

**Board of Mgrs. of the Marbury Club Condominium v  
Marbury Corners, LLC**

2012 NY Slip Op 33675(U)

November 8, 2012

Sup Ct, Westchester County

Docket Number: 29420/09

Judge: Alan D. Scheinkman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED  
ON November 8 2012  
WESTCHESTER  
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
COMMERCIAL DIVISION**

**FILED**

NOV - 8 2012

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

**Present: HON. ALAN D. SCHEINKMAN,  
Justice.**

-----X  
THE BOARD OF MANAGERS OF THE MARBURY CLUB  
CONDOMINIUM,

Plaintiff,

-against-

MARBURY CORNERS, LLC, GINSBURG  
DEVELOPMENT LLC, GINSBURG HOLDINGS,  
MARTIN GINSBURG, WILLIAM RIEHL, SUSAN  
NEWMAN, DAN MULVEY and ROB LODES,

Defendants.

- and -

HUDSON VALLEY BANK, N.A.,

Intervenor-Defendant.  
-----X

Index No. 29420/09

Motion Seq. ##9, 10  
Motion Date: 8/24/12



**DECISION & ORDER**

Scheinkman, J:

Plaintiff, The Board of Managers of the Marbury Club Condominium, ("Plaintiff" or the "Board") moves for summary judgment in the amount of \$475,284.60 under the Third Cause of Action as against Defendants Marbury Corners, LLC ("MC LLC") and Ginsburg Holdings LLC ("Holdings LLC") (collectively "Defendants")<sup>1</sup> (Mot. Seq. No. 009). Defendants oppose Plaintiff's motion and separately move for partial

<sup>1</sup>All of the other Defendants (except for the Intervenor-Defendant Hudson Valley Bank, N.A.) named in the caption have been dismissed from the case voluntarily.

summary judgment as to liability on their First Counterclaim (Mot. Seq. No. 010). These motions are consolidated for purposes of deliberation and disposition.

### **RELEVANT BACKGROUND**

This matter has had a long and involved history.

Briefly stated, the present motions followed in the wake of this Court's Decision and Order dated September 22, 2010 (the "September 2010 Decision") (the contents of which is incorporated herein by reference and familiarity with which is assumed), which granted Plaintiff, the current Board of Managers of the Marbury Club Condominium, partial summary judgment on: (1) its First Cause of Action for declaratory judgment declaring that a Promissory Note dated April 19, 2005 in the amount of \$2,200,000.00 (the "Promissory Note") and related Security Documents executed in favor of MC LLC<sup>2</sup> were illegal, invalid and/or otherwise unenforceable; and (2) its Second Cause of Action for (a) a preliminary injunction enjoining and restraining Defendants MC, LLC, Ginsburg Development, LLC and Holdings LLC from enforcing the provisions of (i) the Promissory Note dated April 14, 2005; (ii) the assignment of common charges dated April 14, 2005; (iii) the Security Agreement dated April 14, 2005, and (iv) the UCC-1 Financing Statement file stamped August 2, 2005; and (b) an order canceling and rescinding these documents. The Court severed the Third Cause of Action for an award of compensatory damages in the amount of at least \$500,000 based on the interest and principal that had been paid on the Promissory Note and the Fourth Cause of Action against the individual defendants for breach of fiduciary duty.

With regard to the issue of damages raised by Third Cause of Action, the Court stated that it

appears to be complex, particularly as relates to the payments received by the Condominium from the Unit Owners of the adjoining condominium for use of the recreational facilities of this Condominium. Accordingly, the Court will not grant an inquest; rather, the Court will schedule a conference for the purpose of establishing schedules for the resolution of the remaining issues in this case (September 2010 Decision at 23).

The Court's September 2010 Decision was based on the undisputed fact that the authority of the Sponsor Board to borrow had not been authorized by the

---

<sup>2</sup>It is undisputed that the Promissory Note and related Security Documents were assigned to Holdings LLC pursuant to assignments dated April 1, 2009.

Condominium's Declaration or By-laws and therefore the Promissory Note violated Real Property Law § 339-jj.

While the present motions were pending, Defendants pursued an appeal of the September 2010 Decision. When it became apparent that a decision on the appeal would be forthcoming, this Court adjourned the submission date of the present motions pending the hand down of the appellate decision.

On August 22, 2012, the Appellate Division, Second Department (Rivera, J.P.; Hall, Lott, Cohen, J.J.), issued a Decision and Order affirming the September 2010 Decision (*Board of Managers of Marbury Club Condominium v Marbury Corners, LLC*, 98 AD3d 641 [2d Dept 2012]). The Court stated:

Contrary to the defendants' contention, the Supreme Court correctly determined that the subject promissory note was made in violation of Real Property Law § 339–jj(1) ... and that, under the circumstances of this case, the promissory note and related documents are unenforceable ... (*Board of Managers of Marbury Club Condominium*, 98 AD3d at 641 [citations omitted]).

Prior to the appellate decision, Plaintiff had moved for summary judgment, a motion which this Court denied without prejudice and with leave to renew by Decision and Order entered July 6, 2011 (the "July 2011 Decision"). In their opposition papers to that motion, Defendants proffered various theories to avoid what they regarded as a windfall that Plaintiff would reap from the invalidation of the Note. Since Defendants had not as yet actually asserted any counterclaims, the Court determined that Defendants should have both the opportunity and the obligation to definitively identify their legal contentions and requests for relief before summary judgment was invoked. In order to make sure that the issue of damages was decided on a full and complete record, the Court afforded Defendants the opportunity to move to interpose an amended pleading which set forth precisely what legal theories or claims they were espousing.

Defendants moved to amend their pleading so as to interpose counterclaims. Plaintiff opposed the motion. By Decision and Order entered July 6, 2011, this Court granted Defendants' motion. While the Court expressed skepticism as to the ultimate viability of Defendants' counterclaims, the Court determined that the counterclaims were not so demonstrably lacking in merit as to compel the Court to deny Defendants the opportunity to interpose them at all.

Defendants interposed their amended pleading on November 16, 2011 and Plaintiff thereafter served a reply to the counterclaims. Plaintiff's present motion is pursued by Notice of Motion dated January 4, 2012 and Defendants' present motion is pursued by Notice of Motion dated January 5, 2012.

Before leaving this review of the history of the matter, there is one more decision to take note of. Defendants had moved for reargument or renewal of the September 2010 Decision, disclosing in their papers that Holdings LLC had assigned the Note and the Security Documents on November 10, 2009 to Hudson Valley Bank, N.A. (the "Bank") as part of the collateral security for a \$3.4 million loan to Holdings from the Bank. This assignment occurred during the pendency of this action. By Decision and Order entered January 24, 2011, this Court denied Defendants' motion to reargue or renew but without prejudice to any application that the Bank may wish to make, such as a motion to intervene.

Subsequently, at a conference held on the record on March 2, 2011, the Court allowed the Bank to intervene in the action. But, it should be noted, that counsel for the Bank agreed with the Court that, because the assignment to the Bank was for collateral security, the question as to whether the Bank was a holder in due course of the Note such that it could enforce it as against Plaintiff would arise only if and when Holdings defaulted on the \$3.4 million loan made by the Bank and, then, only if the Bank elected to proceed on the Note (as it has other security interests as well). Should these eventualities come to pass, the Bank would have the right to sue on the Note and, if Plaintiff is found liable, Plaintiff would have the right to seek indemnification. Thus, these issues are left for another day. The Bank has not submitted any papers on these motions – recognizing that the determination herein does not impact any of its rights.

### **THE SUMMARY JUDGMENT STANDARD**

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 643-644 [1985]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 (2d Dept 2000); *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]). Once the moving party has made a *prima facie* showing of entitlement of summary judgment, the burden of production shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 2007]).

The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v*

*Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*).

With this standard in mind, the Court will turn first to the issue of the damages sought by Plaintiff and then to the issues raised as to Defendants' affirmative defenses and counterclaims.

### **DAMAGES UNDER THE THIRD CAUSE OF ACTION**

It is undisputed that Plaintiff paid Defendants a total of \$551,358.89 for principal and interest under the Note (Pltf Rule 19-a Stmt, ¶19; Def Rule 19-a Stmt, ¶19).<sup>3</sup>

In moving for summary judgment, Plaintiff's counsel takes note that Defendants previously asserted a claim for certain offsets for funds derived from common charges and parking fees that the Sponsor (MC, LLC) paid to Plaintiff during the period after the Offering Plan was declared effective and the Sponsor sold the last of the units (Affidavit of Victor M. Metsch, Esq., sworn to January 4, 2012 ["Metsch Aff."], ¶5). While Plaintiff does not agree that Defendants are entitled to any offsets, Plaintiff nevertheless, to get past this issue, offers to reduce its demand from \$551,358.80 to \$475,284.60, on account of two offsets (*id.*, ¶¶6-7).

The first offset is for \$34,457.49 for parking fees paid to Plaintiff (Metsch Aff., ¶7 and at 3 n1). The second offset for \$41,616.71 is for common charges and "budget shortfalls", an amount representing 27% (that being the percentage of the initial operating budget that was attributed to debt service on the Note) of 2005 common charges, 2005 alleged budget shortfalls, 2006 common charges, and 2006 alleged

---

<sup>3</sup>Plaintiff asserts, based on an affidavit from its President Joseph Acocella, that of the \$551,358.99, \$7,003.81 was for principal and \$544,355.08 was for interest (Pltf Rule 19-a Stmt, ¶¶17-19; Affidavit of Joseph Acocella, sworn to December 19, 2011, ["Acocella Aff."], ¶¶13-14). Defendants rejoin, in their responsive Rule 19-a statement that these amounts are different from the sums attributable to principal (\$6,024) and interest (\$545,335) in Plaintiff's prior summary judgment motion. However, Defendants do not dispute that Plaintiff's present calculations are correct. More important, Defendants concede that the total amount claimed in payments (regardless of whether attributed to principal or interest) of \$551,358.89 is correct. The Court will use this total as neither Plaintiff nor Defendants has asserted that the allocation between interest and principal makes any difference to the Court's determination as to damages. Indeed, the total amount was previously stipulated to by counsel (Ex. G to Affirmation of Jonathan F. Vuotto, Esq., sworn to February 1, 2011 ["Vuotto Opp. Aff."]).

budget shortfalls (*id.*).

While not expressly stated by Plaintiff, it appears that Plaintiff is trying to give Defendants credit for monies paid into Plaintiff's general account by the Sponsor, which funds were not segregated as to purpose (Metsch Aff., ¶6).

In opposition, Defendants assert that, as set forth in a stipulation of April 15, 2011, the Sponsor paid Plaintiff various sums for various purposes in 2005 through 2009 (Affidavit of Martin Ginsburg, sworn to February 1, 2012 ["Ginsburg Opp. Aff."], ¶39). Martin Ginsburg, the manager of MC LLC and Holdings LLC, avers that the Sponsor's records reflect that \$49,500 of its payments to Plaintiff were used to make Note Payments (*id.*, ¶40). However, the records submitted do not bear out that contention. Rather, the records submitted show that on August 2, 2005 MC LLC transferred \$60,000 to "Marbury Club Condo," but the description given for the issuance of the check is "Shortfall," with the same description being listed on the payment request. There is an e-mail of July 26, 2005 which identifies \$48,233 in net cash shortfall and of that \$33,000 is said to be for "Mortgage payments May-Aug" without identifying the mortgage referred to. Similarly, the support for a \$20,000 check issued on September 10, 2005 refers to "Sept mortgage" and insurance and other monthly expenses. Likewise, the backup for a \$10,000 check issued on November 10, 2005 states only "shortfall", though there is a handwritten note on a piece of accounting paper that states: "I need \$10,000 before I could pay the mortgage" (*id.*, Ex. A). None of these documents indicates what mortgage was being paid or in what amount and none of them constitutes proof of payment of any mortgage. Defendants also argue that they should receive a credit for \$188,593.38, representing the total payments by the Sponsor for common charges and budget shortfalls (Def. Opp. Br. at 24). This position, too, is without merit in that it is apparent that the common charges and budget shortfalls cover a host of expenses entirely unrelated to the the Note.

Defendants do argue with some force that Plaintiff has the burden of proof. Their suggestion that the problem is of Plaintiff's creation because it "has admitted that it did not segregate the payments for any particular purpose" (Ginsburg Opp. Aff., ¶40) rings hollow to the extent that Plaintiff was under the Sponsor's control for the period of time in question and to the extent that Plaintiff's banking and accounting practices were set up by the Sponsor. However, Defendants have a valid point in their contention that in 2005, the Note expense of \$66,000 represented 60% of Plaintiff's income and, thus, Defendants have shown that Plaintiff's suggestion of 27% based on an initial budget is unfair (see Def. Opp. Mem. at 24).

It is apparent that Plaintiff cannot recover for payments on the Note to the extent such payments were made by Defendants. The gravamen of the Court's decision to invalidate the Note was that Defendants failed to follow proper procedures in their attempt to recoup profits in the form of the Note. It is Plaintiff's burden to prove that it sustained the damages claimed. The Court is not convinced that Plaintiff has

established, as a matter of law, that it is entitled to the sums demanded. Among other things, Plaintiff has not provided any information at all as when it ceased to be under the Sponsor's control and when money other than the Sponsor's began to flow into Plaintiff's coffers. Accordingly, the branch of Plaintiff's motion that seeks an award of \$475,284.60 in damages is denied.<sup>4</sup>

Defendants also argue that they should receive a credit for \$701,190.00 for parking, storage and recreation fees paid to Plaintiff, which monies Plaintiff would not have received but for the Note (Ginsburg Aff., ¶42). Defendants' theory is that the Sponsor provided Plaintiff with sufficient revenues from the parking, storage and recreation fees to enable it to pay the Note; the point being that the Sponsor would not have turned these fees over to Plaintiff had the Sponsor not created the Note (Ginsburg Aff., ¶41). The Court does not agree with Defendants' theory.

This Court has already concluded that the Note was brought into being as a vehicle to give the Sponsor the profits the Sponsor lost by virtue of the Sponsor's decision to reduce the sales prices of the units in order to lower the tax assessments for the units. While the Court was originally inclined to perceive that Defendants were entitled to a credit for parking fees paid by unit owners, the Court, having carefully reviewed its prior determinations, the Appellate Division decision, and submitted papers, concludes that Defendants are not entitled to any offset for parking fees paid by unit owners. As the Court stated in the September 2010 Decision:

While the fact of the borrowing was disclosed, the purpose of the borrowing was not. Nowhere were purchasers informed that the borrowing plan was devised as a means by which the Sponsor could recoup the profits lost by purchase price reductions made in order to artificially lower realty taxes. Putting it another way, the unit purchasers were not informed that they were being required to pay for parking spaces, which parking was originally intended to be free of charge, so that the Sponsor could receive more money on account of its sale of the units.

To allow Defendants to obtain a credit for the \$631,665.76 in parking fees

---

<sup>4</sup>The Court notes that another way of approaching this issue is to ascertain, for each month when the Sponsor was contributing funds to Plaintiff, the percentage that the Sponsor's contributions bear to the contributions by unit owners, and apply that percentage to the amount actually paid on account of the Note for such month. While there may be other ways to deal with this issue, the above approach would seem to avoid the issue raised by Defendants as to the arbitrary nature of an across-the-board use of a 27% figure, a figure gleaned from the initial operating budget.

paid between 2005 and 2010 would permit them to gain at least part of the profit that they were seeking to obtain via the now-invalidated Note. The parking fees were put into place by the Sponsor so that it could extract profit through the revenue stream created by the mandatory parking lease and parking fee requirements. Having concluded that the Note is unenforceable, the Court cannot permit Defendants to receive any benefit from the parking fees actually paid, given the Court's prior and affirmed determination that but for the Note, the parking would have been free of charge.

Defendants have not explained what the storage fees are for which they seek a credit. While it has been stipulated that \$30,86.24 was paid to Plaintiff for storage fees in 2005 through 2010 (Ginsburg Aff., ¶41), no other information about them has been provided, such as why these fees were imposed and what services, if any, were provided in exchange for them. Further, these fees appear to be wholly unrelated to the issue regarding the Note. Hence, the Court concludes that Defendants have not shown any basis for giving them an offset for storage fees.

The Court also, upon reconsideration, determines that it cannot presently decide whether Defendants are entitled to a credit of \$38,656.00 for recreation fees received by Plaintiff from 2006 to 2010. As recounted in the September 2010 Decision, as part of the Sponsor's plan for putting revenue into Plaintiff so that it could cover the Note, the Sponsor arranged for Plaintiff to receive a fee for the use of its recreational facilities by the members of a separate condominium also being developed by the Sponsor nearby. To the extent that the money was collected from the neighboring condominium, these payments were not extracted from Plaintiff or its unit owners, differentiating these payments from the parking fees. On the other hand, Plaintiff is required, apparently, to permit the neighbors to use the recreational facilities. Such increased use may increase the costs of operation, maintenance and repair of the facilities and, to the extent that the fees were siphoned off to pay the Note and were not available to defray the costs associated with the neighbor's use of the facilities, Plaintiff can be said to have been damaged. However, no information is before the Court as to how the recreational fees were calculated in the first place or as to the expenses, if any, of the use of the facilities by the neighbors. Thus, the Court cannot presently decide this question and, therefore, the Court shall deny so much of Plaintiff's motion for summary judgment as seeks an award of damages.

The Court now turns to Defendants' affirmative defenses and counterclaims, the object of which is to avoid liability all together.

Defendants' 15 affirmative defenses require little discussion. To the extent that the affirmative defenses seek to avoid invalidation of the Note, the Court has already found the Note to be unenforceable. In any event, the affirmative defenses are so lacking in merit as to render extended analysis of them unnecessary. For example, the Fourth, Fifth, and Sixth Affirmative Defenses assert the commission of "culpable

conduct” of Plaintiff, its unit owners, or third parties, a tort concept and there is no basis for imputing any culpable conduct to Plaintiff for the invalidity of the Note, which was prepared by the developer. The unit owners have not been made parties to the action and no third parties have been joined either. The Second Affirmative Defense asserts the statute of limitations, though the Note has already been invalidated and there is no apparent time bar. Defendants also claim that the action should be barred by “*caveat emptor*”, though, again the Note has been invalidated. Accordingly, the Court shall dismiss all of the Defendants’ affirmative defenses.

### **UNJUST ENRICHMENT** **(Defendants’ First Counterclaim)**

Defendants’ First Counterclaim asserts that, as consideration for conveying the common areas of the Condominium, including the parking garage, the Sponsor required execution and payment of the Note. Defendants assert that if the Sponsor had known that the Note was invalid, it would not conveyed the garage to Plaintiff. Thus, Defendants allege that because of a “technical oversight” Plaintiff will reap an “unconscionable windfall”, that is, the retention of ownership of the garage and continued receipt of parking, recreation and storage fees, to the detriment of Defendants. According to Defendants, “[a]llowing Plaintiff to retain the benefits provided by [the Sponsor] would be inequitable and unjust” (Def. Amd. Answer, ¶¶42-47). As a remedy, Defendants seek the recovery of “substantial damages” (*id.* at ¶48), in an amount to be established at trial, together with interest, costs and attorneys’ fees (*id.* at ¶49).

Plaintiff moves for summary judgment dismissing all counterclaims. Defendants move for summary judgment in their favor as to liability on the First Counterclaim.

Defendants’ argument is that, to establish unjust enrichment, they must show: (1) that Plaintiff was enriched; (2) that the enrichment was at Defendants’ expense; and (3) it is against equity and good conscience to permit Plaintiff to keep what is sought to be recovered (Def. Mem. in Support at 9). They claim that all of these elements are present and, in fact, have been established by them. Naturally, Plaintiff asserts that none of these elements has been established and that, as a matter of law, the First Counterclaim must fail.

The Court accepts the argument of Plaintiff that neither Defendant has standing to present a claim of unjust enrichment. The Sponsor (MC LLC) assigned the Note to Holdings LLC by instrument dated April 1, 2009 and recorded by the County Clerk on June 3, 2009. Defendants’ answer concedes that MC LLC “assigned its interest in the Note to ... Holdings [LLC], for valuable consideration” (Def. Amd. Answer, ¶35). The assignment occurred prior to the commencement of this litigation on

December 19, 2009. While the nature and amount of the consideration transferred by Holdings to MC LLC in exchange for the assignment to Holdings of the Note is not disclosed, the Court is required to accept Defendants' judicial admission that the consideration was "valuable" (see *Zegarowicz v Ripatti*, 77 AD3d 650 [2d Dept 2010] [admission in answer is a formal judicial admissions and conclusive of the facts admitted in the action in which they are made]). Whatever consideration MC LLC received from Holdings, it received at the time of the assignment in April 2009, long before any unjust enrichment of Plaintiff occurred by virtue of the invalidation of the Note. Since MC LLC had already gotten whatever consideration it was entitled to from Holdings and had effectively passed the Note along to Holdings, there is no basis to conclude that its entitlement was diminished on account of the invalidation of the Note at time after MC LLC had already parted with it. In short, MC LLC has not shown that the invalidation of the Note, after MC LLC had already given it up in exchange for valuable consideration, caused MC LLC any damages.

Stated another way, the heart of the unjust enrichment claim is the allegation that if MC LLC "had known that the Note was or would be alleged to be invalid, it would not have conveyed title to the garage" to Plaintiff (Def. Amd. Answer, ¶44). But, since MC LLC had already conveyed its interest in the Note to Holdings several months before the validity of the Note was called into question and since MC LLC received "valuable consideration" for its transfer of the Note to Holdings, the subsequent invalidation of the Note makes no difference to MC LLC's rights in the matter. In any event, MC LLC has not articulated any plausible reason for it having standing to pursue the claim of unjust enrichment.

Defendants' argue in their memorandum of law that they do not seek to enforce the Note but seek equitable relief (Def. Mem. in Opp. at 7). This is not correct in relation to the First Counterclaim in that, while Defendants are not seeking to enforce the Note, they are seeking money damages. Standing is claimed to exist because "if Plaintiff is permitted to retain title to the garage and the income from it without compensating Sponsor [MC LLC], then Sponsor will incur a significant forfeiture" (Def. Mem. in Opp. at 7) for which Defendants want compensation. The problem with this argument is that MC LLC was already compensated for the Note by Holdings at the time of the assignment.

As to Holdings, while it holds the beneficial interest in the Note (the assignment to the Bank being for collateral purposes only), and it has sustained a cognizable economic loss from the invalidation of the Note, Holdings never had title to the garage, only the right to get paid on the Note. Accordingly, it cannot be said that Holdings would only have transferred the garage (which it never owned) to Plaintiff but for the Note.

Moreover, the loss sustained by Holdings was the amount of the consideration transferred by it from MC LLC. Holdings never claimed to be holder in due

course of the Note and, to the extent that it is trying to assert that it was deprived of the value of the Note, it cannot seek to revive the invalidated Note by claiming “unjust enrichment.”

For these reasons, the Court concludes that neither Defendant has standing to assert the First Counterclaim. Nonetheless, the Court will proceed to deal with the merits of the First Counterclaim, as to which Defendants fare no better.

As Judge Breitel cogently stated for a majority of the Court of Appeals in *Paramount Film Distrib. Corp. v State* (30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]):

The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered .... Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice .... Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent .... (*id.* [citations omitted]).

This concept has been distilled into three elements that a plaintiff claiming unjust enrichment must show: (1) that defendant was enriched; (2) that the enrichment was at plaintiff's expense; and (3) it is against equity and good conscience to permit defendant to retain what is sought to be recovered (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). However, an action to recover for unjust enrichment sounds in restitution or quasi-contract (*Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept 1983]) and rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another (*Miller v Schloss*, 218 NY 400, 407 [1916]). Because the theory of unjust enrichment lies as a quasi-contract claim, where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

Here, as Martin Ginsburg, the sole manager of MC LLC, pointed out in a prior affidavit, the condominium units were offered for sale pursuant to an Offering Plan filed with, and approved by, the Office of the Attorney General on March 30, 2004 (Affidavit of Martin Ginsburg, sworn to August 19, 2010, [“Ginsburg S.J. Aff.”] ¶2, annexed as Exhibit G to Reply Affirmation of Jonathan Vuotto, Esq., dated February 15, 2012 [“Vuotto Reply Aff.”]; Affidavit of Martin Ginsburg, sworn to January 4, 2012,

“Ginsburg Opp. Aff.” ¶13). Each purchaser of a condominium unit signed a purchase agreement with MC LLC pursuant to which the terms of the Offering Plan, as it may be amended, are incorporated into the purchase agreement by reference and made a part thereof (Ginsburg S.J. Aff., ¶7). The Offering Plan provides that the portions of the condominium located outside of the individual units are to be considered common elements and use and ownership are to be shared among all unit owners. These common elements are defined as including “the garage underneath the building”, as well as the courtyard, landscaped area, hallways, stairways, elevators and lobbies (Affidavit of Joseph Acocella, sworn to January 25, 2012 [“Acocella Opp. Aff.”] ¶¶19-20, 21, 23 and Ex. 1).

The Offering Plan thus makes it clear that the parking garage is a common element to be owned by Plaintiff and that such provision is incorporated into all of the purchase agreements. This is not disputed. Indeed, the purchase agreements made it clear that MC LCC was selling to each unit purchaser “an undivided interest” in the common elements, a term which is defined as having the same meaning as in the plan (Metsch Aff., Ex. D at ¶¶3,4).

The thrust of Defendants’ argument is that the garage would not have been transferred to Plaintiff but for the Note.

As Martin Ginsburg points out, the Special Risks identified in the Offering Plan advised purchasers that, upon conveyance of title to the first unit, Plaintiff would execute and deliver to MC LLC a promissory note for \$2.2 million secured by a pledge of Plaintiff’s rights to the common charges, security agreement and UCC-1 statements (Ginsburg Opp. Aff., ¶15). However, the Offering Plan did not provide that the garage would be subject to reversion to MC LCC under any circumstances. Rather, the purchase agreements with unit owners, which incorporate the Offering Plan, provided, instead:

**Severability.** If any provision of this Agreement or the Plan is invalid or unenforceable as against any person or under certain circumstances, the remainder of this Agreement or the Plan and the applicability of such provision to other persons or circumstances shall not be affected thereby. Each provision of this Agreement or the Plan, except as otherwise specifically set forth herein or in the Plan, shall be valid and enforced to the fullest extent permitted by law (Metsch Aff., Ex. D at ¶28).

Even if it is assumed that the payment of the Note was integral part of the Offering Plan, the subsequent invalidation of the Note does not affect the portion of the Plan pursuant to which the parking garage was designated as part of the common elements. While the Note was held invalid, the balance of the Offering Plan was not affected. Pursuant to the terms of the Offering Plan, it was subject to amendment and

the invalidation of the Note may be regarded as bringing about, in effect, an amendment to the Offering Plan. Further, pursuant to the purchase agreements, the invalidation of part of the Plan, if the Note is so regarded, does not affect the validity of the balance of the Plan, including the definition of the common areas.

Since there is a valid agreement which covers the subject matter of the claim of unjust enrichment, and Defendants cannot be heard to complain about Plaintiff's retention of the garage which they are permitted to retain under the valid provisions of the Note and the purchase agreements, the unjust enrichment claim must fail.

Further, even an analysis of the three elements of an unjust enrichment claim leads inexorably to the conclusion that Defendants' claim in this case must fail.

First, it cannot be said that Plaintiff has been enriched by its continued ownership of the parking garage. The parking garage was, under the terms of the Offering Plan and of the purchase agreements, to be owned by Plaintiff along with all of the other common elements. The unit purchasers each paid for an undivided interest in the common elements, including the parking garage. While it is true that Plaintiff (and its unit owners) are no longer burdened by the obligation to pay the Note, that does not enrich them – it means that Defendants' effort to recoup the profits lost when the Sponsor decided to reduce the basis on which the units would be taxed (September 2010 Decision at 17). To the extent that it could be said that the unit owners benefitted from an "artificially low sales price" set for real estate tax purposes (*id.*), the unit owners are not themselves parties to this action and, in any event, neither they nor Plaintiff can be said to be "enriched" by being rid of an obligation not properly imposed upon them.

Second, it cannot be fairly said that any enrichment was at Defendants' expense. As recounted in the September 2010 Decision, the Sponsor chose to try recoup the profits lost upon its decision to reduce the basis on which the units would be taxed rather than embark on the legitimate but more difficult path of changing to a cooperative plan and obtaining new approvals (*id.*). Additionally, as Plaintiff points out with considerable force, the real estate tax issue is directly related to the pricing that MC LCC was setting. In the original Offering Plan dated March 30, 2004, MC LC was seeking gross sales proceeds of \$31,452,000; under a First Amendment dated June 3, 2004, the gross sales proceeds were increased to \$37,742,640; and under a Second Amendment of June 24, 2004, just a few weeks after the First Amendment, the gross sales proceeds were increased to \$45,294,168 (Metsch Aff., ¶¶22-24 and Exs. F-H). While Defendants may stand to lose \$2.2 million in profits, Defendants have not shown that this loss was actually at their expense. The construct is that Defendants developed this plan because, if they actually charged the prices they wanted in order to obtain the desired profits, the real estate taxes would have been higher, and the units would not have been marketable.

Defendants' theory has consistently been that the Sponsor would not have given Plaintiff title to the parking garage but for the Note and would have instead retained title and leased the parking spaces or sold the parking spaces to unit owners (see Def. Mem. in Opp. at 14). However, there is no evidence to show that had Defendants retained the garage, they would have been able to either: (a) market the units subject to a requirement that unit owners must lease or purchase parking spaces from the Sponsor at particular prices; or (b) market the units without including the parking garage in the common areas; or (c) lease the spaces or to anyone else at a profit, bearing in mind that the Sponsor, if had retained the garage, would also have retained all responsibility and liability for the garage.

The third factor in unjust enrichment is that it must be shown that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Here, Defendants have not shown that it is against equity and good conscience to permit Plaintiff to retain the parking garage (or its economic value), which Defendants seek to recover. The plan all along was for the parking garage to be part of the common elements held by Plaintiff and in which all unit owners have an undivided interest. Defendants should not be permitted to circumvent the economic consequences of the invalidation of the Note (which was brought about by Defendants' failure to comply with the law) by claiming unjust enrichment. Such a result would be itself be unjust in that it would deprive the unit owners, who are not individually parties here, of their undivided interest in the garage (or its economic value).

For these reasons, the Court will grant so much of Plaintiff's motion for summary judgment as seeks dismissal of the First Counterclaim and will deny Defendants' motion for summary judgment in its entirety.

### **CONSTRUCTIVE TRUST** **(Defendants' Second Counterclaim)**

The Second Counterclaim asserts that a fiduciary relationship exists between the Sponsor-appointed Board, the Condominium and unit owners. In particular, Defendants allege that a fiduciary relationship arose between the Sponsor (MC LLC) and Plaintiff "upon transfer of control of the Condominium's affairs from the Sponsor-appointed Board to Plaintiff, in that Plaintiff had a fiduciary obligation to abide by the Offering Plan, the Declaration and By-Laws (Def. Amd. Answer, ¶51). Defendants assert that the Sponsor (MC LLC) reasonably relied on Plaintiff's promise to pay the Sponsor "for the benefit of the parking garage and other common areas of the Condominium, because [MC LLC] had no reason to believe that Plaintiff would take ownership of the garage without giving the concomitant consideration" (*id.* at ¶54). Defendants claim that Plaintiff breached its promise to pay for the transfer of title to the parking garage and other common areas and as a result Plaintiff has been unjustly enriched (*id.* at ¶¶55-56).

Defendants allege that Plaintiff, without paying the Sponsor, has title to the parking garage and other common areas, and is receiving the rents and fees. Defendants aver that the Sponsor “established the parking, recreation center and storage fees in order to provide Plaintiff with sufficient income to pay Marbury Corners for title to the garage and other common areas” (*id.* at ¶¶57-58). Claiming unjust enrichment, Defendants seek the impressment of a constructive trust “on the incomes generated by the Condominium’s common areas, including the parking garage, for the benefit of Marbury Corners” (*id.* at 59-60).

A constructive trust is an equitable remedy designed to prevent unjust enrichment (*see generally, Simonds v Simonds*, 45 NY2d 233 [1978]; *Sharp v Kosmalski*, 40 NY2d 119 [1976]). Since, as a matter of law, there has been no unjust enrichment, as previously held with respect to the unjust enrichment claim, the constructive trust claim fails as well. But there some additional points that should be noted as well.

Under New York law, while the application of the concept of constructive trust is susceptible to some flexibility, to establish a constructive trust, four elements must generally be present: (1) a confidential or fiduciary relation; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment (*Bankers Security Life Ins. Society v Shakerdge*, 49 NY2d 939, 940 [1980]; *Marini v Lombardo*, 79 AD3d 932, 933 [2d Dept 2010], *lv denied* 17 NY3d 705 [2011]).

In response to Plaintiff’s motion challenging the existence of a fiduciary duty, Defendants have failed to present any facts that would establish that Plaintiff had or has any fiduciary obligations towards the Sponsor. A confidential or fiduciary relationship is required in the constructive trust context and arises where a bond of trust and confidence exists between the parties (*Rocchio v Biondi*, 40 AD3d 615, 616 [2d Dept 2007]). There is no showing that there was any bond of trust and confidence existing between Plaintiff, the Board of Managers of the Marbury Club Condominium, and any of the Defendants, particularly after the transfer of the Sponsor-controlled Board to the present unit owner-controlled Board. Indeed, it is readily apparent that the relationship between the unit owners and the Sponsor was an arms-length buyer/seller relationship.

In response to Plaintiff’s challenge to the allegation that the Sponsor transferred title to all of the common areas, including the parking garage, in reliance upon a promise by Plaintiff to pay the Note, Defendants have failed to produce admissible evidence that the transfer of the common areas was made in reliance upon such a promise. All that Defendants offer is that they would not have done what they did but for the giving of the Note (Def. Mem. in Opp. at 14). As Plaintiff points out, there is nothing in the Offering Plan, the Declaration of Condominium, By-Laws or purchase agreements that state that the transfer of the common elements was in consideration for the Note.

Third, the promise to pay \$2.2 million was embodied in the Note which, as the Court has previously found, is an invalid and unenforceable promise.

Accordingly, the Court will grant the branch of Plaintiff's motion as seeks summary judgment dismissing the Second Counterclaim.

**REFORMATION BASED ON MUTUAL MISTAKE**  
**(Defendants' Third Counterclaim)**

As their Third Counterclaim, Defendants assert a claim for reformation of the Offering Plan and the purchase agreements so as to provide that the fees generated from parking spaces should be paid to MC LLC rather than to Plaintiff (Def. Amd. Answer, ¶70). Defendants assert that in order to pay the Note, the Sponsor required each unit owner with a car to rent a parking space and that neither the Sponsor nor the unit owners were aware that the Note violated the law (*id.* at ¶¶63-66). According to Defendants: "Based on this mutual mistake, Marbury Corners permitted the parking fees to be paid to Plaintiff, and the unit purchasers agreed to this arrangement" (*id.* at ¶67). Again, Defendants contend that had they and the unit owners known of the illegality, the Sponsor would have either sold the parking spaces to the unit owners or retained the garage and the parking fees (*id.* at ¶68).

As a preliminary matter, the Court notes that Defendants have not joined, nor have they sought to join, any of the individual unit owners. The parties to the purchase agreements, which Defendants seek to reform, were the Sponsor and the individuals who initially purchased the units (*see Metsch Aff., Ex. D*). While Defendants plead that the unit owners "are on notice of this action by and through Plaintiff" (Def. Amd. Answer, ¶70), they have not offered any evidence of any communication by Plaintiff to any unit owners regarding this action and none of the unit owners have been afforded the opportunity to be heard. Further, it seems apparent that at least some of the initial unit owners may have transferred their units to others over time. Fundamental principles of due process require that a person may not be deprived of property without being accorded notice and an opportunity to be heard and, therefore, reformation of the purchase agreements cannot be undertaken without the joinder of the parties holding the rights of the buyers under those agreements (*see Galbraith v Guida* 161 AD2d 206 [1st Dept 1990]).

In any event, Defendants' claim fails on its merits. As the Appellate Division, First Department has explained in *Jossel v Meyers* (212 AD2d 55, 57 [1st Dept 1995]):

Where the parties have made an instrument as they intended it should be, and the instrument expresses the transaction as it was understood and designed to be made, then the party who had an opportunity to know the contents of the instrument cannot obtain cancellation or reformation because he misunderstood the legal effect of the whole or of any of its provisions; equity will not grant a rescission although one of the parties “—and as many cases hold, both of them—” may have mistaken or misconceived its legal effect (*id.*, citing 3 Pomeroy's Equity Jurisprudence § 843, at 295 [5th Ed.]).

Stated somewhat differently, under New York law, however, a mutual mistake must be as to a fact, and not as to the legal consequences of the contract into which the parties are entering (*Compania Embotelladora Del Pacifico, S.A. v Pepsi Cola Co.*, 607 F Supp 2d 600, 603 [SD NY 2009]; *Cobalt Multifamily Inv. I, LLC v Bridge Capital (USVI), LLC*, 2007 WL 2584926 at \*9 [SD NY 2007]; *Gonzalez v Green*, 14 Misc 3d 641 [Sup Ct NY County 2006]).

Since all that Defendants have alleged is that there was a mistake as to the legal consequences of the Note, their claim for reformation based on mutual mistake must fail.

Further, in response to Plaintiff's motion, Defendants have not come forward with any evidence to show that any of the unit purchasers had any knowledge, one way or the other, as to the validity of the Note. Thus, any mistake was unilateral, not mutual (*Carney v Carozza*, 16 AD3d 867 [3d Dept 2005]).

The Court also notes the recent expression of the law of mutual mistake by the Court of Appeals in *Simkin v Blank* (19 NY3d 46, 52-53 [2012]):

We have explained that “[t]he mutual mistake must exist at the time the contract is entered into and must be substantial” ... Put differently, the mistake must be “so material that ... it goes to the foundation of the agreement” ( ... see also 27 Lord, *Williston on Contracts* § 70:12 [4th ed.] [“The parties must have been mistaken as to a basic assumption of the contract ... Basic assumption means the mistake must vitally affect the basis upon which the parties contract”] ). Court-ordered relief is therefore reserved only for “exceptional situations” ... The premise underlying the doctrine of mutual mistake is that “the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties” (*id.*, [citations omitted]).

In response to Plaintiff's motion for summary judgment, Defendants have not offered evidence that would support the view that this is one of the "exceptional situations" in which court-ordered relief can permissibly be obtained. Defendants have not shown, for example, that there is any legitimate basis upon which it can be concluded that, even if all parties believed the Note was valid, this premise was so material as to go to the foundation of the entire structure of the sale and acquisition of each unit.

The Court will grant dismissal of the Third Counterclaim.

**REFORMATION BASED ON UNILATERAL MISTAKE**  
**(Defendants' Fourth Counterclaim)**

In their Fourth Counterclaim, Defendants assert that certain unit owners, and in particular Plaintiff's counsel, intentionally concealed from the Sponsor their belief that the Note violated the law and misrepresented that they approved of the Note when signing the purchase agreements (Def. Amd. Answer, ¶77). Defendants allege that the Sponsor reasonably relied on these misrepresentations because it, the Sponsor, had no reason to know that these unit purchasers executed the purchase agreement with the intent to take advantage of the law (*id.* at ¶79). On these allegations, Defendants seek reformation of the Offering Plan and purchase agreements based on unilateral mistake.

"[I]n the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement .... A bare, conclusory claim of unilateral mistake, which is unsupported by legally sufficient allegations of fraud, fails to state a cause of action for reformation .... The essential elements of a claim of fraud are misrepresentation of a material fact, falsity, scienter and deception ..." (*Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 442 [1st Dept 2007] [citations omitted]).

In addition to what has already been said, the Fourth Counterclaim merely alleges that some unit owners (who are not parties to the action) merely concealed their knowledge of the potential infirmity of the Note. This is insufficient to plead the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception, much less with the specificity and particularity requirements of CPLR 3013 and 3016(b) (*Barclay Arms, Inc. v Barclay Arms Assoc.*, 74 NY2d 644, 646 [1989]).

Furthermore, where the parties deal with each other at arms length, there is generally no duty to disclose information and mere silence, without some deceptive act or conduct, is insufficient to constitute fraud (*see, e.g., Rozen v 7 Calf Creek, LLC* 52 AD3d 590 [2d Dept 2008]). There is no showing here of any confidential or fiduciary

relationship between any unit purchaser and the Sponsor or any knowledge of “special facts” by any unit purchaser that would trigger a duty to make an affirmative disclosure (see PJI 3:20). In any event, it is well settled that “[i]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations” (*Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]). Here, the facts underlying the Note were, at least, equally known (if not better known) by the Sponsor and the Sponsor and developer had access to counsel to obtain knowledge as to the applicable law. Indeed, as recounted in the September 2010 Decision, the Sponsor developed the concept of the Note after much deliberation and reflection. Further, the Sponsor was aware, as early as June 2007, that attorneys were disputing the validity of the Note.

In short, the Sponsor, part of a sophisticated real estate development company, knowingly created, with the advice of its counsel, the Note and related documents. It cannot claim justifiable reliance upon any alleged misrepresentations by any unit owners. The Fourth Counterclaim shall be dismissed.

#### **SPECIFIC PERFORMANCE** **(Defendants' Fifth Counterclaim)**

The Fifth Counterclaim asserts that, even if the Note is invalid, Plaintiff should not be excused from paying the Sponsor the fair consideration for the conveyance of the common areas and the garage. Defendants seek to compel Plaintiff to “specifically perform the arrangement, either by (I) paying Marbury Corners the principal amount of \$2.2 million (with interest to be determined) or (ii) re-conveying to Marbury Corners the Condominium's common areas, including the garage” (Def. Amd. Answer, ¶191).

Specific performance is a remedy to enforce a contract (*see, e.g., Piga v Rubin*, 300 AD2d 68 [1st Dept 2002]). To the extent that Defendants are seeking to compel Plaintiff to pay the principal amount of the Note, it suffices to say that the Note has already been declared illegal and unenforceable. The alternative relief requested by Defendants – reconveyance of the common areas – is also not obtainable since Defendants have failed to prove that there is an agreement between either of them and Plaintiff pursuant to which reconveyance was required in the event of the invalidation of the Note.

The Fifth Counterclaim shall be dismissed.

**EQUITABLE ESTOPPEL**  
**(Defendants' Sixth Counterclaim)**

As their Sixth and last Counterclaim, Defendants essentially reiterate various of their prior allegations: the Sponsor mistakenly believed the Note was valid, the existence of the Note was disclosed in the Offering Plan, some unit owners (including Plaintiff's counsel) concealed their belief that the Note was invalid and the Sponsor relied on these claimed misrepresentations. Defendants again assert that, in "fairness", Plaintiff should be compelled to pay Plaintiff the \$2.2 million principal amount of the Note or else convey back the common areas, including the garage (Def. Amd. Answer, ¶102). This cause of action is headlined "Equitable Estoppel."

Equitable estoppel is not itself a cause of action for damages; rather, the doctrine may be invoked in order to prevent a party from engaging in certain conduct (see *Clifford R. Gray, Inc. v LeChase Constr. Services, LLC*, 31 AD3d 983, 987 [3d Dept 2006]). If it was Defendants' intention to plead equitable estoppel in order to prevent Plaintiff from challenging the Note, that train left the station a long time ago.

To the extent that Defendants are seeking to assert a cause of action based on promissory estoppel, such claim is also unsuccessful. To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise (*Rogers v Town of Islip*, 230 AD2d 727 [2d Dept 1996], citing *Ripple's of Clearview, Inc. v Le Havre Assoc.*, 88 AD2d 120, 122 [2d Dept 1982], *lv denied* 57 NY2d 609 [1982]). These elements cannot exist in this case for the reasons previously discussed.

The Court will grant dismissal of the Sixth Counterclaim.

**CONCLUSION**

The Court has considered the following papers in connection with these motions:

*Seq. No. 9*

- 1) Plaintiff's Notice of Motion, dated January 4, 2012, together with the exhibits annexed thereto;
- 2) Plaintiff's Commercial Division Rule 19-a Statement, dated January 4, 2012;
- 3) Affidavit of Victor M. Metsch, Esq., sworn to January 4, 2012,

together with the exhibits annexed thereto;

- 4) Affidavit of Joseph Acocella, sworn to December 19, 2011, together with the exhibits annexed thereto;
- 5) Plaintiff's Memorandum of Law and revised Memorandum of Law;
- 6) Affidavit of Martin Ginsburg, sworn to February 1, 2012, together with the exhibit annexed thereto;
- 7) Affirmation of Jonathan P. Vuotto, Esq., dated February 1, 2012, together with the exhibits annexed thereto<sup>5</sup>;
- 8) Defendants' Memorandum of Law, dated February 1, 2012;
- 9) Defendants' Commercial Division Rule 10-a Counter-Statement, dated February 2, 2012;
- 10) Affirmation of Michael P. Regan, Esq., dated February 13, 2012, together with the exhibit annexed thereto;
- 11) Reply Affidavit of Joseph Acocella, sworn to February 8, 2012, together with the exhibit annexed thereto;
- 12) Plaintiff's Reply Memorandum of Law.

*Seq. No. 10*

- 13) Defendants' Notice of Motion, dated January 5, 2012;
- 14) Defendants' Commercial Division Rule 19-a Statement, dated January 5, 2012;

---

<sup>5</sup>To the extent that counsel complains in this affidavit that the Court did not permit Defendants to exceed the 25 page limit on memoranda of law set in Commercial Division Rule 17, the Court notes that Plaintiff adhered to the same page limitation and, further, between two main briefs and a reply brief, Defendants submitted some 65 pages of briefing to the Court (exclusive of the factual submissions). The papers on these motions are, at times, duplicative (both in terms of arguments and exhibits) and voluminous. The Court does not perceive that Defendants (or Plaintiff for that matter) were prevented from making any argument they desired and counsel's assertion is not appreciated by the Court.

- 15) Affirmation of Jonathan P. Vuotto, Esq., dated January 5, 2012, together with the exhibits annexed thereto;
- 16) Affidavit of Martin Ginsburg, sworn to January 4, 2012;
- 17) Defendants' Memorandum of Law, dated January 5, 2012;
- 18) Plaintiff's Commercial Division Rule 19-a Counter-Statement, dated January 31, 2012;
- 19) Plaintiff's Response to Defendants' Commercial Division Rule 19-a Statement, dated January 31, 2012;
- 20) Affidavit of Joseph Acocella, sworn to January 25, 2012, together with the exhibits annexed thereto;
- 21) Plaintiff's Memorandum of Law;
- 22) Reply Affirmation of Jonathan P. Vuotto, Esq., dated February 15, 2012, together with the exhibits annexed thereto; and
- 6) Defendants' Reply Memorandum of Law, dated February 15, 2012.

Based upon the foregoing papers, and for the reasons stated, it is hereby

ORDERED that the motion of Plaintiff Board of Managers of Marbury Club Condominium for summary judgment dismissing the affirmative defenses and counterclaims of Defendants Marbury Corners LLC and Ginsburg Holdings, LLC and granting a judgment against said Defendants, jointly and severally, in the sum of \$475,284.60 in respect of the Third Cause of Action (Seq. No. 9) is granted in part and denied in part as herein set forth; and it is further

ORDERED that the branch of the said motion by said Plaintiff as seeks dismissal of the affirmative defenses and counterclaims of the said Defendants is granted and the said affirmative defenses and said counterclaims are dismissed, with prejudice; and it is further

ORDERED that the branch of the said motion by said Plaintiff as seeks a judgment against said Defendants, jointly and severally, in the sum of \$475,284.60 in respect of the Third Cause of Action is denied; and it is further

ORDERED that the Court hereby schedules a trial on the issue of damages with respect to the Third Cause of Action to commence on January 31, 2012 at 9:30 a.m., which date may not be adjourned without the prior written permission of

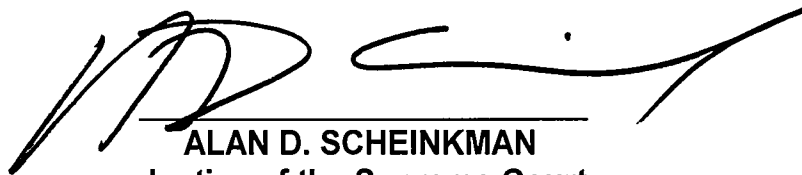
this Court; and it is further

ORDERED that the motion by Defendants Marbury Corners LLC and Ginsburg Holdings LLC for summary judgment in their favor and against Plaintiff Board of Managers of the Marbury Club Condominium on liability on the First Counterclaim (Seq. No. 10) is denied in all respects.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
November 8, 2012

E N T E R :

A handwritten signature in black ink, appearing to read 'A. D. Scheinkman', written over a horizontal line.

**ALAN D. SCHEINKMAN**  
Justice of the Supreme Court