

Board of Mgrs. of the 15 Union Sq. W. Condominium v BCRE 15 Union Sq. W. LLC
2022 NY Slip Op 31924(U)
June 16, 2022
Supreme Court, New York County
Docket Number: Index No. 162500/2015
Judge: Debra James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA JAMES PART 59

Justice

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BOARD OF MANAGERS OF THE 15 UNION SQUARE WEST CONDOMINIUM,

Plaintiff,

INDEX NO. 162500/2015

MOTION DATE 06/15/2022

MOTION SEQ. NO. 002 003

- 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

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that it seeks to dismiss the third cause of action for negligence, the fourth cause of action for fraud, the fifth cause of action for aiding and abetting fraud, and the sixth cause of action sounding in piercing the corporate veil and to dismiss the complaint in its entirety against defendants BCRE SERVICES LLC, BCS USA LLC, and BRACK CAPITAL REAL ESTATE USA CORP only, the motion of defendants to dismiss (motion sequence number 002) is granted, without

opposition, and the third, fourth, fifth and sixth causes of action of the complaint and the complaint in its entirety as against BCRE SERVICES LLC, BCS USA LLC, and BRACK CAPITAL REAL ESTATE USA CORP only are dismissed; and it is further

ORDERED to the extent that it seeks to dismiss the second cause of action for unjust enrichment against defendants MOSHE AZOGUI, ISSAC HERA, BCRE 15 USW HOLDINGS LLC, BCRE 15 USW SECOND LLC, and BCRE 15 USW CORP, the motion of defendants is denied; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendants BCRE SERVICES LLC, BCS USA LLC, and BRACK CAPITAL REAL ESTATE USA CORP only, with costs and disbursements to such defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the

court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motion of plaintiff to strike the answer of defendant BCRE 15 UNION SQUARE WEST LLC for its failure to produce discovery, and to enter a default judgment against defendants BCRE, 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. for their failure to answer the complaint (motion sequence number 003) is denied; and it is further

ORDERED that the cross motion of defendants to stay the proceedings in this action until resolution of motion sequence number one is dismissed, as moot, and it is further

ORDERED that, within twenty (20) days of service of this order with notice of entry, defendants MOSHE AZOGUI, ISSAC HERA, BCRE 15 USW HOLDINGS LLC, BCRE 15 USW SECOND LLC, and BCRE 15 USW CORP shall serve their answer(s) to the complaint; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed compliance conference order or proposed compliance conference order(s) at least two days before August 4, 2022, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

With respect to the viability of the second cause of action of unjust enrichment against defendants MOSHE AZOGUI, ISSAC HERA, BCRE 15 USW HOLDINGS LLC, BCRE 15 USW SECOND LLC, and BCRE 15 USW CORP (Sponsor Defendants), who are non-signatories to the Offering Plan, the facts alleged in the complaint at bar are distinguishable from those in Bellino Schwartz Padob Advertising, Inc v Solaris Marketing Group, Inc, 222 AD2d 313 (1st Dept 1995). In affirming the trial court's dismissal of the unjust enrichment claim against defendant Titan, the nonsignatory to the contract in that case, the First Department found "The record reveals that Titan did not unjustly benefit from plaintiff's work since Solaris, rather than Titan, had produced commercials and placed and aired television commercials containing plaintiff's advertising materials". In contrast, the complaint before the court is replete with factual allegations that the Sponsor Defendants unjustly profited, receiving windfall benefits from the conversion of the Building.

With respect to the motion of plaintiff to strike the answer of defendant BCRE 15 Union Square West LLC for its failure to comply with the directives set forth in the preliminary discovery conference entered on March 15, 2021, the filing of the motion of defendants to dismiss the complaint (motion sequence number 002) on March 1, 2021, stayed discovery pursuant to CPLR 3214(b). As there was no reference to the motion to dismiss in the preliminary discovery conference order, it cannot be said that the court ordered "otherwise".

Likewise, as to the motion of plaintiff to enter a default judgment, the moving defendants were procedurally unable to serve answer(s) during the pendency of their motion to dismiss the complaint.

Debra A. James
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<u>6/16/2022</u> DATE					<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE