo make clear that the Board is responsible for the repairs and maintenance to common areas of the condo, including the area in which plaintiffs are having problems. According to the second amended complaint, in 2010, plaintiffs saw a crack in the foundation of their unit. The Board assigned Quantum to arrange for the repairs. Plaintiffs allege that the work did not commence until approximately 11 months later, in May 2011. Even after the work had been completed, plaintiffs allege that the defective condition of the foundation was not fixed, and that it in fact "created an unreasonable risk of property damage and/or increased the risk of property damage" to their unit.

In early 2012, plaintiffs hired an independent contractor to do some other work on their unit. As alleged in the second amended complaint, when the contractor was ready to begin the

work - but before he had done anything - he noticed that the basement floor had sunk by about five inches. He then installed temporary steel beams to support the home while he did certain work. Plaintiffs allege in the second amended complaint that they notified defendants Bundarin and McCarthy of the damage in June 2012, but that "on various occasions" they, plus the other Movants, "made false representations to" them "concerning the status of repairs to their foundation." Plaintiffs further allege that between January and April 2013, Mrs. Sorblum spoke to defendant Margolis while at the train station, and that Margolis told her that the project was "moving forward," and that the problems would be fixed "soon."

In May 2013, according to the second amended complaint, at the annual homeowners' meeting, defendant McCarthy "continued to make the false claim" that plaintiffs' contractor had caused the basement floor to sink. She "knew or had reason to know that the basement floor had sunk" before plaintiffs' contractor had done anything. Also in May 2013, Margolis allegedly said to plaintiffs that she was the only one on the Board who "was making any effort to remedy" their problems.

The Eighth Cause of Action seeks damages from the Board Movants for alleged fraudulent misrepresentations based on (1) emails sent by Bundarin, and copied to some of the Board Movants; (2) Margolis' statements to Mrs. Sorblum on the train platform;

(3) McCarthy's statements at the annual meeting; and (4) Margolis' May 2013 statements. The Ninth Cause of Action seeks damages for negligent misrepresentations based on the same incidents. The Eleventh Cause of Action seeks damages for breach of fiduciary duty by the Board Movants "by their fraudulent and negligent misrepresentations and personally corrupt actions as set forth more fully in the Eighth and Ninth Causes of Action herein."

Analysis

It has long been settled that "To state a cause of action for fraudulent misrepresentation, a plaintiff must allege a misrepresentation . . . which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury."

*Gomez-Jimenez v. New York Law School*, 103 A.D.3d 13, 956 N.Y.S.2d 54 (1<sup>st</sup> Dept. 2012). See also *Structure Tone, Inc. v. Niland*, 112 A.D.3d 505, 977 N.Y.S.2d 228 (1<sup>st</sup> Dept. 2013) ("Plaintiff's claim for fraudulent misrepresentation fails, given the absence of a showing of justifiable reliance, and the absence of evidence raising an inference of fraudulent intent."). Similarly, negligent misrepresentation requires "(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." *Gomez-Jimenez*, 103 A.D.3d 13, 18, 956 N.Y.S.2d 54, 59.

The most important element of both of these claims in this action is the purported reliance by plaintiffs on the statements by Movants.<sup>1</sup> According to plaintiffs' opposition papers, they relied on Movants' misrepresentations "to their detriment, having held off for a lengthy period from seeking judicial intervention because they reasonably believed the problem was being addressed, when it was not." As a result, "their misrepresentations furthered the delay in addressing the problem, and, as alleged, permitted the condition to deteriorate" so that their home became "unmarketable, uninsurable, diminished in value and prospectively uninhabitable. . . ."

The Court finds no evidence that this is the case. "To establish causation, plaintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)." *Laub v. Faessel*, 297 A.D.2d 28, 745

---

<sup>1</sup>The Court notes that as set forth in the complaint, most of the Movants did not make any statements at all to plaintiffs concerning the repairs. Indeed, Klekman was first elected to the Board in May 2013 (at the same meeting at which McCarthy allegedly made some statements). As set forth below, the Court need not reach the issue of whether plaintiffs may impute statements to others based on being copied on an email, or hearing something at a group meeting.

---

N.Y.S.2d 534 (1<sup>st</sup> Dept. 2002). The *Laub* Court went on to explain that "An essential element of the plaintiff's cause of action . . . is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *Id.*

Here, the loss that plaintiffs have alleged is damage to their home as a result of the inaction and/or poor remediation work already done. The fact that plaintiffs held off on filing this action did not cause the damages they have alleged. *Marcum, LLP v. Silva*, 117 A.D.3d 917, 986 N.Y.S.2d 508 (2d Dept. 2014) (failure to plead justifiable reliance); *Tai v. Broche*, 115 A.D.3d 577, 982 N.Y.S.2d 463 (1<sup>st</sup> Dept. 2014) (plaintiffs' awareness of facts defeats claim of reliance). Plaintiffs argue, essentially, that the only reason that work is being done on their home is because plaintiffs filed this action. By being lulled into inaction by the misrepresentations, plaintiffs argue, the repairs did not commence. While it may well be true that plaintiffs held off on the litigation, the damage to plaintiffs' home occurred in 2010, when they first noticed the cracks in the foundation, and in 2011, when the allegedly poor repairs were done, which was discovered in June 2012 when they discovered that the basement floor had sunken by five inches. The deterioration in the value, insurability, habitability and marketability of their home, if any, had already occurred in 2010-2012, regardless

of plaintiffs' delay in filing this action.

This case is distinguishable from *Grubin v Gotham Condominium*, 34 Misc.3d 1202, 946 N.Y.S.2d 66, 2011 WL 6756068 (Sup. Ct. NY Co. Dec. 21, 2011), relied on by plaintiffs. In that case, the plaintiffs did allege a claim for fraudulent misrepresentation in which the plaintiffs refrained from filing a lawsuit because of the misrepresentations by the board. The misrepresentations in that case were myriad, and very specific, and included particular inducements to stop the plaintiffs from commencing litigation. For example, "To deter the plaintiffs from bringing suit, the defendants falsely told them that the railing had been **manufactured and delivered**. But at that time, **they had not even been ordered**." (Emphasis added). Moreover, in that case, "defendants' lawyer asked plaintiffs to forebear on bringing suit, while he brought in an expert on construction to take charge of the repairs. Plaintiffs agreed to refrain from bringing the lawsuit and continued to pay the monthly common charge. Thereafter, defendants notified plaintiffs that they would make the necessary repairs only if plaintiffs signed a release from all their claims for damages. . . ." This case, and the alleged misrepresentations here, pales in comparison to the express misrepresentations in *Grubin*, made for the specific purpose of stopping those plaintiffs from commencing litigation.

Notably, even if the alleged misrepresentations had been .

---

made by all of the Movants, there is no way that plaintiffs could possibly have believed that "the problem was being addressed" such that they could have actually been lulled into inaction. It was quite clear - as the complaint itself sets forth - that nothing happened to remedy the problem for a long time. No contractors (other than plaintiffs' contractor), engineers or inspectors took measurements, made proposals or otherwise visited the site.<sup>2</sup> Indeed, plaintiffs allege that Margolis actually told them that "no one on the Board, other than Ms. Margolis, was making any effort to remedy" their problem.

It thus cannot follow rationally or reasonably that plaintiffs relied on these statements, and thought that they did not have to sue to assure movement on the repairs. See *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 929 N.Y.S.2d 3 (2011) (could not be reasonable reliance when falsity was apparent). See also *New York City Educational Const. Fund v. Verizon New York Inc.*, 114 A.D.3d 529, 981 N.Y.S.2d 11 (1<sup>st</sup> Dept. 2014) ("plaintiff did not establish justifiable reliance, due to its failure to use ordinary intelligence to ascertain the truth of defendant's representation."); *Laurel Ridge, LLC v. A. Alfredo Nurseries*,

---

<sup>2</sup>This is not the same situation as in *Grubin*, where the plaintiffs had been told that needed items had been ordered and delivered, when the order had never even been placed. The plaintiffs in that case had no way of verifying whether the order had been placed or not.




*Inc.*, 286 A.D.2d 710, 730 N.Y.S.2d 447 (2d Dept. 2001).

Because the Court finds that, as a matter of law, plaintiffs cannot prove that they reasonably relied on Movants' alleged misrepresentations, the Court must dismiss both the Eighth and Ninth Causes of Action. Since the Eleventh Cause of Action, as discussed above, relies on the "fraudulent and negligent misrepresentations and personally corrupt actions as set forth more fully in the Eighth and Ninth Causes of Action," and the Court has dismissed the Eighth and Ninth Causes of Action, the Eleventh Cause of Action must also be dismissed. Plaintiffs have not alleged any "personally corrupt actions" on behalf of any of the Movants. There is no allegation that even those defendants who allegedly made misrepresentations were "personally corrupt." There are no allegations that any of the Movants acted for his or her personal benefit or gain, or took any other "personally corrupt" actions.

Accordingly, the Court dismisses the Eighth, Ninth and Eleventh Causes of Action. The parties on the remaining Causes of Action are directed to appear for a Preliminary Conference in the Preliminary Conference Part on August 18, 2014 at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
~~June~~, 2014  
July 3

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court