Board of Mgrs. of the 165 E. 62nd St. Condominium v Churchill E 62nd LLC
2023 NY Slip Op 31828(U)
May 25, 2023
Supreme Court, New York County
Docket Number: Index No. 656401/2022
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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BOARD OF MANAGERS OF THE 165 E. 62ND STREET CONDOMINIUM,

Plaintiff,

-against-

CHURCHILL E 62ND LLC, JUSTIN EHRLICH, SORABH MAHESHWARI, COUNTRYWIDE BUILDERS INC., "JOHN DOE" Nos. 1 through 10, and "JANE DOE" Nos. 1 through 10, said names being fictitious and unknown to plaintiff but intending to be the recipients of any voidable transfers made by CHURCHILL E 62ND LLC, JUSTIN EHLRICH or SORABH MAHESHWARI,

Defendants.

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Index No. 656401/2022
[Mot. Seq. Nos. 001-002]

DECISION AND ORDER

HON. NANCY M. BANNON:

In this action, *inter alia*, to recover damages for breach of contract and fraud in the inducement, defendants Churchill E 62nd LLC, Justin Ehrlich, and Sorabh Maheshwari jointly move for dismissal of the second and the fifth causes of action in the complaint, pursuant to CPLR 3211 and CPLR 3016 (b), and for dismissal of the complaint in its entirety insofar as asserted against Ehrlich and Maheshwari, pursuant to Limited Liability Company Law §§ 609 and 610 (Motion Sequence No. 001). The plaintiff opposes the motion and moves pursuant to CPLR 3215 for the entry of a default judgment against defendant Countrywide Builders Inc. (Motion Sequence No. 002). Countrywide Builders Inc. opposes plaintiff's motion.

I. BACKGROUND

Plaintiff Board of Managers of the 165 E. 62nd Street Condominium (the Condo) commenced this action to recover damages arising from the allegedly defective conversion/construction of a building into a 7-story residential condominium located at 165 East

62nd Street, New York, New York ("the Building"). The defendants in this action include Churchill E 62nd LLC, the sponsor of the condominium development ("the Sponsor"), and the Sponsor's principals, Justin Ehrlich and Sorabh Maheshwari (together "the Sponsor's Principals"), as well as the general contractor, Countrywide Builders Inc. ("the Contractor").

According to the complaint, the Sponsor breached its obligations under the Condominium Offering Plan ("the Offering Plan") incorporated by reference in the purchase agreements for each unit, by failing to construct the Building and individual units in accordance with the promises and representations made in the Offering Plan. Using the Offering Plan as a promotional tool, the Sponsor began marketing individual condominium units for sale and entering into purchase agreements starting in or around July 2019. It continued selling units throughout the Building's construction and thereafter, with the first closing on the sale of a unit occurring on or about February 24, 2021.

In the Offering Plan and other marketing materials, as well as through communications with prospective purchasers, the Sponsor represented that the Building and the individual condominium units would be "of a premier luxury caliber and constructed with the highest quality of materials and workmanship and in accordance with all applicable government codes, rules, regulations and the representations in the architect's Description of Property and Building Condition" (Complaint at ¶ 27). The plaintiff maintains that these representations were false, inasmuch as "multiple promised and/or code-required Building components and features are missing and many of the components and features that are installed suffer from material defects, exhibit poor workmanship and shoddy construction practices, or are contrary to what Sponsor depicted the Building and its units to be" (*id.* at ¶ 28).

In addition, pursuant to the Offering Plan, the Sponsor agreed to correct all latent and non-latent defects. Despite receiving timely, written notice of all defects, it has failed to repair or correct many outstanding issues.

The Sponsor also failed to obtain

> "a permanent (final) Certificate of Occupancy ('PCO') for the Building or comply with its obligation [under the Offering Plan] to continuously renew the temporary Certificate of Occupancy ("TCO") for the Building until a PCO is issued. . . . Moreover, upon information and belief, Sponsor has not complied with its obligations to escrow with its attorneys an amount sufficient to ensure that a PCO is obtained, as required by the Offering Plan"

(*id.* at ¶ 31).

Furthermore, at the time the Sponsor began closing on the sale of individual condominium units, it was indebted to a private lender, and obligated under its loan agreement to pay substantially all the sales proceeds to the lender until the debt was satisfied. At some point, the Sponsor closed on a sufficient number of condominium units so as to repay the lender in full. After paying the lender in full, the Sponsor closed on the remainder of the units. As the Sponsor completed these additional closings, it retained little, if any, of the sales proceeds, instead distributing those proceeds pro rata to Sponsor investors, and/or members or affiliates of Sponsor, including, but not limited to the Sponsor's Principals, and John Doe and Jane Doe defendants, in accordance with their equity interests in the Sponsor ("the Equity Distributions"). The plaintiff maintains that these Equity Distributions rendered the Sponsor insolvent and were made with the intent to defraud and without fair consideration, prioritizing the Sponsor's investors, members, and affiliates over the Sponsor's creditors, which include the Condo and the individual condominium unit owners.

With respect to the Contractor, the complaint alleges that the Condo is the successor-in-interest to the Sponsor's construction contracts with the Contractor and that the Contractor

breached its obligation under those contracts by, among other things, negligently and improperly performing the construction work and failing to ensure that it was performed in accordance with the construction plans and specifications.

In the complaint, the Condo asserts five causes of action. The first cause of action seeks damages for breach of contract against the Sponsor. The second cause of action seeks damages for fraud in the inducement against the Sponsor and the Sponsor's Principals (together "the Sponsor Defendants"). The third and fourth causes of action seek damages, respectively, for breach of contract and negligence against the Contractor. The fifth cause of action alleging voidable transfers, seeks to set aside the Equity Distributions as fraudulent, or recover damages, under the Debtor and Creditor Law, as well as attorney's fees.

The Sponsor Defendants now jointly move, pre-answer, for dismissal of the second cause of action for fraud in the inducement and the fifth cause of action for voidable transfers pursuant to CPLR 3211 and CPLR 3016 (b), and for dismissal of the complaint in its entirety insofar as asserted against the Sponsor's Principals pursuant to Limited Liability Company Law §§ 609 and 610 (Motion Sequence No. 001). The Condo opposes the motion and moves for the entry of a default judgment against the Contractor on the ground that the Contractor has failed to appear or answer the complaint (Motion Sequence No. 002). The Contractor opposes the Condo's motion. The motions are decided as follows.

II. DISCUSSION

A. The Sponsor Defendants' Motion to Dismiss (Seq. No. 001)

1. Fraud in the Inducement (Second Cause of Action)

The Sponsor Defendants argue that the second cause of action for fraud in the inducement must be dismissed pursuant to CPLR 3211 (a) (7) as preempted by the Martin Act.

They also contend that the fraud claim is duplicative of the breach of contract claim and fails to assert allegations with the specificity required by CPLR 3016 (b).

On a motion to dismiss under CPLR 3211 (a) (7), the facts alleged are presumed to be true and the plaintiff is accorded "every favorable inference, unless the allegations actually constitute legal conclusions or are inherently incredible or unequivocally contradicted by documentary evidence" (*Landmark Ventures, Inc. v InSightec, Ltd*., 179 AD3d 493, 494 [1st Dept 2020]). Where a cause of action is based upon fraud, "the circumstances constituting the wrong [must] be stated in detail" (CPLR 3016 [b]).

Pursuant to the Martin Act, the Attorney General is authorized "to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State" (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243 [2009]). "The Martin Act makes it illegal for a person to make or take part in a public offering of securities consisting of participation interests in real estate unless an offering statement is filed with the Attorney General (General Business Law § 352-e [1] [a])[,] details the numerous items of information that an offering statement must include," and "authorizes the Attorney General to enforce its provisions and implementing regulations" (*id.* at 243-244).

It is well-settled that the Martin Act preempts common-law fraud claims that are "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. v. J.P. Morgan Inv. Mgmt. Inc*., 18 NY3d 341, 341 [2011]). As such, fraud claims predicated solely on allegations that a defendant *omitted* to disclose information in an offering plan required under the Martin Act are preempted, but claims based upon allegations of *affirmative misrepresentations* in the offering plan, rather than omissions, are not precluded (*see Board of Mgrs. of the Latitude Riverdale Condominium v 3585*

Owner, LLC, 199 AD3d 441, 442 [1st Dept 2021]; *Board of Mgrs. of the Walton Condominium v 264 H2O Borrower, LLC,* 180 AD3d 622 [1st Dept 2020]; *Board of Mgrs. of the S. Star v WSA Equities, LLC,* 140 AD3d 405, 405 [1st Dept 2016]).

Here, the fraud cause of action is predicated on allegations that the Building's construction does not comply with express statements made in the Offering Plan regarding the conditions, features, and components of the Building and individual units. Specifically, the fraud cause of action sets forth the following alleged misrepresentations:

a. no circulation pumps are installed between each hot water heater and no insulated storage tank exists on the roof level;
b. no shut off valves are installed for the hose bibbs in apartments THE, THW, PH6 and PH7 and the shut off valve serving the hose bibb in the cellar has no handle and is not labeled;
c. the secondary bathrooms do not contain a separate shower with enclosure and double vanity;
d. the Building's skylight is not made of laminate glass;
e. there is no fire-rated wall in the public corridor;
f. ceramic tiles, rather than marble tiles, are installed in the bathrooms and kitchen backsplashes;
g. no wall and door exists separating the corridor from units PH6 and PH7;
h. double basin sinks are inexplicably absent from the units; and
i. a total of three gas-fired hot water heaters are not installed at the roof level

(Complaint at ¶ 134). These claims are not precluded by the Martin Act in that they are allegations of affirmative misrepresentations, not omissions. For example, the Attorney General's implementing regulations require a description of the building's plumbing and drainage system, pumps, storage, and location, as well a description of the heating system

(*see* 13 NYCRR 20.7). The complaint is not alleging that the Sponsor failed to disclose such information. Rather, the complaint alleges that the Sponsor made affirmative misrepresentations with regard to this information.

That said, the Condo also bases the fraud cause of action on allegations that the Offering Plan and amendments falsely claim that the Building's construction complies with all applicable laws, codes and regulations when, in fact, the Building suffers from "substantial and pervasive water infiltration problems" which the Sponsor Defendants were aware of and failed to disclose (i*d.* at ¶ 138). Specifically, there are multiple leaks in the roof, exterior walls, retaining walls, unit windows, and exterior doors, as well as a grossly inadequate drainage system which has yielded excessive moisture readings throughout the Building. The Condo alleges that such readings are a strong predictor of pervasive mold conditions in the walls and other areas of the premises.

These alleged defects were required to be disclosed under the Attorney General's implementing regulations (*see* 13 NYCRR 20.7 ["For existing buildings, the condition of all systems and materials must be fully described. Such report(s) shall disclose all defective conditions apparent upon inspection, and shall note any defective condition which is hazardous or which requires immediate repair to prevent further deterioration"]). Therefore, such allegations constitute an alleged omission in Martin Act disclosures and are therefore preempted by the Martin Act (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 245 [2009][sponsor's alleged failure to disclose various construction and design defects in the offering plan amendments which caused significant water damage to the building and led to substantial water leaks, systems failures, widespread condensation and levels of mold posing serious health risks, did not give rise to a claim for common-law fraud because "[b]ut for the

Martin Act and the Attorney General's implementing regulations, . . . the sponsor defendants did not have to make the disclosures"]).

Accordingly, to the extent the Condo's fraud in the inducement claim is based upon omissions in the offering plan, the claim is preempted (Complaint at ¶ 138). To the extent it is based upon allegations that defendants affirmatively misrepresented, as part of the offering plan, a material fact about the condominium, it is not preempted by the Martin Act (Complaint at ¶ 134).

Nevertheless, with respect to the claims that are not preempted by the Martin Act, the Condo cannot establish reasonable reliance upon the Sponsor Defendants' representations. Reasonable reliance is an element of a claim for fraud (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc*., 115 AD3d 128, 135 [1st Dept 2014] [internal citation omitted][to state a claim for fraud, plaintiff must allege "misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury"]; *Von Ancken v 7 E. 14 L.L.C*., 171 AD3d 440, 441 [1st Dept 2019]). Relevant to the issue of reasonable reliance, the complaint alleges that the execution of the purchase agreements for each unit and the closing for all units occurred *after* the Building's construction was substantially complete. The complaint alleges, therefore, that the affirmative misrepresentations about the Building were false at the time they were made in that the Building was already erected and renovated, and the true conditions, features and components of the Building were already known. Since the Offering Plan and purchase agreement provide for pre-closing inspection rights, the Condo cannot establish reasonable reliance on a representation concerning these conditions because they "had the means to ascertain the truth of the condition" (*id*.; *see also Board of Mgrs. of the Latitude Riverdale Condominium v 3585 Owner*, LLC, 199 AD3d at 442 ["Board cannot

establish as a matter of law that it reasonably relied upon the Offering Plan's statements about the brand of toilet, type of roofing material, and existence of a lobby vestibule, as the unit purchasers had the means to ascertain the truth of the condition when they inspected the apartments and buildings"]).

In addition, to the extent the claim is not preempted by the Martin Act, it is duplicative of the Condo's breach of contract claim asserted against the Sponsor. The Appellate Division, First Department has explained the following with regard to the issue of whether a fraudulent inducement claim alleged in a complaint is duplicative of a breach of contract claim:

> "It is axiomatic in order to state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury. In the context of a contract case, the pleadings 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. Moreover, these misrepresentations of present fact must be collateral to the contract and [must have] induced the allegedly defrauded party to enter into the contract. Therefore, [a]s a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from, or in addition to, the breach of contract"

(*Wyle Inc. v ITT Corp*, 130 AD3d 438, 438-439 [1st Dept 2015][internal quotation marks and citations omitted]).

Here, the Condo fails to allege that the Sponsor Defendants breached any duty to the Condo other than contractual duties predicated upon the terms of the offering plan, incorporated by reference in their purchase agreements. The alleged fraudulent misrepresentations at issue are not collateral or extraneous to the offering plan. The fraudulent inducement claim merely restates "the contract claim in terms of fraud and misrepresentation" and "is therefore duplicative of the contract claim" (*FJ Vulis, LLC v Val*, 166 AD3d 469, 469 [1st Dept 2018]; *see Board of Mgrs. of the Latitude Riverdale Condominium v 3585 Owner, LLC*, 199 AD3d at 442; *Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 684 [2d

Dept 2016]; *20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735 [1st Dept 2013]; *Board of Mgrs. of the 15 Union Sq. W. Condominium v BCRE 15 Union Sq. W. LLC*, 2021 NY Slip Op 30253 [U][Sup Ct, NY County, 2021]; *Alexander Condominium v East 49th St. Dev. II, LLC*, 60 Misc 3d 1232 [A], 2018 NY Slip Op 51288[U], [Sup Ct, NY County, 2018]); *Board of Mgrs. of the Vetro Condominium v 107/31 Development Corp*., 2014 NY Slip Op 32748[U] [Sup Ct, NY County, 2014]).

The Sponsor Defendants contend that the fraud claim cannot, in any event, be dismissed as duplicative against the Sponsor's Principals because the breach of contract claim is not asserted against the Sponsor's Principals. It is only asserted against the Sponsor. However, as already discussed, the fraud claim, insofar as it is not preempted by the Martin Act, is also subject to dismissal for lack of reasonable reliance. As such, this argument is academic.

Thus, the second cause of action for fraud in the inducement is dismissed.

2. Voidable Transfers (Fifth Cause of Action)

The fifth cause of action alleging voidable transfers seeks to set aside the Equity Distributions or recover damages under the Debtor and Creditor Law. The Condo also seeks an award of attorney's fees pursuant to Debtor and Creditor Law § 276-a. The Sponsor defendants assert that this cause of action must be dismissed because the Condo fails to allege a fiduciary relationship between them and the Condo. They also maintain that this claim is subject to dismissal because the allegations are made on "information and belief" and fail to plead fraudulent intent with sufficient particularity pursuant to CPLR 3016 (b). They contend that since the claim seeking to set aside the Equity Distributions is insufficiently pleaded, the Condo is not entitled to award of attorney's fees under Debtor and Creditor Law § 276-a.

As an initial matter, it is undisputed that the transfers at issue occurred after April 4, 2020, and are therefore governed by the amendments to the Debtor and Creditor Law effected by the New York Uniform Voidable Transactions Act ("the UVTA"), which became effective April 4, 2020 and applies to transactions made on or after that date (L 2019, ch 580 §7). At this point in time, there is a dearth of reported case law applying the UVTA.

The Condo's opposition papers indicate that it is relying on Debtor and Creditor Law § 273, as amended by the UVTA, to void the Equity Distributions. The statute, as amended, provides:

> "**273. Transfer or obligation voidable as to present or future creditor**
>
> **(a)** A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.
>
> **(b)** In determining actual intent under paragraph one of subdivision (a) of this section, consideration may be given, among other factors, to whether:
>
> (1) the transfer or obligation was to an insider;
> (2) the debtor retained possession or control of the property transferred after the transfer;
> (3) the transfer or obligation was disclosed or concealed;
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) the transfer was of substantially all the debtor's assets;
> (6) the debtor absconded;
> (7) the debtor removed or concealed assets;

> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.
>
> **(c)** A creditor making a claim for relief under subdivision (a) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence."

The court notes that the category of voidable transaction set forth above in section 273(a)(1) is akin to causes of action involving intentional fraudulent conveyances under the former Debtor and Creditor Law § 276. The categories set forth above in section 273 (a)(2) are analogous to causes of action for constructive fraudulent conveyances under former Debtor and Creditor Law §§ 273 and 274.

(i) Actual Intent under Debtor and Creditor Law § 273 (a)(1)

Section 273 (a) (1) encompasses transactions made "with actual intent to hinder, delay or defraud any creditor of the debtor." Section 273 (b) sets forth 11 factors, which derive from the common law "badges of fraud" (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]), constituting an inexhaustive list to be considered in determining "actual intent" under section 273 (a)(1).

Courts have required intentional fraudulent conveyance claims under the former Debtor and Creditor Law § 276 to be plead with sufficient particularity pursuant to CPLR 3016(b) and have held that the allegations concerning such transfers cannot be alleged "on information and belief" (*see Avilon Auto. Group v Leontiev*, 194 AD3d 537, 539 [1st Dept 2021]; *RTN Networks, LLC v Telco Group, Inc*., 126 AD3d 477, 478 [1st Dept 2015]). Badges of fraud must also be

pleaded with particularity (*see Avilon Auto. Group v Leontiev*, 194 AD3d at 539). The Condo provides no reason why a claim under the current section 273 (a) (1) for "actual intent to . . . defraud" should not be subject to the same requirements and the court perceives no reason to depart from this requirement when applying the amended statute. Since the relevant allegations in this regard are made upon "information and belief" and the references made to factors set forth in section 273 (b) are conclusory, the Condo's claim, insofar as it is brought under Debtor and Creditor Law § 273 (a)(1), is dismissed.

(ii) Constructive Intent under Debtor and Creditor Law § 273 (a)(2)

It is well settled that claims for fraudulent conveyance under former Debtor and Creditor Law §§ 273 and 274 are not subject to the particularity requirement of CPLR 3016 because they are "based on constructive fraud" (*Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]; *see Hudson Spring Partners, L.P. v. P+M Design Consultants, Inc.*, 210 AD3d 553, 554 [1st Dept 2022]; *Board of Mgrs. of E. Riv. Tower Condominium v Empire Holdings Group, LLC*, 175 AD3d 1377, 1379 [2d Dept 2019]; *Board of Mgrs. of the Lore Condominium v Gateway IV LLC*, 169 AD3d 617, 618 [1st Dept 2019]). Furthermore, contrary to the Sponsor Defendants' contention, "no confidential or fiduciary relationship is required for constructive fraudulent conveyances" (*Board of Mgrs. of the Latitude Riverdale Condominium v 3585 Owner, LLC*, 199 AD3d at 443; s*ee Board of Mgrs. of Be@William Condominium v 90 William St. Dev. Group LLC*, 187 AD3d 680, 681-682 [1st Dept 2020]). Thus, to the extent the Condo's claim seeks to void the distributions under Debtor and Creditor Law § 273 (a)(2), the Sponsor Defendants' arguments in this regard do not provide a basis for dismissing the claim.

The complaint alleges that the Sponsor sold additional units after repaying its lender in full and rather than retaining the proceeds of the additional sales, the Sponsor distributed them

"*pro rata* to Sponsor investors, and/or members or affiliates of Sponsor, including but not limited to Ehrlich, Maheshwari, and John Doe and Jane Doe defendants, in accordance with their equity interests in Sponsor" (Complaint at ¶ 159). Furthermore, the distributions were made "without receiving a reasonably equivalent value in exchange" (Complaint at ¶ 160). The distributions were also made when the Sponsor "was engaged or about to engage in a business transaction for which its remaining assets were unreasonably small in relation to the business or transaction" and when the Sponsor "intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due" (Complaint at ¶¶ 164, 165). In light of these allegations, the Condo has satisfied the liberal-pleading standard and the Sponsor Defendants' motion to dismiss this cause of action, insofar as it is based upon Debtor and Creditor Law § 273 (a)(2) is denied.

(iii) Attorney's Fees under Debtor and Creditor Law § 276-a

Debtor and Creditor Law § 276-a, as amended by the UVTA, grants the prevailing party a right to reasonable attorney's fees in certain circumstances. The Sponsor Defendants argue that the request for attorney's fees should be dismissed on the ground that the viability of this request depends on the viability of the fraudulent conveyance claim. They argue that since the fraudulent conveyance claims must be dismissed, the request for attorney's fees should likewise be dismissed. However, the Condo's claim under Debtor and Creditor Law § 273 (a)(2) remains viable at this juncture. As such, the Sponsor Defendants' contention in this regard lacks merit. Since the Sponsor Defendants raise no other basis upon which to dismiss the request for attorney's fees, this branch of their motion is denied.

(iv) The Condo's Request for Sanctions

The Condo asks this court to sanction the Sponsor Defendants pursuant to 22 NYCRR 130-1.1 on the ground that some of the arguments raised in support of their motion to dismiss the Debtor and Creditor Law claims are meritless. The arguments at issue do not reach a level of frivolousness or harassment so as to warrant the imposition of monetary sanctions and the award of costs pursuant to 22 NYCRR 130-1.1. Thus, the Condo's request for sanctions is denied.

3. The Complaint insofar as asserted against the Sponsor's Principals

The Sponsor's Principals argue that the complaint should be dismissed in its entirety insofar as asserted against them because the allegations are based on their capacity as "principals" or "managers" of the Sponsor LLC and is therefore barred by the LLC Law. This request, insofar as it concerns the cause of action for fraud in the inducement, is rendered academic given that this cause of action has already been dismissed on other grounds.

The only other cause of action in the complaint that names the Sponsor's Principals as defendants is the claim seeking to set aside the transfer of the Equity Distributions under the Debtor and Creditor Law. However, the Sponsor's Principals do not address whether as alleged transferees, and beneficiaries of the distributions, they are proper defendants to the cause of action brought pursuant to the Debtor and Creditor Law (*see Schwartz v Boom Batta, Inc*., 137 AD3d 512, 512-513 [1st Dept 2016]; *Emirates NBD Bank P.J.S.C. v System Construct LLC*, 2022 NY Slip Op 30489(U), ** 4 [Sup Ct, NY County 2022]).

B. The Condo's Motion for a Default Judgment against the Contractor (Seq. No. 002)

The Condo argues that it is entitled to the entry of a default judgment against the Contractor because the Contractor failed to timely answer the complaint despite being duly served and the Condo has viable claims against the Contractor for breach of contract and negligence. For the following reasons, the motion is granted.

CPLR 3215 (f) provides that on an application for a default judgment, the applicant must submit "proof of service of the summons and the complaint and . . . proof of the facts constituting the claim, the default and the amount due" (CPLR 3215 [f]). "To demonstrate facts constituting the claim, the movant need only proffer proof sufficient to enable a court to determine that a viable cause of action exists. The movant may do so either by submission of an affidavit of merit or by verified complaint, if one has been properly served" (*Bigio v Gooding*, 213 AD3d 480, 481 [1st Dept 2023][internal quotation marks and citations omitted]).

In order to avoid the entry of default judgment upon its failure to submit a timely answer, a defendant must "come forward with a reasonable excuse for its default and . . . demonstrate a meritorious defense to the action" (*Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]; *see Nationstar Mtge. Llc v Ahmed*, 194 AD3d 575, 575 [1st Dept 2021]). "The determination of what constitutes a reasonable excuse lies within the discretion of the trial court" (*Redbridge Bedford, LLC v 159 N. 3rd St. Realty Holding Corp.*, 175 AD3d 1569, 1571 [2d Dept 2019]; *see M&E 73-75 LLC v 57 Fusion LLC*, 121 AD3d 528, 529 [1st Dept 2014]).

In seeking the entry of a default judgment, the Condo submits evidence that it served the Contractor by delivery of the summons and complaint to the Secretary of State's office on May 23, 2022 (CPLR 311[a][1]; Business Corporation Law § 306 [b][1])(NYSCEF Doc. No. 14), and that an additional copy was also mailed to the Contractor at its last known address on July 6, 2022, with notice indicating that service was made upon the Secretary of State on May 23, 2022 (NYSCEF Doc. Nos 15). The Condo also submits evidence of the facts constituting its claims against the Contractor (NYSCEF Doc. No. 12), as well as the Contractor's failure to appear or answer the complaint within the time allowed (NYSCEF Doc. No. 11). Thus, to avoid the entry

of default judgment, the Contractor must demonstrate a reasonable excuse for its default and a meritorious defense to the action.

In opposition to the motion, the Contractor submits the affidavit of its president, Meyer Weber (NYSCEF Doc. No. 22). Weber does not dispute that service was properly effectuated or deny that he received a copy of the summons and complaint in time to interpose a timely appearance or answer. The only statement set forth in Weber's affidavit concerning an excuse for failing to answer the complaint is the following:

> "I failed to arrange an earlier response for [the Contractor] due to the fact that notice of the lawsuit came by mail at a time when some staff was on summer vacation. I was also under the impression the [Sponsor] was retaining an attorney who would put in an answer for both of us"

(*id.* at ¶ 7). Weber provides no elaboration. He does not state that he was away on vacation when the Contractor was served and fails to explain why some of his staff being on vacation lead to a failure to timely appear or interpose an answer. Nor does he provide an explanation for why he was under the erroneous impression that the Sponsor would be retaining an attorney to submit a joint answer for both the Sponsor and the Contractor. The Contractor also submits an attorney affirmation wherein the Contractor's counsel sets forth the conclusory statement that the Contractor has "a reasonable excuse for failing to appear in this action." (NYSCEF Doc. No. 21, at ¶¶ 4, 13). Assuming counsel is referring to the inadequately explained excuse set forth in Weber's affidavit, counsel provides no caselaw to support the proposition that this court should deem such an excuse to be reasonable. In light of the foregoing, the Contractor's submissions are insufficient to demonstrate a reasonable excuse for the default (*see generally Wells Fargo Bank, N.A. v Krauss*, 128 AD3d 813, 814 [2d Dept 2015]["proffered excuse, that (defendant's) default in appearing and answering the complaint was due to a clerical error, was unsubstantiated, conclusory, and inadequately explained, and, therefore, did not constitute a

reasonable excuse for the default"]; *Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d at 790 ["Defendant's claim of law office failure being perfunctory and unsubstantiated, it was insufficient to avoid the entry of default judgment"]).

The absence of a reasonable excuse for the Contractor's default renders it unnecessary to determine whether the Contractor sufficiently demonstrated the existence of a potentially meritorious defense *(see Jansons Associated Inc. v 12 E. 72nd LLC*, 185 AD3d 499, 500 [1st Dept 2020].

III. CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendants Churchill E 62nd LLC, Justin Ehrlich, and Sorabh Maheshwari is granted to the extent that the second cause of action is dismissed in its entirety and so much of the fifth cause of action as is based upon Debtor and Creditor Law § 273 (a) (1), as amended by the UVTA, is dismissed, and the motion is otherwise denied (Motion Sequence No. 001); and it is further

ORDERED that the plaintiff's motion for leave to enter a default judgment against defendant Countrywide Builders Inc. (Motion Sequence No. 002) is granted as to the issue of liability, damages to be determined at trial; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

Dated: May 25, 2023