

**Griffon V, LLC v 11 East 36th LLC**

2012 NY Slip Op 33272(U)

October 15, 2012

Sup Ct, New York County

Docket Number: 850023/2011

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS
Justice

PART

Index Number : 850023/2011
GRIFFON V, LLC
vs.
11 EAST 36TH LLC
SEQUENCE NUMBER : 004
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
accompanying Memorandum Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/15/12

CHARLES E. RAMOS, J.S.C.

- 1. CHECK ONE: CASE DISPOSED (checked), NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART (checked), OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----x  
GRIFFON V, LLC, HERALD NATIONAL BANK,

Plaintiffs,

Index No. 850023/2011

-against-

11 EAST 36<sup>TH</sup> LLC, MORGAN LOFTS LLC, THE  
BOARD OF MANAGERS OF THE MORGAN LOFT  
CONDOMINIUM, WORKERS COMPENSATION BOARD  
OF THE STATE OF NEW YORK, "JOHN DOE #1"  
through "JOHN DOE #60",

Defendants.

-----x  
11 EAST 36<sup>TH</sup> LLC, MORGAN LOFTS LLC,

Counterclaim/Cross-claim Plaintiffs,

-against-

CHINATRUST BANK (USA), CHINATRUST  
CAPITAL CORPORATION, FINANCIAL ONE,  
CORP., GRAND PACIFIC FINANCE CORP., GLOBAL  
ONE, CORP., JEFFERY KOO, SR., YIN TUNG  
TONY CHANG a/k/a TONY CHANG, MICHAEL CHIH  
CHANG LIN a/k/a C.C. LIN a/k/a MICHAEL  
LIN, THEODORE JER-JYH CHEN a/k/a TED CHEN,  
CHANG-MING HUANG a/k/a JAMES HUANG, JOHN  
HUANG, BELTON YU CHUNG LEE a/k/a BELTON  
LEE, FIFTH FIELD LLC, 366 MADISON INC.,  
DAHAN REALTY, ROBERT W. HEINEMANN and  
LOUIS VARSOS,

Cross-claim Defendants.

-----x

**Hon. Charles Edward Ramos, J.S.C.**

Motion sequences 004 through 012 are consolidated for the  
purposes of this decision.

In motion sequence 004, cross-claim defendants Grand Pacific  
Finance Corp. ("Grand Pacific"), Robert W. Heinemann

("Heinemann"), Louis Varsos ("Varsos"), and Financial One Corp. ("Financial One") move pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss with prejudice, and pursuant to CPLR 3211(a)(8) to dismiss without prejudice all cross-claims asserted against them, and pursuant to CPLR 3211(a)(5) to dismiss with prejudice the eighth and ninth causes of action.

In motion sequence 005, cross-claim defendants Michael Lin ("Lin") and Dahan Realty LLC ("Dahan") move pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss with prejudice the first, third, fourth, eighth, and ninth cross-claims.

In motion sequence 006, cross-claim defendant 366 Madison Inc. ("366 Madison") moves pursuant to CPLR 3211(a)(1) to dismiss with prejudice all cross-claims asserted against them.

In motion sequence 007, cross-claim defendant Global One Corp. ("Global One") moves pursuant to CPLR 3211(a)(1) to dismiss with prejudice all cross-claims asserted against them.

In motion sequence 008, cross-claim defendants Belton Lee ("Lee") and Fifth Field LLC ("Fifth Field") move pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss with prejudice all cross-claims asserted against them.

In motion sequence 009, cross-claim defendant Chinatrust Capital Corporation ("CCC") moves pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss with prejudice the first, third, forth, eighth, and ninth cross-claims.

In motion sequence 010, cross-claim defendant Yin Tung Tony Chang ("Chang") moves pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss with prejudice the first, third, fourth, eighth, and ninth cross-claims and pursuant to CPLR 3211(a)(5) to dismiss with prejudice the eighth and ninth cross-claims.

In motion sequence 011, cross-claim defendant Chinatrust Bank (U.S.A.) ("Chinatrust") moves pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the first, second, third, fourth, fifth, seventh, eighth, and ninth cross-claims.

In motion sequence 12, the cross-claim plaintiffs 11 East 36<sup>th</sup> LLC ("11 East") and Morgan Lofts LLC ("Morgan") (together, the "Cross-claim Plaintiffs") move pursuant to CPLR 3217 to voluntarily dismiss without prejudice all cross and counter claims.

### **Background**

Among a myriad of conclusory allegations and extraneous information, the Cross-claim Plaintiffs allege the following relevant facts which are accepted as true for the purposes of disposition. Morgan owns and operates a condominium conversion project located at 11 East 36<sup>th</sup> Street, New York, New York (the "Morgan Lofts"). In or around 2004, Morgan financed the acquisition of Morgan Lofts with a \$14.7 million loan from Chinatrust and a \$2.3 million mezzanine loan from Grand Pacific (Answer ¶ 85).

When this funding proved inadequate, Morgan approached Lee and Lin, two of Grand Pacific's senior officers, and requested additional funding. Lee and Lin informed Morgan that neither Chinatrust nor Grand Pacific would extend further loans, but they introduced Morgan to Fifth Field and Global One, each of whom provided Morgan with an additional \$500,000 loan in exchange for "higher-than-normal returns" (Answer ¶ 89).

Morgan alleges that Lee and Lin represented that Fifth Field and Global One were "foreign investors" and concealed from Morgan that Lee owned and controlled Fifth Field, Lin owned and controlled Global One, and that Grand Pacific and its affiliates were the source of funding for Global One and Fifth Field (Answer ¶ 90). Morgan also characterizes the two \$500,000 loans as "investments" in its pleading, but counsel for Morgan informed this Court at a hearing on June 19, 2012 that these were, in fact, loans and that Fifth Field and Global One were not joint venturers and did not take an equity stake in the Morgan Lofts.

In July 2005, Morgan obtained an additional \$10 million acquisition loan from Chinatrust. Grand Pacific took a \$6 million participation in this loan (Answer ¶ 91).

In 2006, Morgan sought to obtain financing for the construction phase of the Morgan Lofts. As part of this effort, Morgan arranged for a \$38 million loan from Chinatrust, the proceeds of which it intended to use to retire the earlier \$14.7

million and \$10 million priority and \$2.3 million mezzanine loans. Morgan was particularly eager to retire the \$2.3 million mezzanine loan, which was set to mature in May 2006.

Morgan alleges that Chinatrust and Grand Pacific objected to its plan to retire the mezzanine loan and that Lee threatened to use his influence with Chinatrust to block the new financing and foreclose on the mezzanine loan if Morgan refused to retire the two \$500,000 loans instead of the mezzanine loan (Answer ¶ 94). Because "it was critical" to obtain construction financing from Chinatrust at that time, Morgan asserts that it was "forced to comply with Lee's demands" (Answer ¶ 94).

In August 2006, Morgan entered into the new loan with Chinatrust for approximately \$38 million, using the proceeds to retire loans totaling \$24.7 million, but not the \$2.3 million mezzanine loan. Of the \$38 million borrowed, Morgan alleges that over \$3 million "was diverted to pay principal, accrued interest, and 'miscellaneous' fees to the [s]traw companies, Fifth Field, Global One, and 'consulting fees to EAE, LLC, a company controlled by Lee, even though no 'services' were rendered" (Complaint ¶ 98).

Concurrent with the closing of the \$38 million loan, Grand Pacific funded a new \$3 million loan to retire the prior \$2.3 million mezzanine loan. Morgan alleges that it was damaged by being pressured to enter into this loan because it allowed Grand

Pacific to charge Morgan points and fees, as well as an "exit fee" on the mezzanine loan, including points and interest charged on the exit fee.

Morgan alleges that throughout the project, Lee, Lin, and Tony Chang, a senior vice president of Chinatrust, engaged in ongoing wrongful conduct that contributed to Morgan's financial decline including purposefully delaying requisition payments to contractors, diverting construction payments to pay interest on the mezzanine loan, diverting proceeds from a separate project in White Plains, New York to pay Fifth Field, and requiring Morgan to pay Lee and Lin fees for services not rendered (Complaint ¶ 101-181).

In early 2007, Morgan communicated to Chinatrust that it needed approximately \$2-2.5 million to complete construction on the Morgan Lofts. Morgan alleges that Chinatrust coerced it, by diverting funds to satisfy interest payments on prior loans and to pay various fees, to enter into a larger \$7.5 million loan (Answer ¶ 184). In April 2008, after Morgan was unable to retire the \$7.5 million loan, it entered into a \$2.2 million line of credit facility (the "Note") with Chinatrust that is secured by five condominium units at Morgan Lofts (Answer ¶ 187).

In fall 2009, Morgan attempted to purchase the Note from Chinatrust. Morgan alleges that Chinatrust accepted via email its offer to purchase the Note, but then delayed and hindered the



sale, and instead sold the Note to Griffon at a reduced rate on October 14, 2009.

Prior to commencing this action, the plaintiffs Griffon and Herald National Bank (the "Plaintiffs") commenced an action pursuant to CPLR 3213 in Nassau County (*Griffon V LLC v 11 East 36<sup>th</sup> LLC*, Index No. 022614/2009, Supreme Court, Nassau County) by filing a motion for summary judgment in lieu of complaint on the face of the Note (Tobias Aff. Ex. 6). Chinatrust and Grand Pacific have both appeared as cross-claim defendants in the Nassau County action (Tobias Aff., Ex. 4). On November 16, 2011, Morgan moved the Nassau County Court to add the remaining cross-claim Defendants, but later withdrew that motion on December 6, 2011.

On September 17, 2010, the Nassau Court issued an order that denied summary judgment to the plaintiffs. This order was subsequently reversed by the Second Department, which held that the Cross-claim Plaintiffs had waived the defenses asserted and their "conclusory allegation with respect to the defense sounding in fraud in the inducement was insufficient to defeat the plaintiff's entitlement to summary judgment." The Court also held that "the purported defense based on discussions between the parties which occurred after the note and guaranties were executed was insufficient to raise a triable issue of fact with respect to the defendants' liability under those documents"

(*Griffon V, LLC v 11 E 36<sup>th</sup>, LLC*, 90 AD3d 705 [2<sup>nd</sup> Dept 2011]).

On April 17, 2011, the Plaintiffs commenced this action by filing a summons and complaint seeking to foreclose on the five condominium units at Morgan Lofts that secure payment on the Note. On September 28, 2011, Morgan filed its amended verified answer, counterclaims, and cross-claims.

On January 12, 2012, this Court granted the Plaintiffs' motion for summary judgment to foreclose on the mortgage, appoint a referee to compute the amount owed under the Note, and dismiss Cross-claim Plaintiffs' sixth and seventh causes of action on the grounds that the defenses asserted are conclusory and the Cross-claim Plaintiffs failed to present any viable defenses to foreclosure.

Between January 30, 2012 and June 11, 2012, the various cross-claim defendants (the "Cross-claim Defendants") filed motions to dismiss the cross and counter claims. On June 11, 2012, Morgan filed its motion to voluntarily discontinue this action.

#### **Standard of Review**

Dismissal under CPLR 3211 (a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Dismissal under CPLR 3211(a)(7) is warranted where the pleadings fail to

state a cause of action upon which relief may be granted. The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (511 W. 232<sup>nd</sup> Owners Corp., 98 NY2d at 152, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The Court must afford the pleadings a liberal construction, giving the plaintiffs the benefit of every possible favorable inference and accept as true the facts alleged in the complaint and any admissions in opposition to the dismissal motion (*id.*). Conclusory allegations, claims consisting of bare legal conclusions with no factual specificity, are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 N.Y.3d 358, 373 [2009]).

### **Discussion**

In motion sequences 004 through 011, the Cross-claim Defendants move to dismiss all causes of action pursuant to CPLR 3211(a)(1), (5), and (7) on the grounds that a defense is founded upon documentary evidence, that Morgan has failed to state a claim upon which relief may be granted, and that some claims are barred by the statute of limitations.

At the outset, it must be noted that in pleading several of their claims, the Cross-claim Plaintiffs point to actions by specific Cross-claim Defendants in support of their claim, but nonetheless seek relief from all Cross-claim Defendants without

explanation or argument as to why all Cross-claim Defendants are liable for the actions of those named. In such instances, the claims against the Cross-claim Defendants for which actions giving rise to liability are not alleged shall be dismissed with prejudice.

A. First Cause of Action

The Cross-claim Plaintiffs' first cause of action asserts a claim of breach of contract against Chinatrust. Chinatrust argues that all of the Cross-claim Plaintiffs' claims against them are subject to dismissal pursuant to CPLR 3211(a)(1) on the ground that several of the lending documents contain broad, explicit language wherein Morgan waived all rights to offsets, defenses, counterclaims, and fraud. The relevant provisions are as follows:

"All sums payable to [Chinatrust] hereunder shall be payable in U.S. Dollars, without set-off or counterclaim, on the day in question, to [Chinatrust] at its address as [Chinatrust] may from time to time designate in a written notice of [Morgan]" (Note, Re Aff., Ex. Q).

"[Morgan] hereby certifies that this Mortgage . . . [is] a valid first lien for the amount last above specified, with interest thereon at the rate set forth in the Note, and that there are no offsets or defenses to this Mortgage . . . or to the indebtedness secured thereby" (Collateral Mortgage, Re Aff., Ex. R).

"That there are no offsets or defenses, nor is there any usury, fraud or adverse equity affecting the indebtedness evidenced by the Note or the lien of the Mortgage" (Estoppel Affidavit, Re Aff., Ex. S).

A mortgagor who has given an estoppel certificate stating

that there are no defenses or offsets to the mortgage will be estopped from asserting the defenses unless it makes a showing that it executed the estoppel certificate under duress, there is an equitable reason to invalidate the certificate, or if the party seeking enforcement took it with knowledge of some defect in the manner in which the certificate was obtained (*Hammelburger v Foursome Inn Corp.*, 54 NY2d 580 [1981]; *Bush Realty Assoc. V A.M. Cosmetics, Inc.*, 2 AD3d 270 [1<sup>st</sup> Dept 2003]).

The Cross-claim Plaintiffs assert that they are not bound by the estoppel provisions because the Note and related documents are contracts of adhesion. Aside from a bare assertion, the Cross-claim Plaintiffs have presented no facts to support this claim or the assertion that their principals, seasoned real estate developers who arranged and executed the Morgan Lofts project, were unsophisticated or not represented by counsel throughout the course of the events leading up to execution of the Note. Furthermore, the Second Department previously held that they waived all defenses under the Note. The Cross-claim Plaintiffs are estopped from bringing such defenses against Chinatrust. Therefore, the first cause of action is subject to dismissal with prejudice pursuant to CPLR 3211(a)(1).

#### B. Second Cause of Action

In their second cause of action, the Cross-claim Plaintiffs allege that Chinatrust, Grand Pacific, Global One, Fifth Field,

or officers of same fraudulently induced them to enter into lending agreements by concealing affiliations between the lenders and concealing information regarding payments between the lenders (i.e., that "the funds supplied to Grand Pacific through the larger-than-requested \$7.5 million loan were forwarded to Grand Pacific in order to cover up the prior faulty underwriting and loan history. . .") (Answer ¶ 214-217).

In order to assert a viable claim for fraud, a plaintiff must make a showing, pled with particularity pursuant to CPLR 3016(b), that the defendant made a material representation of fact, with knowledge of its falsity and intent to induce reliance (scienter), and that the plaintiff justifiably relied on the misrepresentation (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

As noted above, the Counter-claim Plaintiffs are estopped from bringing this claim against Chinatrust.

The Cross-claim Plaintiffs' allegations that the lenders or their officers concealed information regarding relationships or payments between one another are insufficient to bring a cause of action for fraudulent inducement because the Cross-claim Plaintiffs have not made a showing that the lenders had a duty to disclose the information in question as a matter of law. Nor have the Cross-claim Plaintiffs pled facts that would lead this Court to conclude that reliance on the alleged omissions induced them

to enter into the various lending agreements. Furthermore, the facts are pled in a conclusory and non-specific manner insufficient to sustain a claim for fraud. Therefore, the second cause of action must be dismissed with prejudice.

C. Third Cause of Action

The Cross-claim Plaintiffs' third cause of action alleges that Chang, Lin, and Lee "all knowingly and willfully participated in . . . frauds, breaches of contract, breaches of duties of good faith and fair dealing to illegally convert for their own use, monies from the Morgan Lofts project by, *inter alia*, charging excessive fees, conditioning continued financing upon usurious terms and/or guarantees in related and unrelated development projects . . . and knowingly making payments for non-existent services to [] Lee personally and through entities controlled by him" (Answer ¶ 222).

To the extent that the third cause of action alleges breach of contract against Chang, Lin, and Lee, such claim is not recoverable at law because the Cross-claim Plaintiffs have not made a showing that these individuals were parties to an enforceable agreement.

With respect to the remaining claims, the Cross-claim Plaintiff's pleadings are insufficient to sustain any cause of action because they fail to indicate which specific actions give rise to causes of action recoverable as a matter of law.

Therefore, this claim is subject to dismissal without prejudice pursuant to CPLR 3211(a)(7). Whereas it appears the Counter-claim Plaintiffs may have a cognizable claim arising from misappropriated funds or other frauds, they may re-plead with specificity.

D. Fourth Cause of Action

The Cross-claim Plaintiffs' fourth cause of action asserts a claim for commercial bad faith against Chinatrust and its parent corporation, CCC. "A cause of action for commercial bad faith against a bank requires allegations of a scheme or acts of wrongdoing, together with allegations of the bank's actual knowledge of the scheme or wrongdoing that amounts to bad faith or allegations of complicity by bank principals in alleged confederation with the wrongdoers" *Peck v. Chase Manhattan Bank, N.A., Supreme Court*, 190 AD2d 547, 549 [1<sup>st</sup> Dept 1993]). Claims for commercial bad faith are subject to heightened pleading requirements.

As noted above, the Cross-claim Plaintiffs are estopped from asserting this claim against Chinatrust. With respect to CCC, the Cross-claim Plaintiffs have failed to allege specific allegations of wrongdoing that constitute bad faith. Nor have they alleged that the bank had actual knowledge of such wrongdoing or that the knowledge and conduct of the bank's officers should be imputed to CCC under the doctrine of *respondeat superior*. This claim is



therefore subject to dismissal without prejudice pursuant to CPLR 3211(a)(7). To the extent that Counter-claim Plaintiffs may have a viable claim for commercial bad faith against CCC, they may re-plead with the requisite specificity.

C. Fifth Cause of Action

In their fifth cause of action, the Cross-claim Plaintiffs make a claim for breach of contract arising from Chinatrust's alleged agreement to sell the Note to Morgan and subsequent sale of the Note to Griffon. Nonetheless, the facts as pled do not sufficiently allege the existence of an enforceable agreement between Chinatrust and Morgan for sale of the Note. This claim is therefore subject to dismissal with prejudice pursuant to CPLR 3211(a)(7).

D. Sixth and Seventh Causes of Action

As noted above, this Court dismissed the Cross-claim Plaintiffs' sixth and seventh causes of action in oral argument on January 12, 2012.

E. Eighth and Ninth Causes of Action

The Cross-claim Plaintiffs' eighth and ninth causes of action assert claims against the Cross-claim Defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The Cross-claim Defendants argue that the claims are barred by the four year statute of limitations under RICO and that the Cross-claim Plaintiffs have failed to plead a *prima facie* claim under

RICO.

The statute of limitations for claims brought under RICO "begins to run when the plaintiff discovers or should have discovered the RICO injury," irrespective of "whether the plaintiff discovered or should have discovered the underlying pattern of racketeering activity, even if such activity includes fraud" (*Frankel v Cole*, 313 Fed Appx 418, 419-420 [2d Cir 2009]). Because the counter and cross-claims were filed on September 28, 2011, all RICO claims related to or arising from injuries discovered or discoverable prior to September 28, 2007 are barred by the statute of limitations.

"An injury is 'discoverable' when a plaintiff has constructive notice of facts sufficient to create a duty to investigate further into the matter" (*Congregation de la Mision Provincia de Venezuela v Curi*, 978 F Supp 435, 444 [EDNY 1997][internal quotations omitted]).

Here, the injuries alleged are that the Counter-claim Plaintiffs were "forced," as a result of misrepresentations or omissions made by Lee, Lin, or Chang regarding relationships or collusion between the parties, to borrow larger than necessary loans at "excessive" or usurious interest rates and that monies from the various loans were converted, delayed, or otherwise misappropriated during the course of the parties dealings beginning in mid to late 2004. Each of these injuries occurred

and were discoverable prior to September 28, 2007.

Regardless of whether the Cross-claim Plaintiffs did not discover "whether crossclaim Defendants were owned and/or controlled by the same parties and what wrongs they may have committed against them" until after the litigation, they were nonetheless on "notice of facts sufficient to create a duty to investigate further into the matter." Their claims pursuant to RICO are, therefore, subject to dismissal with prejudice pursuant to CPLR 3211(a)(5).

F. Motion to Voluntarily Discontinue

The Counter-claim Plaintiffs' motion to voluntarily discontinue, filed on the eve of oral argument for the motions to dismiss, appears to be an attempt to avoid an unfavorable decision on the merits of the claims and is therefore denied. Accordingly, it is

ORDERED that the motions for summary judgment marked sequences 004 through 012 are granted in part, thereby dismissing the cross-claim plaintiffs' 11 East 36<sup>th</sup> LLC and Morgan Lofts LLC first, second, fifth, sixth, seventh, eighth, and ninth causes of action with prejudice; and it is further

ORDERED that the motions for summary judgment marked sequences 004 through 012 are granted in part, thereby dismissing the cross-claim plaintiffs 11 East 36<sup>th</sup> LLC and Morgan Lofts LLC's third and fourth causes of action without prejudice; and it is

further

ORDERED that the cross-class plaintiffs 11 East 36<sup>th</sup> LLC and Morgan Lofts LLC's motion to voluntarily discontinue is denied; and it is further

ORDERED that cross-claim plaintiffs 11 East 36<sup>th</sup> LLC and Morgan Lofts LLC are granted leave to serve an amended complaint so as to replead the third and fourth causes of action within 20 days after service on the cross-claim plaintiffs attorney of a copy of this order with notice of entry. In the event that cross-claim plaintiffs fail to serve an amended complaint within such time, leave to re-plead shall be deemed denied and the action shall be deemed dismissed with prejudice.

Dated: October 15, 2012

ENTER:

J.S.C.