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| <b>Board of Mgrs. of the 369 Harman St. Condominium<br/>v 369 Harman LLC</b>  |
| 2018 NY Slip Op 32026(U)  |
| August 20, 2018   |
| Supreme Court, New York County  |
| Docket Number: 450386/2018  |
| Judge: Carol R. Edmead  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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BOARD OF MANAGERS OF THE 369 HARMAN  
STREET CONDOMINIUM,

Plaintiff,

-against-

369 HARMAN LLC, DONALD FELLNER, and  
STEVEN NOVAK,

Defendants.

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**HON. CAROL R. EDMEAD, J.S.C.:**

**MEMORANDUM DECISION**

This is an action for, among other things, fraud in the inducement, fraudulent conveyance, and breach of contract. Defendants, 369 Harman LLC (Sponsor), Donald Fellner, and Steven Novak (individual defendants) now move, pursuant to CPLR § 3211(a)(7) to dismiss the fourth, sixth, seventh, eighth, and ninth causes of action contained in the Complaint of plaintiff, Board of Managers of the 369 Harman Street Condominium (Plaintiff).<sup>1</sup>

This action arises from a condominium located on 369 Harman Street, Brooklyn, New York (Building). According to the Complaint, the Building is a newly constructed five-story structure containing eighteen residential apartment units and nine parking units. Defendant 369 Harman LLC is the sponsor/developer of the Building and the individual defendants are principals of the Sponsor.

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<sup>1</sup> This motion was originally filed in Kings County under Index No. 500914/2016. The Notice of Motion sought the relief addressed herein and that the Kings County matter be consolidated with a related action pending in New York County (Index No. 654398/2015). By way of order dated November 14, 2017, the Honorable Leon Ruchelsman granted the branch of Defendants' motion to consolidate and transferred the Kings County matter to New York County.

Plaintiff alleges that Defendants offered units of the Building for sale pursuant to the specifications outlined in the Offering Plan. Plaintiff further alleges that Defendants used the Offering Plan as a promotional tool, but failed to amend the Offering Plan to reflect the construction defects in the Building upon its completion. Plaintiff alleges that as construction of the Building proceeded and after it was completed, the Offering Plan ultimately contained affirmative misrepresentations and misleading statements regarding the Building's condition. Plaintiff further claims that despite the Offering Plan no longer reflecting the accurate condition of the Building, Defendants continued to disseminate the Plan in order to sell the remaining units.

As relevant to the disposition of Defendants' motion, the Complaint alleges fraud in the inducement (fourth cause of action), negligence (sixth cause of action), constructive fraudulent conveyances while insolvent (seventh cause of action), constructive fraudulent conveyances causing unreasonably small capital (eighth cause of action), and intentional fraudulent conveyance (ninth cause of action).

#### *Discussion*

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]). However,

“allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437 [1st Dept 2012]), and, in such circumstances, the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

#### *Fraudulent Inducement*

In support of the branch of Defendants’ motion to dismiss Plaintiff’s fourth cause of action for fraud in the inducement, Defendants first argue that the Martin Act preempts the claim, since it relies on misrepresentations made in the Offering Plan. Defendants further argue that the fraud claim should be dismissed because it is duplicative of Plaintiff’s claim for breach of contract, as Plaintiff’s claim arises out of the alleged breach of the Offering Plan and certifications, and the damages Plaintiff seeks for fraud are identical to those it seeks for breach of contract. Moreover, Defendants contend that the fraud claim is not pleaded with the requisite particularity required by CPLR 3016(b). Defendants further claim that Plaintiff’s fraud claim should be dismissed because it is based on allegations of future performance, as the Complaint alleges that Defendants made false representations about the construction before the construction was completed.

In opposition to Defendants’ motion, Plaintiff first argues that the Martin Act does not preclude its fraud in the inducement claim because the Complaint alleges that the basis of its claims is that the Offering Plan contained affirmative misrepresentations. Next, Plaintiff argues that its claim for fraud in the inducement is separate from its breach of contract claim. Further, Plaintiff argues that its fraud claim was plead with sufficient particularity, since the Complaint recites Defendants’ affirmative misstatements contained in the Offering Plan.

In reply, Defendants argue that the fraud claim should be dismissed, since it is based on a duty derived from the Offering Plan. Defendants also argue that the fraud claim should be dismissed against the individual defendants on the basis that Plaintiff does not allege misrepresentations by them separate from the misrepresentations allegedly made by the Sponsor. Moreover, Defendants argue that Plaintiff's fraud claim is based on representations relating to future performance.

"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, L.P. v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

CPLR 3016(b) heightens the pleading standards for fraud-based actions, mandating that the circumstances underlying actions for "misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence . . . shall be stated in detail" (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010] ["CPLR 3016 [b] imposes a more stringent standard of pleading than the generally applicable notice of transaction rule of CPLR 3013"]). Further, CPLR § 3016(b) "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 [2008], quoting *Pludeman v. N. Leasing Sys., Inc.*, 40 A.D.3d 366, 367–68 [2007], *aff'd* 10 N.Y.3d 486 [2008]). Section 3016(b) is satisfied when "the facts suffice to permit a 'reasonable inference' of the alleged misconduct" and that in making such determination, "less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" (*Eurycleia Partners*, 12 N.Y. 3d at 559).

Here, assuming the truth of Plaintiff's allegations, as required on a motion to dismiss pursuant to CPLR § 3211(a)(7), the Complaint alleges facts sufficient to inform Defendants of the complained of fraud and to establish the elements of the cause of action. Specifically, Plaintiff alleges that "defendants made misrepresentations and omissions of fact regarding the Building and its units, in the Offering Plan and/or in circulating the Offering Plan and/or in promoting sales of units of the [c]ondominium after the Building's construction commenced [and was completed]" (Compl. ¶94), made for the purpose of inducing prospective unit owners to purchase units of the Condominium, and that the prospective unit owners reasonably relied upon the aforesaid affirmative misrepresentations. Moreover, Plaintiff alleges that the Sponsor constructed the Building, raising an inference of its' knowledge of the alleged falsity of the statements contained in the Offering Plan. Thus, Plaintiff's allegations of fraudulent inducement are sufficiently specific to state a claim against the Sponsor.

Plaintiff also alleges that "[a]s principals of the Sponsor, Fellner and Novak signed the Sponsor's Certification in the Offering Plan . . . , both in their individual capacity and on behalf of the Sponsor" (*id.* ¶13), and that the individual defendants "exercised complete dominion and control over the Sponsor in making the aforesaid affirmative misrepresentations and directly participated in the fraud in the inducement alleged herein (*id.* ¶108). Defendants do not contend that the fraud in the inducement claim against the individual defendants should be dismissed on the basis that the individuals may not be held individually liable. As Plaintiff's claims of fraudulent inducement against the Sponsor and the individual defendants are sufficiently specific, the branch of the motion seeking dismissal of these claims pursuant to 3016(b) must be denied.

The Court also denies the motion to dismiss the fraud claim on the basis that the Martin Act preempts Plaintiff's fraud claim. The Martin Act is a disclosure statute which is designed to protect the public from fraud in the sale of real estate securities, and the Attorney General is charged with enforcing its provisions and implementing regulations (*see Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243–44 [2009]; *CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268, 276–77 [1987]). A private common-law cause of action for fraud may be brought by a plaintiff where its basis is distinct from the Martin Act and it “is not entirely dependent on the Martin Act for its viability” (*Assured Guar. [UK] Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]). Thus, a plaintiff's claims are not preempted by the Martin Act where the plaintiff alleges “not that [the] defendant omitted to disclose information required under the Martin Act but that it affirmatively misrepresented, as part of the offering plan, a material fact about the condominium” (*Bhandari v. Ismael Leyva Architects, P.C.*, 84 AD3d 607, 607 [1st Dept 2011]).

However, “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” (*Assured Guar. [UK] Ltd.*, 18 NY3d at 353). Thus, there is no private right of action where the fraud alleged by plaintiff rely entirely upon alleged omissions in filings required by the Martin Act (*Kerusa Co. LLC*, 12 NY3d at 247; *Berenger v. 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]).

Here, the basis of Plaintiff's fraud claim is not omissions, but affirmative misrepresentations contained in the Offering Plan. Specifically, the Complaint identifies affirmative misrepresentations in the “Description of Property” within the Offering Plan which materially differed from the actual conditions at the Building.

Among the affirmative misrepresentations of fact Plaintiff alleges existed in the Offering Plan as to the construction of the Building, Plaintiff claims that the Building's balcony balustrades were constructed with glass panels instead of steel; that the skylights were constructed with wire glass glazing instead of plate glass; that terrace drains were installed directly under doors curbs, rather than in the middle of the terrace, thereby rendering the drains nearly non-functional; and that the Building's parking lot does not have sufficient room for nine parking spaces, as indicated in the Offering Plan (Compl. ¶94).

Plaintiff also alleges that the Offering Plan misrepresented that the Building complied with the NYC Building Code (Code) (*id.* ¶98). Specifically, Plaintiff alleges that the Building's balcony railings do not meet loading requirements; the Building's parapet does not meet minimum height requirements; the Skylights over the stair bulkheads have wire glass glazing in violation of the Code; the gas vents and exhaust ducts were installed without a two-hour fire-rated enclosure, in violation of the Code; and that the Building's sprinkler system was installed without freeze protection and various sprinkler heads were installed less than four inches from the wall, in violation of the Code (*id.* ¶99).

The caselaw cited by Defendants to demonstrate that fraud claims alleging a misrepresentations contained in documents filed in accordance with the Martin Act are preempted by the Martin Act are inapposite, since the claim for misrepresentation in those cases is based on an *omission* in the offering plan (*see Bd. of Mgrs. of 647 & 649 Place Condo. v. 647 & 649 Washington Ave., LLC*, 49 Misc. 3d 1216(A), 26 N.Y.S.3d 723 [Sup. Ct. Kings County 2015]; *Bd. of Mgrs. of 125 N. 10th Condo. v. 125 N. 10, LLC*, 42 Misc.3d 1214[A], 2014 N.Y. Slip Op 50035[U] [Sup Ct. Kings County 2014]).

Further, Defendants' argument that Plaintiff's fraud claim is duplicative of its claim for breach of contract is without merit. "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform" (*Hawthorne Group, LLC v. RRE Ventures*, 7 A.D.3d 320, 323-24 [1st Dept 2004]; see *Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 439 [1st Dept 2015] [holding that "[i]n the context of a contract case, the pleadings [alleging fraud in the inducement] must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim"]). Here, the Complaint alleges that the Offering Plan contained a misrepresentation of the state of the building at the time it was completed, and is thus the misrepresentation of a present fact. As discussed in greater detail above, Plaintiff alleges that most, if not all unit owners purchased their units after the Building's construction was completed, and that Defendants utilized the affirmative misrepresentations contained in the Offering Plan to sell the units.

Thus, the branch of Defendants' motion to dismiss the fourth cause of action is denied.

#### *Negligence*

In support of the branch of Defendants' motion to dismiss Plaintiff's sixth cause of action for negligence, Defendants argue that the sixth cause of action is duplicative of its first and second causes of action for breach of contract and third cause of action for breach of warranty, since they are based on the same facts and alleged breaches. Plaintiff's opposition does not address Defendants' motion to dismiss the negligence cause of action, and it is thus deemed abandoned (see *Perez v. Folio House, Inc.*, 123 A.D.3d 519, 520 [1st Dept 2014] [failure to

address claims indicates an intention to abandon them as bases of liability]). Accordingly, the branch of Defendants' motion to dismiss the sixth of action is granted.

*Debtor and Creditor Law*

In support of the branch of its motion to dismiss Plaintiff's seventh cause of action and eighth causes of action alleging constructive fraudulent conveyance pursuant to Debtor and Creditor Law (DCL) §§ 273 and 274, Defendants argue that Plaintiff fails to allege any facts to support the inference that the Sponsor: is insolvent; made conveyances without fair consideration; is undercapitalized; or fraudulently conveyed assets to the individual defendants. Defendants further argues that Plaintiff's claims under DCL §§ 273 and 274 also fail to state a claim, since the supporting allegations are based on information and belief and fails to allege sufficient facts to support its constructive fraudulent conveyance claims.

Here, Plaintiff adequately pleads a cause of action under DCL §§ 273 and 274.

DCL § 273 states:

"[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation incurred without fair consideration."

DCL § 274 states:

"[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent."

Thus, to state a claim under Debtor and Creditor Law §§ 273 and 274 for constructive fraudulent conveyance, the plaintiff must allege that the defendant (1) made a conveyance; (2) without fair consideration; (3) that depleted the debtor's assets (*Joslin v. Lopez*, 309 A.D.2d 837, 838 [2d Dept 2003]; *172 Van Duzer Realty Corp. v. 878 Educ., LLC*, 142 A.D.3d 814, 818 [1st

Dept 2016]; *Zanani v. Meisels*, 78 A.D.3d 823, 824 [2d Dept 2010]). It is not required that a pleading articulating a cause of action under DCL §§ 273 and 274 plead those violations with the heightened particularity required under CPLR 3016(b) (see *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149-50 [2d Dept 2009]; *Menaker v Alstaedter*, 134 AD2d 412, 413 [2d Dept 1987]).

The Complaint alleges that upon information and belief, at some point between August 28, 2010, and the present time, the Sponsor had closed on the sales of a number of units, but it retained little if any of the sales proceeds, instead distributing those proceeds to the individual defendants and other undisclosed investors in accordance with their equity interests in the Sponsor and/or the Condominium without fair consideration, which left it with an unreasonably small amount of capital, and thus unable to meet its debts and other future financial obligations (Compl. ¶¶132-139; 142).

Accordingly, the branch of Defendants' motion to dismiss the seventh and eighth causes of action is denied.

Finally, in support of the branch of Defendants' motion to dismiss the intentional fraudulent conveyance alleging intentional fraudulent conveyance under DCL § 276, Defendants argue that Plaintiff fails to meet the heightened pleading requirements of CPLR 3016(b), since the claim is only based on information and belief.

Plaintiff contends that it sufficiently plead its ninth cause of action, since it alleges that the Sponsor made distributions and transferred assets without fair consideration, with an intent to hinder, delay and defraud Sponsor's creditors, including Plaintiff. Plaintiff also argues that it should be afforded the opportunity to conduct discovery on its DCL claims.

Section 276 of the DCL states:

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

In order to assert a claim under DCL § 276 the party must comply with the particularity provisions of CPLR 3016(b) (*see Ray v. Ray*, 108 A.D.3d 449, 451 [1st Dept 2013]; *NTL Capital, LLC v. Right Track Rec., LLC*, 73 A.D.3d 410, 412 [1st Dept. 2010]).

Plaintiff's claims under DCL § 276 are dismissed, since that claim was not pleaded with the particularity required under CPLR 3016(b). Plaintiff alleges that “[u]pon 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 Sponsor, including Plaintiff and the Unit Owners” (Compl. ¶145). The allegations of fraud in the DCL context—which are based on information and belief—merely mimic the statutory language, fail to inform Defendants of the substance of the claim, and importantly, fail to support a cause of actual intent to defraud (*see* CPLR 3016(b); *RTN Networks, LLC v. Telco Grp., Inc.*, 126 A.D.3d 477, 478 [1st Dept 2015]; *Ray v. Ray*, 108 A.D.3d at 451-52). Accordingly, the branch of Defendants' motion to dismiss the ninth cause of action is granted.

### CONCLUSION

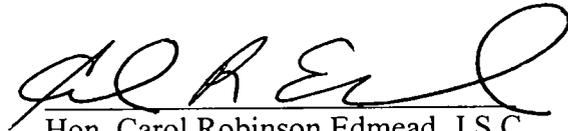
Accordingly, it is hereby

**ORDERED** that the branch of the motion of Defendants, 369 Harman LLC, Donald Fellner, and Steven Novak, is granted only to the extent that the sixth and ninth causes of action contained in the Complaint of Plaintiff, Board of Managers of the 369 Harman Street Condominium, are dismissed. It is further

**ORDERED** that Defendants shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: August 20, 2018



Hon. Carol Robinson Edmead, J.S.C

**HON. CAROL R. EDMED**  
**J.S.C.**