Board of Mgrs. of the 128 W. 111th St. Condominium v 114 W. Realty LLC
2017 NY Slip Op 31567(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 65397/2015
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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THE BOARD OF MANAGERS OF THE 128 WEST 111TH STREET CONDOMINIUM,

Plaintiff,

- against -

114 WEST REALTY LLC, AARON TUBBS and KURT G. CONTI,

Defendants.

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Index Number: 65397/2015

Sequence Nos.: 001, 002, 003

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used on: (1) the motion of defendant Tubbs, and the cross-motion of defendants 114 West Realty LLC and Conti, to dismiss the complaint, and plaintiff's cross-motion to amend the complaint and for attorneys' fees; (2) defendant Tubbs' motion to dismiss the cross-claims of defendants 114 West Realty LLC and Conti; and (3) defendant Tubbs' motion for sanctions and costs:

Papers Numbered:

Defendants' Motion and Cross-Motion to Dismiss the Complaint, and Plaintiff's Cross-Motion to Amend (Seq. No. 001)

Notice of Motion to Dismiss – Affirmation – Exhibits (memorandum of law) 1
Memorandum of Law in Opposition . . . . .
Reply Memorandum of Law In Further Support of Motion to Dismiss . . . . .

Notice of Cross-Motion to Dismiss – Affirmation – Exhibit 2
Memorandum of Law in Opposition . . . . .

Notice of Cross-Motion to Amend – Affidavits – Affirmation – Exhibits 3
Memorandum of Law in Opposition to Cross-Motion to Amend and
In Support of Motion for Costs and Sanctions . . . . .

Defendant Tubbs' Motion to Dismiss Cross-Claims (Seq. No. 002)

Notice of Motion – Affirmation – Exhibits (memorandum of law) 4
Affirmation in Opposition – Exhibits (memorandum of law) 5
Reply Memorandum of Law . . . . .

Defendant Tubbs' Motion for Sanctions (Seq. No. 003)

Notice of Motion (memorandum of law) 6
Memorandum of Law in Opposition . . . . .

Upon the foregoing papers, defendants' motion and cross-motion to dismiss the complaint are granted in part and denied in part; plaintiff's cross-motion to amend the complaint is denied; defendant Tubbs' motion to dismiss the cross-claims is denied in part and granted in part; and defendant Tubbs' motion for sanctions is denied.

Background

In this action, plaintiff, the Board of Managers of The 128 West 111th Street Condominium (the "Board"), a six-story condominium building located at 128 West 111th Street, New York, New York ("the Building"), sues to recover damages for alleged "substantial construction defects" during the physical renovation and legal conversion of the Building from a class B multiple dwelling to a class A multiple dwelling consisting of three triplex condominium units. Defendant 114 West Realty LLC is the developer-sponsor of the condominium (the "Sponsor"). Defendants Aaron Tubbs ("Tubbs") and Kurt G. Conti ("Conti") are alleged to be the Sponsor's president and manager, respectively, and the principals of the construction company that performed the renovations. Essentially, the Board claims that the Sponsor, Tubbs, and Conti knew of, and "actively concealed," "structural flaws, water leaks and water damage... [including] visible mold" throughout the Building before, during, and after they marketed the condominium units for sale to the public, as a result of which the Board sustained approximately $1,000,000 in damages.

The Complaint

The complaint, filed on December 1, 2015, consists of 27 pages, 130 paragraphs, and 9 separate causes of action. Over the course of the first fifteen pages, the complaint sets forth the history of the ownership of the Building, purchased in February 2007 by Tubbs; the formation of the Sponsor as a Delaware LLC in March 2007, with Tubbs being the initial sole owner of the Sponsor; the construction and renovation work performed, including the addition of three floors and creation of three triplex apartments (work commenced in April 2007, and a final certificate of occupancy was issued February 6, 2009); the conversion of the Building to a condominium (the initial Offering Plan was filed July 2008, and the Condominium Declaration was filed on May 19, 2014); Tubbs' sale of 100% of his interest in the Sponsor to Conti on December 24, 2010; and the pertinent provisions of the Offering Plan that were incorporated into the Purchase Agreements for the individual units. According to the complaint, the closing on the sale of the first condominium unit took place on June 3, 2014, with all units sold by July 11, 2014; and the Sponsor controlled the Board from May 19, 2014 to June 20, 2014. The complaint further alleges that the unit owners began experiencing water infiltration "almost immediately upon taking possession" of their units, and that despite the Board having put the Sponsor and Conti on notice of the defects by letter dated May 26, 2015, no repairs have been made and "a hazardous condition" remains in the Building.

As for the alleged defects, the complaint lists thirty-six "substantial and material defects" in the structure and systems of the Building, including but not limited to the Building's exterior walls, facade, and roof; the waterproofing systems; the plumbing and drainage systems; the fire prevention system; the electrical system; and the HVAC system, and alleges that these "grave unsafe conditions" in the Building violate the New York City Building Code and have caused water infiltration, water damage, and mold throughout the common elements and individual units. The complaint also alleges that the Sponsor, Tubbs, and Conti knew that the Building "was constructed in a negligent and reckless manner and that the Building was not fit for residential occupancy," conspired to hide the defects throughout "the construction process, while the Units were being sold, as well as after Units were sold" when the Sponsor controlled the Board, and made "various representations regarding the workmanship and construction of the Building [that] were knowingly false and misleading" in order to induce the unit owners to purchase the apartments.

Based upon defendants' alleged intentional concealment and omission from the Offering Plan of the alleged construction defects, the complaint asserts nine causes of action, to wit: breach of contract (1st cause of action); breach of express warranty (2nd cause of action); breach of housing merchant implied warranty (3rd cause of action); fraud (4th cause of action); deceptive trade practices under General Business Law ("GBL") § 349 (5th cause of action); trespass (6th cause of action); nuisance (7th cause of action); negligence (8th cause of action); and breach of fiduciary duty (9th cause of action). The complaint also seeks punitive damages on each cause of action, based upon defendants' alleged "reckless and morally reprehensible behavior … because said injuries were aimed at the public generally, were gross and involve high moral culpability."

On April 22, 2016, the Sponsor and Conti, represented by the same attorney, served and filed a Verified Answer, in which they denied the material allegations of the complaint, asserted various affirmative defenses, and interposed two cross-claims against Tubbs, the first for contribution and the second for contractual or common law indemnification.

Defendant Tubbs did not serve an answer to the complaint and instead now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint in its entirety. In the main, Tubbs argues that the complaint asserts "duplicative and insufficiently pled claims" against him. Specifically, Tubbs argues that the complaint fails to state causes of action against him upon the grounds that, inter alia: there is no privity between himself and the unit owners because he sold his interest in the Sponsor in 2010, four years prior to the sale of the units; the Offering Plan was amended four times after he sold his interest in the Sponsor, thereby relieving him of any liability for any purported omissions thereunder; the breach of warranty, fraud, and negligence causes of action are duplicative of the breach of contract cause of action; on the alleged facts, the GBL § 349, trespass, nuisance, and breach of fiduciary duties causes of action do not lie under New York law; and the Statute of Limitations bars the negligence claims. The Sponsor and Conti join in Tubbs' motion to dismiss and adopt the arguments raised therein. The Sponsor and Conti also argue, in the alternative, that if the complaint is dismissed as to Tubbs, he nevertheless must remain in this action vis-a-vis the cross-claims. The Board opposes the motion and cross-motion to dismiss arguing – based on its attorney's affirmation – that the "totality of the circumstances" as "adequately pleaded" in the complaint demonstrate that defendants intentionally concealed the alleged the construction defects and misrepresented the condition of the Building to the unit owners and, therefore, that the complaint should withstand dismissal.

In addition, the Board now cross-moves, pursuant to CPLR 3025, to amend the complaint to assert causes of action for: constructive fraudulent conveyances while insolvent (10th cause of action), constructive fraudulent conveyances causing unreasonable small capital (11th cause of action), and intentional fraudulent conveyances (12th cause of action). The proposed new causes of action are based solely on the "current facts" alleged in the initial complaint, no new facts are alleged in the proposed amended complaint; the only new "fact" is the allegation in the Board's attorney's affirmation that defendants "abused the corporate form to perpetrate a fraud and injustice" against the Board.

Tubbs also separately now moves to dismiss the Sponsor and Conti's cross-claims, and for sanctions against the Board.

Discussion

Dismissal of a complaint pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims.

Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal 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"). Dismissal of a complaint pursuant to CPLR 3211(a)(7) is only warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. Stukuls v State of New York, 42 NY2d 272, 275 (1977); EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013; see Rogers v Earl, 249 AD2d 990 (4th Dept 1998).

The First Cause of Action, for Breach of Contract

The complaint fails to state a cause of action for breach of contract as against Tubbs and Conti upon the ground that there is no privity between either Tubbs or Conti and the Board/unit owners. Tubbs and Conti are not parties to the Purchase Agreements and they did not individually guarantee the Sponsor's obligations thereunder. Moreover, as defendants correctly argue, the fact that Tubbs certified the initial Offering Plan in 2008, and Conti certified all subsequent Offering Plans, is insufficient to impose liability against either of them for alleged breach of contract. Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC, 106 AD3d 542, 544 (1st Dept 2013) ("The motion court correctly determined that the Non-Sponsors may not be held individually liable for any of plaintiff's claims premised solely on alleged violations of the offering plan and certification."). It is undisputed that: the Offering Plan was amended in November 2010 to replace Tubbs with the Sponsor; Tubbs sold his interest in the Sponsor in December 2010; and the Offering Plan was amended by the Sponsor in 2013 and 2014, prior to the execution of any of the Purchase Agreements (which incorporated the Offering Plan). The complaint does not allege that Tubbs and Conti are the "alter-ego" of the Sponsor, such that a breach of contract claim against them would lie. As discussed more fully below, the bare allegation of the Board's attorney in support of its motion to amend the complaint, that Tubbs and Conti "abused the corporate form to perpetrate a fraud and injustice" against the Board, is insufficient to state a an "alter-ego" claim.

However, the complaint sufficiently pleads a cause of action against the Sponsor for its alleged breach of the Purchase Agreements. The complaint alleges: (I) the existence of a contract, i.e., the Purchase Agreements; (ii) the provisions of the Purchase Agreement that the Sponsor allegedly breached, i.e., the promises and covenants that the units would be constructed in accordance with the Offering Plan, and comply with the Building Code and all other applicable laws, rules and regulations; (iii) the individual unit owners' performance of their obligations thereunder; and (iv) damages arising from the breach. See Furia v Furia, 116 AD2d 694, 695 (2nd Dept 1986) ("The pleading clearly specifies the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant."). Accordingly, the first cause of action, for breach of contact, as against Tubbs and Conti only is subject to dismissal; the first cause of action, for breach of contract, as against the Sponsor stands.

The Second Cause of Action, for Breach of Express Warranty

For the reasons stated above, the complaint fails to state a cause of action for breach of express warranty as against Tubbs and Conti – neither Tubbs nor Conti personally guaranteed the Purchase Agreements and cannot be held liable by the simple expedient of having certified the Offering Plans, the two documents upon which the Board bases its claim. Thus, as a matter of law, Tubbs and Conti are not liable for an alleged breach of any express warranties contained in the Offering Plan and Purchase Agreements.

In addition, the complaint fails to state a claim for breach of express warranty as to the Sponsor. As defendants correctly point out, and the Board fails to refute, the breach of express warranty claim is based upon the same alleged failure to construct and repair the Building in accordance with the Purchase Agreements and Offering Plan, as is the breach of contract claim. The Board fails to identify any independent warranties, limited or otherwise, on which it bases its breach of express warranty claim such that it is not duplicative of the breach of contract cause of action. Cf. Tiffany at Westbury Condo. By Its Bd. of Managers v Marelli Dev. Corp., 40 AD3d 1073, 1075–76 (2nd Dept 2007) ("Since the offering plan and purchase agreements contained specific provisions as to how Tiffany would be constructed, which are separate and apart from the limited warranty, the owners are entitled to assert common-law breach of contract causes of action with respect to those provisions.").

Accordingly, the second cause of action, for breach of express warranty, is subject to dismissal.

The Third Cause of Action, for Breach of Housing Merchant Implied Warranty

The complaint fails to state a cause of action for breach of housing merchant implied warranty under General Business Law ("GBL") § 777 because the Building is a multi-unit residential structure that is six-stories tall, and this statute applies only to "any single family house or for-sale unit in a multi-unit residential structure of five stories or less… ." Contrary to the Board's assertion, the implied warranty was not "expressly made part of" the Offering Plan and Purchase Agreements. Rather, the Offering Plan states that GBL § 777 applies to structures of five stories or less and refers the reader to the terms of the statute "including the circumstances under which the Law does not extend" – i.e., circumstances involving six-story multi-unit residential structures. The Board's reliance on Gumenick v Arvidson, 93 AD3d 558 (1st Dept 2012), is unavailing as the subject structure in that case "was undisputedly a single-family home."

Accordingly, the third cause of action, for breach of housing merchant implied warranty, is subject to dismissal.

The Fourth Cause of Action, for Fraud

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009). As explained by the Court of Appeals in Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 492 (2008):

> Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action. Although under [CPLR] section 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be

> confused with unassailable proof of fraud. Necessarily, then, [CPLR] section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct.

Here, the complaint does not contain sufficiently detailed allegations of the allegedly fraudulent misrepresentations made by Tubbs, Conti, and/or the Sponsor in the Offering Plan and Purchase Agreements that were allegedly known to be false when made, made with the intention of inducing the individual unit owners to purchase units, and which they allegedly justifiably relied upon, causing them to be injured. Paragraphs 41 - 45 of the complaint, which purport to set forth defendants' alleged fraudulent conduct, contain general statements that defendants "conspired" with each other to "defraud" the unit owners, to hide and conceal the alleged construction defects, and that their representations "were knowingly false and misleading" – without any details or specifics of the misrepresentations, the dates on which they were made, to whom they were made – as required by CPLR 3016(b). See Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559-60 (2009) (complaint that "conclusorily alleges that at some unspecified point in 2005 S & K became aware that more than 10% of Wood River's holdings were invested with Endwave but, nonetheless, S & K continued to issue offering memoranda falsely representing that Wood River would not invest more than 10% of its assets in any given security" failed to satisfy CPLR 3016 pleading requirement). Indeed, the fraud allegations are alleged solely "upon information and belief," which is insufficient to permit a reasonable inference that the Sponsor and individual defendants knew about the allegedly seriously defective conditions, yet misrepresented the condition of the Building in the Offering Plan in order to induce the individual unit owners to enter into Purchase Agreements. See Facebook, Inc. v. DLA Piper LLP (US), 134 AD3d 610,.615 (1st Dept 2015) ("Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud.").

In addition, the fraud cause of action is duplicative of the breach of contract cause of action because the alleged wrongful conduct underlying the fraud claim is the same as that underlying the breach of contract claim. See First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287, 291-292 (1st Dept 1999) ("A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract"). Here, the complaint alleges that defendants concealed, hid, and omitted from the Offering Plan the alleged defective and negligent construction of the Building with the intent to deceive, that the individual unit owners justifiably relied on defendants' representations as to the condition of the Building to their detriment in purchasing the units, and that defendants failed to make repairs after receiving notice of the defects by the Board's May 26, 2015 letter to the Conti Group. These allegations are not separate and apart from those upon which the Board relies to support its breach of contract claim.

Accordingly, the fourth cause of action, for fraud, is subject to dismissal.

The Fifth Cause of Action, for Deceptive Trade Practices Under GBL § 349

General Business Law § 349 (consumer protection statutes which form part of the "Martin Act") empowers the Attorney General to bring an action to enjoin deceptive trade practices based upon omissions in a condominium offering plan. See Kerusa Co. LLC v W10Z/515 Real Estate L. P., 12 NY3d 236 (2009) (actions based solely upon omissions from Offering Plan lie solely within purview of Attorney General); cf. Assured Guar. v JP Morgan Inv. Mgt Inc., 18 NY3d 341, 353

(2011) (holding that the Martin Act does not prevent a private litigant from bringing a fraud claim based upon affirmative misrepresentations in Offering Plan). Thus, to the extent that the fifth cause of action is based upon allegations that the Sponsor omitted facts about the alleged defective condition of the Building, it is barred by the Martin Act.

Additionally, to the extent that the fifth cause of action is based upon affirmative misrepresentations of fact about the condition of the Building in the Offering Plan (not one of which, the Court notes, has been specifically identified other than the general allegation that the Board concealed "substantial and material defects" in the structure and systems of the Building), it could have been the basis of a Martin Act claim. However, this cause of action still fails as a matter of law because the claimed violations vis-a-vis the sale of the Building's three residential condominium units do not have a broad impact on consumers at large. Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 AD3d 646, 648 (1st Dept 2013) ("The court also properly dismissed the claims alleging violation of General Business Law §§ 349 and 350, as this action is limited to the parties in the subject building and does not involve "the public at large."); Plaza PH2001 LLC v Plaza Residential Owner LP, 98 AD3d 89, 104 (1st Dept 2012); Thompson v Parkchester Apts. Co., 271 AD2d 311, 311–312 (1st Dept 2000) (contracts between parties involving the purchase of condominium units held "unique to the parties" and "[do] not fall within the ambit of the statute").

Accordingly, the fifth cause of action, for deceptive trade practices under GBL § 349, is subject to dismissal.

The Sixth Cause of Action, for Trespass

It is well-settled that "[t]respass is the invasion of a person's right to exclusive possession of his land, and includes the entry of a substance onto land." Berenger v 261 W. LLC, 93 AD3d 175, 181 (1st Dept 2012). Moreover, a trespass claim requires an intent by the defendant to perform an act – whether "willfully … or so negligently as to amount to willfulness" – that caused the harm to the plaintiff's land. Phillips v. Sun Oil Co., 307 NY 328, 331 (1954) ("Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness."). Thus, as a matter of pleading, a complaint that alleges *"inter alia*, that the defendants removed lawn ornaments from the plaintiffs' backyard, damaged their barbecue grill, and diverted rainwater onto the plaintiffs' yard causing flooding," adequately pled a cause of action sounding in trespass. Zimmerman v Carmack, 292 AD2d 601, 602 (2d Dept 2002).

Here, the Board's trespass cause of action is based solely upon defendants' alleged "improper construction of the Building and unwillingness to repair the Building Defects" that caused the water infiltration, mold damage, and interfered with the unit owners' use of their units. In this Court's considered view, these allegations amount to, at most, negligence and not the type of intentional, willful conduct required for a trespass claim.

Additionally, the trespass cause of action is subject to dismissal as duplicative of the breach of contract cause of action as it is based upon the same allegations – defendants' alleged failure to construct the Building and repair the alleged construction defects – and seeks the same damages. See Wildenstein v 5H & Co, Inc., 97 AD3d 488, 492 (1st Dept 2012) (trespass cause of action dismissed because it "repeats the same allegations that form the basis of plaintiff's claim for

breach of contract. And, again, seeks the same damages."). Indeed, the trespass cause of action (and the complaint in toto) fails to allege a tort obligation "apart from and independent of" the contract. See Clark Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382, 389 (1987) ("It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract").

Accordingly, the sixth cause of action, for trespass, is subject to dismissal.

The Seventh Cause of Action, for Nuisance

The complaint fails to state a nuisance cause of action against defendants because (1) the parties are not "neighboring contemporaneous land users" (see 55 Motor Ave. Co. v Liberty Indus. Finishing Corp., 885 FSupp 410, 421 [EDNY 1994] ["The law of nuisance historically evolved as a means of resolving conflicts between neighboring contemporaneous land users."]); and (2) "the conditions involved do not arise from outside the subject premises." Graham v Wisenburn, 39 AD2d 334, 335-336 (3d Dept 1972) (common-law nuisance claim did not lie against landlord for alleged failure to make "such repairs as obviate the danger of lead poisoning"); Miller v Morse, 9 AD2d 188, 193 (1959) ("A cause of action is also pleaded in nuisance but, accurately used, the term 'nuisance' is applicable only to conditions or activities which threaten injury to persons outside the defendant's premises, either upon a public highway or upon the premises of others in the neighborhood."). It is undisputed that defendants are not the Board's "contemporaneous" neighbors and that the Board's claims do not arise out of conditions "outside of" the Building. To the contrary, the Board's nuisance claim is based upon defective conditions inside of the Building allegedly caused by defendants' "improper workmanship and/or construction practices" during the time they allegedly owned/controlled/constructed the Building.

Accordingly, the seventh cause of action, for nuisance, is subject to dismissal.

The Eighth Cause of Action, for Negligence

The eighth cause of action, for negligence, suffers from the same fatal flaw as does the sixth cause of action, for trespass, to wit: the Board failed to allege that defendants had a legal duty independent of the contract, springing from "circumstances extraneous to, and not constituting elements of, the contract" claim. Clark Fitzpatrick, Inc. v Long Island R. Co., supra, 70 NY2d at 389. To the contrary, the negligence cause of action is based defendants' alleged "duty to construct and manage the Building without defects *pursuant to the Offering Plan"* – the identical allegations that support the breach of contract cause of action.

Even assuming, arguendo, that the complaint alleges a legal duty independent of the contract insofar as it is based upon defendants' alleged breach of their "fiduciary responsibility as the Sponsor Control Board" (which allegation, as demonstrated below, fails), the eighth cause of action is nevertheless subject to dismissal as barred by the applicable three-year Statute of Limitations that began to run upon completion of construction of the Building. See City Sch. Dist. of City of Newburgh v Hugh Stubbins & Assocs., Inc., 85 NY2d 535, 538 (1995) ("In cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance so that that no matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract—an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties.").

Accordingly, the negligence cause of action is subject to dismissal as duplicative of the breach of contract cause of action and because it is untimely.

The Ninth Cause of Action, for Breach of Fiduciary Duties

The complaint fails to state a cause of action for breach of fiduciary duties as against Conti and Tubbs based upon their alleged misconduct, namely, alleged fraud and/or intentionally refusing to cure and repair the defects in the Building after receiving notice thereof. See generally Burry v Madison Park Owner LLC, 84 AD3d 699, 699–700 (1st Dept 2011) ("[t]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct"; breach of fiduciary duty claim dismissed as "plaintiffs' allegations of 'misconduct' on the part of defendant are in essence claims of fraud that have not been pleaded with particularity."). As set forth above, the complaint fails adequately to plead with particularity fraud and intentional conduct on the part of defendants. The Court notes that a breach of fiduciary duty claim against a corporation does not lie.

Accordingly, the ninth cause of action, for breach of fiduciary duties, is subject to dismissal.

Plaintiff's Proposed Amended Complaint:
Tenth Cause of Action, for Constructive Fraudulent Conveyance While Insolvent; Eleventh Cause of Action, for Constructive Fraudulent Conveyance Causing Unreasonably Small Capital;
Twelfth Cause of Action, for Intentional Fraudulent Conveyance

A Court, in its sound discretion, may "liberally" grant a pleading amendment, but leave to amend will be denied where the amendment causes substantial surprise or prejudice to the opposing party, is palpably insufficient, or is totally devoid of merit. See generally JP Morgan Chase Bank, N.A. v. Low Cost Bearings N.Y. Inc. 107 AD3d 643, 644 (1st Dep't 2013). Here, the Court declines to grant the amendment as the proposed new causes of action are palpably insufficient and totally devoid of merit.

The proposed tenth and eleventh causes of action, for constructive fraudulent conveyance, seek relief under Debtor and Creditor Law §§ 273 and 274, respectively. The allegations in support of these causes of action track the language of the statute but fail to contain facts "showing a fiduciary or confidential relationship between" the Board/unit owners and Tubbs, Conti, and the Sponsor necessary to support a claim for constructive fraudulent conveyance. Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, supra,107 AD3d 646, 648 (1st Dept 2013) ("The court properly dismissed [co-op board's] claims alleging constructive fraudulent conveyance and fraudulent conveyance causing unreasonably small capital, as [co-op board] did not allege facts showing a fiduciary or confidential relationship between them and the sponsor defendants.").

The proposed twelfth cause of action, for intentional fraudulent conveyance, which seeks relief under Debtor and Creditor Law § 276, fails to satisfy the fraud pleading requirement. The Board has failed to allege the basic facts of the purported fraudulent scheme or any facts from which fraudulent intent could be inferred. Instead, the proposed complaint contains the following conclusory allegation, which merely tracks the language of the statute: "Upon information and belief, some or all of the Equity Distributions were made by the Sponsor with actual intent to hinder, delay and defraud creditors of the Defendants, including the Plaintiffs." See Zanani v Meisels, 78 AD3d 823, 825 (2d Dept 2010) (DCL § 276 claim dismissed as complaint "failed to allege with the requisite specificity a cause of action upon which relief could be granted sounding

in actual fraud"). As the proposed twelfth cause of action for intentional fraudulent conveyance is without merit, there is no basis for the Board's request for punitive damages, and such request is futile.

Accordingly, the Board's motion to amend the complaint is denied.

Tubbs' Motion to Dismiss the Cross-Claims and for Sanctions

In the main (and in the usual course), the cross-claims allege that "if and in the event the plaintiff sustained any damages as alleged in the Verified Complaint ... said damages were caused by the negligence, breaches of contract, culpable conduct and/or wrongful acts or omissions" of Tubbs, thus entitling the Sponsor (and Conti) to contractual and/or common-law indemnification and contribution. The only cause of action in the complaint that remains is the first cause of action, for breach of contract, as against the Sponsor only. Thus, the question now before the Court on Tubbs' motion to dismiss the cross-claims, is whether, as pled, the cross-claims state contractual or common-law indemnification, and/or contribution, claims on the Board's remaining breach of contract cause of action. The Court answers this question in the affirmative as to the indemnification claims, and in the negative as to the contribution claim.

The contractual indemnification cross-claim is based upon the "Indemnification" provision (Article 4) contained in the December 2010 Purchase Agreement in which Tubbs sold to Conti and the Sponsor his interest in the Sponsor. Briefly, the Indemnification provision requires Tubbs to indemnify and hold Conti and the Sponsor harmless from any and all claims arising out of Tubbs' breach of "representations, warranties, covenants or agreements," including Tubbs' representation that there is no breach or violation of, inter alia, any statute, law, rule, regulation or provision of the Sponsor's organizational documents. It is undisputed that the Board's breach of contract claim is based upon a breach of the Offering Plan, as well as violations of the New York City Building Code, in the construction of the Building. It is further undisputed that Tubbs was the initial sole owner of the Sponsor, certified the initial Offering Plan filed in 2008, and that he continued his ownership interest in the Sponsor throughout the construction of the Building until its completion in 2009 and prior to the sale of his interest in the Sponsor in 2010. Thus, although there is no privity of contract between Tubbs and the Board/unit owners (Tubbs having sold his interest in the Sponsor prior to the execution of any Purchase Agreement), Tubbs may be required to indemnify the Sponsor if it is shown that Tubbs' breach of the initial Offering Plan and violation of Building Codes in the construction of the Building – circumstances for which Tubbs expressly agreed to indemnify the Sponsor – caused the alleged construction defects.

Similarly, the common-law indemnification cross-claim adequately states a cause of action in that the Sponsor may be compelled to pay damages to the Board based upon Tubbs' breach of the Offering Plan and violation of building codes, which damages the Sponsor should be able to recover from Tubbs. See generally Raquet v Braun, 90 NY2d 177, 183 (1997) ("Similarly, the key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.'"; duty that forms basis for liability arises from principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.").

The cross-claim for contribution is subject to dismissal as "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's

contribution statute [CPLR 1401]." Bd. of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 26 (1987). Here, the Board's sole remaining cause of action seeks economic loss of approximately $1,000,000 based upon the Sponsor's alleged breach of contract. Accordingly, the Sponsor's cross-claim for contribution fails as a mater of law.

Although the Court herein grants, almost in their entirety, defendants' motion and cross-motion to dismiss, and denies the Board's motion to amend the complaint, it does not find that the assertion of the claims in the complaint or in the proposed amended complaint to be in bad faith or otherwise sanctionable under 22 NYCRR 130-1.1. Accordingly, Tubbs' request for sanctions is denied.

The Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons set forth herein:

(1) The motion by Tubbs, and the cross-motion by the Sponsor and Conti, to dismiss the complaint is granted in part and denied in part (Motion Seq. No. 001);

(2) The cross-motion by the Board to amend the complaint is denied (Motion Seq. No. 001);

(3) The motion by Tubbs to dismiss the cross-claims of the Sponsor and Conti is granted in part to the extent of dismissing the cross-claim for contribution only (the cross-claim for contractual and/or common-law indemnification stands) (Motion Seq. No. 002); and

(4) The motion by Tubbs for sanctions is denied (Motion Seq. No. 003).

The clerk is hereby directed to enter judgment as follows: dismissing the first cause of action, for breach of contract, as against defendants Tubbs and Conti only; dismissing the second, third, fourth, fifth, sixth, seventh, eighth, and ninth causes of action against all defendants; and dismissing the Sponsor and Conti's cross-claim, for contribution.

Tubbs' answer to the complaint as herein modified is due to be served and filed within thirty-five days hereof.

Dated: July 21, 2017

Arthur F. Engoron, J.S.C.