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

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

PEOPLE

Plaintiff(s),

- v -

LEVY, YAIR

Defendant(s).

INDEX NO. 401478/10

MOTION DATE 9/23/10

MOTION SEQ. NO. 002 FINAL DECISION

MOTION CAL. NO.

The following papers, numbered 1 to 20, were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion / Order to Show Cause – Affidavits – Exhibits	1-9
Answering Affidavits – Exhibits	xmot 10-11
Replying Affidavits	12-14, 15-19, 20

Cross-Motion: [✓] Yes [ ] No

The cross-motion is decided in accordance with the following decision and order. The motion on sequence number 002 was previously denied. See decision and order dated October 12, 2010.

Dated: 11/22/10

JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Petitioner, Index No. 401478/2010

-against-

YAIR LEVY and YL RECTOR STREET LLC,

Respondents.

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Joan B. Lobis, J.:

Motion sequence numbers 001 and 002 are hereby consolidated in this memorandum decision and order.

This is a proceeding (motion sequence no. 001) brought on behalf of the People of the State of New York by Attorney General Andrew Cuomo (the AG) against respondents YL Rector Street LLC (YL), the sponsor of a non-eviction condominium conversion plan, and its principal and YL's managing member, Yair Levy (Levy), charging them with fraud, deceitful conduct and other illegalities in connection with the offering for sale of condominium units at 225 Rector Place in Manhattan (the Condominium), and seeking monetary damages, penalties, costs, and permanent injunctive relief. In essence, it is claimed that respondents failed to fund the Condominium's reserve fund in accordance with the representations in the Condominium's offering plan (the Offering Plan) and the applicable law; failed to make a

required payment in lieu of taxes (PILOT),[1] as promised in the Condominium's offering plan; and raided the Condominium's reserve fund, using the monies so obtained for improper purposes, thereby leaving the Condominium in a compromised financial position, without regard for the harm inflicted on the Condominium units' purchasers and tenants. It is also claimed that the respondents failed to update the Offering Plan for completeness and accuracy, so as to provide prospective purchasers with a sufficient basis upon which to make a knowledgeable decision about whether to purchase. 13 NYCRR 23.1 (b) (1), (2). Respondents now move (motion sequence no. 002)[2] to dismiss the petition. Since respondents have failed to establish their entitlement to the requested relief, their motion is denied, and the parties are directed to serve any answering and reply papers as provided herein.

Background

The Condominium consists of a leasehold interest in land located in Battery Park City, on which a building, containing 303 residential units, a garage, and commercial units, sits. On May 1, 2007, the office of the Attorney General (OAG) accepted respondents' Offering Plan for filing. The stated purpose of the

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[1]Instead of New York City real estate taxes, payments in lieu of taxes to the Battery Park City Authority were required.

[2]Application 002 was made in response to the petitioner's motion against respondents for a default judgment, which motion was previously denied.

Offering Plan (at 1) was to "set forth in detail all material facts relating to the offering by Sponsor of the 303 Residential Units." Under the Offering Plan (*id.* at 529), Levy represented that he and YL had the primary responsibility for complying with Article 23-A of the General Business Law (commonly known as the Martin Act) and the regulations promulgated under Title 13 of the New York Code of Rules and Regulations (NYCRR), Part 23, which regulate, among other things, the offer and sale of condominiums, and for complying with any other applicable laws and regulations. Levy and YL further acknowledged that they were jointly and severally certifying, as required by 13 NYCRR 23.3 (ac) and 23.4 (b), that the representations made in the Offering Plan were (and that its amendments would be) "complete, current and accurate," and contained no omissions of material fact, no promise as to the future "which [was] beyond reasonable expectations or unwarranted by existing circumstances," and no false statements where the sponsor and its principal knew or could have known the truth, or where they lacked knowledge about the statement made. Offering Plan, at 529-530.

Pursuant to 13 NYCRR 23.3 (ac), offering plans were required to state whether there would be a reserve fund, and, if so, to state the amount, and which capital replacements and repairs were to be credited against the sponsor's contributions to that fund. The reserve fund was only to be used for capital expenditures. *Id.* Offering plans were required to comply with

any law applicable to reserve funds. *Id.*

Pursuant to the Administrative Code of the City of New York (Administrative Code)[3] §26-703, condominium conversion plan sponsors were each required to establish a reserve fund, which was to be used only for capital repairs, improvements and replacements required for the residents' health and safety. That regulation provided two ways for the sponsor to establish a reserve fund. The first alternative was for the sponsor to fully satisfy its obligation by placing three percent of the total price, as that term was defined under Administrative Code § 26-702 (b), of the condominium units being offered, into a reserve fund, and by transferring that fund to the condominium's board of managers within 30 days of the first unit closing. Administrative Code § 26-703 (a).

The second alternative for establishing a reserve fund (*see* Administrative Code § 26-703 [b]) permitted the sponsor to fully meet its reserve fund obligations over a five-year period. Under this funding method, the sponsor was required to make an initial contribution (the Mandatory Initial Contribution) within 30 days of the first unit closing, and was then required to make subsequent contributions as each unit was sold. The Mandatory Initial Contribution was to equal three percent of the actual

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[3]The sections of the Administrative Code, which are relevant to this proceeding, are set forth in that portion of the code commonly known as "Local Law 70."

sales price of all the units sold at the time the offering plan was declared effective. However, if that amount was less than one percent of the total price, the sponsor was required to deposit at least one percent of the total price into the reserve fund. After paying the Mandatory Initial Contribution into the reserve fund, and transferring that fund to the board of managers, the sponsor was to make subsequent contributions to the fund. Specifically, whenever a unit was sold after the offering plan was declared effective, the sponsor had to deposit three percent of that unit's actual sales price into the fund within 30 days of the sale. If, on the fifth anniversary due date of the Mandatory Initial Contribution, the sum of that contribution, before any credits claimed by the sponsor, and the subsequent contributions was less than three percent of the total price of all of the units offered, the sponsor had to make up the shortfall. Therefore, under the second funding alternative, the total of all contributions was, within five years, to equal or exceed the amount deposited under the first funding alternative, except to the extent that the sponsor received a credit against the Mandatory Initial Contribution.

Under the second funding alternative, the sponsor was entitled to claim and obtain a credit against the Mandatory Initial Contribution for the actual cost of capital replacements begun after the offering plan was filed and before it was declared effective, "provided, however, that any such

replacements [had to] be set forth in the plan together with their actual or estimated costs ..." Administrative Code § 26-703 (c). Under Administrative Code § 26-702 (c), a "capital replacement" was defined as "a building-wide replacement of a major component of the ... (1) elevator; (2) heating, ventilation and air-conditioning; (3) plumbing; (4) wiring; [or] (5) window" systems of the building, or a "major structural replacement to the building; provided, however, that replacements made to cure code violations of record [could] not be included." Notwithstanding the two funding alternatives, the sponsor was permitted to make contributions to the reserve fund earlier and in greater amounts than required. Administrative Code § 26-703 (c).

As is relevant, respondents' Offering Plan estimated that the reserve fund would be in excess of six and a half million dollars; indicated that under the law the reserve fund could only be used for capital repairs, replacements, and improvements needed for the residents' health and safety; stated that the sponsor was required to establish a reserve fund pursuant to Local Law 70 and listed the two possible ways the reserve fund could be funded; indicated that if the sponsor elected the second funding alternative, it could choose to advance contributions to the reserve fund and take a credit against subsequent contributions due thereafter; recited that the sponsor could receive credit against the Mandatory Initial Contribution for the

cost of capital replacements commenced after the Offering Plan was filed and before it was declared effective; and indicated that the sponsor did not then anticipate taking such a credit, but that it reserved the right to do so, provided that any qualifying work was performed[4] before the Offering Plan's effective date. Offering Plan, at 191, xi. A copy of Local Law 70 was appended to the Offering Plan. The Offering Plan further stated that a description of such qualifying work would be disclosed "in a duly filed amendment to the Plan." *Id.* at 191; *see also* 13 NYCRR 23.5 (a) (1) (if the offering plan does not comply with 13 NYCRR 23.1 [b], "due to change of circumstances, the passage of time or any other reason, the offering plan must be amended promptly").

Under the Offering Plan (at 135-136), the sponsor, which represented that it had the financial means to meet its duties with respect to unsold units, agreed to pay real estate taxes, among other charges, on the unsold units, in accordance with the Condominium's by-law provisions, and indicated that it intended to meet its duty in this regard through the sale proceeds from offered units, rental income from non-purchasing tenants, and through financing.

The Offering Plan (at 141) and by-laws (¶ 2.4) provided that

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[4]It is unclear whether the word "performed" in this context simply referred to qualifying work which was "begun" before the Offering Plan's effective date. Administrative Code § 26-703 (c).

the Condominium's affairs would be governed by the Condominium's board, which would at first be made up of the one person designated by the commercial unit owners to comprise the commercial board, and two individuals selected by the sponsor as the residential board. The commercial units were initially to be retained by the sponsor. At first, there was to be a "Control Period," during which the sponsor controlled the Condominium board as well as the residential board, until the earlier of five years after the first closing, or when the sponsor owned less than 50% of the aggregate common interests of all units. Offering Plan, at 139. The Condominium board was charged with making decisions regarding repairs, replacement, and upkeep to the general common elements; the residential board was entitled to make similar decisions with respect to residential common elements, and residential limited common elements; and the commercial board had a corresponding entitlement with respect to commercial common and limited common elements. By-laws § 2.2.2 (Offering Plan, at 462-467). The Offering Plan provided that the Condominium board was going to enter into a management agreement with Penmark Realty Corporation (Penmark), which was permitted to cause common elements to be maintained and repaired "in the manner deemed advisable by the" various boards, but that, in general, Condominium board approval was needed for ordinary repair expenditures over $10,000 for any one item. Offering Plan, at 195. Penmark was to be paid a yearly base salary of

$100,000, and was to be bonded in the amount of $250,000 for any dishonest or fraudulent acts. *Id.* at 195-196.

Respondents amended the Offering Plan eight times before the plan was declared effective, on December 13, 2007, by which time 46 prospective purchasers had executed purchase agreements.[5] The Offering Plan was amended for the ninth time, about two months later, on February 15, 2008. The sponsor represented in each amendment that there had been no material changes in the Offering Plan, except those set forth in each amendment.

The Condominium's first unit closed on April 4, 2008, and the 30-day period, by which monies under either of the two funding alternatives had to be deposited into the reserve fund, ended on May 4, 2008. Under the first funding alternative, $7,399,215 had to have been deposited by that date. Under the second funding alternative, a minimum of $2,466,450 had to have been deposited as the Mandatory Initial Contribution, unless an appropriate credit was taken. Neither full amount was ever deposited into the reserve account.

In the meantime, respondents undertook to renovate the Condominium in 2007 and 2008, but never finished it. In early 2009, the Sponsor's lender commenced a foreclosure action against

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[5]In essence, an offering plan cannot be declared effective until purchase agreements have been executed and delivered by a minimum of 15% of a building's residential tenants or by purchasers who state that they intend to occupy a unit once it is vacated. General Business Law § 352-eeee (b).

it, Levy, and others, claiming that respondents had defaulted on a $351,881.19 January 1, 2009 PILOT; abandoned the Condominium without heat or hot water; failed to pay subcontractors; failed to maintain a proper operating shortfall escrow account; failed to meet the minimum liquidity levels required by the loan documents; and failed to meet certain third-party expenses. *See* Radin aff. in support of petition, ex. L. The Condominium was placed under receivership on February 27, 2009. According to the OAG, before the Condominium was placed in receivership, 72 Condominium units had been sold pursuant to the Offering Plan. The OAG has not indicated specifically when each subsequent unit was purchased, the amount of each subsequent contribution which had to have been placed in the reserve fund, what the status was of the reserve fund or of monies taken from it when each unit was purchased, or what the sponsor's overall financial situation was when each unit was purchased.

Levy and YL then commenced an action against the lender, claiming that it did not meet its lending obligations, and urging, among other things, that the Condominium's managing agent had absconded with the PILOT funds when it feared that it would not be paid its management fees. In January 2010, the lender's motion to dismiss the respondents' complaint was granted, and the lender was granted summary judgment in its foreclosure action. *Id.* Penmark was ultimately replaced as the Condominium board's managing agent.

Meanwhile, the sponsor attempted to file a 10th amendment, apparently in or about April 2008, which recited, among other things, that the Sponsor had contributed a total of $ 1,597,932.41 to the reserve fund as of the end of April 2009, but had withdrawn a total of $1,597,773.56 from it, "and ha[d] used such funds for construction of the building." The proposed amendment also revealed that the January 1, 2009 PILOT had not been paid, and that it was being disputed in the lender's foreclosure action. Roschelle, reply aff., ex. A. Neither that proposed amendment, nor any prior one, specifically indicated that respondents were taking a credit against the Mandatory Initial Contribution, nor did any amendment or proposed amendment set forth any capital replacements or their actual or estimated costs.

Some time before the end of July 2009, the AG's office started an investigation into respondents' conduct, including, evidently, requisitioning the reserve fund bank account records, and records relating to a payroll account and an operating account (operating account) of an entity called YL Management, LLC. Levy, Daniel Deutsch, Levy's son-in-law, and other members of Levy's family had signatory power over these latter two accounts. According to the OAG, as supported by the reserve fund's and the operating fund's monthly statements, monies were withdrawn from the reserve fund account and deposited into the

operating account,[6] and some payments from the latter account were seemingly used for purposes other than for the Condominium's capital replacements. These included payments of Macy's and American Express credit card bills, payments personally to Levy and his family, including to Deutsch, and payments to Staples, Verizon Wireless, and to the Oxford Health Plan. A review of the reserve fund's monthly statements from April 2008 through February 2009 reveals that, for the most part, any monies deposited each month into that account, were largely withdrawn by the end of that month, that no funds were deposited into the account after November 26, 2008, and that, at the end of February 2009, only $70 was left in the account.

On July 30, 2010, respondents' 10th proposed Offering Plan amendment was accepted for filing, after certain corrections and deletions required by the AG's office were made, including the deletion of the Sponsor's claim that the money it had withdrawn from the reserve fund had been used to construct the building.

The Instant Proceeding

On June 9, 2010, the OAG commenced this proceeding against Levy and YL. The petition alleges eight causes of action against respondents. The first through third causes of action are premised on Executive Law § 63 (12), which permits the AG to seek injunctive and monetary relief whenever a person has been engaged

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[6]Funds from other sources had also been deposited into the operating account.

in repeated illegal or fraudulent acts or has "otherwise demonstrated persistent fraud or illegality in the carrying on, conducting or transaction of business." Under that statute the term "fraud" includes a scheme to defraud as well as "any deception, misrepresentation, concealment, suppression, false pretense, promise or unconscionable contract provision." *Id.* The term "persistent," as it relates to fraud and illegality, includes "continuance or carrying on of any fraudulent or illegal act or conduct," and the term "repeated" includes "repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person." *Id.*

The AG's first cause of action, brought pursuant to Executive Law § 63 (12), alleges that respondents fraudulently failed to fund the reserve fund as represented in the Offering Plan, failed to disclose that they would raid the reserve fund of its subsequent contributions, and fraudulently failed to make the January 1, 2009 PILOT, and that such acts constituted repeated fraudulent acts and persistent fraud or illegality in conducting a business. The second cause of action alleges that the respondents' repeated violations of Local Law 70, in failing to fund the reserve fund as represented in the Offering Plan and in raiding that fund, constituted repeated illegal acts and persistent illegality in conducting a business under Executive Law § 63 (12). The third cause of action alleges that the respondents' repeated violations of the Martin Act amounted to

illegal acts and persistent illegality in conducting a business in violation of Executive Law § 63 (12).

The fourth through seventh causes of action are based on claimed direct violations of the Martin Act. The Martin Act governs the offer and sale of securities, including condominiums, and permits the AG to investigate and commence an action for injunctive and monetary relief when the AG believes, from the evidence, that a person or entity has engaged in, or is about to engage in, fraudulent practices under Article 23-A of the General Business Law. *See* General Business Law §§ 352 (1), 353. "Fraudulent practices" include "any deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise" in the sale of securities, such as condominiums. General Business Law § 352 (1). Under the Martin Act, it is illegal to use any "fraud, deception, concealment [or] suppression ...," or to make a false statement, when the statement's maker "(i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made ... ." General Business Law § 352-c (1) (a), (c). The Martin Act also sets forth the information which a condominium offering plan must contain; empowers the AG to promulgate rules and regulations in that regard; and requires the offeror to provide information prescribed by the AG in order to give prospective purchasers adequate information upon which to

form a judgment. General Business Law §§ 352-e (1) (b); 352-e (6). Pursuant to that authority, the AG has promulgated the regulations governing offering plans which are set forth in Title 13 NYCRR, Part 23.

The AG's fourth cause of action, which is brought under the Martin Act, alleges that the respondents' failure to disclose in the Offering Plan and its amendments that they did not properly fund the reserve fund, their raid on the fund, and their failure to make the January 2009 PILOT constituted fraudulent practices under the Martin Act. The fifth cause of action alleges that, while they were engaged in selling and offering units in the Condominium, the respondents, in violation of the Martin Act, did not disclose in the Offering Plan and its amendments their failure to properly fund the reserve fund, their raid on that fund, and their failure to meet the January 2009 PILOT. The sixth cause of action asserts that respondents' misrepresentations in the Offering Plan, that they would fund the reserve fund, as per the plan's requirements, and meet PILOT obligations with respect to unsold units, constituted violations of the Martin Act. Under the seventh cause of action, the AG alleges that the respondents' failure to amend the Offering Plan to timely disclose that they did not deposit the Mandatory Initial Contribution into the reserve fund and that they withdrew subsequent contributions to the reserve fund constituted violations under the Martin Act.

Finally, under the eighth cause of action, the AG asserts that the respondents violated General Business Law § 349, a consumer protection statute, which declares unlawful deceptive acts and practices in the conduct of any business in the state, and permits the AG to enjoin such acts and obtain restitution of money or property so obtained. In particular, the AG claims that each of 72 Condominium unit purchases, made pursuant to the Offering Plan, was a consumer transaction; that the respondents' conduct in connection with those sales transactions was misleading, because respondents concealed that they had failed to fund the reserve fund as the law required; and that respondents engaged in deceptive practices in the sale and advertisement of the units.

As a result, the AG seeks, under the first through eighth causes of action, restitution and/or damages of $7,399,145, the amount that it is claimed respondents should have placed in the reserve fund, minus the $70 which was left unspent in the reserve fund account; under the fourth through seventh causes of action, a judgment permanently enjoining respondents from directly or indirectly engaging in any business activity involving the sale, offer or advertisement of securities in this state; under the first through seventh causes of action, a judgment permanently enjoining respondents from further engaging in the foregoing alleged fraudulent, unlawful and deceptive acts; on the eighth cause of action, penalties of $360,000.00 under General Business

Law § 350-d ($5,000 for each of the 72 unit sales); on all causes of action, from each respondent, a discretionary allowance, in the amount of $2,000, pursuant to CPLR 8303 (a) (6); and costs and disbursements.

Respondents now cross-move to dismiss the petition. The original cross motion to dismiss was brought by Levy, acting pro se, purporting to represent himself and YL, a limited liability company. In that application, Levy asserted that the AG's allegations about the reserve fund were false because YL selected the second reserve fund funding option, which YL had reserved the right to do in the Offering Plan, and then took the full credit to make capital replacements, repairs and improvements, thus offsetting the sponsor's requirement to make the Mandatory Initial Contribution to the reserve fund. He further claimed that the sponsor thereafter deposited the requisite three percent contribution into the reserve fund as each transaction closed, so that, by the end of 2008, $1,597,932.41 had been deposited into the fund. Levy baldly asserted that these funds were then used, as permitted, to make capital repairs, replacements and improvements needed for the safety and health of the residents, with the approval of the Condominium board.

Levy maintained that there was no timing requirement set forth for when the sponsor had to disclose that it would take a credit, and that, at most, there was a technical deficiency in the Offering Plan. Levy also claimed that he had five years

under the Administrative Code to fund the reserve fund, and that since five years had not elapsed, the OAG could not prevail. As to the January 2009 PILOT, Levy claimed that this constituted, at most, a breach of contract claim, actionable only by the Condominium board, and that, in any event, the fact that the managing agent converted the January 2009 PILOT would not amount to fraud or illegality by respondents within the intendment of the laws relied upon by the OAG. As to the failure to timely amend the plan, Levy claimed that the OAG should have had him amend the plan after the respondents submitted the proposed 10th amendment.

Once represented by counsel, the respondents conceded that, under the second funding alternative, $2,466,450 was the required Mandatory Initial Contribution. Counsel urged, however, based on the affidavit of respondents' accountant, Scott Ackerman (Ackerman), who reviewed unspecified books, records, invoices and change orders, that construction work and capital improvements undertaken by the sponsor in the categories of HVAC, electrical, plumbing, and steel replacement, "among others," exceeded $4.3 million, and that the "majority" of that work was started before December 13, 2007, the effective date of the Offering Plan. Ackerman aff., ¶ 3. Attached to that affidavit was a spreadsheet which contained vague descriptions of work, some of which was dated "99/99/99," and some of which postdated the effective date of the Offering Plan.

Respondents' counsel also asserted, contrary to Levy's apparent claim that the deposits into the reserve account were the requisite three percent contributions (from subsequent sales), that respondents over-funded the reserve fund because the "vast majority" of funds which were allegedly misappropriated, was from sales contracts entered into before December 13, 2007, rather than from contracts entered into after the plan was declared effective, only the latter of which required subsequent contributions into the reserve fund. Thus, respondents' counsel claimed that her clients never had to make the Mandatory Initial Contribution, and were simply withdrawing their own money, all of which they had gratuitously placed in the reserve fund account. Respondents' counsel further stated that she had been advised that the January 2009 PILOT had been made, evidently by the lender. Finally, respondents' counsel maintained that the petition must be dismissed because the OAG has no jurisdiction to enforce the Administrative Code/Local Law 70 provisions regarding reserve funds.

DISCUSSION

On an application to dismiss a petition for insufficiency, the petition's allegations of fact, but not its conclusions of law, are deemed as true. *Matter of Hines v State Bd. of Parole*, 293 NY 254, 258 (1944); *see also Matter of Nedles Land Corp. v Town of Brookhaven*, 20 AD2d 648 (2d Dept 1964); *Matter of Hassett v Barnes*, 11 AD2d 1089 (4th Dept 1960).

Respondents' assertion that the OAG lacks jurisdiction with respect to any cause of action which is based on a violation of Local Law 70 is without merit. The instant proceeding is not an enforcement proceeding, pursuant to Administrative Code § 26-708, and the AG is not seeking relief under that code provision. Rather, the AG is seeking to enforce his powers under General Business Law § 349, Executive Law § 63 (12), the Martin Act, and the regulations which the AG was authorized to promulgate under the Martin Act. The AG has the sole responsibility for enforcement of the Martin Act. *Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 58 (2005). Also, the AG's authority to assert a claim under Executive Law § 63 (12) has been sustained, where other administrative agencies have had statutory jurisdiction. *See People v American Motor Club, Inc.*, 179 AD2d 277 (1st Dept 1992); *State of New York v Winter*, 121 AD2d 287 (1st Dept 1986); *State of New York v Solil Mgt. Corp.*, 128 Misc 2d 767 (Sup Ct, NY County 1985), *affd* 114 AD2d 1057 (1st Dept 1985).

The format and content of offering plans are under the AG's control. 13 NYCRR 23.3. Also, the AG has set minimum standards of compliance, which detail the high degree of candor required by offering plans. 13 NYCRR 23.1 (b). To this end, the AG's regulations specifically provide that offering plans must comply with "any applicable law concerning reserve funds," state the amount of those funds and what they will be used for, and, if the

fund is a reserve fund, indicate that it can only be used for capital expenditures. 13 NYCRR 23.3 (ac). Further, the AG has promulgated regulations regarding the need to promptly amend offering plans so that they remain complete and accurate.

Here it is claimed that YL and Levy were less than forthcoming in the Offering Plan regarding the reserve fund, its funding and its use. It is also claimed that they raided the fund, which they represented would only be used for capital expenditures, and failed to amend the Offering Plan to provide complete and accurate information about the reserve fund's status. Additionally, it is claimed that the respondents engaged in repeated and persistent illegality under Executive Law § 63 (12) by repeatedly violating Local Law 70, clearly an applicable regulation, which, accordingly, respondents represented in the Offering Plan they had the duty to comply with. *See State of New York v Princess Prestige Co.*, 42 NY2d 104 (1977); *People v Empyre Inground Pools*, 227 AD2d 731, 733 (3d Dept 1996) (repeated statutory violations constituted repeated illegality under Executive Law § 63 [12]). The AG is certainly entitled to assert claims under the Executive Law, Article 23-A of the General Business Law, and General Business Law § 349, even though the AG's claims under those statutes may be related to or be based on violations of Local Law 70. Otherwise, the AG's powers under its own regulations, the General Business Law and the Executive Law would be meaningless. Finally on the jurisdictional issue, the

claims against respondents do not arise solely out of the reserve fund and Local Law 70, but also involve representations in the Offering Plan regarding payments in lieu of taxes. Therefore, respondents' application to dismiss this proceeding based on a claimed lack of jurisdiction is denied.

Respondents' position that dismissal is warranted because the sponsor allegedly chose the second reserve fund funding option, and then took the credit permitted under that funding option, is unavailing. Aside from the fact that this is a motion to dismiss where the petition's allegations are deemed true, respondents have failed to establish, through competent evidence, that they used $2,466,450 for capital replacements, begun after the Offering Plan was filed and before it was declared effective. Ackerman's affidavit is not based on personal knowledge, and his vague spreadsheet, which is based on some nebulously defined documents, none of which is supplied, is wholly inadequate. *See Hambsch v New York City Transit Auth.*, 63 NY2d 723, 725-726 (1984); *Ainetchi v 500 West End LLC*, 51 AD3d 513, 515 (1st Dept 2008). Respondents' counsel's denial of respondents' misappropriation of funds, is similarly unavailing, since counsel lacks personal knowledge. *Foley v Haffmeister*, 156 AD2d 541, 543 (2d Dept 1989). Further, respondents have failed to establish that they had, at the relevant time in issue, determined to take a credit for the Mandatory Initial Contribution to the reserve fund under the second funding alternative. On the record here,

respondents' failures to comply with their duty under the Offering Plan and applicable law, to promptly amend the Offering Plan to indicate that they were taking such credit, the nature of the capital replacements which were performed after the plan was filed and before its effective date, and what its costs were, strongly suggest that their current claim, of having taken a credit on their Mandatory Initial Contribution, is a recent fabrication. In this regard, although respondents claim that they selected the second funding alternative and took a credit under it, they never indicated in the ninth amendment, dated February 15, 2008, two months after the Offering Plan's effective date, that they were taking a credit, even though respondents would have been aware whether capital replacements had begun before the effective date. I further note that respondents offered conflicting accounts as to the subsequent contributions under the second reserve fund funding option, which were not subject to a credit. Also, even though the Condominium's boards were under the sponsor's control at the time in issue, no affidavits were offered from the board members indicating their action on, or approvals of, any specific capital replacement. Accordingly, respondents' assertion that this proceeding must be dismissed because the reserve fund was appropriately funded, proper credits were taken, and because the reserve fund was never raided, fails.

Respondents maintain that the instant proceeding is not ripe

because five years have not passed since the time commenced for funding the reserve fund. The AG asserts that this proceeding is ripe because respondents failed to meet those funding obligations which accrued before the end of the five-year period, and failed to make the Mandatory Initial Contribution, thereby requiring them to have fully funded the reserve fund by May 8, 2008, under the first funding option. As previously alluded to, it is unclear on the instant record what the sponsor's exact dollar amount financial obligation was to the reserve fund before the Condominium was placed under receivership in February 2009. Nonetheless, while under the second reserve fund funding option, a sponsor had up to five years from the due date of the Mandatory Initial Contribution to fully fund the reserve fund, the sponsor, aside from any appropriate credit, still had to deposit the Mandatory Initial Contribution within 30 days of the first closing and make each subsequent contribution within 30 days of each subsequent closing. Here, it is claimed that respondents failed to meet the funding obligations. Also, as previously observed, this proceeding is not based solely on the reserve fund claims, but also involves the failure to make the January 2009 PILOT. Thus, this proceeding is ripe.

Respondents' claim that their failure to meet their obligation concerning the January 2009 PILOT does not constitute fraud or illegality within the intendment of the relevant statutes and regulations, and that, in any event, their failure

in this regard was due to the misfeasance of the original managing agent, Penmark, is inadequate to demonstrate respondents' entitlement to dismissal of the PILOT claim. First, that respondents' lender evidently paid the outstanding PILOT would not exonerate respondents from failing to meet their obligation. Second, respondents have not indicated how much Penmark was owed when it allegedly took the PILOT monies to satisfy what it believed it was owed in management fees. Third, there is no indication that respondents went after Penmark's bond in order to recoup some of the monies allegedly taken, which casts doubt on respondents' claim that Penmark converted the funds. Fourth, while respondents' failure to make the January 2009 PILOT may ultimately turn out to be nothing more than a breach of contract, respondents have not demonstrated that here. It is unclear when respondents became aware that they would be unable to meet that payment, whether any unit was purchased after respondents became so aware, and whether there was sufficient time for respondents to attempt to file an amendment to the Offering Plan in this regard, before anyone purchased a unit without that knowledge.

Finally, respondents' attempt to blame the AG for respondents' failures to timely amend the Offering Plan, is meritless. While the AG was certainly free not to accept a proposed amendment unless it was revised to the AG's satisfaction, the duty to timely proffer necessary amendments was

on respondents.

In conclusion, it is

ORDERED that Yair Levy's and YL Rector Street LLC's motion for an order dismissing the petition of the People of the State of New York, by Andrew Cuomo, Attorney General of the State of New York, is denied; and it is further

ORDERED that, within five days of service of a copy of this order with notice of entry, respondents Yair Levy and YL Rector Street LLC are directed to serve their answer, if any, to this petition; and it is further

ORDERED that petitioner, the People of the State of New York, by Andrew Cuomo, Attorney General of the State of New York, is directed to serve any reply within five days of receipt of the answer; and it is further

ORDERED that the parties, by so-ordered stipulation, may amend their time to serve any answer or reply; and it is further

ORDERED that the original of any answer and reply shall be delivered to my chambers, room 690, 60 Centre Street, Manhattan. Chambers will schedule a date for oral argument, and so advise counsel.

Dated: 11/22/10

ENTER:

J.S.C.