Board of Mgrs. of Petit Verdot Condominium v 732-734 WEA, LLC
2022 NY Slip Op 33383(U)
October 6, 2022
Supreme Court, New York County
Docket Number: Index No. 162432/2019
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

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BOARD OF MANAGERS OF PETIT VERDOT CONDOMINIUM,

Plaintiff,

- v -

732-734 WEA, LLC,CARTER SACKMAN, JAMES HEFELFINGER, FRANCES BLAKE, CYNTHIA CONCEPCION, SACKMAN ENTERPRISES, INC.

Defendant.

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INDEX NO. 162432/2019

MOTION DATE 03/10/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISSAL.

Plaintiff the Board of Managers of Petit Verdot Condominium alleges that defendants are liable for the defective condition of the building. Defendants move, pursuant to CPLR 3211 (a) (1) and (7), 3013, and 3016 (b), to partially dismiss the complaint.

Defendants consist of the sponsor, 732-734 WEA, LLC (Sponsor), the condominium's management company, Sackman Enterprises, Inc. (SEI), and four individuals. Carter Sackman and James Hefelfinger were principals of Sponsor and SEI. Francis Blake was a principal of SEI. Sponsor designated these three to be initial members of the condominium's board of managers, and they served until mid-May 2016. That month, a new board was elected, a majority of which was designated by Sponsor, namely: Hefelfinger and Cynthia Concepcion. Concepcion is an employee of SEI, which served as the property manager for the condominium from its effective date until about April 2018. The complaint alleges that Sponsor and its

principals controlled and dominated the board to the detriment of the condominium and the unit owners.

BACKGROUND

The Complaint

Sponsor purchased real property in 2007, retained design professionals and contractors to construct a new building on the property and sponsored the building's conversion to a condominium. Sponsor filed the offering plan in 2009 and it was declared effective in 2014. The complaint further alleges that the building was built with substandard materials and not in compliance with the offering plan and applicable laws and codes, including the New York City Building Code. Defects include misaligned windows with misfit joints and loose gaskets. The windows are not water-tight and air-tight and leak and fog as a result. Terrace railings were made with lesser quality materials in lieu of the stainless steel and tempered glass promised in the offering plan. Flashing was not installed at the seismic gap between the building and either of its neighboring buildings; thus, the north and south facades of the building are exposed to water infiltration. The HVAC has repeatedly suffered from catastrophic failure and does not adequately condition or ventilate the units. The hot water system deviates from that specified in the offering plan, resulting in an inadequate pressure and hot water. The bathrooms are not waterproof and the electrical wiring is faulty. In addition, defendants failed to deliver a roof manufacturer's warranty despite the representation in the offering plan that a 10-year manufacturer's roof warranty would be furnished. Upon information and belief, the roofing manufacturer notified defendants that actions taken by them had voided the roof warranty.

The complaint alleges that, despite being informed of the building defects by the unit owners, defendants failed to correct them. Defendants used monies belonging to the

condominium to pay costs and expenses that should have been borne by Sponsor in repairing the building. The complaint sets forth causes of action for breach of contract, breach of fiduciary duty, fraudulent conveyance, conversion, and an accounting.

MOTION TO DISMISS

On a CPLR 3211 motion to dismiss, the factual allegations of the complaint are deemed true, and the affidavits submitted on the motion are considered only for the limited purpose of determining whether the plaintiff has stated a claim, not whether plaintiff has one (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 526-527 [1st Dept 1999]). On a motion to dismiss for failure to state a cause of action, a pleading shall be liberally construed and will not be dismissed for insufficiency merely because it is inartistically drawn (CPLR 3211 [a] [7]; *Foley v D'Agostino*, 21 AD2d 60, 64-65, 65 [1st Dept 1964]). The dispositive inquiry is whether the plaintiff has a cause of action and not whether one has been stated, that is, whether the alleged facts fit within any cognizable legal theory (*JFK Holding Co., LLC v City of New York,* 68 AD3d 477, 477 [1st Dept 2009]). On a motion to dismiss based on documentary evidence, dismissal is warranted only if the relevant document conclusively establishes a defense to the asserted claims as a matter of law (CPLR 3211 [a] [1]; *Constellation Energy Servs. of N.Y., Inc. v New Water St. Corp.*, 146 AD3d 557, 557 [1st Dept 2017]). Under CPLR 3013, "a pleading shall be sufficiently particular to give the court and parties notice of the transactions [or] occurrences . . . intended to be proved and the material elements of each cause of action or defense." Under CPLR 3016 (b), a claim based on fraud must be stated in detail.

First cause of action for breach of contract against Sponsor, Hefelfinger, and Jackman

The first cause of action alleges that the above named defendants breached the offering plan and the purchase agreements (by which the units owners purchased their units), by

delivering the condominium and units with a myriad of design and construction defects. Defendants move to dismiss the claim as to the individual defendants. During oral argument, the court noted that plaintiff had withdrawn the first cause of action as it related to Hefelfinger and Sackman (NYSCEF 33 at 3). Although in the complaint, the first cause of action refers only to those two individuals, during oral argument there was a suggestion that the claim also applied to the other individual defendants, Concepcion and Blake (*id.*, at 15). Since the complaint does not allege any reason to find personal liability for breach of contract against Concepcion and Blake, the first cause of action is dismissed as against them, as well as the other two individual defendants.

Second cause of action for breach of contract against Sponsor, Hefelfinger, and Jackman

The second cause of action alleges that said defendants breached the part of the offering plan that provides, "[U]pon the dissolution or liquidation of the Sponsor, or the transfer of twenty percent (20%) or more of the total number of Units in the Condominium, the principals of the Sponsor will provide financially responsible entities or individuals who will assume the status and all of the obligations of the Sponsor for those Units under the Offering Plan, applicable laws or regulations" (NYSCEF 10, complaint, ¶ 56, NYSCEF 11, offering plan at 101-102, ¶ 13). Sponsor was dissolved and, "[U]pon information and belief," Sackman and Hefelfinger failed to provide the above said financially responsible persons (NYSCEF 10, ¶ 58).

Part 20 of Title 13 of the New York Code of Rules and Regulations governs "Newly Constructed, Vacant or Non-Residential Condominiums." The section of the offering plan that defendants allegedly breached tracks the language of 13 NYCRR 20.3 (t) (8). Plaintiff contends and defendants disagree that the reference in 13 NYCRR 20.3 (t) (8) to the sponsor's principals rather than just the sponsor clearly indicates that the intention was to render the principals liable

in their individual capacities for breaching the regulation. Plaintiff contends that the individual defendants' signatures show that they signed the certification attached to the offering plan in their individual capacity. During oral argument, there was discussion as to whether individuals had ever been found liable for breaching this section (NYSCEF 36 at 12, 17, 42-43). Plaintiff's attorney acknowledged that it found no cases that dealt with that question (*id.* at 17).

The certification is headed "Certification of Sponsor pursuant to Sec. 20.4 (b) of the regulations issued pursuant to General Business Law, Article 23-A, as amended" (NYSCEF 11 at 351). It is signed by Hefelfinger as Managing Member and again by him with no capacity or position indicated. Sackman's signature does not indicate any capacity or position.

Under section 20.4, the offering plan must include:

> "a certification subscribed and sworn to by the sponsor and sponsor's principals in their capacity as principals, in the following form:
> "We are the sponsor and the principals of sponsor of the condominium offering plan for the captioned property.
> "We understand that we have primary responsibility for compliance with the provisions of Article 23-A of the General Business Law, the regulations promulgated by the Department of Law in Part 20 and such other laws and regulations as may be applicable"

(13 NYCRR 20.4 [b]).

Under section 20.1, "[P]rincipal(s) means all individual sponsors . . . all officers, directors and shareholders of a corporate sponsor that are actively involved in the planning or consummation of the offering, and all other individuals who both (i) own an interest in or control sponsor and (ii) actively participate in the planning or consummation of the offering, regardless of the form of organization of sponsor" (13 NYCRR 20.1 [c] [2]).

Section 20.4 requires signatures by the sponsor's principals in their official capacity and also by the sponsor. This may indicate that the legislature was anticipating that the person who signed for the sponsor would not necessarily be the same person who was the sponsor's

principal, or that the same person would sign twice, as the sponsor and as a principal. The regulation does not clearly state that principals must sign the certification in their capacities as individual persons. Nor can that meaning be attributed to the reference to individuals in section 20.1.

Generally, participation in a breach of contract will not cause a member of the board to be liable in his/her individual capacity (*Board of Mgrs. of the Alfred Condominium v Miller*, 202 AD3d 467, 468 [1st Dept 2022]), just as the director of a corporation is not personally liable for the corporation's breach of an agreement merely by virtue of his/her decisions or actions that resulted in the corporation's promise being broken (*Murtha v Yonkers Child Care Assn.,* 45 NY2d 913, 915 [1978]; *Hixon v 12-14 E. 64th Owners Corp.,* 107 AD3d 546, 547-548 [1st Dept 2013]). "The First Department has held that a sponsor's principal is not personally liable for breaches of an offering plan based on the execution of a sponsor certification, as the sponsor's principal, as required by the Martin Act" (*Board of Mgrs. of the Gateway Condominium v Gateway II, LLC*, 51 Misc 3d 1209 [A], 2016 NY Slip Op 50518 [U], *3 [Sup Ct, NY County 2016], citing *Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC,* 106 AD3d 542, 544 [1st Dept 2013]; *see also Board of Mgrs. of the Lore Condominium v Gateway IV LLC,* 169 AD3d 617, 618 [1st Dept 2019]; *Healy v Carriage House LLC,* 2021 NY Slip Op 30883[U], *12 [Sup Ct, NY County 2021], *but see Board of Mgrs. of Dragon Estates Condominium v Omansky*, 2010 NY Slip Op 34056[U], *9 [Sup Ct, NY County 2010] [finding individual liability based on a different but similar regulation, 13 NYCRR 23.3 [v] [9]]).

A Kings County decision reads, "[I]t is well settled within the Second Department that a plaintiff may seek damages for a breach of contract against the individual principals of the sponsor, based upon certification of the offering plan and the incorporation of the terms of the

offering plan in a specific provision of the purchase agreement" (*Board of Mgrs. of 125 N. 10th Condo. v 125 N. 10, LLC*, 50 Misc 3d 1208[A], 2016 NY Slip Op 50020[U], *5-6 [Sup Ct, Kings County, 2016], *revd sub nom. Board of Mgrs. of the 125 N.10th Condominium v 125North10, LLC*, 150 AD3d 1065 [2d Dept 2017] [internal quotation marks and citation omitted]). In the reversal, the Second Department determined that the principals could be not held individually liable for breach of contract, "merely by their certification of that offering plan in their representative capacities on behalf of the sponsor, in accordance with the requirements of the Martin Act and the implementing regulations promulgated thereunder" (*id.*, 150 AD3d at 1066). The court did not discuss the import of the signatures, but based on statements by the lower court, it seems that the signatures could be taken to be in a personal capacity. Nonetheless the Second Department took the signatures to be representative.

In this case, there is no reason to suppose that the signatures without titles or positions underneath are meant to be in an individual capacity. Following the First Department, the signatures do not point to individual liability for breaching the subject regulation and, as such, the second cause of action is dismissed as against them. However, this is not a cognizable basis to dismiss against Sponsor. Contrary to defendants' argument, this claim does not duplicate the first cause of action. This claim deals with the specific failure to appoint responsible persons to take the Sponsor's place, while the other claim deals with building defects.

Third cause of action for fraudulent conveyance against Sponsor, Sackman, and Hefelfinger

The third cause of action alleges that, upon information and belief, said defendants engaged in fraudulent conveyance by causing Sponsor to transfer all its assets to Sackman and Hefelfinger. At the time of the alleged transfer, defendants knew that the building was defective

in construction and workmanship, and that the condominium and the unit owners had incurred and would continue to incur substantial costs to remedy the defects. Upon information and belief, Sponsor was insolvent or rendered insolvent as a result of the transfer.

The complaint does not specify the applicable parts of the Debtor and Creditor Law (DCL), but subsequently plaintiff indicated that the claim was based on constructive fraudulent conveyance. A constructive fraudulent conveyance is a conveyance made without fair consideration where (i) the transferor is insolvent or will be rendered insolvent by the transaction in question (DCL § 273); (ii) the transferor is engaged in or about to engage in a business for which its capital is unreasonably small (DCL § 274); or (iii) the transferor believes that it will incur debts beyond its ability to pay (DCL § 275).

The allegations fail to identify what was transferred, or when, and do not state that the transfer was made without fair consideration. Defendants argue that the allegations are conclusory. At the court's request, the parties submitted letter briefs regarding whether fraudulent conveyance could be alleged upon information and belief. The court concludes that, in general, in the First Department, constructive fraudulent claims made upon information and belief are insufficiently alleged (*L&M 353 Franklyn Ave. LLC v Steinman*, 202 AD3d 440, 440 [1st Dept 2022]; *Carlyle, LLC v Quik Park 1633 Garage LLC,* 160 AD3d 476, 477 [1st Dept 2018]; *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]). Nonetheless, causes of action for constructive fraudulent conveyance made upon information and belief may be sustained where sufficiently detailed (*see Board of Mgrs. of the 369 Harman St. Condominium v 369 Harman LLC,* 2018 NY Slip Op 32026[U], * 10 [Sup Ct, NY County 2018]). The claims there are more filled out with facts than the claims in the instant case.

It should also be noted that constructive fraudulent conveyance is not subject to the particularity requirement of CPLR 3016 (b) (*Board of Mgrs. of the Lore Condominium v Gateway IV LLC*, 169 AD3d 617, 618 [1st Dept 2019], citing *Ridinger v West Chelsea Dev. Partners LLC,* 150 AD3d 559, 560 [1st Dept 2017]). CPLR 3013 is satisfied so long as the pleading gives notice to an adversary of the transactions or occurrences giving rise to a claim (*Colleran v Rockman*, 232 AD2d 322, 323 [1st Dept 1996]).

As defendants contend, the DCL § § 273, 274, and 275 claims lack a factual basis. On the other hand, giving a liberal reading to the allegations that the building's defects are serious and that Sponsor's principals placed Sponsor in a position where it does not have the money to pay for repairs, and considering that defendants have been given some notice that the claim is that the principals transferred Sponsor's assets to themselves, the DCL § § 273, 274, and 275 claims are dismissed without prejudice to replead (*see PJSC Natl. Bank Trust v Pirogova,* 2022 NY Slip Op 30367[U], *2 [Sup Ct, NY County 2022]).

Fourth cause of action for breach of contract against SEI

Plaintiff alleges that Sponsor and the sponsor-designated board hired SEI to serve as the condominium's management company. Paragraph 77 of the complaint alleges that SEI breached the contract to act as the condominium's property manager by (a) failing to secure the proper completion of construction work performed upon the property and (b) failing to assert or pursue claims against the parties responsible for defects in the construction (NYSCEF 10, ¶ 77 [a], [b]).

During oral argument, plaintiff withdrew Paragraphs 77 (a) and (b) claims (NYSCEF 36 at 32-33). Plaintiff and the court agreed that the duties outlined in those sections did not belong to SEI.

Paragraph 77 (c) alleges that SEI breached the management contract by expending monies to correct defects in the building, when these expenses should have been borne by Sponsor. The court stated that this allegation was contradictory beyond the purposes of the rule of pleading in the alternative, given that plaintiff was pleading facts that were "diametrically opposed" (NYSCEF 36 at 40). On the one hand, plaintiff alleged that SEI paid the expenses with the board's authorization; for that reason, plaintiff was suing individual board members for improper expenditures. On the other hand, plaintiff alleged that SEI paid the expenses without the authorization of the board (NYSCEF 36 at 38-40). The court indicated that the fourth cause of action would be dismissed without prejudice to replead.

Fifth cause of action against SEI for an accounting

During oral argument, the court denied the motion to dismiss this claim (NYSCEF 33 at 12).

Sixth cause of action against the individual defendants for breach of fiduciary duty

Plaintiff alleges that Sponsor designated Sackman, Hefelfinger, Blake, and Concepcion to serve as members of the condominium's board of managers. As board members, defendants owed fiduciary duties to the condominium and to the unit owners to manage the affairs of the condominium honestly, free of conflicts of interest, and in the best interests of the condominium and the unit owners.

Paragraph 96 of the complaint alleges that each defendant board member breached its fiduciary duty by (a) failing to secure the proper completion of construction work being performed upon the property; (b) protecting their interests as principals, officers, directors and/or employees of Sponsor at the expense of the condominium; and (c) failing to assert claims against Sponsor or other responsible parties arising from the defects in the building. During oral

argument, the court determined that "[paragraph] 96 (a) is clearly duplicative" of the breach of contract claim and "is not an independent tort" (NYSCEF 33 at 31). A cause of action for breach of fiduciary duty which duplicates a breach of contract claim will be dismissed (*William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]). As for paragraph 96 (b), the court stated, "it's so conclusory, it really is nothing more than a conclusory allegation" (NYSCEF 33 at 31). Claims in Paragraphs 96 (a) and (b) of the Complaint are dismissed.

A fiduciary, in the context of condominium management, is "one who transacts business, or who handles money or property, not for their own benefit but for the benefit of another person" (*Caprer v Nussbaum,* 36 AD3d 176, 192 [2d Dept 2006], citing *Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 325 [2d Dept 1993]). Members of a condominium board owe a fiduciary duty to the unit owners (*Caprer*, 36 AD3d at 191). Condominium board members, "who cause the performance of an affirmative tortious act of malfeasance may be subject to personal liability" (*Pomerance v McGrath*, 143 AD3d 443, 447-48 [1st Dept 2016]). While participation in breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]).

To state a claim for the tort of breach of fiduciary duty, plaintiff must allege that individual defendants acted outside of their authority as board members (*Board of Mgrs. of the Latitude Riverdale Condominium v 3585 Owner, LLC,* 199 AD3d 441, 442 [1st Dept 2021]; *Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 57 [1st Dept 2012]). "The business judgment rule protects individual board members from being held liable for decisions, such as those concerning the manner and extent of repairs, that were within the scope of their authority" (*Berenger v 261*

W. LLC, 93 AD3d 175, 184 [1st Dept 2012]). The rule prohibits judicial inquiry into board actions taken in good faith and honest judgment, and for the legitimate furtherance of corporate purposes (*Fletcher,* 99 AD3d at 48). Judicial scrutiny becomes appropriate where fiduciaries' conduct indicates self-dealing, bad faith, or other misconduct (*Cannings v East Midtown Plaza Hous. Co., Inc.,* 33 Misc 3d 1216[A], 2011 NY Slip Op 51947[U], *9 [Sup Ct, NY County 2011], *affd* 104 AD3d 443 [1st Dept 2013]; *lv to appeal den* 21 NY3d 864 [2013]).

The complaint does not directly allege bad faith or acting outside of one's authority. However, such conduct is suggested by the allegation that board members misused condominium funds by using said funds to pay for repairs which Sponsor should have paid. That aspect of the fiduciary claim is not dismissed.

Paragraph 96 (c) alleges that the board members breached their fiduciary duty by failing to pursue claims against Sponsor for the defects in the condominium (NYSCEF 10). Upon the court's request, each side furnished a letter brief addressing whether there exists a cognizable cause of action based on such an allegation. Plaintiff found two cases in which the courts declined to dismiss breach of fiduciary claims which were based on the allegation, among others, that board members failed to sue the sponsor (*Capellan v Jackson Avenue Realty LLC*, 2011 NY Slip Op 33871[U], *6 [Sup Ct, Queens County 2011]; *The Bd. of Mgrs. of the Bromley Condominium v 83rd St. Invs., L.P.*, 1992 WL 12664328 [Sup Ct, NY County 1992]).

Defendants argue that plaintiff cannot properly allege breach of fiduciary duty based on failing to sue the sponsor without providing supporting facts. Defendants point out that in *Cappellan*, cited in plaintiff's letter brief, the plaintiffs alleged that the sponsor-controlled board members voted against the hiring of an attorney to pursue claims against the sponsor and the principal, and that the sponsor induced those board members to refuse to attend board meetings

so that a quorum could not be obtained and not to take any action to enforce construction contracts. *Bromley,* also cited by plaintiffs, does not relate the factual allegations with regard to failing to sue the sponsor, but defendants argue that those allegations must have been present; otherwise, the claim would have been dismissed.

While the claim of not suing the sponsor lacks supportive facts, together with the allegations that Sponsor controlled the board, and the board used monies belonging to the condominium to pay costs and expenses that should have been borne by Sponsor, it states a claim for breach of fiduciary duty.

Seventh cause of action for conversion against all defendants

The complaint alleges that defendants improperly used and permitted to be used monies belonging to the condominium to pay the costs and expenses of construction and repair work for which the Sponsor was responsible pursuant to the offering plan. At oral argument, the court determined that the conversion claim duplicated the breach of contract claim and that the conversion claim should be dismissed (NYSCEF 33 at 7-8), citing to the case of *ABL Advisor LLC v Peck* (147 AD3d 689, 691 [1st Dept 2017]).

CONCLUSION

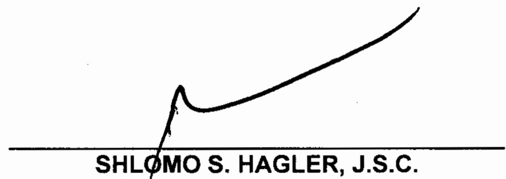
On the basis of the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint is decided as set forth below.

1) First cause of action – the motion to dismiss the individual defendants Carter Sackman, James Hefelfinger, Francis Blake, and Cynthia Concepcion from the first cause of action is granted;

2) Second cause of action – the motion to dismiss is granted to the extent that the second cause of action is dismissed as against individual defendants Carter Sackman and James Hefelfinger, and the motion is otherwise denied;
3) Third cause of action – the third cause of action is dismissed without prejudice with leave to replead within thirty (30) days;
4) Fourth cause of action – the fourth cause of action is dismissed without prejudice with leave to replead within thirty (30) days;
5) Fifth cause of action – the motion to dismiss is denied;
6) Sixth cause of action – the motion to dismiss is denied; and
7) Seventh cause of action – the motion to dismiss is granted, and the claim is hereby dismissed; and it is further

ORDERED that defendants shall answer the complaint within 30 days of the date of this order.



10/6/2022
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
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APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE