COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2017-01924-D

DOUGLAS SOUZA, ET AL., As They are Trustees of the Regency at Methuen Condominium Trust,
Plaintiff

vs.

TOLL MA LAND LIMITED PARTNERSHIP, TOLL BROS., INC., DAVID BAUER, MATTHEW DENNIS, SHAWN NUCKOLLS, TOLL ARCHITECTURE, MICHAEL LEBLANC, and KP BUILDING PRODUCTS,
Defendants

MEMORANDUM AND DECISION ON TOLL DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Now before the court is plaintiffs' first amended complaint. [D. 4]. Plaintiffs are the trustees (the "trustees") of the Regency at Methuen Condominium (the "condominium"). The Toll defendants are the three entities bearing the name Toll, plus the four named individual defendants that have or had employment relationships with one or more of the named Toll entities. The Toll entities and the named individual defendants with connections to the Toll entities will be collectively referred to as the "Toll defendants" and individually referred to by portions of their full names. The claims in this case arise out of the construction of the condominium

by the Toll defendants. Defendant KP Building Products, Inc. ("KP") is alleged to have provided defective siding as part of the construction of the condominium. Toll MA Land Limited Partnership was the developer of the condominium and the declarant on the trust documentation that created the condominium. Toll Bros., Inc. is alleged to have participated in the development of the condominium and/or to have had pervasive control of the development such that it should be liable for any proven damages.

The first amended complaint [D. 4] asserts the following causes of action:

1. Negligence against Toll MA and Toll Bros.
2. Breach of fiduciary duties against Toll MA and Toll Bros.
3. Breach of implied warranty against Toll MA and Toll Bros.
4. Breach of fiduciary duties against Bauer, Dennis, Nuckolls and Toll Bros.
5. Piercing corporate veil of Toll MA against Toll Bros.
6. Negligence against LeBlanc and Toll Architecture
7. Negligent misrepresentation against LeBlanc and Toll Architecture
8. Breach of contract - third party beneficiary against LeBlanc and Toll Architecture
9. Negligence against KP

10. Breach of implied warranty against KP

11. Breach of express warranty against KP

12. Breach of warranty for a particular purpose against KP

13. Negligence against John Doe(s)

John Doe(s) are alleged, upon information and belief, to have provided subcontracting services with regard to the construction of the condominium pursuant to agreements with Toll MA and/or Toll Bros. Negligence by John Doe(s) is alleged upon information and belief. The court dismisses Count XIII for failure to state a claim against a named individual at this time. Service of process is impossible to effect, and no one is available to respond to the claim. Subcontractors may well be brought into the case by the Toll defendants and/or KP. Discovery may well provide plaintiffs with specific facts to name one or more identified subcontractors as defendants. Those possibilities will be addressed by the court upon appropriate motions filed in a timely fashion.

Now before the court is the motion to dismiss filed on behalf of all Toll defendants. [D. 15]. KP has filed an answer to the first amended complaint [D. 18] and is not a party to the motion to dismiss now before the court.[1] A non-evidentiary

[1]Also before the court is plaintiffs' subsequently filed motion for leave to file second amended complaint. [D. 16]. Plaintiffs will be given leave to file a second amended complaint consistent with the court's rulings on the Toll defendants' motion to dismiss.

hearing was held on January 22, 2019. For reasons discussed below, the Toll defendants' motion to dismiss is **ALLOWED IN PART** and **DENIED IN PART**.

DISCUSSION

In considering a motion to dismiss, "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true." *Nader* v. *Citron*, 372 Mass. 96, 98 (1977). The Supreme Judicial Court has restated the motion to dismiss standard by adopting the reformulated standard adopted by the United States Supreme Court. In *Iannacchino* v. *Ford Motor Company*, 451 Mass. 623, 636 (2008), quoting liberally from *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007), the Supreme Judicial Court stated:

> "While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . ." What is required at the pleading stage are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, in order to "reflect[] the threshold requirement of [Fed. R. Civ. P.] 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"

See also *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). "Threadbare

recitals of the legal elements, supported by mere conclusory statements, do not suffice to state a cause of action." *Id.* It is worth noting that *Iannacchino* "retired" the previous standard used in Massachusetts to determine the legal sufficiency of claims challenged under Mass. R. Civ. P. 12(b)(6), which was the same federal standard overruled in *Twombly*. The earlier standard was: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Nader*, 372 Mass. at 98. The current *Iannacchino* standard is more stringent than the earlier, now retired, *Nader/Conley* standard. There are two commands that this court takes from *Iannacchino*. First, specific factual allegations must plausibly suggest an entitlement to relief. Second, labels and conclusions are not sufficient to make such a plausible suggestion.

In considering a motion to dismiss, the court is bound by the four corners of the complaint, but a "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Mass. R. Civ. P. 10(c). Here, no exhibits are attached to the plaintiffs' first amended complaint. However, the court will accept as properly before it the copies of the trust documentation recorded with the registry, attached to the Toll Bros. supporting memorandum, and referenced in plaintiffs' first

amended complaint. The court does not view its consideration of recorded trust documentation as converting this motion to dismiss into a Rule 56 motion, and so rules. Mass. R. Civ. P 12(b).

1. Statute of Repose Issue

An action of tort for damages arising "out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues" and in no event "more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." G. L. c. 260, § 2B. The Toll defendants contend that the six-year statute of repose bars tort claims for those parts of the condominium that were opened or occupied more than six years before the complaint in this case was filed on December 22, 2017. The Toll defendants contend that sixty of the 240 units planned and ultimately built were opened/ substantially competed before December 22, 2011. Plaintiffs contend that the statute of repose did not start to run until the last of the 240 planned units were opened/ occupied, well within the six years prior to December 22, 2107. The court agrees with the plaintiffs.

If this was a different case, and there were two distinct phases of the

development, either by distinct geographical locations or perhaps by type of unit, such that construction was completed on one distinct phase prior to commencement of construction of a second distinct phase, the Toll defendants' argument would have more force. But here, there was one continuous construction project with no large distinct phases, and units merely came on line for occupancy as the particular unit, and not a large distinct phase was completed. In other words, there were not two distinct phases, there were sixty-six phases, each comprised of a small number of units, that were ready for occupancy as each small phase was completed. The sixty units for which the Toll defendants seek the protection of the statute of repose are distinguishable from the remaining 180 units only by their completion date. As plaintiffs argue, the law should not impose a duty on plaintiffs to commence separate law suits arising out of a large series of small construction phases one at a time to prevent the statute of repose from running on numerous small indistinct portions of one comprehensive and continuous condominium development.

In any event, as to certain of the Toll defendants, they executed a written tolling agreement with plaintiffs, apparently before six years had passed from the occupancy of the first completed units. The court agrees with the Toll defendants that equitable tolling is unavailable to defeat the statute of repose, but rejects their unsupported contention that parties cannot contractually toll the statute of repose. No

case cited by the Toll defendants supports that unfathomable contention that potential defendants can lull potential plaintiffs into delaying the commencement of suit by execution of a written tolling agreement, and then sandbag them by disavowing the legal effect of the written agreement. So much of the motion to dismiss that relies on the statute of repose will be denied.

2. ADR/Mediation Issue – Former Trustees

Bauer, Dennis and Nuckolls ("former trustees") are alleged to have been trustees of the condominium appointed by the developer to hold their offices until replaced by trustees elected by unit owners, which plaintiffs allege occurred in or about the fall of 2015. Plaintiffs alleged that the former trustees breached their fiduciary duties to the trust by failing and refusing to address and remediate certain construction defects despite having actual and/or constructive knowledge of the existence of the significant design and/or construction deficiencies. Plaintiffs also allege that the former trustees failed to pursue the trust's claims concerning construction defects against the developer or take other proper action concerning the construction deficiencies. The former trustees seek dismissal of the breach of fiduciary duty claim against them for failure by plaintiffs to pursue required alternative dispute resolution ("ADR") provided for in Paragraphs 23 and 24 of the Master Deed. The pertinent portion of Paragraph 23, as it now reads, provides as

follows:

> B. The Board of Trustees, its trustees, officer, directors and committee members, unit owners and all parties subject to this Master Deed, agree that it is in the best interest of all concerned to encourage the amicable resolution of disputes involving the Condominium without the emotional and financial cost of litigation. Accordingly each Bound Party agrees not to file suit in any court with respect to a Claim described below, unless and until it has first submitted such Claim to the alternative dispute resolution procedures set forth herein in a good faith effort to resolve such Claim.

Such claims referenced above include: "The rights obligation, and duties of any Bound Party under the Master Deed, Declaration of Trust, the By-Laws, and Rules and Regulations adopted by the Board of Trustees." There is no dispute, and the court finds, that the fiduciary duty claim asserted against the former trustees is a described claim under Paragraph 23 of the Master Deed. The dispute between the parties is whether the former trustees are included within the reference to "its trustees" and thus entitled to the protections of the ADR provision of the Master Deed. The court agrees with the former trustees and finds that they are entitled to the ADR protection of the Master Deed and cannot be sued without plaintiffs having first complied with its provisions.[2]

First, the claims asserted against the former trustees in the first amended

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[2]Plaintiffs concede that they did not pursue the dispute resolution procedures of Paragraph 24 of the Master Deed with respect to any defendants, including the former trustees.

complaint arose while they were trustees of the condominium. Second, Paragraph 23 does not limit its protections to current trustees. Third, plaintiffs recently amended Paragraph 23 to remove the developer of the condominium from its protections. Plaintiffs could have further limited Paragraph 23 to current, or current and future trustees, or eliminated developer appointed trustees from its coverage, but did not. Fourth, the amended provision maintained protection for "all parties subject to this Master Deed." The Master Deed has numerous provisions regarding the rights and responsibilities of the condominium's trustees, that at one time included the former trustees. Just by way of example, the first Paragraph 23 of the Master Deed (at page 32) provides in part: "The Board of Trustees shall have the power to adopt, amend and enforce compliance with such reasonable Rules and Regulations relative to the operation, use and occupancy of the Units and the Common Elements consistent with the provisions of this Master Deed . . ." So much of the motion to dismiss that seeks dismissal of the former trustees from Count IV (breach of fiduciary duty) will be allowed. The dismissal shall include defendant Toll Bros., as the court is also finding below no fiduciary duty on the part of the developer/declarant Toll MA, and it follows that the same claim against Toll Bros. cannot survive.

3. Fiduciary Duties of Developer/Declarant

Plaintiffs have asserted a breach of fiduciary duty claim against Toll MA and

Toll Bros. as the developer of the condominium and declarant on the Master Deed. [See Count II]. Toll MA has not moved to dismiss the negligent design/construction claim against Toll MA in Count I of the first amended complaint, as it concedes that Massachusetts law has long recognized suits against condominium developers for defective or negligent construction. Toll MA has moved to dismiss the breach of fiduciary duty claim in Count II, contending that Massachusetts law has not established a fiduciary relationship between a condominium developer and unit purchasers/owners. Plaintiffs do not dispute that no appellate court in Massachusetts has ever found such a fiduciary relationship, but rely on trial court decisions and decisions in other jurisdictions. Plaintiffs also analogize to established law finding a fiduciary duty between corporate promoters and investors. On the other hand, Toll MA relies on former Superior Court Judge Paul Chernoff's decision in *Wyman* v. *Ayer Properties, LLC*, Middlesex Superior Court Civil Action 2005-04230 (September 30, 2010), a negligent/defective condominium construction case charged similarly to this case. Judge Chernoff found that any statutorily based fiduciary duty placed upon a condominium developer was not breached by the allegations in the case, and that no general fiduciary duty exists upon a developer/declarant to submit the common areas and facilities to condominium status free from defects, fit for their intended purpose, and in accordance with all laws, codes and industry standards.

[Pages 23-27 of memorandum decision]. This court agrees with the analysis and rulings in the *Wyman* case and will dismiss so much of the first amended complaint (Count II) that asserts a breach of fiduciary duty claim against Toll MA and vicariously against Toll Bros.

4. Third-Party Beneficiary Claim

Count VIII of the first amended complaint asserts a breach of contract claim against the architects for the construction of the condominium on a third-party beneficiary theory of liability. This claim is in addition to the negligence and negligent misrepresentation claims brought against the same defendants, and which are not the subject of the Toll defendants' motion to dismiss. For reasons advanced by the architect defendants, the third-party defendant claim asserted against them in Count VIII will be dismissed.

5. Claims Against Toll Bros.

Plaintiffs added Toll Bros. as a named defendant in each of their claims against Toll MA as a direct participant in the alleged misconduct. Plaintiff also separately asserted a piercing the corporate veil claim against Toll Bros. based on alleged pervasive control of Toll MA by Toll Bros. Toll Bros. seeks dismissal of those claims where it is alleged it was a direct participant, and dismissal of the piercing claim as failing to state a cause of action recognized in Massachusetts. The court

agrees with Toll Bros. that Count V does not state a cause of action in this Commonwealth. The doctrine of corporate disregard is an equitable tool available to courts, but not a stand-alone cause of action. Count V will be dismissed. Although a close call, the court will not dismiss Toll Bros. from Counts I and III without further factual development and a properly submitted summary judgment record, if one develops through the course of discovery. Much will depend on whether employees of Toll Bros. who were not employees of Toll MA participated meaningfully in the design and construction of the condominium. The court is also not sure, given use of one counsel to represent all Toll defendants, whether Toll Bros.'s inclusion in this case is of any significant concern to the Toll defendants. If is it, the court will given Toll Bros. the option of splitting discovery in this case, staying general discovery, and permitting expedited discovery on the role of Toll Bros. in the development of the condominium, in order to determine whether plaintiffs have a reasonable expectation of establishing direct participation by Toll Bros. or the doctrine of corporate disregard. The court will not at this time dismiss Toll Bros. from Count I and III.

ORDER

The Toll defendants' motion to dismiss [D. 15] is **ALLOWED** as to the following counts, and otherwise **DENIED**:

1. Count II in its entirety against Toll MA and Toll Bros.

2. Count IV in its entirety against Bauer, Dennis, Nuckolls, and Toll Bros.

3. Count V in its entirety against Toll Bros.

4. Count VIII in its entirety against LeBlanc and Toll Architecture

5. Count XIII in its entirety against John Doe(s)

Plaintiffs' motion for leave to file second amended complaint [D. 16] is **ALLOWED**, but the proposed second amended complaint submitted to the court will not be docketed. Plaintiffs shall have thirty days from this date to file a second amended complaint that is not inconsistent with the court's rulings on the Toll defendants' motion to dismiss. After answers are filed to the second amended complaint, Toll Bros., if it wishes, may file (under Rule 9A) a motion for leave to limit initial discovery to the issue of its liability, with a proposed schedule of such discovery. If the Toll defendants do not exercise their right to file a third-party complaint without leave of court within 20 days of serving their original answers, they shall have leave to file any such third-party complaint within sixty days after the expiration of the original twenty days to so file as a matter of right. Any further leave shall be by motion only, supported by good cause for any delay.

Timothy Q. Feeley
Associate Justice of the Superior Court

January 28, 2019