Board of Mgrs. of Fifteen Madison Sq. N. Condominium v Madison Park Owner LLC
2013 NY Slip Op 32215(U)
September 13, 2013
Supreme Court, New York County
Docket Number: 652052/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE Justice

PART 12

Index Number : 652052/2011
FIFTEEN MADISON SQUARE NORTH
vs
MADISON PARK OWNER LLC
Sequence Number : 001
DISMISS ACTION

INDEX NO. 652052/11
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 9/13/13

BARBARA JAFFE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF FIFTEEN MADISON SQUARE NORTH CONDOMINIUM,

Plaintiff,

- against -

MADISON PARK OWNER LLC, *et al.*,

Defendants.

----------x

MADISON PARK OWNER LLC, *et al.*,

Third-Party Plaintiffs,

-against-

G BUILDERS IV LLC, *et al.*,

Third-Party Defendants.

----------x

Index No. 652052/11

Mot. seq. nos. 01, 03

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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Pryor Cashman LLP
7 Times Square
New York, NY 10036
212-421-4100

For defendants:
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620 Eighth Ave.
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All direct defendants except Daniel Goldner Architects and Jack Green Associates move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the first, fifth, seventh, twelfth, fifteenth, and sixteenth causes of action and so much of plaintiff's complaint by which it seeks to hold individual defendants personally liable. Plaintiff opposes. Plaintiff also moves to compel defendants to produce documents responsive to its first notice of discovery and inspection.

Defendants oppose.

I. BACKGROUND

Defendant Madison Park Owners LLC (sponsor) sponsored the conversion to condominium status and related construction work of the residential portion of a building located at 15 East 26th Street. The condominium consists of residential units and certain common areas throughout the building. Plaintiff is the condominium board. On or about April 26, 2006, sponsor filed its offering plan setting out to convert the subject building into a mixed-use residential condominium and commercial space. (NYSCEF 8).

In the offering plan, sponsor represents that the building foundations are in good condition, that construction would be performed in a first-class manner, that there is no significant evidence of water infiltration, that the building facade is in fair condition with only minor deterioration of mortar, and that sponsor knows of no material defects or need for major repairs not already disclosed. (NYSCEF 16-4).

Plaintiff commenced this action by filing and serving a summons with notice on or about July 27, 2011, and thereafter with a first amended complaint dated October 17, 2011, alleging the existence of various building defects that allegedly deviate materially from the representations set forth in the offering plan. (NYSCEF 1, 8).

Plaintiff names as defendants sponsor member Madison Park Mezzanine LLC (Mezzanine), Mezzanine member Madison Park Holding LLC (Holding), Madison 26 LLC (Madison 26), and Holding members G.O. IV-SIC U.S., L.L.C. (G.O.) (collectively, member defendants), managing agent Walter & Samuels, Inc. (W&S), marketing agent Corcoran Group Marketing (Corcoran), Madison 26 member and W&S principal David I. Berley, Peter Weiss and

Steven C. Forest, principals of W&S, W&S employee Andrew Manton, alleged G.O. principal Kurt W. Roeloffs Jr., and alleged G.O. employee Peggy DaSilva. It maintains that these individuals are alter egos of sponsor. (NYSCEF 8).

II. RELEVANT PLEADINGS

In the first cause of action, for fraud against sponsor, member defendants, Berley, Weiss, Forest, Manton, and Corcoran, plaintiff alleges that these defendants knowingly misrepresented the condominium in the offering plan in order to induce purchases of units, and that they falsely represented orally, on the internet, and in promotional materials that the condominium would be luxurious and constructed using the finest craftsmanship, in accordance with the specifications of the offering plan and all applicable codes and ordinances. (NYSCEF 8).

The fifth cause of action is for aiding and abetting a breach of fiduciary duty, and is advanced against sponsor, member defendants, Roeloffs, and DaSilva. Plaintiff therein alleges that defendants provided substantial assistance to Berley, Weiss, Forest, and Manton, members of an alleged sponsor-controlled condominium board, to undertake various improper board actions or fail to undertake various proper board actions, thereby breaching their fiduciary duties to the condominium and unit owners. (*Id.*).

The seventh cause of action is against G.O., Roeloffs and DaSilva for aiding and abetting conversion. In it, plaintiff alleges that defendants provided substantial assistance to sponsor to use working capital funds to pay for various condominium construction costs, which was sponsor's financial responsibility. (*Id.*).

In the twelfth cause of action, against sponsor, member defendants, W&S, Berley, and Corcoran for negligent misrepresentation, plaintiff alleges that defendants disseminated

information about the condominium that they knew or should have known was false, thereby breaching the duties they owed to unit-owners by virtue of the special relationship between sponsor and unit-owners. (*Id.*).

The fifteenth cause of action is against sponsor, member defendants, W&S, Berley, Weiss, Forest, Manton, and Corcoran for deceptive consumer practices and false advertising in violation of New York General Business Law (GBL) §§ 349 and 350. Plaintiff therein alleges that defendants created, prepared, and disseminated to consumers false and misleading promotional materials about the condominium. (*Id.*).

In the sixteenth cause of action, against sponsor, member defendants, and W&S for breach of the implied covenant of good faith and fair dealing, plaintiff alleges that defendants' actions deprived unit owners of the benefits of the offering plan and their respective purchase agreements. (*Id.*)

III. DEFENDANTS' MOTION TO DISMISS

Pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a pleading on the ground that it has a defense based on documentary evidence, although such a motion will only be granted if

the evidence conclusively establishes a defense to a claim as a matter of law. (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

A. Fraud and negligent misrepresentation claims

1. Contentions

Defendants claim that plaintiff's cause of action for fraud is not pleaded with the specificity required by CPLR 3016(b) and is duplicative of its breach of contract cause of action. (NYSCEF 16-2). They also maintain that plaintiff fails to allege the existence of a special relationship between plaintiff and sponsor in order to state a claim for negligent misrepresentation. Both claims, defendants also argue, are preempted by the Martin Act. (*Id.*).

Plaintiff maintains that its fraud claim is pleaded with particularity, is independent of its breach of contract claim, and that a sponsor/unit owner relationship creates the requisite privity to sustain a claim for negligent misrepresentation. According to plaintiff, the Martin Act only preempts actions alleging omissions, not affirmative misrepresentations, and that the Act does not preempt statements made outside the offering plan. (NYSCEF 39).

2. Analysis

a. Fraud

To establish, *prima facie*, a cause of action for fraud, a plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, its justifiable reliance, and damages. (*Eurycleia P v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Pursuant to CPLR 3016(b), fraud must be pleaded with sufficient particularity to allow a reasonable inference of the alleged wrongdoing, but need not rise to the level of unassailable proof. (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-92 [2008]).

An action for fraud is not viable when an allegation of fraud constitutes a restatement of a claim for breach of contract. (*Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443 [1st Dept 2012]; *Dalton v Union Bank of Switzerland*, 134 AD2d 174 [1st Dept 1987]). Thus, where it is alleged that a defendant was "not sincere when it promised to perform under the contract," the allegation is deemed redundant of a breach of contract claim. (*First Bank of the Americas v Motor Car Funding*, 257 AD2d 287, 291 [1st Dept 1999]). However, where the defendant has breached a duty independent of, or in addition to, its duty under a contract, a cause of action for fraud may be successfully pleaded notwithstanding a pleading for breach. (*Id.*).

Here, plaintiff pleads in sufficient detail the statements made in the offering plan, and alleges a misrepresentation, namely, that defendants knew that their statements about the quality of the building were false. These allegations sufficiently set forth an attempt to induce purchases of units by way of false representations, and thus do not solely constitute allegations of an insincere promise to perform. Consequently, the fraud claim does not duplicate the cause of action for breach of contract.

b. Negligent misrepresentation

The elements of negligent misrepresentation are: 1) the existence of a special or privity-like relationship which creates a duty on the defendant to convey accurate information to the plaintiff, 2) that the information was false, and 3) that the plaintiff reasonably relied on the information. (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). Particularly with regard to commercial transactions, liability will only be imposed on a defendant in a "special position of confidence and trust" with a plaintiff (*Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2d Dept 2004]), in that it creates an "identifiable source of a

special duty of care" (*Kimmel v Shaefer*, 89 NY2d 257, 260 [1996]). Special relationships do not arise from typical arms-length transactions. (*Andres v Leroy Adventures*, 201 AD2d 262 [1st Dept 1994]). In *Houlihan/Lawrence, Inc. v Duval*, 228 Ad2d 560 (1st Dept 1996), and *Grammar v Turits*, 271 AD2d 644 (2d Dept 2000), the defendants were real estate brokers, not sponsors, and the plaintiffs submitted affidavits specifying the nature of their personal and special relationships with their brokers and why reliance on their statements was justifiable.

Here, by contrast, plaintiff's allegation that a special relationship of trust and confidence existed between sponsor and unit-owners by virtue of their purchase of units alone, does not state a claim for negligent misrepresentation. (*See Bd. of Mgrs. of 374 Manhattan Ave. Condo v Harlem Infil. LLC*, 2010 NY Slip Op 31518[U] [Sup Ct, NY County] [plaintiff must articulate nature of special relationship between unit owners and sponsor defendants; contractual relationship with sponsor insufficient]).

c. The Martin Act

The Martin Act (General Business Law art 23-A) regulates the sale or offering of securities, and empowers the Attorney General to investigate violations of the Act and its implementing regulations, bring enforcement actions, and seek restitution and damages for injured parties. Pursuant to the Act, and in derogation of the common law whereby a seller in an arms-length real estate transaction was under no duty to disclose to a buyer information about the premises (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 245 [2009]), a sponsor converting a building to condominium status must file an offering plan with the Attorney General containing disclosures relating to construction work. (*See* GBL § 352[e][1][a]; 13 NYCRR part 20). Thus, a cause of action premised on an omission in an offering plan is

preempted by the Martin Act.

In *Kerusa*, the Court of Appeals reasoned that to permit a private right of action for a violation of the Martin Act would

> expand the already detailed disclosure requirements of the Martin Act by forcing parties to disclose the normal kinds of problems encountered in the course of construction that are described in field reports, project meetings and change orders in order to avoid transforming every potential latent construction defect case into a claim for common-law fraud on account of alleged omissions in Martin Act disclosures.

(12 NY3d at 245-46).

However, common-law causes of actions arising from Martin Act filings that are not entirely dependent on the Act for their existence, such as typical breach of fiduciary duty or gross negligence claims, remain viable. (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]). That the Attorney General may bring its own action arising from the same facts is insufficient to preempt these private claims. (*Id.*). And, alleged affirmative misrepresentations made outside the offering plan, be they oral or contained in advertisements or purchase agreements, are not preempted. (*Bd. of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, 71 AD3d 935, 936 [2d Dept 2010]).

In *Kerusa*, the plaintiff alleged that the sponsor knew of defects which arose during the construction phase of a new condominium, yet stated in the offering plan amendments that there were no material changes to the project. The Court of Appeals observed that but for the Martin Act regulations, the sponsor would not have been required to issue any statement. (12 NY3d at 245). Therefore, to permit fraud claims premised under the amendment would improperly "invite a backdoor private cause of action to enforce the Martin Act." (*Id.*). And, that the plaintiff had alleged all of the elements of common-law fraud did not transform its Martin Act

claim into an independent private action. (*Id.* at 247).

Similarly, in *Berenger v 261 W LLC*, the court dismissed fraud causes of action against the sponsor because the gravamen of the allegations arose from the sponsor's failure to disclose the existence and operation of a rooftop cooling tower. Because the Martin Act specifically requires such disclosures in the offering plan, the court held that the plaintiff's claim was preempted. (93 AD3d 175, 184 [1st Dept 2012]; *accord Katz 737 Corp. v Cohen*, 104 AD3d 144, 152-54 [1st Dept 2012] [Andrias, J., concurring] [gravamen of plaintiff's common-law fraud claim dependent on Martin Act for viability]; *Davidoff v 125 Greenwich Owners*, 2012 NY Slip Op 33063[U] [Sup Ct NY County] [same]).

However, the Appellate Division, Second Department, has apparently adopted a more lenient standard, having declined to dismiss fraud causes of action arising from the sponsors' alleged misrepresentations, reasoning that the pleadings were not based entirely on omissions from offering plan filings required under the Martin Act. (*See Caboara v Babylon Cove Dev., LLC*, 82 AD3d 1141 [2d Dept 2011]; *Marke Gardens Condominium*, 71 AD3d 935 [2d Dept 2010]). To the extent that the reasoning relied upon in these decisions contradict *Berenger*, they do not bind me.

Here, although defendants are alleged to have made affirmative representations of fact in the offering plan, such as stating that they knew of no undisclosed defects, if not for the Martin Act, they would have not been obligated to disclose any defects. (*See Kerusa Co. LLC*, 12 NY3d at 245; *Whitehall Tenants Corp. v Estate of Olnick*, 213 AD2d 200, 201 [1st Dept 1995] ["plaintiff is endeavoring to vindicate its shareholders for information withheld or misrepresented by the sponsor, which is exactly what the Martin Act commits exclusively to the

Attorney-General."]). Thus, as in *Berenger*, the gravamen of plaintiff's allegations are misrepresentations about the construction in the offering plan, and as such disclosures are mandated under the Martin Act, they preempt plaintiff's fraud and misrepresentation causes of action.

Plaintiff also does not allege with any specificity what statements were made in the promotional materials apart from those already set forth in the offering plan. And the general allegations that the materials contain false representations as to the luxuriousness and top-tier quality of the construction do not give rise to independent fraud claims (*See Jacobs v Lewis*, 261 AD2d 127, 127-128 [1st Dept 1999] ["opinions . . . puffery or ultimately unfulfilled promises" not actionable in fraud]); *Bd. of Mgrs. of 374 Manhattan Ave. Condominium v Harlem Infil LLC*, 2010 NY Slip Op 31518[U] [Sup Ct, NY County] ["boastful statements about performance or quality" not actionable]).

B. Alter ego/piercing the corporate veil claims

1. Contentions

Defendants assert that plaintiff's allegations that member defendants have no existence separate and apart from sponsor and from each other, that W&S is merely the operating partner of sponsor, and that the individual defendants, by virtue of their alleged membership or employment with various member defendants, are alter egos of sponsor, are all pleaded upon information and belief, and are bereft of supporting facts. (NYSCEF 16-2). They argue that no inference of liability arises from their role as a member of sponsor, which plaintiff concedes is a Delaware limited liability corporation, formed for the legitimate purpose of selling condominium units. They rely on plaintiff's response to their request for documents supporting their theory, in

which plaintiff only submitted the offering plan and its amendments, and otherwise objected to the request on the grounds that it was premature at this stage of the litigation. (NYSCEF 16-6). In defendants' view, this evidences the baselessness of plaintiff's claims. (*Id.*).

Plaintiff argues that defendants' motion is premature absent discovery, but relies on the fact that some defendants are insured under sponsor's insurance policies, and that they have now sought coverage, that W&S held itself out as the condominium's sponsor on the internet and on a gift card, and that Holding executed agreements with Corcoran as "sponsor." (NYSCEF 39).

Defendants maintain that plaintiff has engaged in a fishing expedition and pleads no facts in support. (NYSCEF 44). They also allege that their construction contract requires that they name as insureds anyone who could be named as a defendant, and that such requirements are standard in the industry. (NYSCEF 56). They deny that such allegations set forth an alter ego relationship. (NYSCEF 44; 56).

2. Analysis

A plaintiff seeking to pierce the corporate veil bears the heavy burden of showing that the defendant exercised total control with respect to the transaction complained of, and that this control was employed to perpetrate a wrong against the plaintiff. (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). A plaintiff must plead detailed allegations of fraud or corporate misconduct. (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dept 2005]). Conclusory allegations of the corporation's undercapitalization, that the defendant intermingled its assets with those of the corporation, or that the defendant dominated the corporation, without additional facts, are insufficient to pierce the corporate veil. (*Andejo Corp. v S. St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007]).

Rather, a plaintiff must establish that the defendant "abused the privilege of doing business in the corporate form" (*Morris v State Dept. of Taxation and Fin.*, 82 NY2d 135, 142 [1993]), rendering the corporation an illegitimate entity, formed for illegitimate purposes (*ABN AMRO Bank, N.V. v MBIA Inc.*, 81 AD3d 237, 245 [1st Dept 2011]).

In *Teachers Ins. Annuity Ass'n of Am. v Cohen's Fashion Optical of 485 Lexington Ave. Inc.*, the plaintiff-landlord alleged that a corporate parent had negotiated a lease on behalf of another defendant as tenant while holding itself out as the real party in interest, and then, in violation of the lease and without notice to the landlord, installed a franchisee to operate the business, leaving a judgment-proof empty shell with no assets as the tenant. (45 AD3d 317, 318-19 [1st Dept 2007]). The court held that these allegations sufficed to withstand a motion to dismiss.

Similarly, in *Shisgal v Brown*, the plaintiff alleged, with the support of substantial documentary evidence, that the defendant companies falsely represented that loans made by the plaintiff were to be used for working capital when in fact the companies' funds were, as a matter of regular and continuous practice, used to pay for personal expenses such as plastic surgery and parking tickets, and that the defendants operated the company without regard for any bookkeeping formalities. (21 AD3d 845 [1st Dept 2005]). There too, the court found that these allegations were adequate to plead a claim for piercing the corporate veil. (*See also UBS Sec. LLC v Highland Capital Mgt., L.P.*, 93 AD3d 489, 490 [1st Dept 2012] [allegations, corroborated by board meeting minutes, that holding company's only board member was on a defendant's board, and that defendant did not distinguish its debts and obligations from those of holding company, and that it operated both as one economic entity sufficient to state alter ego claim];

Gardner v Yanko, 2011 NY Slip Op 32193[U] [Sup Ct, NY County] [allegations that defendants used personal funds to settle complaint with Attorney General, and that settlement agreement specifically referred to corporation and alleged alter egos jointly and severally as sponsor raised inference that defendants commingled funds and did not obey formalities of corporation]).

Apart from consistently referring to individual defendants as sponsor's alter egos, plaintiff does not allege how they abused the corporate form in their representation of the condominium or how the abuse was used to defraud or commit a wrong against it. And, apart from alleging that sponsor was inadequately capitalized, plaintiff neither specifies nor even alleges how this inadequate capitalization has been used to perpetrate a fraud against it.

The evidence offered by plaintiff here, that certain defendants are named as sponsor on various documents, evinces at most a degree of cooperation between non-sponsor defendants and sponsor. It does not, and in contrast to the evidence offered by the plaintiffs in the cases cited, *supra*, show that sponsor is an alter ego of the non-sponsor defendants. Additionally, that individual defendants are insured under sponsor's policy and that these individuals, in response to plaintiff's suit, have sought coverage does not constitute evidence that the sponsor is an alter ego of the individual defendants. (*See Lorne v 50 Madison Ave., LLC*, 2008 NY Slip Op 33453[U] [Sup Ct, NY County], *revd other grounds*, 60 AD3d 879 [1st Dept 2009] [agreement naming defendant as insured not evidence of alter ego relationship with sponsor]).

Plaintiff's assertion that discovery may yield evidence substantiating its claims provides no basis for denying the motion. (*See Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009] [plaintiff's claim that discovery is necessary so that she may oppose motion to dismiss based solely on "unsubstantiated hope of discovering something relevant to her claims" and thus

insufficient to warrant denial of motion]; *Ravenna v Christie's Inc.*, 289 AD2d 15 [1st Dept 2001] [plaintiff's hope that discovery would yield evidence supporting his claims insufficient to avoid dismissal of defective cause of action]; *Desyatnikov v Credit Suisse Group, Inc.*, 2012 WL 1019990 [ED NY] [rejecting plaintiff's contention that dismissal of piercing claims before discovery premature; permitting inquiry into relationship between alleged alter ego and corporation would result in fishing expedition]).

C. General Business Law §§ 349, 350

1. Contentions

Individual defendants argue that plaintiff fails to allege in its complaint that they acted in an individual capacity, rather than as members, employees, or agents of sponsor, that they owed any individual duties to plaintiff, or that they were in privity with plaintiff. (NYSCEF 16-7).

2. Analysis

Pursuant to GBL §§ 349 and 350, respectively, deceptive business practices and false advertising are prohibited, and GBL § 349(h) provides a right of action for such injured parties. To state a claim for a violation of GBL § 349, a plaintiff must allege that the defendant engaged in a deceptive or materially misleading act or practice and that the plaintiff was injured as a result. (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]).

Here, sponsor is a Delaware limited liability company (NYSCEF 8), and consequently, its members cannot be held personally liable for actions undertaken solely by virtue of their membership in, or management of the company (6 Del. C. §18-303 [2011]). Additionally, individuals cannot be held liable for corporate wrongdoing when acting in their capacity as agents of the corporation, absent a showing of exclusive control of the corporation (*see Mendez v*

City of New York, 259 AD2d 441, 442 [1st Dept 1999]), or that they were guided by personal, rather than corporate, interests (*see Hoag v Chancellor, Inc.*, 246 AD2d 224, 203 [1st Dept 1998]). Absent any allegation that a non-sponsor defendant had a personal stake in the condominium conversion apart from those allegations premised on its unsuccessful alter ego claims (*see supra*, II.B.2.), plaintiff fails to state claim under GBL §§ 349 or 350 against non-sponsor defendants.

D. Aiding and abetting

To state a claim for aiding and abetting a breach of a fiduciary duty, the plaintiff must plead that: 1) a fiduciary duty owed to him was breached, 2) that the defendant participated in, or knowingly induced the breach, and 3) that he sustained damages as a result. (*Baron v Galasso*, 83 AD3d 626, 629 [2d Dept 2011]).

A defendant knowingly participates in a breach of a fiduciary duty when it provides "substantial assistance to the primary violator," and affirmatively assists or fails to act when required to do so. (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]). A plaintiff must plead this tort with sufficient particularity in order to apprise the defendant of the conduct underlying the claim. (*Rand Intl. Leisure Prods., Inc. v Bruno*, 2009 NY Slip Op 50085[U], at *3 [Sup Ct, Nassau County]). Conclusory allegations, such as claims that the principal could not have committed the particular breach "without the complicity" of a defendant, are insufficient to demonstrate substantial assistance. (*Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005]).

To state a claim for aiding and abetting a conversion, the plaintiff must show: 1) the existence of an underlying violation committed by the primary party, 2) knowledge of this violation by the defendant, and 3) "substantial assistance" by the defendant to achieve the

violation. (*ULU v Turkotrans Intern. Transport Co.*, 2011 NY Slip Op 31803[U] [Sup Ct, NY County]).

Here, plaintiff's allegations that the various defendants knowingly provided substantial and material assistance to Berley, Weiss, Forest, and Manton to breach their fiduciary duties, and that various non-sponsor defendants provided substantial and material assistance to sponsor to misuse the working capital fund, without more, do not demonstrate substantial assistance, and are insufficient to apprise these defendants of the conduct on which the claim is predicated. Plaintiff thus fails to state a claim under either aiding and abetting theory.

E. Breach of implied covenant of good faith and fair dealing claims

All contracts imply a covenant of good faith and fair dealing, which imposes on contracting parties the duty to refrain from acting in a manner that would deprive the other party of its rights to receive benefits under the contract. (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 [1st Dept 1996]). Thus, a breach of the implied covenant of good faith and fair dealing cause of action is redundant of a breach of contract cause of action when the facts alleged are identical to those giving rise to liability under the contract claim (*Empire State Bldg. Assoc. v Trump*, 247 AD2d 214 [1st Dept 1998]; *Canstar v J.A. Jones Const. Co.*, 212 AD2d 452, 453 [1st Dept 1995]).

Here, the sixteenth cause of action contains no distinct allegation of facts not alleged in the cause of action for breach of contract.

III. PLAINTIFF'S MOTION TO COMPEL

Plaintiff moves for an order compelling all defendants other than sponsor to produce

documents responsive to its first notice of discovery and inspection bearing on their alleged alter ego status. (NYSCEF 51). Plaintiff alleges that "what little information [defendants] have allowed to seep into the public domain" supports an inference that sponsor and the other defendants are alter egos of one another (NYSCEF 51-1), and relies on the same documentary evidence raised in its opposition to defendants' motion to dismiss (*see supra*, II.B.1.).

It is well settled that discovery is only available when a party shows it has a meritorious cause of action or defense and that the documents sought are material and necessary to the action. Whether a party has demonstrated merit is left to the trial court's discretion. (*See Bishop v Stevenson Commons Assocs., LP,* 74 AD3d 640, 641 [1st Dept 2010]). As the pleadings here are insufficient to state a claim for piercing the corporate veil (*see supra*, II.B.2.), an inquiry into the alleged alter ego status of the individual defendants is unwarranted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion to dismiss is granted and the first, fifth, twelfth, and sixteenth causes of action of the first amended complaint are dismissed as against direct defendant Madison Park Owner LLC; it is further

ORDERED, that the first, second, fifth, sixth, seventh, eighth, twelfth, thirteenth, fifteenth, sixteenth, seventeenth, and eighteenth causes of action are dismissed as against G.O.-SIV U.S., L.L.C.; it is further

ORDERED, that the first, second, fifth, sixth, eighth, twelfth, thirteenth, fifteenth, sixteenth, seventeenth, and eighteenth causes of action are dismissed as against Madison Park Mezzanine LLC, Madison Park Holding LLC, and Madison 26 LLC; it is further

ORDERED, that the first, second, sixth, seventh, eighth, twelfth, thirteenth, fifteenth, sixteenth, seventeenth, and eighteenth causes of action are dismissed as against Walter & Samuels, Inc.; it is further

ORDERED, that the first, twelfth, and fifteenth causes of action are dismissed as against Corcoran Group Marketing; it is further

ORDERED, that the first, sixth, eighth, twelfth, thirteenth, fifteenth, and eighteenth causes of action are dismissed as against David I. Berley; it is further

ORDERED, that the first, sixth, eighth, thirteenth, fifteenth, and eighteenth causes of action are dismissed as against Peter Weiss, Steven C. Forest, and Andrew Manton; it is further

ORDERED, that the fifth and seventh causes of action are dismissed as against Kurt W. Roeloffs Jr. and Peggy DaSilva; it is further

ORDERED, that plaintiff's motion to compel defendants to produce documents responsive to its first notice of discovery and inspection is denied; and it is further

ORDERED, that counsel are directed to appear for a compliance conference in Room 279, 80 Centre Street, on October 2, 2013, at 2:30 PM, as previously scheduled.

ENTER:

Barbara Jaffe, JSC

DATED: September 13, 2013
New York, New York