**SUPREME COURT-STATE OF NEW YORK**
**SHORT FORM ORDER**
**Present:**

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

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| **CITY OF LONG BEACH,** | **TRIAL/IAS PART: 16**<br>**NASSAU COUNTY** |
| **Plaintiff,** | **Index No: 2502-11**<br>**Motion Seq. Nos. 1, 2 and 3** |
| **-against-** | **Submission Date: 11/14/11** |
| **JANOW ASSOCIATES, LLC; SHORE ROAD DEVELOPMENT PARTNERS, LLC; SHORE ROAD LB SUPERBLOCK, LLC; iSTAR FM LOANS, LLC and PHILIP PILEVSKY,** | |
| **Defendants.** | |

**The following papers having been read on these motions:**

**Notice of Motion, Affirmation in Support and Exhibits.....x**
**Affirmation in Opposition and Exhibits.....x**
**Reply Affirmation in Further Support,**
**Reply Affidavit in Further Support and Exhibits.....x**

**Notice of Motion.....x**
**Affirmation in Support and Exhibits.....x**
**Memorandum of Law in Support.....x**
**Affirmation in Opposition and Exhibits.....x**
**Memorandum of Law in Opposition.....x**
**Reply Memorandum of Law.....x**
**Responding Affirmation.....x**

**OSC, Affirmation in Support and Exhibit.....x**
**Affirmation in Opposition and Exhibit.....x**

This matter is before the Court for decision on 1) the motion filed by Defendant Philip Pilevsky ("Pilevsky") on April 1, 2011, 2) the motion filed by Defendants iStar FM Loans LLC

and Shore Road-Long Beach Superblock, LLC (collectively "iStar Defendants") on June 23, 2011, and 3) the Order to Show Cause filed by the iStar Defendants on August 18, 2011, all of which were submitted on November 14, 2011, following oral argument before the Court. For the reasons set forth below, the Court 1) grants the motion by Defendant Pilevsky for judgment dismissing the Complaint, declares that Plaintiff has no contractual claims against Pilevsky, and denies leave to replead, except with respect to the 19th cause of action against Pilevsky, based upon an alleged fraudulent conveyance, regarding which the Court grants leave to replead within 60 days of the date of this Order; 2) determines the iStar Defendants' motion as follows: a) dismisses all contractual claims pursuant to the contractual provisions of the initial contract of sale, amendments and survival letter, and denies leave to replead; b) dismisses all claims for failure to comply with the Urban Renewal Plan, with leave to replead specific breaches of the Urban Renewal Plan only within 60 days of the date of this Order; and c) dismisses the 19th cause of action, with leave to replead within 60 days of the date of this Order; and d) dismisses the claim for unjust enrichment and denies leave to replead; and 3) denies the Order to Show Cause seeking an Order cancelling the Notice of Pendency.

## BACKGROUND

### A. Relief Sought

Defendant Pilevsky moves for an Order, pursuant to CPLR § 3211(a)(1), dismissing the Verified Complaint ("Complaint") with prejudice.

The iStar Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Complaint.

The iStar Defendants also move for an Order, pursuant to Article 65 of the CPLR, cancelling the Notice of Pendency.

Plaintiff City of Long Beach ("City") opposes the motions.

### B. The Parties' History

The Court previously set forth a detailed description of this action, including the allegations in the Complaint, the parties' positions and certain relevant contractual principles, in a prior Order of the Court dated October 5, 2011 ("Prior Order") that directed oral argument on Defendants' motions. The Court incorporates the Prior Order by reference herein as though set forth in its entirety.

As noted in the Prior Order, Plaintiff sought to have a 6-acre parcel of vacant oceanfront property known as the "Superblock" developed through a comprehensive Urban Renewal Plan. It conducted a blight study and issued a request for proposals. Defendant Janow Associates, LLC ("Janow"), an entity owned solely by Pilevsky, was selected as the designated developer for the construction of a luxury hotel and condominium complex. Thereafter, the City entered into a contract of sale dated November 7, 2001 with Janow. According to the contract, the purchase price was $11,000,000.

Four separate amendments to the contract of sale were executed. The first three amendments were executed by the City and Janow. The fourth amendment was executed by the City and Shore Development Partners, LLC ("Shore LLC"), Janow's assignee. Shore LLC was owned 50% by Janow, and 50% by JELB Long Beach Associates, LLC, an entity of which Pilevsky owned 50%.

The second and fourth amendments expressly state that the provisions therein shall survive the closing. The purchase price in the Second Amendment was increased to include the cost of acquiring all of the Superblock properties.

The City commenced a condemnation proceeding and acquired title to the separate parcels that make up the "Superblock" property pursuant to a vesting order dated April 4, 2006. A number of the property owners contested the valuations of their parcels, and those disputes continue in litigation.

Pilevsky executed a guaranty in favor of the City dated September 7, 2005, pursuant to which he agreed to guarantee the closing on the contract for the sale of the Superblock, and payment of the Appraised Value. Although no definition of Appraised Value is contained in the Guaranty itself, the Guaranty provides that the terms used therein were to have the meanings ascribed to them in the Second Amendment. On this issue the Second Amendment (Ex. 4 to Diamant Aff. in Supp.) provides as follows at paragraph 1(a):

> (a) "Appraised Value" shall mean the aggregate amount that the Seller is required to deposit with the Court within ninety (90) days of the time of the Nassau County Clerk's entry of the signed vesting order, filing of the acquisition map and of Seller's taking title to the Property, plus the aggregate amount of actual payments as advance payment(s) plus applicable interest if the same is requested by the existing owner(s) or the property and/or claimants ("the Property Owners"), or demanded, as the case may be.

By letter dated May 31, 2006, Pilevsky agreed to a modification of the guaranty. In the modification (Ex. 9 to Diamant Aff. in Supp.), he guaranteed that the closing would be in accordance with the Third Amendment, and that he would guarantee payment of the Appraised Value on or before October 31, 2006.

The Third Amendment (Ex. 5 to Diamant Aff. in Supp.), *inter alia*, modified the Purchase Price to include:

> (iii) The Condemnation Costs, to be payable at Closing, plus the Agreed Value of the Shore Road Parcel, the Stated Value (as hereinafter defined) of the Tax Deed Parcel, plus the Additional Consideration (as hereinafter defined), less the Down Payments, and subject to the adjustments and prorations set forth in Section 4 of the 2001 Contract and elsewhere in the Contract, if any (the "Closing Balance"); and
>
> (iv) The balance of the purchase Price, to be paid as and when determinations with the various Property Owners have been effectuated, as more particularly described in the Contract.
>
> Third Amendment at ¶ 3(a)

The closing took place on October 30, 2006, and the deed from the City to Shore LLC was delivered and recorded. The deed contained a covenant that the purchaser, its successors and assigns would comply with the Urban Renewal Plan. The City and Shore LLC executed a Survival Letter on the day of the closing, to expressly agree that various obligations, including the payment of "condemnation costs" and future payments to the individual property owners, found in the Second, Third and Fourth Amendments would survive the closing of title. Pilevsky did not execute the Survival Letter in his individual capacity.

To finance the project, Shore LLC entered into a loan agreement with Fremont Investment & Loan ("Fremont"). This loan was in the original principal amount of $51,500,000, and was secured by a mortgage on the "Superblock" property. The loan, or some part thereof, was personally guaranteed by Pilevsky. At the closing Fremont wired a check in the amount of $38,703,061.65 to the City's account.

Fremont apparently went out of business and its assets were assigned to iStar. Sometime thereafter Shore LLC defaulted on the loan and defaulted on its surviving contractual obligations. Instead of commencing foreclosure proceedings, iStar accepted a Bargain and Sale Deed Without Covenants in lieu of foreclosure pursuant to which the grantor was Shore LLC,

and the grantee was Shore Superblock, an affiliate of iStar. This deed, given in lieu of foreclosure, is dated May 4, 2009. It does not contain a covenant requiring compliance with the Urban Renewal Plan. At the time of this transfer by deed, the City alleges, iStar released Pilevsky from his personal guaranty of all or part of the original loan amount to Janow.

C. The Parties' Positions

The Court incorporates the Prior Decision herein by reference.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Contract Interpretation

The Court incorporates the Prior Order herein by reference.

C. Fraudulent Conveyances

Pursuant to Debtor and Creditor Law ("DCL") § 272, fair consideration is given when, "in exchange for such property or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied." Conveyances that satisfy an antecedent debt made while the debtor is insolvent are neither fraudulent nor otherwise improper, even if

their effect is to prefer one creditor over another. *Town of Southampton v. Chiodi*, 75 A.D.3d 604 (2d Dept. 2010), quoting *Ultramar Energy v. Chase Manhattan Bank*, 191 A.D.2d 86, 90-91 (1st Dept 1993). This general rule, however is not a license to engage in sham transactions in furtherance of such a preference. *Matter of The CIT Group/ Commercial Services Inc v. 160-09 Jamaica Avenue Limited Partnership*, 25 A.D.3d 301, 302 (1st Dept. 2006), *rearg. den.*, 2006 N.Y. App. Div. LEXIS 6386 (1st Dept. 2006).

Both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under DCL § 273, and the burden of proof is on the party challenging the conveyance. *Joslin v. Lopez*, 309 A.D.2d 837, 838 (2d Dept. 2003).

D. Non-Parties to an Agreement

Non-parties to an agreement are not generally bound thereby. *Manhattan Real Estate Equities Group, LLC v. Pine Equity NY, Inc.*, 27 A.D.3d 323 (1st Dept. 2006); *National Survival Game of New York, Inc. v. NSG of LI Corp*, 169 A.D.2d 760 (2d Dept. 1991). Although an agreement purports to bind successors and assigns of the parties to the agreement, an assignee or successor will not be bound to the terms of a contract absent an affirmative assumption of the duties in the contract. *Amalgamated Transit Union Local 1181, AFL-CIO v. City of New York*, 45 A.D.3d 788, 790 (2d Dept. 2007); *see also Sillman v. Twentieth Century-Fox Film Corp*, 3 N.Y.2d 395, 402 (1957).

E. Covenants Running with the Land

Affirmative covenants may be enforced against subsequent holders of the originally burdened land whenever it appears that 1) the original grantor and grantee intended such a result; 2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened; and 3) the covenant "touches" or "concerns" the land to a substantial degree. *Harrison v. Westview Properties, LLC*, 79 A.D.3d 1198, 1200 (3d Dept. 2010), quoting *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 245 (1959).

F. Unjust Enrichment

To recover under a theory of quasi contract, the plaintiff must be able to prove that performance was rendered for the defendants, resulting in their unjust enrichment. It is not enough to show that the defendants consented to the improvements or received a benefit from the plaintiff's activities. *Outrigger Construction Co., Inc v. Bank Leumi Trust Co of New York*,

240 A.D.2d 382 (2d Dept 1997).

G. Notice of Pendency

When the court entertains a motion to cancel a notice of pendency, it neither assesses the likelihood of success on the merits, nor considers material beyond the pleading itself; the court's analysis is to be limited to the pleading's face. *Ewart v. Ewart*, 78 A.D.3d 992, 992-993 (2d Dept. 2010), citing *Nastasi v. Nastasi*, 26 A.D.3d 32, 36 (2d Dept. 2005), quoting *5303 Realty Corp v. O & Y Equity Corp,*. 64 N.Y.2d 313, 321 (1984).

H. Application of these Principles to the Instant Action

I. Pilevsky Motion

The documentary evidence presented establishes that Pilevsky's obligations, pursuant to his guaranty and the letter dated May 31, 2006, ended at the closing. To the extent that the City argues that Pilevsky's guarantee of the Appraised Value included costs which the parties knew could not be determined at the time of the closing, it was incumbent on the City to document any continuing personal liability on the part of Pilevsky. There is, however, no document executed by Pilevsky in his individual capacity that extends his liability past the closing. Under these circumstances, the documentary evidence directly contradicts the City's claim that Pilevsky owed contractual obligation for post-closing costs, and conclusively disposes of Plaintiff's contractual claims against Pilevsky. Accordingly, the Court dismisses those claims and denies leave to replead any contractual claims against Pilevsky individually.

The Court dismisses the 19th cause of action against Pilevsky because the City has failed to allege the required elements of the debtor's insolvency and lack of fair consideration for the deed given in lieu of foreclosure. As noted in the Prior Order, the 19th cause of action, asserted against all Defendants, alleges that the deed given in lieu of foreclosure from Shore LLC to Shore Superblock was a fraudulent conveyance. As to Pilevsky, the City alleges that his reward for deeding away the "Superblock" property was that he was released from his guaranty of all or part of the original loan of $51,500,000 to Janow. Pilevsky argues that the deed given in lieu of foreclosure was a conveyance made for fair consideration because it satisfied the antecedent debt of $51,500,000. The Court grants leave to replead this cause of action within sixty (60) days of the date of this Order, but cautions the City that there must be a factual basis for any claim of lack of fair consideration. The Court notes that Shore LLC's debt to iStar in the amount

of nearly $54,000.000 was satisfied by the deed given in lieu of foreclosure.

II. Motion by iStar Defendants

The Court dismisses all causes of action seeking contractual payments from iStar or Shore Superblock pursuant to the original contract of sale, amendments or survival letter. In light of the absence of any contractual document obligating iStar or Shore Superblock to pay the obligations evidenced by the original contract of sale, amendments or survival letter, and the absence of any express assumption of the alleged contractual duties, these causes of action must be dismissed.

This Court, however, agrees with the City that the covenant to comply with the terms of the Urban Renewal Plan "touches" or "runs" with the land; indeed the Urban Renewal Plan is the genesis of all of the City's actions in obtaining bids from developers, granting the bid to Janow, litigating the values of the individual parcels, selling the property to Shore LLC, and planning for redevelopment of the blighted area. Shore Superblock notes, however, that there are no provisions in the Urban Renewal Plan that require any party to affirmatively develop the Superblock Property, or to do by a particular date, and argues that Plaintiff has not alleged any specific breach of the Urban Renewal Plan, requiring dismissal of the 22nd cause of action. Moreover, although iStar insists that it is only a lender, the City argues that iStar engaged with Shore Superblock, Pilevsky and Shore LLC in an elaborate procedure to transfer title in a way that avoided performance of all surviving contractual obligations. The Court concludes that the Complaint does not adequately plead these causes of action. Accordingly, the Court dismisses all causes of action based on iStar and/or Shore Superblock's breach of the Urban Renewal Plan, without prejudice to the City's right to replead specific breaches of the Urban Renewal Plan.

The Court dismisses the 19th cause of action, based on an alleged fraudulent conveyance, for the reasons discussed *supra* with respect to Pilevsky. The Court grants Plaintiff leave to replead, but reminds Plaintiff of the cautionary language used by the Court with respect to repleading this cause of action.

The 20th cause of action alleges that Shore Superblock "has been unjustly enriched by the Urban Renewal process and should, through the equitable powers of the court, be made to stand in the shoes of [Shore LLC] with regard to any and all Urban Renewal Plan and contractual liability to the [City]" (Compl. at ¶ 107). The City alleges that Shore Superblock is "the passive

beneficiary to the City's efforts to assemble several smaller parcels through Urban Renewal into perhaps the most valuable single parcel of oceanfront property on the Eastern Seaboard" (*id.* at ¶ 106).

The Court has already determined that, to the extent that the City can allege specific breaches of the Urban Renewal Plan, it may allege such breaches against Shore Superblock. To the extent that the City seeks any kind of contractual payments from Shore Superblock and iStar, however, such payments are barred. It is not enough to show that these Defendants received a benefit from the City's activities; the City must be able to prove that performance was rendered for the Defendants resulting in their unjust enrichment, which the City cannot do. Accordingly, the Court dismisses any claim for unjust enrichment against iStar and Shore Superblock, with prejudice.

III. Order to Show Cause Regarding Notice of Pendency

The Court, at this juncture, denies the motion for an Order cancelling the notice of pendency. Given that the Court has granted the City leave to replead claims that will affect the use of the "Superblock" property, and in the absence of evidence that the City is not acting in good faith or has an ulterior motive, the Court denies the motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on February 23, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
January 31, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.