

**Board of Mgrs. of the 15 Union Sq. W. Condominium
v BCRE 15 Union Sq. W. LLC**

2021 NY Slip Op 30253(U)

January 27, 2021

Supreme Court, New York County

Docket Number: 162500/2015

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

BOARD OF MANAGERS OF THE 15 UNION SQUARE
WEST CONDOMINIUM,

Plaintiff,

INDEX NO. 162500/2015

MOTION DATE 12/06/2019

MOTION SEQ. NO. 001

- v -

BCRE 15 UNION SQUARE WEST LLC, MOSHE AZOGUI,
ISSAC HERA, BCRE 15 USW HOLDINGS LLC, BCRE 15
USW SECOND LLC, BCRE 15 USW CORP, BCRE
SERVICES LLC, BCS USA LLC, and BRACK CAPITAL
REAL ESTATE USA CORP,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss is granted only to the extent that the second, third and fourth causes of action of the complaint against defendant BCRE are dismissed, and such motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve answer(s) to the complaint within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to submit to 59nyef@nycourts.gov and file with NYSCEF a proposed preliminar

conference order or a proposed counter preliminary conference order on March 12, 2021.

DECISION

In this action brought by the Board of Managers (the "Board") of the condominium at 15 Union Square West (the "Building") against the developer-sponsor BCRE 15 Union Square West LLC ("BCRE") and other defendants, BCRE moves to dismiss the complaint against it on the grounds that it fails to state actionable claims and that in any event those claims are time-barred. For the reasons that follow the court shall deny the motion.

BCRE argues that plaintiff's first and second causes of action, for breach of contract and unjust enrichment respectively, are time-barred because this action was commenced more than six years after the sale of the first condominium unit (see CPLR 213[2]). However, the court agrees with plaintiff's opposition to the motion that the first two causes of action were brought within the statute of limitations period because the Court has held that amendments to an offering plan that reaffirm the representations and terms of the original offering plan extend the time within which the statute of limitations begin to run and therefore plaintiff's first two causes of action are timely. See 61 W. 62 Owners Corp. v Harkness Apt.

Owners Corp., 222 AD2d 358, 360 (1st Dept 1995) (where Plan was amended four times within the six years before the action was commenced and each time the Sponsor reaffirmed the Plan, plaintiff's breach of warranty claim was timely as a matter of law). Similar principles apply to plaintiff's fourth cause of action for fraud, which the court based upon the foregoing finds is timely.

However, the court shall grant the defendant's motion to dismiss the second cause of action for unjust enrichment as plaintiff fails to raise any obligations separate and apart from those promised in the Offering Plan and therefore the cause of action is duplicative of plaintiff's breach of contract claim. See EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 23 (2005) (plaintiff fails to state a cause of action for unjust enrichment as the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter).

The court shall also grant the motion to dismiss the third cause of action for negligence on the grounds that plaintiff has failed to plead a viable tort action. Here, although the nature of the injury and resulting harm sound in tort, the manner in which the alleged injury occurred sounds in contract because there would be no legal duty owed to plaintiff but for the existence of the contractual obligations specified in the

Offering Plan. See Gallup v Summerset Homes, LLC, 82 AD3d 1658, 1660 (4th Dept 2011).

The court further finds that plaintiff's fourth cause of action for fraud is subject to dismissal because contrary to plaintiff's argument, the court agrees with defendant that as pled the complaint plaintiff's claim of fraud is based wholly upon the alleged misrepresentations in the Offering Plan and plaintiff does not allege a breach of obligations separate and apart from those governed by the Offering Plan and therefore encompassed by plaintiff's breach of contract claim. See Alexander Condominium, by its Bd. of Managers v E. 49th St. Dev. II, LLC, 60 Misc 3d 1232(A) (Sup Ct, NY County, Sep 11, 2018) (plaintiff fails to allege any misrepresentations separate from the promises under the Offering Plan); Bd. of Managers of Beacon Tower Condominium v 85 Adams St., LLC, 136 AD3d 680, 684 (2d Dept 2016) ("the complaint fails to allege facts that would give rise to a duty owed to the plaintiff, or to the unit owners, independent of the duty imposed by the offering plan and purchase agreements").

1/27/2021
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE