NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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FORDHAM DORMITORY TOWER LLC, FORDHAM ROAD & CONCOURSE RETAIL LEASING LLC, and IVAN DIAZ,

Index No. **32311/2020E**

Plaintiffs,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

MENDEL TRESS, MARK TRESS, SUN CONCOURSE LLC, AA SUN CONCOURSE LLC, ZM SUN CONCOURSE LLC, 2530 GC LLC, MORRIS SABBAGH, KASSIN SABBAGH REALTY LLC, STANLEY CONWAY, and CONWAY TOWNE REALTY,

Defendants.

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The following papers numbered 1 to 9, read on these motions, noticed on 2/26/2021 and 4/16/2021, and duly submitted as no. 1, 2 and 3 on the Motion Calendar of 6/1/2021.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 4, 7	
Answering Affidavit and Exhibits	2, 5, 8	
Replying Affidavit and Exhibits	3, 6, 9	

Defendants' motions are decided in accordance with the Amended Decision and Order annexed hereto.

Dated: 4/22/22

FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: May 23, 2022 at 11:00 a.m. (PC)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

FORDHAM DORMITORY TOWER LLC, FORDHAM ROAD & CONCOURSE RETAIL LEASING LLC, and IVAN DIAZ,

Plaintiffs,

-against-

MENDEL TRESS, MARK TRESS, SUN CONCOURSE LLC, AA SUN CONCOURSE LLC, ZM SUN CONCOURSE LLC, 2530 GC LLC, MORRIS SABBAGH, KASSIN SABBAGH REALTY LLC, STANLEY CONWAY, and CONWAY TOWNE REALTY,

Defendants.

AMENDED DECISION AND ORDER
Index No. 32311/2020E

The following e-filed documents, listed on NYSCEF as document numbers 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 53, 54, 55, 56, 61 (Motion Seq. #001); document numbers 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 57, 62 (Motion Seq. # 002); and document numbers 46, 47, 48, 49, 50, 51, 52, 64, 65 (Motion Seq. # 003) were read on the two motions to dismiss and motion to cancel the lis pendens

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Upon the foregoing cited papers, the Decision and Order of the Motions is as follows:

Defendants Mendel Tress ("Mendel"), Sun Concourse LLC ("Sun LLC"), AA Sun Concourse LLC ("AA LLC"), ZM Sun Concourse LLC ("ZM LLC"), 2530 GC LLC ("2530 LLC"), Morris Sabbagh ("Sabbagh") and Kassin Sabbagh Realty LLC ("Sabbagh Realty") (collectively, "Moving Defendants") move to dismiss plaintiffs' first, second, fifth, seventh, eighth and ninth causes of action pursuant to CPLR 3211(a)(7) (Motion Seq. # 001). The Moving Defendants also move to pursuant to CPLR 6501, 6516(c) and 6514(b) to cancel the Notice of Pendency filed by plaintiffs, and pursuant to CPLR 6514(c) for an award of costs and expenses (Motion Seq. # 002). Defendant Mark Tress ("Mark") moves pursuant to CPLR 3211(a)(5) and (a)(7) to dismiss plaintiffs' claims against him (Motion Seq. # 003). Plaintiffs oppose the aforementioned defendants' various applications. The Court determines the aforementioned defendants' applications as follows.

Background

In November 2013, plaintiff Ivan Diaz ("Diaz") acquired the ground floor unit ("Bank Unit") of a two-unit commercial condominium located at 2530 Grand Concourse, Bronx, New York ("Building"). The second unit is a 10-story office tower adjacent to the Bank Unit ("Tower Unit"). Family Support Systems ("FSS"), a non-profit agency, owned the Tower Unit subject to a mortgage secured by bonds owned by Oppenheimer Funds ("Oppenheimer"). Also in November 2013, plaintiff Diaz entered into a contract with Oppenheimer to purchase the bonds of the Tower Unit which had a face value of $7,240,000 for $2,800,000. Plaintiff Diaz failed to obtain financing to purchase the bonds prior to the December 2, 2013 expiration date of the contract.

In 2014, plaintiff Diaz met defendant Mark Tress ("Mark") who claimed to be a private "hard money" lender. Plaintiff Diaz and defendant Mark entered into a Memorandum of Understanding ("MOU") on October 2, 2014, wherein Mark agreed to lend Diaz $3,000,000 to purchase the bonds subject to the terms of the MOU. Also in 2014, plaintiff Diaz met defendant Stanley Conway ("Conway"), a real estate broker with defendant Conway Towner Realty ("Conway Realty"), who represented that he could help plaintiff Diaz finds tenants for the Building. On October 20, 2014, defendant Conway emailed plaintiff Diaz that he had identified a hotel owner/operator, defendant Mendel, interested in leasing the Tower Unit. Defendant Mendel is Defendant Mark's uncle. Defendant Conway requested that plaintiff Diaz allow Sabbagh, a co-broker colleague of his, to show the Tower Unit to defendant Mendel.

On November 26, 2014, FSS deeded the Tower Unit to plaintiff Diaz' company, plaintiff Fordham Dormitory Tower LLC ("Fordham"), in a deed-in-lieu of foreclosure based on the $1,000,000 condominium lien. In or about November 2014, Sun LLC, in which defendant Mendel is the managing member, acquired the bonds. The mortgage on the Tower Unit was foreclosed upon, and the Tower Unit was deeded to AA LLC, ZM LLC and AA Sun Concourse Investor LLC after they submitted a credit bid in the amount of $9,500,000, the bonds' unpaid balance. On October 26, 2017, the Tower Unit was transferred to AA LLC, ZM LLC, and 2530 LLC as tenants-in-common.

Failure to State a Cause of Action

Moving Defendants seek to dismiss plaintiffs' first cause of action asserting constructive trust against defendants Mendel, Sabbagh, AA LLC, ZM LLC and 2530 LLC; second cause of action asserting fraudulent misrepresentation against defendant Mendel; fifth cause of action asserting breach of fiduciary duty against defendants Sabbagh and Sabbagh Realty; seventh cause of action asserting civil conspiracy against the Moving Defendants; eighth cause of action asserting unjust enrichment against defendants Mendel, Sabbagh, AA LLC, ZM LLC and 2530 LLC; and the ninth cause of action seeking to pierce the corporate veil of the corporate Moving Defendants pursuant to CPLR 3211(a)(7). Defendant Mark Tress seeks to dismiss plaintiff's first cause of action seeking to impose constructive trust; third cause of action asserting fraud; fourth cause of action asserting breach of fiduciary duty; seventh cause of action asserting civil conspiracy; eighth cause of action asserting unjust enrichment; and ninth cause of action seeking to pierce the corporate veil pursuant to CPLR 3211(a)(5) and (a)(7).

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*Leon v Martinez,* 84 NY2d 83 [1994] *citing Monroe v Monroe,* 50 NY2d 481 [1980]; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). The court must accept 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 within any cognizable legal theory" (*Leon,* 84 NY2d 83). The court must consider not whether the complaint has stated a cause of action but rather whether, upon examining the four corners of the pleading, do the factual allegations contained within it indicate the existence of a cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]). The "[c]riterion for deciding whether to dismiss for failure to state a cause of action is whether the proponent of pleading has cause of action, not whether the proponent has stated one (*see Leon v Martinez,* 84 NY2d 83 [1994]).

Constructive Trust

After according plaintiffs the benefit of every possible favorable inference, the Court finds that the plaintiffs failed to state cognizable causes of action for constructive trust against defendants Mendel, Sabbagh, AA LLC, ZM LLC, 2530 LLC and Mark Tress within the four corners of the complaint. "Generally, a constructive trust may be imposed '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest'" (*Sharp v Kosmalski,* 40 NY2d 119 [1976]). To impose a constructive trust, there must exist "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment" (*Sharp,* 40 NY2d). It is undisputed that there was no transfer of property from plaintiffs to the Moving Defendants or Defendant Mark Tress in reliance of their purported promises. Furthermore, plaintiffs had no actual interest in the Tower Unit at the time of their interactions with the Moving Defendants and Defendant Mark Tress or when any of the alleged representations were made. "Where the party has no actual prior interest in the property, he or she will be required to show that an equitable interest developed through the expenditure of money or labor in the property" (*see Manufacturers and Traders Trust Co. v Berthole,* 130 AD3d 881 [2d Dept 2015]). The complaint suggests that plaintiffs intended to purchase both the Bank and Tower Units noting that Plaintiff Diaz spent approximately a year and a half conducting due diligence on the Building, including spending "countless hours and substantial financial resources nullifying a deed restriction" (paragraph 24); "substantial time and resources negotiating with the owners of the Tower Unit and the Bank Unit, the New York Industrial Development Agency, the City of New York's Corporation Counsel, the New York Attorney General's Office and other stakeholders in the Building" (paragraph 25); and "substantial time and resources on these matters in order to create a profitable real estate acquisition investment opportunity for himself and his companies" (paragraph 26). Although plaintiffs contend that Plaintiff Diaz' aforementioned efforts added value to the Building (paragraph 27), it is not the type of value contemplated by caselaw establishing an equitable interest in the Tower Unit to impose a constructive trust against the Moving Defendants and Defendant Mark Tress (*Manufacturers and Traders Trust Co.,* 130 AD3d 881 at 882 ["Here,

the evidence submitted by the appellant did not establish that . . . she contributed considerable sums of money towards the mortgage and maintenance of the property"]; *Hernandez v Florian*, 173 AD3d 1144, 1145 [2d Dept 2019] ["[t]he element of a 'transfer in reliance' is not limited to instances in which the plaintiff has actually transferred title to the property to the defendant, but may also include instances where the plaintiff has provided substantial funds for the maintenance and improvement of it"] [internal quotation marks omitted]) .

It is true that constructive trust elements "serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established" (*see Sanxhaku v Mergetis,* 151 AD3d 778 [2d Dept 2017]), and that "'the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice'" (*Sanxhaku*, 151 AD3d 778, quoting *Ning Xiang Liu v Al Ming Chen,* 133 AD3d 644 [2d Dept 2015]). However, although plaintiffs' allegations concerning the Moving Defendants and Defendant Mark Tress' purported conduct may offend one's conscience, the allegations in the complaint fail to state a cause of action to impose constructive trust against them.

Fraudulent Misrepresentation

The Court finds that plaintiffs have sufficiently stated a cause of action for fraudulent misrepresentation against defendants Mendel and Mark Tress ("Tress Defendants") (Second and Third Causes of Action). "In order to establish fraud, a plaintiff must show a 'material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages'" (*Carbon Capital Management, LLC v American Exp. Co.,* 88 AD3d 933 [2d Dept 2011], quoting *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]). The Court notes that plaintiffs allege that the Tress Defendants knowingly misrepresented their capacities as potential lender (Defendant Mark) who would lend monies to plaintiffs to purchase the bonds of the Tower Unit, and as potential tenant (Defendant Mendel) interested in renting the Tower Unit from plaintiffs in order to induce the latter's reliance on their

misrepresentations to obtain information concerning the Tower Unit, that plaintiffs justifiably relied on their misrepresentations, and that the Tress Defendants utilized this information to purchase the Tower Unit for their own benefit resulting in injury to plaintiffs.

The Court finds that the allegations in the complaint sufficiently detail the alleged fraudulent conduct pursuant to CPLR 3016(b). It is well-settled that "the complaint must sufficiently detail the allegedly fraudulent conduct, [but] that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Norther Leasing Sys., Inc.*, 10 NY3d 486 [2008]). Contrary to the Tress Defendants' arguments, plaintiffs have alleged facts from which it can be reasonably inferred that Defendant Mark Tress never intended to offer the loan, and that Defendant Mendel Tress never intended to rent the Tower Unit from plaintiffs. At the pleading stage, plaintiffs are not required to prove fraud as the Tress Defendants imply. The Court also finds the Tress Defendants' argument that the fraud action should be dismissed because plaintiffs are sophisticated investors unavailing because the Court cannot determine, as a matter of law, whether plaintiffs' alleged reliance on the Tress Defendants' representations was unjustified. Furthermore, whether plaintiffs reasonably relied upon the Tress Defendants' representations is an issue that requires fact-finding (*see Errant Gene Therapeutics, LLC v Sloan-Kettering Institute for Cancer Research*, 174 AD3d 473, 474 [1st Dept 2019]; *ACA Financial Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] ["the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss"]). In addition, the Tress Defendants' arguments that plaintiffs' fraud claims fail because they seek profits which they would have allegedly realized but for the fraud is unavailing (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 [2017] ["[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . ."]). While plaintiffs do seek "the loss of the ability to purchase the Bonds and thereby obtain title to the Tower Unit", plaintiffs also seek actual out-of-pocket expenses incurred in connection with the acquisition of the Tower Unit.

Fiduciary Duty

"To state a claim for breach of fiduciary duty, a plaintiff must allege that the defendant owed him a fiduciary duty, that the defendant committed a misconduct, and that the plaintiff suffered damages caused by that misconduct" (*NRT New York, LLC v Morin,* 147 AD3d 589 [1st Dept 2017]). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation' (Restatement [Second] of Torts 874, Comment *a*). Such a relationship, necessarily fact-specific, is grounded in higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman, Sachs & Co.,* 5 NY3d 11 [2005]. Nevertheless, "it is fundamental that fiduciary 'liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation'" (*EBC I,* 5 NY3d 11, quoting Restatement [Second] of Torts 874, Comment *b*).

Fiduciary Duty Cause of Action Against Defendant Mark (Fourth Cause of Action):

The Court finds that plaintiffs have not sufficiently alleged a cause of action for breach of fiduciary duty against Defendant Mark. Plaintiffs allege that Defendant Mark owed fiduciary duties to plaintiffs as their lender (paragraphs 32, 99, 100). However, it is well settled that "an arms-length lender-borrower or creditor-debtor contractual relationship may not give rise to a fiduciary obligation on the part of the lender or creditor" (*Wiener v Lazard Freres & Co.,* 241 AD2d 114, 122 [1st Dept 1998]; *P. Chimento Co. v Banco Popular de Puerto Rico,* 208 AD2d 385, 386 [1st Dept 1994]; *Bank Leumi Trust Co. of New York v Block 3102 Corp.,* 180 AD2d 588, 589 [1st Dept 1992]).

Plaintiffs also allege that Defendant Mark owed fiduciary duties to plaintiffs because they provided him with purportedly confidential information (paragraphs 36, 100). However, it is also well settled that "the mere communication of confidential information [is not] sufficient in and of itself to create a fiduciary relationship between a bank and its customers" (*Wiener* at 122; *ADT Operations, Inc. v Chase Manhattan Bank,* 173 Misc2d 959, 967 [Sup Ct, New York County 1997]).

Here, plaintiffs do not allege that their relationship with Defendant Mark was anything other than of lender and borrower, with whom they shared allegedly confidential information. Plaintiffs do not allege that they reposed confidence in Defendant Mark and reasonably relied on his superior expertise or knowledge. Nor do they make any allegations to transform the parties' business relationship to a fiduciary one, "such as control by one party of the other for the good of the other" (*Saul v Cahan*, 153 AD3d 947, 949 [2d Dept 2017]; *MAFG Art Fund, LLC v Gagosian*, 123 AD3d 458, 459 [1st Dept 2014] ["Moreover, even read liberally, the complaint does not establish that defendants exercised control and dominance over plaintiffs-limited liability companies . . ."]). As such, plaintiffs have not alleged a special relationship between the parties so as to state a fiduciary duty owed by Defendant Mark. (*See Citibank, N.A. v Silverman*, 85 AD3d 463, 466 [1st Dept 2011] ["His conclusory allegations that his relationship with plaintiff was more than that of lender and borrower and that he relied on plaintiff's advice are insufficient to raise the inference that this bank-borrower relationship was special"]).

Accordingly, Defendant Mark's motion to dismiss the fourth cause of action for breach of fiduciary duty against him is granted.

Fiduciary Duty Cause of Action Against the Sabbagh Defendants (Fifth Cause of Action):

The Court finds that based upon the totality of the allegations in the complaint, the breach of fiduciary duty claim survives for pleading purposes in light of the plaintiffs' allegations that the Sabbagh Defendants acted in their capacity as co-brokers of plaintiffs working in conjunction with broker Defendant Conway. It is well-settled that "a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" (*see Rivkin v Century 21 Teran Realty LLC*, 10 NY3d 344 [2008]). The Sabbagh Defendants breached their alleged duty as agents of plaintiffs by concealing the true intentions of the purported Tower Unit tenant, Defendant Mendel, whom they ultimately represented in purchasing the Tower Unit. The Sabbagh Defendants do not deny receiving $200,000 for brokering the sale of the Tower Unit to defendants.

The Court finds the Sabbagh Defendants' argument that plaintiffs fail to point to any agreement unavailing. The complaint alleges that the Sabbagh Defendants "entered into an

agreement to serve as a real estate agent/broker on behalf of Plaintiff" (paragraph 104). Furthermore, it is well-settled that the agreement between a broker and a principal may be written or oral, the latter of which does not violate the statute of frauds (*see Jemal v ZTI Corp.,* 144 AD3d 467 [1st Dept 2016]). The Sabbagh Defendants' reliance on *RNK Capital LLC v Natsource LLC*, 76 AD3d 840 (1st Dept 2010), is misplaced insofar as that case involved a summary judgment motion. Furthermore, the Court cannot determine at this stage of the litigation whether plaintiffs' failure to acquire the Tower Unit was well beyond the scope of the Sabbagh Defendants' influence and control as they suggest.

Accordingly, the Moving Defendants' motion to dismiss the fifth cause of action for breach of fiduciary duty against the Sabbagh Defendants is denied.

Civil Conspiracy

The Court finds that Plaintiffs' seventh cause of action asserting civil conspiracy against the Moving Defendants and Defendant Mark Tress is properly pled. Although this State does not recognize "'civil conspiracy . . . as an independent tort'" (*see Errant Gene Therapeutics, LLC,* 174 AD3d 473, quoting *Mamoon v Dot Net Inc.,* 135 AD3d 656 [1st Dept 2016]), "allegations of civil conspiracy are permitted 'to connect the actions of separate defendants with an otherwise actionable tort'" (*Cohen Bros. Realty Corp. v Mapes,* 181 AD3d 401, 404 [1st Dept 2020], quoting *Alexander & Alexander of NY v Fritzen,* 68 NY2d 968 [1986]). In order to establish a claim for civil conspiracy, "plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury" (*Cohen Brothers Realty Corp.,* 181 AD3d 401).

Plaintiffs pleaded the underlying tort of fraud against defendants Mark Tress and Mendel, as well as an agreement amongst the Moving Defendants and Defendant Mark Tress to act in concert to defraud plaintiffs of the opportunity to acquire the Tower Unit. "[T]he allegations in the complaint herein charging conspiracy are deemed part of the remaining causes of action to which

they are relevant," namely the fraud causes of action (*see Errant Gene Therapeutics, LLC,* 174 AD3d 473). It is well-settled that "liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud" (*Kuo Feng Corp. v Ma,* 248 AD2d 168 [1st Dept 1998]). Furthermore, conspiracy allegations "'serve to enable a plaintiff to connect a defendant with the acts of his co-conspirators where without it he could not be implicated'" (*Errant Gene Therapeutics, LLC,* 174 AD3d 473, quoting *Hoag v Chancellor, Inc.,* 246 AD2d 224 [1st Dept 1998]). "[O]nce a conspiracy is established, all defendants are liable for each other's acts in furtherance of the conspiracy" (*Errant Gene Therapeutics, LLC,* 174 AD3d 473, relying on *Keller v Levy,* 265 AD 723 [1st Dept 1943]).

Unjust Enrichment

The unjust enrichment claim is dismissed as duplicative of a conventional tort claim (*see for example Corsello v Verizon New York Inc.,* 18 NY3d 777 (2012). This is not the typical case of unjust enrichment in which "the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled" (*Corsello,* 18 NY3d 777, at 790). Plaintiffs' allegations are premised on the Moving Defendants and Defendant Mark Tress' wrongdoing. As such, plaintiffs' cause of action asserting unjust enrichment against defendants Mendel Tress, Sun Concourse LLC, AA Sun Concourse LLC, ZM Sun Concourse LLC, 2530 GC LLC, Morris Sabbagh, Kassin Sabbagh Realty LLC and Defendant Mark Tress is dismissed.

Piercing the Corporate Veil

The Court finds that plaintiffs' complaint is palpably insufficient insofar as it seeks to pierce the corporate veil of AA Sun Concourse LLC, ZM Sun Concourse LLC, and 2530 GC LLC, and assert alter ego claims against the Tress Defendants and Defendant Sabbagh. In order to state a veil piercing claim, the plaintiff is required to show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to

commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.,* 82 NY2d 135 [1993]). However, it is well-settled that,

> [I]f, standing alone, domination over corporate conduct in a particular transaction were sufficient to support the imposition of personal liability on the corporate owner, virtually every cause of action brought against a corporation either wholly or principally owned by an individual who conducts corporate affairs could also be asserted against that owner personally, rendering the principle of limited liability largely illusory" (*East Hampton Union Free School,* 66 AD3d 122).

As such, the party seeking to pierce the corporate veil must establish that "the owners, through their domination, abused the privilege of doing business in the corporate form" (*Morris,* 82 NY2d 135). Factors which constitute an abuse of the privilege of doing business in the corporate form include "failure to adhere to corporate formalities, inadequate capitalization, commingling of the assets, and use of corporate funds for personal use" (*Millenium Const., LLC v Loupolover,* 44 AD3d 1016 [2d Dept 2007]).

The Court finds that plaintiffs fail to allege particularized facts to warrant asserting pierce the corporate veil of the aforementioned corporations (*see for example 20 Pine Street Homeowners Ass'n v 20 Pine Street LLC,* 109 AD3d 733, 735 [1st Dept 2013]). Aside from their conclusory allegations that the Tress Defendants exercised complete dominion and control over AA LLC, ZM LLC, and 2530 LLC; that Tress Defendants and Sabbagh are alter egos of the aforementioned LLCs; and that they have "engaged in commingling of assets and use of corporate funds and have failed to observe corporate formalities in an effort to conceal the connection between" the Tress Defendants and Sabbagh and the Tower Unit, plaintiffs have failed to plead any facts to substantiate such conclusory claims (*see for example Albstein v Elany Contracting Corp.,* 30 AD3d 210, 210 [1st Dept 2006]). Furthermore, plaintiffs failed to submit an affidavit which "may be received for a limited purpose only, serving normally to remedy defects in the complaints" (*see for example Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]). Accordingly, the Moving Defendants' and Defendant Mark Tress' application seeking to dismiss plaintiff's cause of action seeking to assert alter ego liability against the Tress Defendants and Defendant Sabbagh is granted.

Statute of Limitations

It is well-settled that "[i]n moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period" (*Matteawan On Main, Inc. v City of Beacon,* 109 AD3d 590, 590 [2d Dept 2013]). "In order to make a prima facie showing, the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (*Swift v New York Med. Coll.,* 25 AD3d 686, 687 [2d Dept 2006]).

Fraudulent Misrepresentation

Defendant Mark Tress' application to dismiss the fraudulent misrepresentation cause of action as asserted against him is denied. It is well-settled that a fraud claim must be asserted "within the longer of six years from its accrual or two years from the date the alleged fraud was either discovered or with reasonable diligence should have been discovered" (*Nordberg v South St. Seaport Corp.,* 43 AD3d 774, 775-776 [1st Dept 2007]). Defendant Mark has failed to make a *prima facie* showing that the fraudulent misrepresentation cause of action against him should be dismissed as untimely. Defendant Mark argues that the fraud claim accrued when Plaintiffs released the purported confidential information to him or his agents. Defendant Mark argues that this information was provided to him on October 2, 2014, and thus, the fraud claim accrued on October 2, 2014. He argues that since this action was not brought until October 21, 2020, more than six years after the date on which the claim accrued, this action is untimely. In support, Defendant Mark submitted a copy of Plaintiff Diaz's reply affidavit, which was submitted in a prior foreclosure action, to which Plaintiff Diaz attached a Transaction Timeline summarizing emails between Plaintiff Diaz and his agents and Defendant Mark (the "Timeline"). Defendant Mark argues that this

Timeline demonstrates that Plaintiff Diaz provided him with the purported confidential information on October 2, 2014.

A review of the Timeline indicates that on October 2, 2014, Plaintiff Diaz appears to have provided Defendant Mark with documents regarding the building. The Timeline does not indicate that from October 21, 2014, forward, that there was any information exchanged, at least by email, regarding any purported confidential information.

However, in Plaintiff Diaz's reply affidavit, which was submitted in the prior foreclosure action, Plaintiff Diaz alleges that he introduced Defendant Mark to Kevin Wetmore, Oppenheimer's Bond Counsel, on October 28, 2014 (Defendant Mark Tress' Exhibit A: Reply Affidavit of Ivan Diaz, ¶ 48). The Court notes that the complaint identifies confidential information allegedly provided to Defendant Mark as including, among other items, "e. Contact information for Wetmore, the Oppenheimer Funds attorney with whom Diaz had directly negotiated the purchase of the Bonds." (paragraph 36). As such, Defendant Mark has not demonstrated that all of the allegedly confidential information was provided to him prior to October 21, 2014, since on this record, there is evidence that it could have accrued thereafter.

Accordingly, Defendant Mark's motion to dismiss the cause of action against him for fraudulent misrepresentation as untimely is denied.

Breach of Fiduciary Duty

The Moving Defendant's and Defendant Mark Tress' application seeking to dismiss plaintiffs' breach of fiduciary claim as asserted against them is denied. "New York law does not provide any single limitations period for breach of fiduciary duty claims" (*see Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). "Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies (see *Leongard v Santa Fe Indus*., 70 NY2d 262, 267 [1987]; *Whitney Holdings, Ltd. v Givotovsky*, 988 F Supp at 741). On the other hand, where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging "injury to property," to which a three-year statute of limitations applies (see CPLR 214 [4];

Yatter v William Morris Agency, 256 AD2d at 261; *Whitney Holdings, Ltd. v Givotovsky*, 988 F Supp at 741)" (*Kaufman*, 307 AD2d 113). Nevertheless, "case law in New York clearly holds that a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year statute of limitations period" (*Kaufman*, 307 AD2d 113 at 119, relying on *Goldberg v Schuman*, 289 AD2d 8 [1st Dept 2001]). Although the fiduciary duty claims seek monetary relief, the six-year statute of limitations applies because the claims sound in fraud, especially in light of the Court's findings that plaintiffs' fraud cause of action is sufficiently pled (*see for example Cusimano v Schnurr*, 137 AD3d 527, 530 [1st Dept 2016]). Contrary to the Moving Defendants' and Defendant Mark Tress' suggestion, plaintiffs' fraud claim is not merely "incidental" to the breach of fiduciary duty cause of action. Accordingly, the applicable statute of limitations period for the breach of fiduciary duty is six years in accordance with CPLR 213(1).

Given the foregoing, the Moving Defendants' and Defendant Mark Tress' application to dismiss plaintiffs' breach of fiduciary claim as barred by the statute of limitations is denied. As the aforementioned defendants note, plaintiffs allege that the breach of fiduciary duty accrued when they purchased the bonds in November 2014. Since the instant action was commenced on October 21, 2020, plaintiffs timely asserted their breach of fiduciary duty claim against defendants Mark Tress, Sabbagh and Sabbagh Realty.

Notice of Pendency

Moving Defendants insist that the notice of pendency in this action must be cancelled pursuant to CPLR 6516(c) on the grounds that plaintiffs filed a notice of pendency and an amended notice of pendency in the foreclosure action commenced in 2015 by UBSNA to foreclose on the mortgage securing the bonds for the Tower Unit. Moving Defendants contend that plaintiffs asserted proposed answer and counterclaims submitted in the foreclosure action "contain the same wild claims of fraud and conspiracy against the same defendants in this action". Moving Defendants contend that the notices of pendency filed in the foreclosure action were dismissed

based upon plaintiffs' failed attempt to intervene in that action, and "in any event, expired by their term three years after filing".

Moving Defendants also argue that the notice of pendency must be cancelled pursuant to CPLR 6514(b) because plaintiffs did not commence the instant proceeding in good faith. Moving Defendants assert that any interest plaintiffs may have held in the Tower Unit was "wiped out by the auction sale". Moving Defendants note that plaintiffs filed notices of appeal of Justice Briganti's decisions but never perfected the appeals. Moving Defendants also contend that plaintiffs do not base their most recent notice of pendency on any "new" facts. Moving Defendants suggest that plaintiffs commenced the instant action "in a shameless attempt to extort a settlement from its current owner, who acquired that property fairly and legitimately via the foreclosure sale years ago."

Plaintiffs argue that the Moving Defendants improperly try to "apply the procedural history of the Foreclosure Action to this case, despite being an entirely separately [sic] action for separate relief brought against separate parties some years after the Foreclosure Action". Plaintiffs contend that in her Decision dated December 7, 2016, Justice Briganti wrote, "Diaz's alleged claims against the bondholders may support his own separate cause of action against those individuals and/or entities, but they may not serve as a defense to this foreclosure action brought by the Plaintiff-trustee who had no involvement in the transfer of the bonds from the former bondholder to the current bondholder". Plaintiffs emphasize that Judge Briganti noted that their "appropriate forum for the hearing of these claims was a separate action against the [Moving] Defendants, rather than to assert them as a defense to the foreclosure action brought by USBNA acting on their behalf". Plaintiffs note that had the Supreme Court rejected their claims as the Moving Defendants suggest, then the Moving Defendants would have asserted *res judicata* "which [Moving] Defendants, curiously, omit from their papers." Plaintiffs emphasizes that this is the first notice of pendency filed against the Moving Defendants noting that the latter had no interest in the Tower Unit at the time of the foreclosure action. Plaintiffs insist that the "temporal link between the two notices of pendency is far too attenuated to construe them as 'successive'". Plaintiffs state that their attempt to

prevent the foreclosure in their capacity as proposed intervenors was dismissed without any consideration of the merits of their claims. Plaintiffs assert that "[t]o construe these two events as procedurally identical, in the manner of the successive notices of pendency in *Israelson, Weiner* and *Sakow*, is to entirely misconstrue the *raison d'etre* of the rule prohibiting successive notices of pendency."

Plaintiffs insist that the Moving Defendants have failed to meet their burden of establishing that they have not commenced this action in good faith. Plaintiffs suggest that the Moving Defendants' arguments rely "entirely on an easily observable misconstruction of the holding in the foreclosure action". Plaintiffs note that their notice of pendency is premised on the construct trust claim which affects title or possession, use or enjoyment, of real property.

"In entertaining a motion to cancel [a notice of pendency], the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501" (*5303 Realty Corp. v O & Y Equity Corp.,* 64 NY2d 313, 320 [1984]). CPLR 6501 provides that "[a] notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property." Accordingly, "the complaint filed with the notice of pendency must be adequate unto itself; a subsequent, amended complaint cannot be used to justify an earlier notice of pendency" (*5303 Realty Corp.,* 64 NY2d 313 at 320, relying on *Van Tuyl v New York Real Estate Sec. Co.,* 153 AD 409 [2d Dept 1912]). "The usual objective of filing a notice of *lis pendens* is to protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in event of a transfer of the subject property by the defendant to a purchaser for value and without notice of the claim." (*see Braunston v Anchorage Woods, Inc.,* 10 NY2d 302, 305 [1961]).

The Court grants the Moving Defendants' application to cancel the notice of pendency. Although the prayer for relief in the complaint requests that defendants AA LLC, ZM LLC and 2530 LLC "hold title to the Tower Unit in constructive trust for the benefit of the Plaintiffs",

plaintiffs' constructive trust cause of action was dismissed in accordance with the Court's findings above. None of the plaintiffs' remaining causes of action against the aforementioned defendants affect the title to, or the possession, use or enjoyment of, the Tower Unit. As such, plaintiffs' notice of pendency must be cancelled.

Costs Pursuant to CPLR 6514(c)

The Moving Defendants' application seeking costs and expenses occasioned by the filing and cancellation is denied based upon their failure to indicate the amount of costs and expenses sought (*see for example Delmaestro v Marlin*, 168 AD3d 813 [2d Dept 2019]). Moving Defendants are not entitled to recover costs and expenses pursuant to CPLR 6514(c) because they failed to "provide any documentation to establish the costs [they] incurred in defending the action" (*Saul v Vidokle*, 151 AD3d 780, 781-782 [2d Dept 2017]).

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED the application of defendants Mendel Tress, Morris Sabbagh, AA Sun Concourse LLC, ZM Sun Concourse LLC, 2530 GC LLC and Mark Tress seeking to dismiss plaintiffs' first cause of action to impose a constructive trust against them is granted in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that the application of defendants Mendel Tress, Sun Concourse LLC, AA Sun Concourse LLC, ZM Sun Concourse LLC, 2530 GC LLC, Morris Sabbagh, Kassin Sabbagh Realty LLC and Mark Tress seeking to dismiss plaintiffs' second, third, fifth, and seventh causes of action as asserted against them is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that plaintiffs' fourth, eighth and ninth causes of action are dismissed in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall dismiss the first, fourth, eighth, and ninth causes of action as asserted against defendants Mendel Tress, Morris Sabbagh,

Sun Concourse LLC, AA Sun Concourse LLC, ZM Sun Concourse LLC, 2530 GC LLC and Mark Tress; and it is further

ORDERED AND ADJUDGED that plaintiffs' notice of pendency must be cancelled in accordance with the Court's findings hereinabove; and it is further

ORDERED that the Clerk cancel the notice of pendency filed by plaintiffs on November 15, 2020, against the property located at 2530 Grand Concourse, Bronx, NY 10458 (Block 3154, Lot: 1002); and it is further

ORDERED AND ADJUDGED that the defendants Mendel Tress, Sun Concourse LLC, AA Sun Concourse LLC, ZM Sun Concourse LLC, 2530 GC LLC, Morris Sabbagh, Kassin Sabbagh Realty LLC's application for costs and expenses pursuant to CPLR 6514(c) is denied in accordance with the Courts' findings hereinabove; and it is further

ORDERED that the parties appear virtually for a **Preliminary Conference** on **Monday, May 23, 2022, at 11:00 a.m.**

The foregoing shall constitute the decision and order of this Court.

Dated: April 22, 2022

HON. FIDEL E. GOMEZ, A.J.S.C.