| **Onetti v Gatsby Condominium** |
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| 2014 NY Slip Op 31282(U) |
| May 13, 2014 |
| Sup Ct, New York County |
| Docket Number: 450493/12 |
| Judge: Carol R. Edmead |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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FABIAN ONETTI and MARIA PIA ONETTI,

Plaintiffs,

-against-

THE GATSBY CONDOMINIUM, INTELL 65 EAST 96, LLC, INTELL 96 MANAGERS, LLC, OMER REALTY, LLC, ALBERT ATTIAS, GARY BARNETT, OFER KALINA, E.S. BARAKETTE, P.E., PH.D., and HALSTEAD MANAGEMENT, LLC,

Defendants.

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Index No. 450493/12
Motion Seq. No. 007

DECISION AND ORDER

**CAROL R. EDMEAD, J.S.C.:**

**MEMORANDUM DECISION**

In this property damage action, plaintiffs Fabian Onetti and Maria Pia Onetti (plaintiffs or the Onettis) move, by order to show cause, for reimbursement of attorney's fees from defendants Intell 65 East 96, LLC (Sponsor Intell), Intell 96 Managers, LLC (Intell Managers), and Gary Barnett (Barnett) (collectively, the Intell defendants) as well as costs and sanctions against those parties and their attorneys, Virginia K. Trunkes, Esq. (Ms. Trunkes), Ganfer and Shore, LLP (G&S), Franklyn H. Snitow, Esq. (Mr. Snitow), and Snitow Kanfer Holtzer & Millus LLP (the Snitow firm) (together, the Snitow defendants)[1] pursuant to 22 NYCRR 130-1.1, *et seq.* in an amount to be determined by the parties' submissions or at a hearing.

**BACKGROUND**

Familiarity with the Court's prior decisions and orders in this case is presumed. The background relevant to this motion is as follows. This action arises out of a fire that occurred on

[1]The Snitow defendants state that the firm is now known as Snitow Kanfer & Holtzer, LLP.

November 1, 2005 in the building located at 65 East 96th Street, New York, New York. In 1998, the Onettis and their three children moved into apartment 9B in the building. In or around 2000, the building was converted to condominium ownership known as the The Gatsby Condominium (hereinafter, the Condominium). The Onettis accepted an offer to purchase their apartment from the building's owner and the sponsor of the condominium conversion, Sponsor Intell. The Onettis allege that, in November 2005, the fire nearly totally destroyed the contents of the Onettis' apartment as well as adjacent apartments and a common hallway in the building. The New York City Fire Marshall determined that the fire was caused by combustible wiring that was located within the walls of the Onettis' apartment.

Sponsor Intell's members were two other New York limited liability companies: (1) Intell Managers (which acted at the Condominium's initial managing agent), and (2) Omer Realty, LLC (Normand affirmation in support, exhibit B, condominium offering plan, identity of parties section). The three principals of Sponsor Intell were defendants Gary Barnett, Albert Attias, and Ofer Kalina (*id.*). In 2002, Intell Managers sold its 30% interest in Sponsor Intell to Omer Realty, LLC (collectively, Omer Realty, LLC, Albert Attias, and Ofer Kalina are referred to as the Omer defendants) (*id.*, exhibit C, contract of sale).

In 2006, the Condominium's insurer and the insurer for a neighbor, Wade Griggs, asserted subrogated claims against Fabian Onetti in related actions in Supreme Court, New York County under Index Nos. 115347/06 and 117663/06. The instant action began as a third-party complaint under Index No. 115347/06, which was filed on December 5, 2006.

In the verified complaint, the Onettis asserted causes of action against, *inter alia*, Sponsor Intell, for breach of contract, breach of warranty, and negligence in connection with its

maintenance of the building's common elements, including the wiring that caught fire. The Onettis also asserted a cause of action for fraudulent misrepresentation against the Intell defendants and the Omer defendants predicated on the certifications in the offering plan.

On October 16, 2007, the Intell defendants appeared by the Snitow firm, filing a verified answer verified by Mr. Snitow, in which they admitted several allegations in the verified complaint (*id.*, exhibit F). Specifically, the Intell defendants admitted that Sponsor Intell "is" a domestic limited liability company with its principal place of business located at 225 West 86th Street, New York, New York, and "was" the sponsor of the conversion of the building to a condominium (*id.*, verified answer, ¶ 4). The Intell defendants admitted that Intell Managers "is" a New York limited liability company formed on April 29, 1999, with its principal place of business located at 225 West 86th Street, New York, New York, and that at all relevant times, Intell Managers "was" a member of Sponsor Intell (*id.*, verified answer, ¶ 5). The Intell defendants admitted that Barnett "was" and "is" a managing member of Intell Managers, and "is" a principal of Sponsor Intell (*id.*, verified answer, ¶ 8). The Intell defendants also asserted a cross claim against defendants Omer Realty, LLC, the Condominium, Halstead Management, LLC, and P.E. Barakette, P.E., PhD, in which they asserted that, at all relevant times, (1) Sponsor Intell "was" a limited liability company and existing pursuant to the laws of the State of New York and having a principal office in New York, New York, and (2) Intell Managers "was" a limited liability company organized and existing pursuant to the laws of New York (*id.*, verified answer, ¶¶ 112, 113).

On December 11, 2007, after the Onettis amended their complaint, Mr. Snitow submitted a verified amended answer on behalf of the Intell defendants in which he made identical

admissions, assertions, and cross claims (*id.*, exhibit G, verified amended answer, ¶¶ 4, 5, 8, 142, 143).

Beginning on January 16, 2008, the Intell defendants served discovery demands on the Onettis, including but not limited to, a demand for a bill of particulars, document demands, a demand for incident reports, a demand for photographs and videotapes, and an expert demand (*id.*, exhibit H).

The Omer defendants subsequently moved for summary judgment dismissing the complaint. The Intell defendants also moved for summary judgment, or, in the alternative, for leave to amend their amended verified answer to assert an additional defense of statute of limitations. In motion papers written by Ms. Trunkes of the Snitow firm, the Intell defendants cited *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236 [2009]) as authority to dismiss the fraudulent misrepresentation cause of action, which was the only cause of action asserted against Intell Managers and Barnett.[2] The Intell defendants argued that Sponsor Intell was shielded from liability for breach of contract by disclaimers within the offering plan, and that the claims against Sponsor Intell were time-barred because it relinquished all interest in the building in 2002. The Intell defendants submitted an affidavit from Raizy Haas, a vice president of Extell Development Corp., affirmed on July 25, 2011, indicating that:

> "[o]n January 30, 2002, Intell Managers, LLC, one of the two members of Intell 65 East 96, LLC, conveyed its entire membership interest to Omer Realty, LLC, the other member of the LLC . . . By May 1, 2002, Intell 96 Managers, LLC resigned as managing agent for both the building & Intell 65 East 96, LLC"

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[2]In response, the Onettis conceded that the fraud claims were no longer valid in light of *Kerusa*, leaving Sponsor Intell as the only Intell defendant against which they were asserting claims. The Onettis did not agree to dismiss their causes of action for breach of contract and negligence against Sponsor Intell.

(*id.*, exhibit J, ¶ 3). The Intell defendants also submitted a proposed verified second amended answer, verified by Ms. Trunkes, which reiterated that Sponsor Intell and Intell Managers were in existence and that Barnett remained a principal of Sponsor Intell (*id.*, exhibit K). The proposed verified second amended answer made identical allegations with respect to Sponsor Intell and Intell Managers in its cross claim.

On March 8, 2012, the Court granted the Intell defendants' motion for summary judgment in its entirety. The Court also, *inter alia*, denied dismissal of the breach of contract and negligence causes of action against the Condominium.

The Condominium appealed the denial of its motion for summary judgment on the Onettis' breach of contract and negligence claims. The Onettis cross-appealed that portion of the March 8, 2012 decision and order which dismissed their causes of action for breach of contract and negligence against Sponsor Intell.

By decision and order dated November 14, 2013, the First Department modified the Court's March 8, 2012 decision and order to the extent of denying Sponsor Intell's motion for summary judgment. The First Department stated that:

> "[Sponsor] Intell did not establish its entitlement to judgment as a matter of law on plaintiffs' negligence claim. Contrary to [Sponsor] Intell's claim, as the owner of the apartment building, it had a duty to exercise reasonable care in maintaining the property, including the wiring, in a reasonably safe condition under the circumstances prior to the condominium conversion. Thereafter, as the sponsor of the condominium conversion, [Sponsor] Intell owed a nondelegable duty to plaintiffs to keep the condominium in good repair. Further, there are issues of fact as to whether [Sponsor] Intell had actual or constructive notice of the defective electrical wiring that allegedly caused the fire. [Sponsor] Intell has not established as a matter of law that the origin of the fire was not within the 'common elements' of the condominium"

(*Onetti v Gatsby Condominium*, 111 AD3d 496, 497 [1st Dept 2013] [citations omitted]).

After the appeals were decided, the parties appeared before the Court at a status conference on November 19, 2013. Ms. Trunkes of G&S and formerly of the Snitow firm, as counsel for Sponsor Intell, informed the Court that Sponsor Intell "has actually been defunct since April 2005 which preceded the incident in this case which was a fire" (11/19/13 conference tr at 5).[3] Ms. Trunkes explained that "[w]e inadvertently voluntarily appeared on behalf of [Sponsor Intell]," and that "[t]he reason for that was because that entity was last operated by the other co-defendants, Omer Realty, [whose principals'] names are Albert Attias and Ofer Kalina" (*id.* at 6). Ms. Trunkes also stated that she "came in later in the case" and "[w]e saw the names Intell and answered on behalf of Intell" (*id.* at 9). Ms. Ahuva Genack, Esq., nonparty Extell Development Company's general counsel,[4] stated that Intell Managers dissolved in April 2005 and that "[o]n appeal, frankly we did not check [the status of the entities]" (*id.* at 11, 15-16, 23).[5] Counsel for the Onettis objected and requested reimbursement of the Onettis' attorney's fees incurred in litigating against the dissolved entities (*id.* at 11, 26). The Court gave the parties 30 days to settle the Onettis' request for reimbursement of attorney's fees, and if that could not be achieved, the Court directed the Onettis to move, by order to show cause, for such fees.

## THE PARTIES' CONTENTIONS

*The Onettis*

The Onettis now move for costs and sanctions under 22 NYCRR part 130, arguing that

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[3]The transcript of the status conference is appended to the Onettis' motion as exhibit A.

[4]Ms. Genack stated that Extell Development Company is Barnett's current company (11/19/13 conference tr at 11).

[5]According to the Department of State "search pages" or "screen shots," on April 22, 2005, both Sponsor Intell and Intell Managers were dissolved (Berman affirmation in opposition, exhibit D).

the Intell defendants and their attorneys have repeatedly asserted material facts that were false at the time that they were made. Specifically, the Onettis contend that the Intell defendants asserted that they were active entities with the capacity to defend claims against them, and had standing to assert cross claims against the co-defendants. According to the Onettis, the Intell defendants, as dissolved entities, were "judgment proof" and had "no legal existence" when they filed their verified answer and verified amended answer. In addition, the Onettis maintain that the Intell defendants, with the aid of counsel willing to verify facts as true without apparently checking their veracity, have engaged in unnecessary and vexatious discovery, motion, and appellate practice that was completely without merit in law and not possibly supportable by a reasonable argument for extension, modification or reversal of existing law.

The Onettis further contend that the fact that the frivolous conduct was inadvertent is irrelevant, because 22 NYCRR 130-1.1a (b) makes clear that any attorney or party that submits a signed paper to the court is under the obligation, at a minimum, to make a reasonable inquiry under the circumstances, that its presentation is not frivolous. As argued by the Onettis, counsel for the Intell defendants and the Intell defendants themselves, through the misleading affidavit of Extell Development Corp.'s vice president submitted on the motions for summary judgment, have fallen below that standard and should be required to reimburse the Onettis for resulting attorney's fees in responding to gratuitous discovery demands, opposing frivolous motions, and bringing a pointless cross appeal. Additionally, the Onettis request that the Court sanction the Intell defendants and/or their counsel in the maximum amount of $10,000 for each instance in

which they made false statements to this Court and the First Department.[6]

*Intell Managers and Barnett*

Intell Managers and Barnett[7] argue that the Onettis' motion should be denied for the following three reasons[8]: (1) the Court no longer has any authority to impose costs or sanctions on Intell Managers and Barnett because they were dismissed from the action in the Court's March 8, 2012 decision and order and the parties did not appeal that portion of the Court's decision and order; (2) the Onettis do not allege that Intell Managers or Barnett engaged in any frivolous or sanctionable conduct – the conduct at issue is that the answer filed by Sponsor Intell failed to disclose that that entity had dissolved two years before the lawsuit was filed; and (3) the Onettis do not allege that anything that they did resulted in any actual expenses or attorney's fees.

*Snitow Defendants*

In opposition to the Onettis' motion, the Snitow defendants contend that the Onettis have failed to show that either Mr. Snitow or the Snitow firm acted "completely without merit" in defending against the complaint or pursuing cross claims. According to the Snitow defendants, the Limited Liability Company Law specifically authorizes a dissolved limited liability company to prosecute and defend claims as part of the winding-up process after dissolution. Additionally, the Snitow defendants maintain that the Onettis were required to exercise due diligence in

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[6]The Onettis also assert that there are issues of fact as to whether Sponsor Intell is dissolved, in light of draft condominium board meetings which state that "Stuart Saft will be asked for a copy of the letter to Intel[l] regarding their responsibility to secure a permanent C of O" (Normand affirmation in support, exhibit N).

[7]Sponsor Intell did not oppose the motion. G&S was discharged as counsel for Sponsor Intell on January 8, 2014 (Berman affirmation in opposition, exhibit B).

[8]Intell Managers and Barnett also adopt the arguments made by their co-defendants' opposition papers to the extent those arguments pertain to Intell Managers and Barnett.

checking the corporate status of the defendants that they sued, and had either actual or constructive notice of the Intell defendants' dissolved status. In this regard, the Snitow defendants argue that the Onettis chose to serve the Intell defendants pursuant to Limited Liability Company Law § 303 through the Secretary of State, and thus were required to obtain and provide the Department of State search page for each of the Intell defendants. For the same reasons, the Snitow defendants argue that an award of costs or sanctions against them is inappropriate.

The Snitow defendants note that sanctions against Ms. Trunkes are especially inappropriate, since she did not work on this matter until December 2008 (after the verified answer and verified amended answer were filed), and it is absurd to expect that an attorney that becomes involved in a case years after a complaint is answered to reinvent the wheel and investigate every fact that had been previously asserted.

*G&S*

G&S argues, in opposition to the Onettis' motion, that there is no basis to impose costs and sanctions on G&S and Ms. Trunkes as its new associate since October 21, 2013, for their brief representation of Sponsor Intell in this action. First, G&S argues that the Onettis had actual or constructive notice of Sponsor Intell's dissolved status. Second, G&S contends that it has not manifested a pattern of asserting baseless claims or statements. As stated by Ms. Trunkes at the status conference, she did not become aware that Sponsor Intell had dissolved during the period that she worked on the case at the Snitow firm. In addition, G&S maintains that it had no reason to investigate the status of Sponsor Intell's viability in preparation for oral argument at the First Department or at any time until the First Department issued its decision on November 14, 2013.

Finally, G&S takes the position that, if the Court awards actual expenses and reasonable attorney's fees to the Onettis, then the same should be awarded to G&S since the Onettis' counsel had notice that they improperly named Sponsor Intell as a party.

*Ms. Trunkes*

In response to the Onettis' motion, Ms. Trunkes contends that there is no basis upon which to assess costs or sanctions against her since she did not engage in frivolous conduct; the Onettis do not allege that her conduct was intentional, and the record demonstrates that it was not intentional. As she stated at the status conference, she did not become aware that Sponsor Intell dissolved during the period that she worked on the case at the Snitow firm, which was after Sponsor Intell served its answer and an amended answer. Ms. Trunkes contends that she had no duty to perform an investigation into Sponsor Intell's corporate status, since there were no material changes in Sponsor Intell's factual position and nothing to place her on notice that Sponsor Intell's corporate status was different from previously alleged or at any time until the First Department issued its decision on November 14, 2013.

Ms. Trunkes submits an affidavit in which she states that, at the oral argument on the appeal, one of the justices asked when "Sponsor" gave up control of the board, and that she subsequently learned that Sponsor Intell and Intell Managers were dissolved in April 2005 when she visited the Department of State's website (Trunkes aff, ¶¶ 12-14). Additionally, Ms. Trunkes argues that any misstatement about Sponsor Intell's corporate status was not material as contemplated by 22 NYCRR 130-1.1 (c). According to Ms. Trunkes, a reasonable attorney in her position would not have reviewed and reinvestigated the pleadings, particularly where there was no new information that would have necessitated such an inquiry. Ms. Trunkes requests that the

Court *sua sponte* sanction plaintiffs and their counsel for bringing this motion.

**DISCUSSION**

22 NYCRR 130-1.1 gives the court "in any civil action or proceeding before the court," the authority, in its discretion, to award "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" and/or to impose "financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part" (22 NYCRR 130-1.1 [a]). "The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both" (22 NYCRR 130-1.1 [b]). Frivolous conduct is defined as conduct that: (1) "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law"; (2) "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another"; or (3) "asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]). The burden of proof is on the party seeking the imposition of a sanction or an award of attorney's fees that the conduct of the opposing party was frivolous within the meaning of the rule (*Matter of Miller v Miller*, 96 AD3d 943, 944 [2d Dept 2012]).

> "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party"

(22 NYCRR 130-1.1 [c]).

22 NYCRR 130-1.1a (b) states that "[b]y signing a paper, an attorney or party certifies

that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances: (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1 (c) of this Subpart."

"Statutes authorizing an award of costs and sanctions are in derogation of common law and, therefore must be strictly construed" (*Saastomoinen v Pagano*, 278 AD2d 218 [2d Dept 2000]). Moreover, statutes or rules which are punitive in nature "may not be extended to doubtful situations," and "every reasonable doubt . . . should be resolved in favor of the [accused party]" (*Steiner v Bonhamer*, 146 Misc 2d 10, 13 [Sup Ct, Allegany County 1989] [internal quotation marks and citation omitted]).

In determining whether sanctions are appropriate, the court must look at the broad pattern of conduct by the offending parties or attorneys (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 33 [1st Dept 1999]). What remedy to impose is "dictated by considerations of fairness and equity" (*id.* at 34). "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large" (*id.*). The purpose of Part 130 "is to prevent the waste of judicial resources and to deter vexatious litigation and dilatory or malicious litigation tactics" (*Matter of Kernisan v Taylor*, 171 AD2d 869, 870 [2d Dept 1991]). In furtherance of these goals, the court must consider whether the attorney followed the standards of a reasonable attorney (*see Principe v Assay Partners*, 154 Misc 2d 702, 708 [Sup Ct, New York County 1992]).

*1. Intell Managers and Barnett*

Here, the Onettis' motion is untimely as to Intell Managers and Barnett. In *Rose Val. Joint Venture v Apollo Plaza Assoc.* (191 AD2d 874, 875 [3d Dept 1993]), the Court held that a

motion by third-party defendants for costs and sanctions, brought more than a year after dismissal of the third-party complaint, was untimely. According to the Court, "[w]e have previously held that because a final judgment terminated a proceeding, the judgment precluded a respondent from obtaining an award of costs pursuant to 22 NYCRR 130-1.1 (a) for frivolous conduct in the petitioner's commencement of the proceeding, and we see no reasons to reach a different result here" (*id.* [citation omitted]).

As pointed out by Intell Managers and Barnett, the Court dismissed them from the action in its March 8, 2012 decision and order, and the parties did not appeal that portion of the Court's decision and order. As a result, the Court no longer has the authority to assess costs or sanctions against Intell Managers or Barnett under 22 NYCRR part 130. Therefore, the Onettis' motion must be denied as to Intell Managers and Barnett (*see Barnes-Joseph v Smith*, 2009 WL 7074350 [Sup Ct, Bronx County 2009] [court denied motion by former defendants for sanctions, costs, and fees against plaintiff's attorney; "This motion is untimely. The former defendants are no longer parties to this action, having been dismissed from the action by this court's order dated April 1, 2009. There is no indication the order has been appealed"]).

In any event, the Onettis have failed to show that either Intell Managers or Barnett asserted any false or misleading statements of material fact, let alone knowingly (*see* 22 NYCRR 130-1.1 [c] [3]). The Onettis argue that the "Intell defendants [], through the misleading affidavit of Extell Vice-President Raizy Haas, have fallen below [the] standard [under 22 NYCRR part 130] and should be made to reimburse the Onettis their resultant attorneys' fees that they were compelled to incur in responding to gratuitous discovery demands, opposing frivolous motions and bringing a pointless cross appeal" (Normand affirmation in support, ¶ 42). Black's Law

Dictionary defines "misleading" as "delusive; calculated to be misunderstood" (Black's Law Dictionary [9th ed 2009]). Haas indicates that she was a senior vice president of Extell Development Corp., a successor to Intell Development Corp., which was an affiliate of Sponsor Intell and Intell Managers (*id.*, exhibit J, ¶ 1). Haas states that, on January 30, 2002, Intell Managers conveyed its entire membership interest to Omer Realty, LLC (*id.*, ¶ 3). As demonstrated by the Onettis, Intell Managers did convey its membership interest in Sponsor Intell on January 30, 2002 (*id.*, exhibit C). Moreover, Haas states that the Intell defendants did not receive complaints about sparks or fires within the building from the time when the building was purchased until when Intell Managers resigned as the managing agent in May 2002 (*id.*, exhibit J, ¶¶ 3, 4). Haas's affidavit was submitted in support of the Intell defendants' contention that they lacked actual or constructive notice of an electrical hazard in the building. While the Onettis complain that the affidavit did not disclose that Intell Managers was subsequently dissolved in April 2005, the Onettis have not pointed to anything incorrect or deceptive about these statements.

For these reasons, the Court finds that the imposition of costs and sanctions against Intell Managers and Barnett is unwarranted (*cf. U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 695 [2d Dept 2012] [trial court properly exercised its discretion in sanctioning mortgagee in foreclosure action where mortgagee provided various affirmations and affidavits in which it made a certain representation that proved to be false, and persisted in making that representation after it knew or should have known it to be false]; *Navin v Mosquera*, 30 AD3d 883, 884 [3d Dept 2006] [conduct on part of owners of servient estate was frivolous where, although the complaint was not frivolous when it was filed, the continued pursuit of their claim became frivolous when new

survey maps completed after the action began showed that encroachment of bridge upon their property was nonexistent]; *Becker v Smith-Haven Mtge. Servicing Corp.*, 234 AD2d 406, 407 [2d Dept 1996] [in action in which plaintiff, a prospective home buyer, alleged that defendant mortgage company did not act "diligently and professionally" in processing his mortgage application, plaintiff's conduct was frivolous and papers submitted by plaintiff were intentionally misleading; purchaser was responsible for failing to obtain timely mortgage commitment]). Accordingly, the Court declines to impose costs and sanctions against Intell Managers and Barnett.

*2. Sponsor Intell*

As previously indicated, the Onettis argue that the Intell defendants engaged in frivolous conduct by submitting a misleading affidavit on the motions for summary judgment (Normand affirmation in support, ¶ 42). Haas's affidavit indicates that, on January 30, 2002, Intell Managers conveyed its entire membership interest to Omer Realty, LLC (*id.*, exhibit J, ¶ 1). The Onettis provide evidence that Intell Managers did convey its membership interest in Sponsor Intell to Omer Realty, LLC on January 30, 2002 (*id.*, exhibit C). Haas states that the Intell defendants did not receive any complaints about any sparks or fires within the building from the time when the building was purchased until May 2002 when Intell Managers resigned as the managing agent (*id.*, exhibit J, ¶¶ 3, 4). As noted above, this affidavit was submitted in support of the Intell defendants' contention that they lacked actual or constructive notice of electrical hazards within the building. The Onettis have not pointed to anything false or misleading in this affidavit; that Sponsor Intell was subsequently dissolved in April 2005 does not make the affidavit misleading. Thus, the Onettis have not shown that Sponsor Intell asserted any false or

misleading statements of material fact (*see* 22 NYCRR 130-1.1 [c] [3]; *cf. Morales v Kerr*, 36 AD3d 503 [1st Dept 2007] [plaintiff's action for intentional infliction of emotional distress, alleging that defendants filed false reports about her with governmental agencies, warranted sanctions where copies of governmental reports, annexed to plaintiff's affidavit, did not name or otherwise tend to identify the defendants as the complainants to the governmental agencies]; *Sanders v Copley*, 194 AD2d 85, 88 [1st Dept 1993] [husband's false testimony and false affidavit that he had no financial interest in real estate located in Pennsylvania and that he never contributed anything to purchase price of property warranted an award of costs]). Accordingly, the Court declines to impose costs and sanctions against Sponsor Intell.

*3. The Snitow Defendants*

The Onettis have failed to show that the Snitow defendants engaged in frivolous conduct. Initially, contrary to the Onettis' contention, the Intell defendants did not admit in their verified answer and verified amended answer verified by Mr. Snitow that they were "active" entities. The Intell defendants admitted, on October 16, 2007 and December 11, 2007, that they were limited liability companies in existence pursuant to the laws of New York (Normand affirmation in support, exhibit F, verified answer, ¶¶ 4, 5, 8, 112, 113, exhibit G, ¶¶ 4, 5, 8, 142, 143).

To begin, the Onettis have failed to establish that Sponsor Intell and Intell Managers' admissions in their answers that they were in existence at all relevant times were "completely without merit in law" (22 NYCRR 130-1.1 [c] [1]). After dissolution, the affairs of a limited liability company are to be wound up (Limited Liability Company Law § 703 [a]). Pursuant to the Limited Liability Company Law, a dissolved limited liability company may defend suits, as part of the winding-up of its affairs, for predissolution events (*see* Limited Liability Company

Law § 703 [b] ["Upon dissolution of a limited liability company, the persons winding up the limited liability company's affairs may, in the name of and for and on behalf of the limited liability company, prosecute and defend suits, whether civil, criminal or administrative, settle and close the limited liability company's business . . ."]; *A.B. Med. Servs., PLLC v Travelers Indem. Co.*, 26 Misc 3d 69, 72 [App Term, 2d Dept 2009] [medical services provider formerly organized as a professional limited liability company was entitled to maintain an action to recover for first-party insurance benefits even though the company had been dissolved]; *see also Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 246 [2007] ["a dissolved corporation may, as part of winding up its affairs, bring a third-party claim for indemnity or contribution in an action arising out of predissolution events"]; *Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 480 [1st Dept 2011], *lv dismissed* 17 NY3d 922 [2011] [dissolved corporation was no longer winding up its affairs, and thus lacked the capacity to pursue breach of contract action, where corporation had not done business in over 40 years, was dissolved more than 30 years earlier, and assigned its interest in litigation]).

Although *Tedesco*, *supra*, involved a dissolved corporation under the Business Corporation Law,[9] this case is instructive. In *Tedesco*, a widow brought an action on behalf of her husband's estate against a dissolved corporation that supplied products to her husband's employer where he was exposed to asbestos prior to his retirement in 1992 (*Tedesco*, 8 NY3d at 246). The distributor was dissolved for nonpayment of taxes in 1999 (*id.*). In 2000, the husband

[9]Business Corporation Law § 1006 (a) states that "[a] dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing: . . . (4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it."

was diagnosed with illnesses allegedly caused by asbestos (*id.*). The estate sued the distributor of the asbestos products, and the distributor, in turn, brought a third-party action for indemnification and contribution against the plaintiff's employer (*id.*). The plaintiff's employer moved to amend its answer to the third-party complaint to assert a defense of lack of capacity to sue (*id.*). The Court of Appeals held that the distributor:

> "had capacity to bring its third-party action against [the plaintiff's employer] so long as the activity was part of 'winding up its affairs.' Clearly, it was. To wind up its affairs, [the distributor] had either to settle or defend the asbestos claims against it, including the one by [the husband's] estate. To assert a third-party claim for contribution or indemnification is a normal part of defending an asbestos claim, and is plainly authorized by Business Corporation Law § 1005 (a) (1) and § 1006 (a)."

(*id.* at 247). The Court continued, stating that "[i]f the statute were read to preclude all suits on claims not ripe at the time of dissolution, it would produce anomalous results. For example, a debt to a dissolved corporation that became due on the day after dissolution would be uncollectible, and the debtor would receive a windfall" (*id.* at 248).

Here, the Onettis assert breach of contract and negligence causes of action for events that occurred prior to Sponsor Intell and Intell Managers' dissolution in April 2005. The Onettis allege that prior to their occupancy of their apartment, Sponsor Intell made repairs and improvements to the common elements of the building (Normand affirmation in support, exhibit E, amended complaint, ¶ 37). The Onettis further allege that another resident of the building complained to the managing agent about electrical surges, fires and other electrical problems (*id.*, ¶ 38). In January 2005, Sponsor Intell represented that the wiring in the resident's unit was repaired (*id.*). Thus, the Onettis' contentions that the Intell defendants had "no legal existence," did not have the capacity to defend claims against them, were "judgment proof," and lacked

standing to assert cross claims when they filed their verified answer and verified amended answer, based *solely* on the fact that Sponsor Intell and Intell Managers were dissolved limited liability companies, are incorrect.

Furthermore, the Onettis have not demonstrated that the Snitow defendants' conduct was intended to delay this litigation or harass the Onettis. Although the Snitow defendants admitted in the verified answer and the verified amended answer that Sponsor Intell and Intell Managers were in existence at all relevant times, the Onettis have not established on this record that the Snitow defendants knowingly made false statements of material fact or intentionally concealed any material facts to the Onettis or the courts (*see Witter v Daire*, 81 AD3d 720, 721 [2d Dept 2011] [vacating a Part 130 award because the failure to turn over documents was based on an error and was not purposeful]; *Kremen v Benedict P. Morelli & Assoc., P.C.*, 80 AD3d 521, 523 [1st Dept 2011] [attorneys moved to renew and reargue a motion to restore a counterclaim for reimbursement of litigation expenses and appended for the first time their retainer agreement; sanctions were not warranted where attorneys did not intentionally conceal retainer agreement]; *cf. Curcio v Hogan Coring & Sawing Corp.*, 303 AD2d 357, 359 [2d Dept 2003] [statement in attorney affirmation that parties agreed to settle litigation for $25,000 was intentionally misleading to Clerk of the Supreme Court where attorney knew that defendants had made written rejection of settlement documents]; *Citibank (S.D.) v Alotta*, 277 AD2d 547, 549 [3d Dept 2000] [in action for account stated, allegations in affidavit prepared by defendant's attorney in opposition to summary judgment motion were misleading, where statements were designed to create the illusion that defendant did not receive statements of account]). Therefore, the Court declines to impose costs and sanctions against the Snitow defendants.

*4. G&S and Ms. Trunkes*

Finally, the Onettis have also failed to show that G&S or Ms. Trunkes engaged in conduct rising to the level of frivolous as defined in 12 NYCRR 130-1.1. The Onettis have not shown that G&S or Ms. Trunkes abused the judicial process (*see Levy*, 260 AD2d at 34). Ms. Trunkes stated at the status conference on November 19, 2013 that she did not become aware that Sponsor Intell had dissolved during the period that she worked on the case at the Snitow firm (11/19/13 conference tr at 9:18-19). Ms. Trunkes states in her affidavit that she began working on the case at the Snitow firm in late 2008 and took over for another attorney who had left the firm (Trunkes aff, ¶ 6). Ms. Trunkes began to work as an associate with G&S on October 21, 2013, and argued the appeal on Sponsor Intell's behalf (*id.*, ¶ 12). Ms. Trunkes avers that at the oral argument on the appeal on October 24, 2013, one of the justices inquired about the names of the individuals who controlled the board of managers after Intell Managers sold its interest in Sponsor Managers in January 2002 through the date of the fire, to which she replied that she had "no idea" (*id.*, ¶ 13). After the oral argument, Ms. Trunkes visited the Department of State's website and learned that both Sponsor Intell and Intell Managers dissolved in April 2005 (*id.*, ¶ 14). On November 14, 2013, the First Department reinstated the Onettis' negligence claim as against Sponsor Intell (*id.*, ¶ 15). By that time, Ms. Genack advised that there was no longer an interest in defending against an entity which they then learned was defunct (*id.*). Therefore, there is no evidence that G&S or Ms. Trunkes attempted to harass or maliciously injure the Onettis, or that G&S or Ms. Trunkes knowingly made false statements to this Court or the First Department (*see Levy*, 260 AD2d at 34). In making this determination, the Court finds that a reasonable attorney that works on a case years after the complaint is answered would not verify every fact

that has been previously asserted in the pleadings (*see Principe*, 154 Misc 2d at 708).

This is not a situation where G&S or Ms. Trunkes "continued [any false statements] when its lack of . . . factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR 130-1.1 [c]; *cf. Matter of 155 W. 21st St., LLC v McMullan*, 61 AD3d 497, 503 [1st Dept 2009] [counsel had the obligation to inform the court that an interim application for vacatur of injunction pending appeal was no long pending, and had been determined against the client, and of the Appellate Division's affirmance]; *Intercontinental Bank, Ltd. v Micale & Rivera, LLP*, 300 AD2d 207, 208 [1st Dept 2002] [court's award of costs and sanctions for law firm's continued refusal to seek or consent to vacatur of temporary restraining order that restrained funds in bank account was proper exercise of discretion; however, law firm could only be held responsible expenses only after firm received a copy of signatories to the account, at which point it became clear that there was no direct connection between defendants in prior action and the account]; *Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [1st Dept 2005] [motion court's award of costs and sanctions was a proper exercise of discretion in light of plaintiff's counsel's unjustifiable and consistent refusal to discontinue the action against defendant in the face of unrebutted documentary evidence showing that another defendant was the owner of the premises, coupled with counsel's unreasonable insistence on obtaining an admission of ownership and control from an unrelated entity]).

Therefore, the portion of the Onettis' motion seeking costs and sanctions against G&S and Ms. Trunkes is accordingly denied.

5. *Request that the Court Sua Sponte Sanction the Onettis and their Counsel*

In opposition to the motion, G&S and Ms. Trunkes request that the Court invoke 22

NYCRR 130-1.1 (d) to sanction the Onettis and their counsel for making this motion. The Court declines to sanction the Onettis and their counsel for bringing their motion.

**CONCLUSION**

Accordingly, for the foregoing reasons, it is

**ORDERED** that the motion (sequence number 007) of plaintiffs Fabian Onetti and Maria Pia Onetti for reimbursement of attorney's fees and costs and sanctions is denied.

Dated: May 13, 2014

ENTER:

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD