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Date: September 21, 2009
To: All Clients and Friends
From: Cliff Bernstein
Re: Recent Cases of Interest

**NEW YORK
RECENT CASES OF INTEREST FOR REAL ESTATE LAWYERS**

Sykes v. RFD Third Avenue 1 Associates, LLC

9/8/2009

First Department

Real Property Law; Commercial Law; Contracts; Negligent Misrepresentation; Third Party; Pleadings

Plaintiffs, the purchasers of a newly built penthouse condo, found that they could not adequately regulate their apartment's temperature in either winter or summer. After bringing suit against the sponsor and the company that designed certain aspects of the construction, including the HVAC systems, plaintiffs commenced a separate action against the design company for professional negligence, common law fraud and negligent misrepresentation. Plaintiffs alleged that, to induce prospective purchasers to buy units, the defendant knowingly provided the sponsor with information about its design services and reputation, as well as the design of the HVAC system for the building, for inclusion in the sponsor's prospectus. Undisputed, however, was that the defendant never communicated or interacted with the plaintiffs before they purchased their apartment. Order granting defendant's motion to dismiss, to the extent of dismissing the professional malpractice claim as time-barred and the fraud claim as conclusory, is modified (3-2) by dismissing plaintiffs' claim for negligent misrepresentation as well. Before a third-party to a contract claim can claim harm from negligent misrepresentation, there must be: "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." Here, plaintiffs failed to allege facts sufficient to support a claim that a "special relationship" approaching that of privity existed with the defendant, as they did not plead that they were known to, or had any direct contact with, the defendant. Although the two justices in dissent concluded that a "special relationship" existed, because the prospectus included particulars about the HVAC system and a statement that it "[would] be designed to maintain a temperature of 72° F," the complaint did not include these allegations, as indicated by the majority. *Sykes v. RFD Third Avenue 1 Associates, LLC*. Decided 9/8/09.

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