Board of Mgrs. of the Baxter St. Condominium v Baxter St. Dev. Co. LLC
2013 NY Slip Op 32742(U)
October 24, 2013
Sup Ct, New York County
Docket Number: 114281/10
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE *Justice* **PART** 61

Index Number : 114281/2010
BRD OF MGRS OF THE BAXTER
vs.
BAXTER STREET DEVELOPMENT
SEQUENCE NUMBER : 005
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 decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/24/13

HON. ANIL C. SINGH
SUPREME COURT JUSTICE **, J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **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: IAS PART 61

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BOARD OF MANAGERS OF THE BAXTER STREET CONDOMINIUM,

Plaintiff,

Index No. 114281/10

-against-

BAXTER STREET DEVELOPMENT COMPANY LLC, 123 BAXTER OWNERS COMPANY, LLC, SRC BAXTER INVESTMENT GROUP, LLC, BAXTER CONDO SALES LLC, MARK ENGEL, PERRY FINKELMAN, NARCZEN LLC, ZENAIDA LEWIS, KUSHNER STUDIOS ARCHITECTURE & DESIGN, P.C., and ADAM KUSHNER,

Defendants.

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BAXTER STREET DEVELOPMENT COMPANY LLC, 123 BAXTER OWNERS COMPANY, LLC, and PERRY FINKELMAN,

Third-Party Plaintiffs,

Index No. 590161/12

-against-

IN HOUSE CONSTRUCTION SERVICE, INC., et al.,

Third-Party Defendants.

----------X

HON. ANIL C. SINGH, J.:

Motion sequences 005, 006, and 007 are consolidated for disposition.

In motion sequence 005, defendants Kushner Studios Architecture & Design, P.C. and Adam Kushner (the Architect Defendants) move, pursuant to CPLR 3211 (a) (1), (3), and (7) to dismiss plaintiff Board of Managers of the Baxter Street

Condominium's claims against them for negligence, negligent misrepresentation, fraud, breach of contract, unjust enrichment, professional malpractice, and violations of New York General Business Law §§ 349 and 350, as well as all cross claims.

In motion sequence 006, defendants 123 Baxter Street Owners Company, LLC, Baxter Street Development Company LLC, Marc Engel and Perry Finkelman (collectively, the Sponsor Defendants) move, pursuant to CPLR 3211 (a) (1), (3), (7), and (8), to dismiss the causes of action alleged against them in plaintiff's amended complaint for breach of implied housing merchant warranty, negligence, fraud, constructive fraudulent conveyances while insolvent, constructive fraudulent conveyances causing unreasonably small capital, and intentional fraudulent conveyance. The Sponsor Defendants also seek sanctions against plaintiff for frivolous pleading.

In motion sequence 007, the Sponsor Defendants submit an amended motion to their prior motion to dismiss (sequence 006) to dismiss the causes of action alleged against them in plaintiff's second amended complaint for constructive fraudulent conveyances while insolvent, constructive fraudulent conveyances causing unreasonably small capital, and intentional fraudulent conveyance.

Background

As the factual background has been discussed in detail in

the court's prior decision, dated September 12, 2012, there is no need for an extensive discussion of the facts, except those that are relevant for the purposes of these motions.

On November 11, 2011, plaintiff commenced an action against the Sponsor Defendants and Architect Defendants, among others, for the alleged defective design and construction of the building located at 123 Baxter Street, New York, New York (the Building), as well as alleged fraudulent practices in connection with the sale of the condominium units in the Building (the First-Party Action). In the First-Party Action, the Sponsor Defendants, excluding Marc Engel, moved to dismiss the complaint. On September 12, 2012, this court issued an order dismissing plaintiff's causes of action for breach of the common law of implied housing merchant warranty, negligence, negligent misrepresentation, and fraudulent conveyance. The court granted plaintiff leave to replead its cause of action for fraudulent conveyance.

On October 9, 2012, plaintiff filed an amended complaint, including the causes of action for breach of the common law of implied housing merchant warranty, negligence, and negligent misrepresentation, which were previously dismissed with prejudice, as well as causes of action for constructive and intentional fraudulent conveyance. On November 9, 2012, in response to the amended complaint, the Sponsor Defendants filed

motion sequence 006, seeking to dismiss the causes of action for breach of the common law of implied housing merchant warranty, negligence, and negligent misrepresentation on the ground that they were previously dismissed with prejudice, as well as the fraudulent conveyance causes of action for failure to state a claim. Motion sequence 006 also seeks sanctions for frivolous pleading.

On November 15, 2012, plaintiff filed a second amended complaint, omitting the causes of action for breach of the common law of implied housing merchant warranty, negligence, and negligent misrepresentation against the Sponsor Defendants. On December 4, 2012, the Sponsor Defendants filed an amended motion, sequence 007, seeking to dismiss the tenth, eleventh, and twelfth causes of action for constructive and intentional fraudulent conveyances as pled in the second amended complaint.

The Architect Defendants filed a motion to dismiss, sequence 005, on August 10, 2012, which seeks to dismiss the causes of action against them for negligence, negligent misrepresentation, fraud, breach of contract, unjust enrichment, professional malpractice, and violations of New York General Business Law §§ 349 and 350, as well as all cross claims. These causes of action are all alleged in the second amended complaint and have not changed, except for their enumeration.

Analysis

Architect Defendants' Motion to Dismiss **(Motion Sequence 005)**

Breach of Contract

Plaintiff alleges that it was the intended beneficiary of the contract between the Architect Defendants and the Sponsor Defendants, and, thus, when the Architect Defendants breached their obligations under such contract, they damaged plaintiff. To support its contention, plaintiff relies on the plain language of the agreement entered into by the Sponsor Defendants and the Architect Defendants (The Architect Agreement).

Section 1.3.7.9. of the Architect Agreement states:

> "[t]he Owner and Architect, respectively, bind themselves, ... to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such party with respect to all covenants of this Agreement"

(Architect Defendants' notice of motion, exhibit C). The Architect Agreement contains no disclaimer of third-party liability, and the rights under this agreement, by the plain terms of this provision, are extended to the parties' successors and assigns. Plaintiff alleges that it is a successor of the Sponsor Defendants, and the Architect Defendants do not dispute this. At this stage, plaintiff has sufficiently alleged that it is an intended third-party beneficiary of the Architect Agreement, and, thus, has stated a claim for breach of the Architect Agreement (*see Board of Mgrs. of Alfred Condominium v Carol Mgt.*, 214 AD2d 380, 382 [1st Dept 1995]; *Kleinberg v 516 W.*

19th St., LLC, 2010 WL 2150607, 2010 NY Misc LEXIS 2210, 2010 NY Slip Op 31253[U] [Sup Ct, NY County 2010]).

The cases cited by the Architect Defendants, in support of dismissing this claim, are distinguishable, as the contracts at issue in those case did not contain language intending that those contracts would benefit a party claiming third-party beneficiary status.

Negligence

The Architect Defendants argue that plaintiff's cause of action for negligence must be dismissed as it is time-barred. Plaintiff's fundamental claim here is that the Architect Defendants failed to perform their services in a professional, non-negligent manner. It is clear that this claim is governed by a three-year statute of limitations in accordance with CPLR 214 (6) (*Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542-543 [2004]). Therefore, the issue is: When did the statute of limitations start to run?

The Architect Defendants argue that the statute of limitations started to run on the day that the Building was completed, which was the date when the first sale closed. Plaintiff does not dispute that the statute of limitations started to run upon completion of the Building, but, rather, argues that the Architect Defendants have not submitted evidence that the Building was substantially completed at the time of the

first closing.

The Architect Defendants submit evidence that the first closing took place on October 9, 2007, and argue that the Building must have been completed in order for there to be a closing. However, this argument is conclusory and not enough to prove that construction of the Building was, in fact, substantially completed at that time. On this record, the court cannot hold that the plaintiff's negligence claim is time-barred.

Thus, the court will determine whether plaintiff has stated a claim for negligence against the Architect Defendants. Plaintiff alleges that the Architect Defendants were to perform their architectural services in a good and workmanlike manner, pursuant to and in accordance with the accepted practices and standards of the architectural profession, but, instead, they performed their services in a negligent manner resulting in defective conditions in the Building.

> "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, although it may be connected with and dependent upon the contract"

(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [internal citations omitted]).

Here, plaintiff's allegations of negligence are merely restatements of the contractual obligations asserted in its claim

for breach of contract against the Architect Defendants. "Simply alleging a duty of due care does not transform a breach of contract [claim] into a tort claim" (*Clemens Realty, LLC v New York City Dept. of Educ.*, 47 AD3d 666, 667 [2d Dept 2008][internal quotation marks and citation omitted]), and there is no particular situation or statutory duty alleged that would convert an alleged breach of contract into a tort claim or permit the existence of both (*see Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]).

Plaintiff's reliance on *Bridge St. Homeowners Assn. v Brick Condominium Developers, LLC* (18 Misc 3d 1128[A], 2008 NY Slip Op 50221[U] [Sup Ct, Kings County 2008]) is misplaced. The court in that case dismissed the negligence claims against the architect for the same reason above, only finding that the malpractice claim was not precluded by the breach of contract claim (*id.* at *4). Plaintiff's cause of action for negligence is dismissed.

Negligent Misrepresentation

For the reason previously discussed, the plaintiff's claim for negligent misrepresentation cannot be dismissed as time-barred at this time. Thus, the court will determine whether plaintiff has stated a claim.

The complaint alleges that the Architect Defendants "had a duty to the Unit Owners to use reasonable care to impart correct information to them because of a special relationship existing

between the Architect Defendants and the Unit Owners" (second amended complaint, ¶ 106). "The special relationship existed because the Unit Owners were prospective purchasers of the units of the Condominium" (*id.*, ¶ 107). It is further alleged that Architect Defendants made misrepresentations in the offering plan, and those misrepresentations were relied on by the unit owners, inducing their purchases of the condominium units (*id.*, ¶¶ 108-109). Specifically, it is alleged that the Architect Defendants made representations in the offering plan as to the Building's condition upon construction (*id.*, ¶ 35).

The Architect Defendants argue that plaintiff has not alleged a special relationship, as required. A claim for negligent misrepresentation against a professional, where the misrepresentations are made in the offering plan, is precluded absent a special relationship with the plaintiff who allegedly relied on them (*Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 372 [2010] [internal citations omitted]). To allege such a relationship, plaintiff must plead that (1) the Architect Defendants had an awareness that their architect certification and description of property were being used for a particular purpose; (2) plaintiff was a known party, who relied on the architect certification and description of property in furtherance of that purpose; and (3) there was some conduct on the part of the Architect Defendants linking them to plaintiff,

which evinces the Architect Defendants' understanding of plaintiff's reliance (*id.* at 373).

The allegations in the complaint satisfy the first prong; however, plaintiff has not pled allegations sufficient to satisfy the other requirements. Specifically, plaintiff has not sufficiently alleged that it was a "known party." It is not enough to allege that prospective purchasers of condominium units would rely on the offering plan (*id.* at 374). This cause of action is dismissed.

Fraud

Plaintiff's fourth cause of action alleges fraud in that the Architect Defendants made false representations in the description of property contained in the offering plan, as well as omissions of fact in the architect certification in the offering plan, inducing the individual unit owners to purchase condominiums in the Building. Plaintiff alleges that the Architect Defendants knew or should have known that their representations were false.

The Architect Defendants assert that the fraud claim must be dismissed as time-barred. They argue that a cause of action for fraud must be brought within two years of the time a plaintiff discovers the fraud or could have discovered it with reasonable diligence. The period of limitation is six years from the accrual of the cause of action or two years from the discovery of

the fraud (CPLR 213 [8]), whichever is longer (CPLR 203 [g]). Plaintiff's fraud claim is timely, as it was commenced less than six years from the date of the alleged fraud.

The Architect Defendants also argue that plaintiff lacks standing to assert its fraud claim, because, pursuant to General Business Law Article 23-A (the Martin Act), the New York State Attorney General is vested with exclusive authority to litigate the rights of persons claiming fraudulent or misleading conduct with respect to the offerings of securities, including new condominiums.

In *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236, 239 [2009]), the Court of Appeals held that "a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act." Two years later, in *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.* (18 NY3d 341, 353 [2011]), the Court of Appeals clarified its decision in *Kerusa*, explaining that,

> "a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies."

Thus, the issue is whether plaintiff's claim for fraud is predicated solely on a violation of the Martin Act, i.e., the fraud is based on alleged material omissions from the offering plan, and would not exist but for the statute.

Here, plaintiff's claim for fraud is based on both misrepresentations and omissions. While a claim cannot be sustained based solely on the allegations of the Architect Defendants' omissions, as it is precluded by the Martin Act, here, to the extent that plaintiff alleges that the Architect Defendants affirmatively misrepresented material facts in the offering plan, the claim is not precluded (*Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 607-608 [1st Dept 2011]).

In order to state a claim for fraud, plaintiff must allege

> "(1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury"

(*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007] [internal citations omitted]). Plaintiff has sufficiently alleged that the Architect Defendants knowingly made material misrepresentations about the soffits and C and D line terraces, purposefully inducing the individual condominium unit owners to rely on them, and that, in reliance on those misrepresentations, the individual condominium owners purchased condominiums units in the Building. Therefore, plaintiff has

stated a claim for fraud based solely on the alleged misrepresentations in the description of property contained in the offering plan.

This cause of action is not duplicative of plaintiff's breach of contract claim, because the fraud involves the representations in the offering plan, not the Architect Agreement.

Unjust Enrichment

Plaintiff's claim for unjust enrichment is duplicative of its breach of contract claim, as both arise from the same factual allegations and subject matter, and the claim seeks damages for events arising out of the alleged breach of the contract (*see Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]). This claim is dismissed.

Professional Malpractice

For the reason discussed above, plaintiff's claim for professional malpractice cannot be dismissed as time-barred at this time. Thus, the court will determine whether plaintiff has stated a claim.

The second amended complaint alleges that the Architect Defendants committed professional malpractice in their performance of architectural services in connection with the Building's construction. The Architect Defendants argue that this claim is duplicative of the breach of contract claim.

"An action for professional malpractice may lie in the context of a contractual relationship if the professional negligently discharged the duties arising from that relationship" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 82 [1st Dept 1999]). Where a claim is brought against a professional, "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals … may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (*id.* at 83 [internal citations and quotation marks omitted]). Here, plaintiff alleges several defective conditions with the Building that were allegedly a result of the Architect Defendant's professional malpractice, separate and apart from their duties under the Architect Agreement, and, thus, plaintiff has stated a claim for professional malpractice.

Violations of General Business Law

Plaintiff alleges that the Architect Defendants engaged in deceptive consumer practices and false advertising in connection with the conversion of the Building to condominiums and the sale of condominium units in the Building, in violation of General Business Law §§ 349 and 350. Specifically, plaintiff alleges that the Architect Defendants "disseminated advertising and promotional information that had a broad impact on consumers at large because such information was broadly disseminated via the

Internet and other media to the general public and particularly to those members of the general public who were also potential home buyers" (second amended complaint, ¶ 125).

General Business Law § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce...." The conduct must have a broad impact on consumers at large (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). General Business Law § 350 prohibits false advertising. To be liable for a violation of General Business Law § 350, the advertisement must have been deceptive or misleading and must have had an impact on consumers at large (*Andre Strishak & Assoc. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002]). Therefore, in addition to pleading a deceptive act and deceptive advertisement and injury, plaintiff must allege facts supporting the element that the deceptive act and deceptive advertisement had a broad impact on consumers at large. The complaint must "at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large" (*New York Univ. v Continental Ins. Co.*, 87 NY2d at 320).

Accepting the allegations of the second amended complaint as true, plaintiff has sufficiently pled a cause of action for violations of General Business Law §§ 349 and 350. Plaintiff alleges the Architect Defendants engaged in deceptive practices

and false advertisement in connection with the conversion of the Building to condominium ownership and the sale of the condominium units in the building specifically through the advertising and promotional materials disseminated. Plaintiff also sufficiently alleges that these materials were circulated to the general public, not just to the current unit owners, to entice the purchase of the condominium units (*see Brine v 65th St. Townhouse LLC* (20 Misc 3d 1138 [A], *5, 2008 NY Slip Op 51780[U]). Finally, plaintiff alleges it suffered an injury.

The Architect Defendants argue that this cause of action can only be brought by the Attorney General under the Martin Act. However, as discussed above, plaintiff can maintain a private cause of action for violations of these statutes, because this cause of action is based on the Architect Defendants' alleged material misrepresentations, and not omissions (*see Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d at 607-608).

Sponsor Defendants' Motion to Dismiss (Motion Sequence 006)

On November 9, 2012, in response to the amended complaint, the Sponsor Defendants filed this motion, sequence 006, seeking to dismiss the causes of action for breach of the common law of implied housing merchant warranty, negligence, and negligent misrepresentation on the grounds that they were previously dismissed with prejudice, as well as the fraudulent conveyance causes of action for a failure to state a claim. Motion sequence

006 also seeks sanctions for frivolous pleading.

On November 15, 2012, plaintiff filed a second amended complaint, omitting the causes of action for breach of the common law of implied housing merchant warranty, negligence, and negligent misrepresentation against the Sponsor Defendants. On December 4, 2012, in response to the second amended complaint, the Sponsor Defendants filed an amended motion, sequence 007, seeking to dismiss the tenth, eleventh, and twelfth causes of action for constructive and intentional fraudulent conveyances as pled in the second amended complaint. This motion is denied as moot.

Sponsor Defendants' Motion to Dismiss (Sequence 007)

Constructive Fraudulent Conveyances While Insolvent

The second amended complaint alleges that the Sponsor Defendants made distributions and transfers to its members without fair consideration, rendering defendants Baxter Street Development Company LLC (Baxter Company) and Baxter Condo Sales LLC (Baxter Sales) insolvent. Plaintiff asserts that, pursuant to New York Debtor and Creditor Law § 273, it is entitled to set aside the equity distributions, and that defendants 123 Baxter Street Owners Company, LLC, SRC Baxter Investment Group, Mark Engel, Perry Finkleman, Narczen LLC, and Zenaida Lewis are liable for the amounts that they received.

Debtor and Creditor Law § 273, requires plaintiff to allege

that the Sponsor Defendants fraudulently made conveyances, rendering Baxter Company and Baxter Sales insolvent, because they did not receive fair consideration for such conveyances (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 [2011]). Plaintiff has sufficiently alleged that it is a creditor of defendants Baxter Company and Baxter Sales, and that those defendants made conveyances to the other Sponsor Defendants without consideration, rendering them insolvent. The Sponsor Defendants argue that plaintiff has not pled this cause of action with particularity, but plaintiff is not required to plead a violation of Debtor and Creditor Law § 273 with heightened particularity pursuant to CPLR 3016 (b) (*Gateway I Group v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149 [2d Dept 2009]).

Constructive Fraudulent Conveyance Causing Small Capital

Plaintiff's eleventh cause of action, brought pursuant to New York Debtor and Creditor Law § 274, alleges that Baxter Company and Baxter Sales made distributions and transfers to the other Sponsor Defendants, without fair consideration, leaving Baxter Company and Baxter Sales with an unreasonably small amount of capital.

Debtor and Creditor Law § 274 similarly requires plaintiff to allege that Baxter Company and Baxter Sales fraudulently made conveyances without fair consideration leaving them with an unreasonably small capital (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17

NY3d at 228). Again, like Debtor and Creditor Law § 273, violations of Debtor and Creditor Law § 274 do not require pleading with heightened particularity (*Gateway I Group v Park Ave. Physicians, P.C.*, 62 AD3d at 149). Plaintiff has sufficiently pled a violation of Debtor and Creditor Law § 274.

The Sponsor Defendants argue that this cause of action must be dismissed, because the statutory provisions it is premised on do not apply to transactions involving the sale of a condominium. The Sponsor Defendants rely on *Wildman & Bernhardt Constr. v BPM Assoc.* (273 AD2d 38, 39 [1st Dept 2000][internal citation omitted]), which held that "conversion of the building to condominiums did not constitute a conveyance that could support a fraudulent conveyance cause of action." However, here, plaintiff is not alleging that the conveyance was the conversion of the Building to condominiums, but, rather, that the fraudulent conveyances were the transfers of the sales proceeds on the units. Thus, the *Wildman* case is not applicable to this cause of action.

Intentional Fraudulent Conveyances

Plaintiff's final cause of action alleges that the equitable distributions made by Baxter Company and Baxter Sales to their members were made with the intent to delay, hinder, and defraud their creditors, and that, pursuant to New York Debtor and Creditor Law § 276, it is entitled to set aside the equity

distributions, and the other Sponsor Defendants are liable for the amounts that they received.

Causes of action brought pursuant to New York Debtor and Creditor Law § 276 must be pled in detail in compliance with CPLR 3016 (b) (*Marine Midland Bank v Zurich Ins. Co.*, 263 AD2d 382, 383 [1st Dept 1999]). Plaintiff has not met this burden.

While "the pleader is allowed to rely on 'badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [internal quotes and citations omitted]), plaintiff's allegations of a close relationship between Baxter Company and Baxter Sales and the remaining Sponsor Defendant and a lack of consideration for the transfers between those parties is not enough to give rise to an inference of intent. More needs to be alleged to give rise to that inference, such as "a questionable transfer not in the usual course of business," "the transferor's knowledge of the creditor's claim and the [transferor's] inability to pay it," the use of dummies or fictitious parties, "and retention of control of property by the transferor after the conveyance" (*id.*; *see also MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 [SD NY 1995]). Therefore, this cause of action is dismissed.

Accordingly, it is

ORDERED that defendants Kushner Studios Architecture & Design, P.C. and Adam Kushner's motion to dismiss (motion sequence 005) is granted, in part, and plaintiff Board of Managers of the Baxter Street Condominium's claims for negligence, negligent misrepresentation, and unjust enrichment are dismissed; and it is further

ORDERED that defendants 123 Baxter Street Owners Company, LLC, Baxter Street Development Company LLC, Marc Engel and Perry Finkelman's motion for sanctions and to dismiss the causes of action in plaintiff's amended complaint (motion sequence 006) for breach of implied housing merchant warranty, negligence, fraud, constructive fraudulent conveyances while insolvent, constructive fraudulent conveyances causing unreasonably small capital, and intentional fraudulent conveyance is denied as moot; and it is further

ORDERED that defendants 123 Baxter Street Owners Company, LLC, Baxter Street Development Company LLC, Marc Engel and Perry Finkelman's motion to dismiss the causes of action in plaintiff's second amended complaint (motion sequence 007) for constructive fraudulent conveyances while insolvent, constructive fraudulent conveyances causing unreasonably small capital, and intentional fraudulent conveyance is granted, in part, and the cause of action for intentional fraudulent conveyance is dismissed; and it

is further

ORDERED that defendants Kushner Studios Architecture & Design, P.C., Adam Kushner, 123 Baxter Street Owners Company, LLC, Baxter Street Development Company LLC, Marc Engel and Perry Finkelman are directed to serve an answer to the second amended complaint within 20 days after the service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference on January 8, 2014 at 9:30 AM in Room 320, 80 Centre Street.

Dated: 10/24, 2013

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE