SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 3

Index Number : 103991/2011
BOARD OF MANAGERS OF 184
vs
184 THOMPSON STREET OWNER
Sequence Number : 001
DISMISS

INDEX NO. 103991/11
MOTION DATE 11/15/11
MOTION SEQ. NO. 001

C

	No(s). 1
Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s). 3,4

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4-2-12

Eileen Branst, J.S.C.
HON. EILEEN BRANSTEN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

----------X

BOARD OF MANAGERS OF 184 THOMPSON STREET CONDOMINIUM,

Plaintiff,

-against-

Index No. 103991/11
Motion Date: 11/15/11
Motion Seq. No.: 001

184 THOMPSON STREET OWNER LLC,
184 THOMPSON ACQUISITION LLC,
184 THOMPSON STREET PARTNERS, LLC,
and RAYMOND CHALME,

Defendants.

----------X

EILEEN BRANSTEN, J:

This action involves defendants' alleged failure to provide required minimum reserve funds, pursuant to the New York City Administrative Code ("NYC Code"), for 184 Thompson Condominium, located at 184 Thompson Street in New York City (the "Condominium").

Background

Plaintiff Board of Managers of 184 Thompson Street Condominium ("184 Board") asserts causes of action for declaratory judgment, injunctive relief, breach of contract, fraud and negligent misrepresentation. Defendants' answer asserts counterclaims for breach of fiduciary duty, negligence, declaratory relief and intentional interference with rights of defendant 184 Thompson Street Owner LLC ("Sponsor") to obtain an amended certificate of occupancy.

Defendant Raymond Chalme ("Chalme") is a member of defendants 184 Thompson Acquisition LLC ("184 Acquisition") and 184 Thompson Street Partners, LLC ("184 Partners"), which, in turn, are members of the Sponsor. The Condominium was created by a March 22, 2007 Sponsor declaration. The Condominium consists of 140 residential units, one commercial unit and four storage units.

The Condominium's Offering Plan ("Offering Plan") was accepted for filing on August 10, 2006 (Adelman Aff., Ex. B), and was declared effective, by the Eighth Amendment, on February 21, 2007. Metz Aff., Ex. 9. The Offering Plan contained a Section titled "Capital Reserve Fund And Working Capital Fund," which, as amended, contained the Sponsor's contractual obligation to fund the Reserve Fund. At the heart of this litigation is 184 Board's contention that, under section 26-703 of the NYC Code, the Sponsor underfunded the Reserve Fund.

Defendants collectively move to dismiss Plaintiff's second, third, fifth and sixth causes of action for failure to state a cause of action. 184 Acquisition, 184 Partners and Chalme (together, the "Non-Sponsor Defendants") also seek dismissal of Plaintiff's first and fourth causes of action for failure to state a cause of action.

Plaintiff 184 Board cross-moves for partial summary judgment on portions of its first cause of action for declaratory relief and on its second through fourth causes of action.

In their combined reply and opposition to 184 Board's cross motion, defendants requests that the court grant defendants summary judgment pursuant to CPLR 3212(b).

Discussion

1. Defendants' Motion to Dismiss

(i) *Declaratory Judgment*

184 Board's first cause of action seeks a declaration as follows:

> (a) Declaring that Defendants have failed to fund the Reserve Fund in an amount which is 3% of the sum of the cost of all Units in the Offering Plan at the last price which was offered to tenants in occupancy prior to the effective date.
>
> (b) Declaring that Defendants underfunded the Reserve Fund by taking a credit for alleged Capital Replacements which credit is available only when the funding method under Section 26-703(b) is used.
>
> (c) Declaring that in the event that a credit for a capital improvement(s) is permissible when funding is made pursuant to Section 26-703(a), the items for which the credit was taken are (i) non-qualifying or (ii) made by the prior owner and/or (iii) were done in a shoddy and nonqualifying manner.
>
> (d) Declaring that in the event that a credit for a capital improvement(s) is permissible when funding is made pursuant to Section 26-703(a), that the work allegedly performed was not performed within the qualifying period set forth in Section §26-703(c).

Defendants argue that Plaintiff's request for a declaratory judgment as asserted against the Non-Sponsor Defendants must be dismissed on the grounds that the Non-Sponsor Defendants are not responsible for funding the Condominium reserves.

Under section 26-703(b) of the NYC Code, the offeror of an offering plan for a condominium conversion is required to establish a reserve fund. Here, the Sponsor offered

the Offering Plan and declared it effective. While 184 Board argues that the Sponsor and Non-Sponsor defendants signed the "CERTIFICATION OF SPONSOR AND PRINCIPALS" ("Certification"), wherein they promised that the condominium plan would not contain any untrue statements of material fact (Metz Aff., Ex. 10), none of 184 Board's allegations in support of its request for a declaratory judgment support the conclusion that any entity or individual other than the Sponsor was responsible for establishing the reserve fund for the Condominium. The members of a limited liability company "cannot be held liable for the company's obligations by virtue of [its] status as a member thereof." *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 210 (1st Dep't 2005), citing NY LLC Law § 609 and 610. Here, the complaint merely alleges that Chalme is a member of 184 Partners and 184 Acquisition, which, in turn, are members of the Sponsor. The complaint does not assert any allegations that would give rise to veil-piercing to reach the Non-Sponsor Defendants. Therefore, the first cause of action is dismissed against the Non-Sponsor Defendants.

(ii) *Injunctive Relief*

Plaintiff 184 Board's second cause of action seeks "an injunction directing and compelling Defendants to make additions to the Reserve Fund which (i) calculates 3% of the Total Price as $2,796,876 and (ii) adds the sum of $832,772 which was improperly taken as a credit for Capital Replacements." Complaint, ¶ 64. 184 Board's own allegations concede that it has an adequate remedy at law to collect the funds. Therefore, the second cause of

action is dismissed in its entirety. *Mini Mint Inc. v. Citigroup, Inc.*, 83 A.D.3d 596, 597 (1st Dep't 2011) (dismissing cause of action for injunctive relief where "plaintiff failed to establish that it does not have an adequate remedy at law").

(iii) *Breach of Contract*

Plaintiff 184 Board's third cause of action for breach of contract alleges that "[d]efendants' failure to properly fund the Reserve Fund is a breach of the Certification provisions of the Offering Plan." Complaint, ¶ 66. According to 184 Board, "[d]efendants violated the [Certification] by inadequately funding the Reserve Fund and in taking credits for Capital Replacements that were (i) not Capital Replacements (ii) unavailable to them and (iii) not timely." *Id.*, ¶ 69.

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." *Flomenbaum v. New York Univ.*, 71 A.D.3d 80, 91 (1st Dep't 2009), *aff'd* 14 N.Y.3d 901 (2010). Here, the complaint fails to allege any specific provision of the Certification that was breached. Plaintiff's third claim is therefore subject to dismissal. *Matter of Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995) (breach of contract claim must be supported by "nonconclusory language" that states "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated").

Moreover, while the Certification was signed by the Non-Sponsor Defendants, as members of the Sponsor, as stated in *Board of Mgrs. of the Arches at Cobble Hill Condominium v. Hicks & Warren, LLC* (14 Misc. 3d 1234[A], 2007 NY Slip. Op 50297[U], *19 [Sup. Ct., Kings County 2007]), "[t]he certification was required to be included in the Condominium Offering Plan pursuant to regulations promulgated by the Attorney General." The fact that the members of the Sponsor "executed the Sponsor's Certification of the Offering Plan" does "not establish the requisite privity upon which to predicate any contract-based claims." *Id.* For the foregoing reasons, Plaintiff's third cause of action is dismissed in its entirety.

(iv) *Breach of Contract*

Plaintiff's fourth cause of action asserts a claim for breach of contract based upon defendants' alleged breach of Offering Plan provisions concerning the reserve fund. Plaintiff asserts that the Offering Plan provisions "were incorporated by reference into the purchase agreements." *Id.*, ¶¶ 72-73. 184 Board claims that defendants underfunded, and improperly took capital replacement credit from, the reserve fund. Complaint, ¶¶ 72-73.

However, Plaintiff's fourth cause of action fails to allege that the Non-Sponsor Defendants were parties to the purchase agreements. The cases cited by 184 Board all uphold fraud-based claims against non-sponsor defendants who signed certifications in their individual capacities. None of these cases uphold a breach of contract cause of action under these facts. *See Residential Bd. of Mgrs. of Zeckendorf Towers v. Union Square-14th St.*

Assocs., 190 A.D.2d 636 (1st Dep't 1993); *Birnbaum v. Yonkers Contr. Co.*, 272 A.D.2d 355 (2d Dep't 2000); *Zanani v. Savad*, 228 A.D.2d 584 (2d Dep't 1996). Therefore, Plaintiff's fourth cause of action is dismissed against the Non-Sponsor Defendants.

(v) *Fraud/Negligent Misrepresentation*

Defendants next seek dismissal of Plaintiff's fifth and sixth causes of action, each of which is plead alternatively as "fraud and/or negligent misrepresentation." Complaint, at 14 and 17. Defendants' argue that Plaintiff's fifth and sixth causes of action fail to allege acts taken by defendants with intent to deceive and fail to satisfy the particularity requirements of CPLR 3016(b).

To the extent that Plaintiff's fifth and sixth causes of action purport to assert claims for negligent misrepresentation, they are preempted by the Martin Act. *Horn v. 440 E. 57th Co.*, 151 A.D.2d 112, 120 (1st Dep't 1989); *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Assocs.*, 191 A.D.2d 621, 622 (2d Dep't 1993). None of the cases cited by 184 Board upheld a negligent misrepresentation cause of action under analogous facts. *See Bhandari v. Ismael Leyva Architects, P.C.*, 84 A.D.3d 607, 608 (1st Dep't 2011) ("the complaint fails to state a cause of action for negligent misrepresentation"); *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt.*, 80 A.D.3d 293, 304 (1st Dep't 2010), *aff'd* 18 N.Y.3d 341 (2011); *Board of Mgrs. of Marke Gardens Condo. v. 240/242 Franklin Ave., LLC*, 71 A.D.3d 935 (2d Dep't 2010).

Further, both Plaintiff's fraud and negligent misrepresentation causes of action fail to state a cause of action, fail to meet the particularity requirements of CPLR 3016(b) and are duplicative of the surviving breach of contract claim. The elements of fraud are "the misrepresentation of a material fact; knowledge by the party making the misrepresentation that it was false when made; justifiable reliance upon the statement; and damages." *Abrahami v. UPC Constr. Co.*, 224 A.D.2d 231, 232-233 (1st Dep't 1996). "In order to show an intent to deceive, plaintiffs must establish that defendant knew, at the time they were made, that the representations were false." *Id.* at 233. "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007).

Plaintiff alleges in its fifth cause of action that defendants' "misrepresentations were made in the promotional materials used to market the Condominium and in the Offering Plan, for the purpose of leading the Purchasers to believe that the Reserve Fund for the Condominium was adequately funded." Complaint, ¶ 76. Plaintiff's sixth cause of action is based upon misrepresentations allegedly made in the Certification. *Id.*, ¶ 91. However, the complaint fails to identify which provisions of the Certification, or the Offering Plan or amendments thereto, were false and made with an intent to deceive, and which language in the Certification the defendants knew to be false at the time they signed it. Thus, other than

conclusory allegations, the complaint fails to allege an intent to deceive. Plaintiffs thereby fail to satisfy the particularity requirement of CPLR 3016(b).

Moreover, defendants signed the Certification on August 7, 2006 (Block Aff., Ex. A), long before the March 22, 2007 creation of the Condominium. Metz Aff., Ex. 13. The complaint fails to explain how signing the Certification before the reserve fund was established could have lead any purchasers to believe that the reserve fund was adequately funded, rendering both the fraud and negligent misrepresentation causes of action insufficiently pled for failure to state the circumstances constituting the wrong in detail and for failure to state a cause of action.

Moreover, the misrepresentations and omissions identified in Plaintiff's fifth and sixth causes of action were defendants' alleged failure to provide the correct total price of Condominium units for calculating the amount required to be placed in the reserve fund, and taking an improper credit for capital replacements. Complaint, ¶¶ 78-81, 91-92. These are the same allegations asserted in the breach of contract causes of action. *Id.*, ¶¶ 66, 69, 72-73. Therefore, the "causes of action for fraud and negligent misrepresentation are not separate and apart from [184 Board's] claim for breach of contract," and must be dismissed. *OP Solutions, Inc. v. Crowell & Moring, LLP*, 72 A.D.3d 622, 622 (1st Dep't 2010); *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 552 (1992) ("where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory").

2. 184 Board's Cross Motion for Summary Judgment

184 Board seeks summary judgment on subsections (a) and (b) of its first cause of action for declaratory judgment. Specifically, 184 Board seeks declarations that defendants failed to establish a reserve fund of 3% of the total price under NYC Code § 26-703(b)(i), and that defendants improperly took a credit for capital replacements under NYC Code § 26-703(c).

Reserve Fund Under NYC Code § 26-703(b)(i)

Under section 26-703(b) of the NYC Code, the offeror of an offering plan for a condominium conversion is required to establish a reserve fund. The parties do not dispute that, here, the Sponsor elected to fund the reserve fund pursuant to section 26-703(b)(i) of the NYC Code. Section 26-703(b)(i) required the Sponsor to establish a fund "in an amount equal to ... three per cent of the total price." Under section 26-702(b)(2), "[t]otal price" is defined as "the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date of the plan regardless of number of sales made."

Schedule A to the Offering Plan identifies the total "Price to Non Tenant-Offerees" as $92,948,000, and the total "Price to Tenant-Offerees" as $83,077,700. Metz Aff., Ex. 6. According to the Sponsor, the total "Price to Tenant-Offerees" in Schedule A was initially listed incorrectly as $83,172,200 due to a typographical error (Adelman Aff., ¶ 10 and Ex.

E), but corrected in the Sixth Amendment to the Offering Plan, which lists the amended, "new price to Tenant-Offerees" as $83,077,700. Metz Aff., Ex. 7, at 2. The Sponsor claims that it adhered to the higher $83,172,200 total price in calculating the mandatory initial contribution to the reserve fund under the NYC Code. Adelman Aff., ¶ 10. According to the Sponsor, its mandatory initial contribution was $2,495,166 (or 3% of $83,172,200), minus a replacement credit in the amount of $831,722, for a net amount funded of $1,663,444.[1]

184 Board claims that "the $92,948,000 figure must be utilized" in calculating the 3% reserve fund, because "the exclusive period expired long before the Plan was declared effective." 184 Board Opp. Brief, at 6. 184 Board also argues that a $281,000 price increase, spread over 12 apartments in the Seventh Amendment to the Offering Plan (Metz Aff., Ex. 8), must be included, for a total price of $93,229,000. In support of this argument, 184 Board relies exclusively upon *Turtle Bay Towers Corp. v. Welco Assoc.*, 228 A.D.2d 189 (1st Dep't 1996).

In *Turtle Bay Towers Corp.*, a sponsor offered shares of a cooperative corporation for sale in an offering plan. By the fourth plan amendment, the sponsor established the price at

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[1] This amount is consistent with the affidavit submitted by 184 Board of Paul Rourke ("Rourke"), a vice president in the accounting department of Prudential Douglas Elliman Real Estate. Rourke states that he has personal knowledge of the accounting work performed for the Condominium and that the Sponsor made a one-time wire transfer of $1,663,444 into the Condominium's capital reserve fund on April 27, 2007. According to Rourke, no further payments were made into the Condominium's reserve fund.

$782 per share to tenants in occupancy. After the fourth amendment expired, the price per share was increased to $1,000 per share to both tenants in occupancy and to outsiders, and the $1,000 per share price remained in effect until the conversion closing. The trial court held that "the last price offered to tenants in occupancy before the effective date of the plan was $1,000 per share." *Turtle Bay Towers Corp. v. Welco Assoc.*, NYLJ, April 12, 1995, at 27, col. 3.

The First Department affirmed, holding that the definition of "total price," in section 26-702(b)(1) of the NYC Code, means "the price in effect just prior to the effective date, and not ... the price in effect during the exclusive purchase period, *i.e.*, the so-called 'insider's price.'" *Id.* at 189-190. The First Department emphasized that "the statutory language, 'last price per share which was *offered to tenants in occupancy* prior to the effective date of the plan,' [was] clear and unambiguous," and rejected the defendants' argument that the "'insider price'" should have been used regardless of price changes prior to the effective date. *Id.* at 190 (emphasis added). Thus, if anything, *Turtle Bay Towers Corp.* supports the conclusion that the Sponsor properly calculated "[t]otal price," under section 26-702(b)(2), as the $83,077,700 "Price to Tenant-Offerees," which was the last price offered to tenants in occupancy prior to the effective date of the Offering Plan. Metz Aff., Ex. 6.

Moreover, the December 13, 2006 Sixth Amendment to the Offering Plan stated that the "exclusive purchase period for Tenant-Offerees expired on Monday, November 20, 2006," thereby excluding the $281,000 price increase identified in the December 15, 2006

Seventh Amendment. Metz Aff., Exs. 7 and 8. The only exception to the expiration of the exclusive purchase period identified in the Sixth Amendment was a 30-day extension to Tenant-Offerees of Units 2S, LE and LF, which, according to defendants, were not included among the 12 units that comprised the $281,000 price increase in the Seventh Amendment. *Id.* Thus, unlike the uniform price increase to both tenants in occupancy and to outsiders in *Turtle Bay Towers Corp.*, which remained in effect until the conversion closing, here, none of the evidence before the court shows a price increase to tenants in occupancy prior to the effective date of the Offering Plan. Specifically, the price increase in the Seventh Amendment did not include an offer or an increase in price to tenants in occupancy, did not extend the exclusive purchase period to tenants in occupancy, and, according to the Sponsor, did not change the price for units 2S, LE or LF during the remaining portion of the extended 30-day exclusive period.

In short, none of the evidence presently before the court shows a price increase to any tenant in occupancy during the exclusive period or prior to the effective date of the Offering Plan. If anything, the evidence suggests that the $83,077,700 "Price to Tenant-Offerees," identified in Schedule A of the Offering Plan (Metz Aff., Ex. 6), was "the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date of the plan," thereby complying with the plain language of section 26-702(b)(2). *Abood v. Hospital Ambulance Serv., Inc.*, 30 N.Y.2d 295, 298 (1972) ("whenever the language of a statute is clear and unambiguous, we are required under ordinary rules of

construction to give effect to its plain meaning"). For the foregoing reasons, 184 Board fails to make a prima facie showing that it is entitled to summary judgment on subsection (a) of its first cause of action.

Although the Sponsor did not cross move for summary judgment, it requests summary judgment in its combined reply and opposition to 184 Board's cross motion. The Sponsor relies upon CPLR 3212(b), whereby "the court, upon a summary judgment motion, may search the record and grant judgment to the non-moving party without necessity of notice or cross motion." *Abramovitz v. Paragon Sporting Goods Co.*, 202 A.D.2d 206, 208 (1st Dep't 1994).

Here, the parties fully briefed and argued the merits of the legal issues pertaining to section (a) of 184 Board's first cause of action. However, the only evidence submitted by the Sponsor of the "last price which was offered to tenants in occupancy prior to the effective date of the plan" (NYC Code § 26-702[b][2]) is the affidavit of the Sponsor's attorney, which states that the Schedule A "'Price to Tenant-Offerees' is the only offer that was ever made to tenants in occupancy and was never increased," and that the $281,000 price increase in the Seventh Amendment "did not include an offer or an increase in price to a tenant in occupancy." Adelman Aff., ¶¶ 9, 16. While the Sponsor's attorney claims to have "prepared the offering plan and all amendments thereto" (*id.*, ¶ 1), he does not claim to have personal knowledge. Nor does he submit documentary proof that identifies the individual "Tenant-Offerees," or that conclusively establishes that the "Price to Tenant-Offerees" in Schedule

A was the "last price which was offered to tenants in occupancy prior to the effective date of the plan" (NYC Code § 26-702[b][2]). Therefore, Adelman's affidavit fails to make a prima facie showing that would entitle the Sponsor to summary judgment on subsection (a) of 184 Board's first cause of action. *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 239 (1st Dep't 1997) ("[a]n attorney's affidavit is of no probative value on a summary judgment motion unless accompanied by documentary evidence which constitutes admissible proof").

Capital Replacement Credit Under NYC Code § 26-703(c)

184 Board next argues that, under section 26-703(c) of the NYC Code, a sponsor is permitted to take a credit against the mandatory initial contribution, but "only when the second funding method is employed." 184 Board further argues that because the Sponsor used the first funding method (under section 26-703[b][i]), "which contains no provision for a [mandatory initial contribution], it is clear that the Sponsor could not take a credit for capital replacements." 184 Board Opp. Brief, at 7. 184 Board concludes that, therefore, the $831,722 replacement credit, taken by the Sponsor, violated the statute.

> It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated: In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning.

Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 (1998) (internal quotation marks and citations omitted).

The "total price" method of establishing the reserve fund, discussed above, requires the sponsor to establish the reserve fund in an amount equal to "three per cent of the total price." NYC Code § 26-703(b)(i). Alternatively, under the "rollover" method, the sponsor can establish the reserve fund in an amount equal to:

> (A) three per cent of the actual sales price of all cooperative shares or condominium units sold by the offeror at the time the plan is declared effective, provided, however, that if such amount is less than one per cent of the total price, then the fund shall be established as a minimum of one per cent of the total price; plus (B) supplemental contributions to be made by the offeror at a rate of three per cent of the actual sales price of cooperative shares or condominium units for each unit or its allocable shares held by the offeror and sold to bona fide purchasers subsequent to the effective date of the plan and within five years of the closing of the conversion pursuant to such plan notwithstanding that the total amount contributed may exceed three per cent of the total price; and provided, further, that if five years from thirty days after the closing of the conversion pursuant to such plan the total contributions by the offeror to the fund are less than three per cent of the total price the offeror shall pay the difference between the amount contributed and three per cent of the total price. Supplemental contributions shall be made within thirty days of each sale.

NYC Code § 26-703(b)(ii).

Section 26-703(c) of the NYC Code provides as follows:

> The contributions required pursuant to this section may be made earlier or in an amount greater than so provided. An offeror

> may claim and receive credit against the mandatory initial contribution to the reserve fund for the actual cost of capital replacements which he or she has begun after the plan is submitted for filing to the state department of law and before the plan is declared effective; provided, however, that any such replacements must be set forth in the plan together with their actual or estimated costs and further provided, that such credit shall not exceed the lesser of the actual cost of the capital replacements or one per cent of the total price.

By its express terms, section 26-703(c) applies to all of section 26-703, as it expressly states that it applies to "contributions required pursuant to *this section* ... ." (Emphasis added.) Furthermore, both methods of funding a reserve fund – under either 26-703(b)(i) or (b)(ii) – involve the sponsor's obligation to establish *initial* funding of the reserve fund at the time the offering plan is declared effective, and because the sponsor is required to establish a reserve fund under either method, either method can be referred to as satisfying the *mandatory* requirement. *Cromwell Owners, Inc. v. Bengualid*, 181 A.D.2d 646, 647 (1st Dep't 1992) ("initial reserve fund obligations were nonwaivable").

In addition, the statutory limitation on the capital replacement credit makes clear that "mandatory initial contribution" applies to both 26-703(b)(i) and (ii). Specifically, the last limitation imposed in section 26-703(c) states that any credit against the mandatory initial contribution "shall not exceed the lesser of the actual cost of the capital replacements or one per cent of the total price." Limiting the credit under both 26-703(b)(i) and (ii) serves the policy purposes of creating an incentive for sponsors to undertake capital replacements while ensuring that reserve funds are not extinguished by the capital replacement credit.

This interpretation is consistent with the "Report of the Committee on Housing and Buildings in Favor of Approving and Adopting a Local Law to Amend the Administrative Code of the City of New York, in Relation to the Conversion of Residential Rental Housing to Cooperative or Condominium Ownership" (Committee Report), which makes no distinction in applying the replacement credit under either method. Proceedings of the Council of the City of New York, from July 13 to December 14, 1982, vol II, at 1131 (Sept. 30, 1982). After identifying the "total price" and "rollover" methods of funding reserve funds, the Committee Report states:

> Finally, the amendments also make clear that this required reserve fund is intended as a minimum and that sponsors and tenants may, and are encouraged, to negotiate for higher reserve funds.
>
> Recognizing that this minimum reserve fund requirement might create a disincentive for some sponsors to make capital replacements before the conversion process, this section provides a sponsor with a credit toward this reserve fund where capital replacements are made after the plan is filed, and before the plan is declared effective. *However, such credit is limited to one percent of the total price with the purpose of insuring that a minimum reserve fund of some appreciable amount is established.*

Id. at 1132 (emphasis added).

Nothing contained in section 26-703 of the NYC Code limits the "mandatory initial contribution" to a reserve fund established pursuant to section 26-703(b)(ii). To the contrary, the plain language of section 26-703 and the Committee Report support the conclusion that

the "mandatory initial contribution" and capital replacement credit of section 26-703(c) apply to both 26-703(b)(i) and (ii). *Abood*, 30 N.Y.2d at 298 ("[w]henever such intent is apparent, from the entire statute, its legislative history, or the statutes of which it is made a part, it must be followed in construing the statute").

The court notes 184 Board's reliance upon *People of the State of New York v. Levy* (2011 NY Misc LEXIS 2519, 2011 NY Slip. Op. 31391[U] [Sup. Ct., NY County, May 25, 2011]), where the court analyzed the "mandatory initial contribution" in the context of section 26-703(b)(ii) only. The court stated that, "[u]nder the second funding alternative, a sponsor is entitled to claim and obtain a credit against the Mandatory Initial Contribution for the actual cost of capital replacements begun after the offering plan is filed and before it is declared effective ... ." *Id.* at *8, **7.

As a preliminary matter, the *Levy* decision was issued by a court of concurrent jurisdiction, which is not binding on this court. More significantly, while the *Levy* decision analyzed the "mandatory initial contribution" in the context of section 26-703(b)(ii), its holding never precludes the application of the capital replacement credit to reserve funds established pursuant to section 26-703(b)(i). In fact, in *Levy*, the offering plan amendments never "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." *Id.* at *14, **11. The court concluded that the respondents failed to explain: why the reserve fund was empty; how their evidence

demonstrated capital replacements or clarified when they were made; or why more money was withdrawn from the reserve account than would be permissible under section 26-703 or the Offering Plan. Thus, 184 Board's reliance on *Levy*, for the rule that "mandatory initial contribution" can be utilized only under section 26-703(b)(ii), is misplaced.

For the foregoing reasons, the Sponsor is entitled to a declaration that it was entitled to "receive credit against the mandatory initial contribution to the reserve fund" under section 26-703(c) of the NYC Code.

184 Board also moves for summary judgment on its second, third and fourth causes of action. As discussed above, the second and third causes of action are dismissed in their entirety, and the fourth cause of action is dismissed against the Non-Sponsor Defendants. The fourth cause of action against the Sponsor is based upon the alleged inadequate funding of the reserve fund and the improper taking of a capital replacement credit from the reserve fund. Also as discussed above, factual issues exist as to whether the reserve fund was properly funded. Factual issues also exist as to whether the credit taken involved items that were non-qualifying, made by the prior owner, performed in a shoddy and non-qualifying manner, and that were untimely, all of which are also the subject of sub-parts (c) and (d) of 184 Board's first cause of action for declaratory relief. Therefore, 184 Board's motion for summary judgment on its fourth cause of action, to the extent it survives defendants' motion to dismiss, is denied.

Order

Accordingly, it is hereby

ORDERED that the defendants' motion to dismiss is granted and the second, third, fifth and sixth causes of action are dismissed in their entirety; and the first and fourth causes of action are dismissed against defendants 184 Thompson Acquisition LLC, 184 Thompson Street Partners, LLC and Raymond Chalme, and the action is dismissed in its entirety as against these defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant, 184 Thompson Street Owner LLC, with respect to the first and fourth causes of action; and it is further

ORDERED that the plaintiff's cross motion for partial summary judgment on subsection (b) of its first cause of action is granted, and the motion is otherwise denied; and it is further

ADJUDGED and DECLARED that defendant 184 Thompson Street Owner LLC, having elected to establish the reserve fund for 184 Thompson Condominium pursuant to section 26-702(b)(i) of the New York City Administrative Code, was entitled to "receive a credit against the mandatory initial contribution to the reserve fund" under section 26-703(c) of the New York City Administrative Code; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442 at 60 Centre Street on May 1, 2012, at 10:00 a.m.

Dated: New York, New York
April 2, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.