

DSW Lenox, LLC v Rosetree on Lenox Ave., LLC

2014 NY Slip Op 31311(U)

May 16, 2014

Supreme Court, New York County

Docket Number: 652786/11

Judge: Saliann Scarpulla

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39**

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DSW LENOX, LLC, on behalf of the Board of
Managers of the LENOX GRAND CONDOMINIUM,
and of the LENOX GRAND CONDOMINIUM,
381-387 Lenox Avenue, New York,
New York 10027,

Plaintiff,

-against-

ROSETREE on LENOX AVENUE, LLC; ROSETREE
DEVELOPMENT COMPANY LLC; PETER ROSENBAUM
and ROY ROSENBAUM, individually and as
principals of ROSETREE; JKT CONSTRUCTION, INC.
D/B/A CORCON; THE DESIGN & DEVELOPMENT
GROUP; DAVID J. OXLEY; BEITIN ASSOCIATES;
FC CONSULTING ENGINEER, PLLC; ANDREW L.
PETTIT, ARCHITECT; ANDREW L. PETTIT;
MEISTER, SEELIG & FEIN LLP; MATTHEW
KASINDORF, ESQ. and EMILY WOLF, ESQ.,
individually and as employees of MSF;
SIGNATURE BANK; PLYMOUTH GROUP II, LLC;
MICHAEL DAVIS and JOSHUA GOLDMAN, individually
and as principals of PLYMOUTH; WARBURG-REALTY
PARTNERSHIP, LTD, KAREN GASTIABURO, KYLER
BROWN and WILLIAM FOLEY, individually and
as employees of WARBURG; COHEN TAUBER
SPIEVACK & WAGNER, P.C.; LEO ESSES, ESQ.,
individually and as employee of CTSW; LISA SEAY;
KYROUS REALTY GROUP INC.; HARRIET KYROUS
and LYNN TIEWS, individually and as employees of KRG;
LEE KOONCE, RON ACQUAVITA, and FRANCOISE
BERTHELOT, individually and as Board members; THERESA
RACHT, ESQ; AND JOHN DOE # 1 through JOHN
DOE # 50, names being fictitious intending
to designate unknown architects, engineers,
contractors, sub-contractors, who performed work
in connection with the design and construction
of LENOX GRAND CONDOMINIUM, 381-387 Lenox Avenue,
New York, New York 10027,

Defendants.

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SALIANN SCARPULLA, J.:

DECISION/ORDER
Index No. 652786/11
Motion Seq. Nos.
001, 002, 004, 005,
006, 007, 010, 018

Motion sequence numbers 001, 002, 004, 005, 006, 007, 010, and 018 are consolidated for disposition.

In this derivative action, plaintiff seeks damages for design and construction defects in the building located at 381-387 Lenox Avenue in New York City and operated as the Lenox Grand Condominium (the “Condominium”). Plaintiff DSW Lenox, LLC (“DSW” or “plaintiff”) is an alleged 30 percent owner. Defendants are comprised of the Condominium’s sponsors, Board members, attorneys, managing and sales agents, mortgage lender, contractors, subcontractors, and the principals and employees of these entities. In its 36-count, 106-page Second Amended Complaint, DSW, on behalf of the Condominium and its Board of Managers, asserts derivative causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of implied warranties, negligence, gross negligence, breach of fiduciary duty, fraudulent inducement, common-law fraud, conspiracy to defraud, professional malpractice, and violations of New York’s General Business Law (“GBL”) § 349 (a) and 15 USC § 1703 (a) (2).

Now, under motion sequence number 001, defendants Meister Seelig & Fein LLP (“Meister Seelig”), Matthew Kasindorf, Esq. (“Kasindorf”) and Emily Wolf, Esq. (“Wolf”) move to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7) for failure to state a cause of action and based upon documentary evidence.

Defendants Ron Acquavita (“Acquavita”) and Lee Koonce (“Koonce”)¹ move under

¹ All claims asserted against Françoise Berthelot (“Berthelot”), who also joins in this motion, were dismissed on the record during oral argument held on November 27, 2012. Tr. 56:15-19, 11/27/12.

motion sequence number 002 to dismiss the Complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Defendants The Design & Development Group (“DDG”) and David Oxley (“Oxley”) move under motion sequence number 004 to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7) for failure to state a cause of action and based upon documentary evidence.

Defendant Signature Bank moves under motion sequence number 005 to dismiss the Complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) for failure to state a cause of action, based upon documentary evidence, and as time-barred, and for failure to plead plain and concise statements pursuant to CPLR 3013 and 3014.

Defendants Leo Esses, Esq. (“Esses”) and Cohen Tauber Spievack & Wagner, P.C. (“Cohen Tauber”) move under motion sequence number 006 to dismiss the Complaint and all cross-claims asserted against them pursuant to CPLR 3211(a)(1) and (a)(7) for failure to state a cause of action and based upon documentary evidence.

Defendants Plymouth Group (“Plymouth”) and Michael Davis (“Davis”)² move under motion sequence number 007 to dismiss the Complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) for failure to state a cause of action, based upon documentary evidence, based upon the statute of limitations, and for failure to plead plain and concise statements pursuant to CPLR 3013 and 3014.

² At oral argument held on June 17, 2013, this Court dismissed on the record all claims asserted against Joshua Goldman (“Goldman”), who joins in this motion.

Defendants Kyrous Realty Group Inc. (“Kyrous Realty”), Harriet Kyrous (“Kyrous”), and Lynn Tiews (“Tiews”) move under motion sequence number 010 to dismiss the Complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action; alternatively, these defendants move for summary judgment dismissal pursuant to CPLR 3212.

Defendant Roy Rosenbaum moves under motion sequence number 018 to dismiss the Complaint pursuant to CPLR 3211(a)(5) and (a)(7) based upon statute of limitations, for failure to state a cause of action, and as barred by *res judicata*.

In addition, under motion sequence numbers 004 and 018, defendants DDG, Oxley, and Roy Rosenbaum also request sanctions, including attorneys’ fees, pursuant to 22 NYCRR § 130-1.1.

With the exception of motion sequence number 018, all of the foregoing motions were noticed between January and March 2012 and directed toward the original Complaint in this action, filed on October 11, 2011. On May 10, 2012, DSW filed a First Amended Complaint, as of right. Shortly thereafter, on July 17, 2012, DSW moved under motion sequence number 016 for leave to amend the First Amended Complaint.

On November 27, 2012, the Court heard oral argument on DSW’s motion for leave to amend its pleading, as well as on the parties’ motions to dismiss which were directed toward the First Amended Complaint. The Court granted DSW’s motion for leave to amend the First Amended Complaint on the record (Tr. 17:2, 11/27/12), and allowed defendants to supplement their original moving papers in order to address the new allegations to be

asserted in the Second Amended Complaint (*id.* at 18:3-7).³ The present motions to dismiss are now fully briefed and supplemented, and are all directed toward the Second Amended Complaint (the “Complaint”), which is now the operative pleading.

Background

In this derivative action in which plaintiff asserts numerous causes of action against a panoply of defendants, the Court must first consider the threshold issue of whether plaintiff may even assert its claims on behalf of the Condominium and its Board of Managers. As such, the following factual allegations, drawn from the Complaint unless otherwise indicated, are tailored to that question.

DSW’s claims are based upon the “Condominium Offering Plan for The Lenox Grand Condominium,” accepted for filing by the New York Attorney General on December 7, 2005 (the “Offering Plan”). Complaint ¶ 81. According to DSW, the Sponsor⁴ represented in the Offering Plan that they would design and construct a “Code-compliant” and “first class luxury building free of material design and construction defects,” and that “the correction of

³ Defendant Roy Rosenbaum was permitted to withdraw his motion to dismiss (motion seq. no. 012) without prejudice and to submit a new motion to dismiss directed toward the Second Amended Complaint (motion sequence number 018). Tr. 34:23-35:15, 11/27/12.

⁴ The Complaint defines the “Sponsor” as defendants Rosetree on Lenox Avenue LLC (“Rosetree on Lenox”), Rosetree Development Company (“Rosetree Development”), and the principals of these entities, defendants Peter Rosenbaum and Roy Rosenbaum. Complaint ¶ 3. However, the Offering Plan identifies the “Sponsor” as “Rosetree on Lenox, LLC” and “Rosetree Development Company, LLC” only (Ex. B, Affirmation of Lisa L. Shrewsberry (motion seq. no. 001)(Offering Plan)), and references to the “Sponsor” in this decision refer to only these entities, excluding Peter Rosenbaum and Roy Rosenbaum.

any defects would be the sole responsibility of the Sponsor.” *Id.*, ¶¶ 76, 81. The Offering Plan allegedly highlighted the “extensive knowledge and experience of Sponsors and its principals” (*id.*, ¶ 79), and also its architects and engineers (*id.*, ¶ 80). Attached as exhibit A to the Offering Plan is the “Purchase Agreement” used for the sale of individual Condominium units, which incorporates the terms of the Offering Plan. *Id.*, ¶ 81.

In 2006, the Sponsor began construction of the Condominium, which was to be comprised of eight stories and 21 units, with 19 residential units and two commercial units on the lower levels of the building. *Id.*, ¶¶ 74-75. According to DSW, that same year the Sponsor began to run out of funds to complete the Condominium, and they defaulted on a \$10.5 million construction loan from Doral Bank. *Id.*, ¶ 86. On September 26, 2006, Rosetree on Lenox, LLC (“Rosetree on Lenox”) and Signature Bank entered into a “Consolidated, Amended and Restated Mortgage, Security Agreement,” to secure Rosetree on Lenox’s payment of a \$15 million construction loan from Signature Bank. *Id.*, ¶ 87; Ex. 7 to the Complaint. These funds were allegedly used toward the payment of the \$10.5 million loan owed to Doral Bank, and to fund the remaining Condominium construction costs and loan expenses. *Id.*, ¶ 88. The Complaint alleges that the Sponsor’s financial problems led to “shoddy workmanship, the use of substandard materials and...construction delays.” *Id.*, ¶ 74.

DSW claims that the first and second amendments to the Offering Plan, dated May 6 and August 8, 2006, respectively, failed to disclose that the Sponsor was having difficulty making the mortgage payments to Doral Bank. The third, fourth, and fifth amendments to

the Offering Plan, dated November 22, 2006, January 22, 2007, and April 17, 2007, respectively, allegedly failed to disclose that the Sponsor had defaulted on its loan from Doral Bank and the existence of the 2006 mortgage with Signature Bank. DSW claims that the Sponsor's misrepresentations are found in each of the amendments to the Offering Plan. *Id.*, ¶ 81.

The Condominium was allegedly one of four projects undertaken by the Sponsor in 2005, all of which were funded by private investors. *Id.*, ¶¶ 93-94. By December 2006, the Sponsor allegedly formed a liquidating trust for the benefit of these private investors, which was to receive the net proceeds realized from the Condominium and the Sponsor's other three real estate projects. *Id.*, ¶ 96. By 2007, the investors were allegedly owed \$8.5 million, and by the summer of 2007, the Sponsor was unable to pay interest to these investors. *Id.*

The Complaint alleges that on July 1, 2007, the Attorney General required the Sponsor to refrain from selling residential Condominium units until certain conditions were satisfied. *Id.*, ¶ 97. By letter dated July 27, 2007, Peter Rosenbaum allegedly informed the Attorney General that the Condominium's construction was delayed as a result of "incompetence and error by Rosetree's architects and their engineers," "numerous conditions all leading to excessive amounts of interest," "increases in the cost of materials and services," and "a softening in the market for condominiums." *Id.*, ¶ 98. In September 2007, based upon construction delays and complaints concerning the Sponsor's construction projects, the Attorney General ordered the Sponsor to offer rescission to the Condominium's 13 "contract vendees" who had signed contracts to purchase Condominium units. *Id.*, ¶ 100. DSW, the

contract vendee of the two commercial units, claims that it was the only contract vendee to decline rescission. *Id.*, ¶ 101. The eleven remaining purchasers rescinded their contracts, causing \$10 million to be removed from escrow, thereby further undermining the financial health of the project. *Id.*

DSW claims that it entered into a lease with Harlem Children's Zone in November 2006, whereby DSW was to lease one of its commercial units beginning in March 2007. However, the Sponsor's construction delays allegedly prevented Harlem Children's Zone from taking occupancy. DSW claims that it declined rescission because it was induced to sign an amended purchase agreement with the Sponsor on October 11, 2007, on the condition that the Sponsor would repair a punch list of construction defects within 30 days. *Id.*, ¶ 102. As part of this agreement, Rosetree on Lenox, LLC also allegedly conveyed to DSW's managing partner, Stanley Wolfson ("Wolfson"), three parking spaces at the Condominium; assigned Wolfson a security interest and lien upon Rosetree on Lenox's interest in net proceeds from the sale of certain Condominium units; and granted Wolfson the right to "at least one seat on the Board of Managers and an absolute right of veto on any issue concerning the Commercial Units." *Id.*, ¶ 103. When the Sponsor failed to complete the punch list repairs, DSW, in its individual capacity, commenced an unrelated action against the Sponsor⁵ asserting direct claims against Rosetree on Lenox, and Peter and Roy Rosenbaum, for breach of contract, fraud, alter ego liability, injunctive relief, declaratory judgment, and an accounting. *Id.*, ¶¶ 22, 102. According to DSW, the punch list defects

⁵ *DSW Lenox LLC v. Rosetree on Lenox, LLC, et al.*, Index No. 604124/2007.

“had nothing to do with the construction defects in the common areas that are the basis for the instant derivative lawsuit.” *Id.*, ¶ 102.

The sixth amendment to the Offering Plan, dated September 27, 2007 (the “Sixth Amendment”), provided for the purchasers’ rescission rights, and identified “Special Risks” in the event that “all contract vendees exercise their rights to rescind and Sponsor does not sell any Unsold Unit,” in which case “Sponsor will not be able to meet its obligations.” *Id.*, Ex. 16, ¶ 2; Ex. A, Shrewsbury Aff. (Sixth Amendment). The Sixth Amendment identifies the risk that this would give Signature Bank “the right to foreclose on the Unsold Units,” and “to proceed with the sales under the Plan and act as successor Sponsor” or “to convert the Building into a rental building.” Sixth Amendment, ¶ 2 (a); Complaint ¶ 104. The Sixth Amendment also identifies three “other cooperatives, condominiums and homeowners associations” where Rosetree on Lenox or its principals owned more than 10% of the shares or units and was not current on its obligations. Sixth Amendment, Ex. A, ¶ 10.

DSW claims that on February 24, 2009, after the Sponsor defaulted on the 2006 mortgage and its amendments, rather than foreclose, Signature Bank and the Sponsor entered into a “Forbearance Agreement.” Complaint ¶ 112. The Forbearance Agreement included approximately \$11 million on the original note, \$430,000 on an additional note⁶, \$588,000 in interest on the original note, and \$10,000 in interest on the additional note. *Id.* This agreement was allegedly scheduled to expire on September 14, 2009. *Id.* DSW alleges that,

⁶ In May 2008, Signature Bank extended an additional loan to Rosetree on Lenox in the amount of \$430,000, guaranteed by Peter Rosenbaum. Complaint ¶ 106 and Ex. 8, at 2.

therefore, the Sponsor owed Signature Bank approximately \$12 million under the Forbearance Agreement, plus another \$8.5 million to the private investors, and the Sponsor subsequently defaulted on the Forbearance Agreement. *Id.*, ¶ 113.

In 2010, the eighth amendment to the Offering Plan (the “Eighth Amendment”) disclosed that the Sponsor was “past due” on the mortgage owed to Signature Bank, and had entered into a forbearance agreement with Signature Bank. *Id.*, ¶¶ 27, 115; Ex. 17, at 2. The Eighth Amendment also disclosed the possibility that Signature Bank would “foreclose on the Property; in which event any Purchasers under contract will either lose their right to purchase the Unit or deal directly with Signature in the event Signature assumes the role of Sponsor.” *Id.*, ¶ 115, Ex. 17, ¶ 2 (c).

Although construction allegedly commenced in 2006, DSW claims that it was not completed until late 2008 or early 2009. Complaint ¶ 74. DSW claims that no permanent certificate of occupancy exists, but that there have been 15 temporary certificates of occupancy, identifying 21 remaining deficiencies. *Id.*, ¶ 81 (B). On June 27, 2011, Koonce, as the purported Condominium President and a Board member, retained nonparty Titan Engineers PC (“Titan”), which issued a “Property Condition Assessment” of the Condominium, identifying various construction defects (the “Titan Report”). Complaint ¶ 116 and Ex. 2, ¶ 1.0. DSW claims that defendants are responsible for these defects, in the areas of storm water drainage, paving, utilities, lighting, building frame, exterior walls, roofing, windows and doors, patios, terraces, balconies, smoke infiltration, air conditioning,

water infiltration, plumbing, elevator, line safety, and fire protection. Complaint ¶ 116. DSW further claims that none of these alleged defects were disclosed to potential purchasers.

The Titan Report recommended that the “Board Members retain an experienced attorney to represent them to the sponsor or developer of the property with respect to the issues contained in this report.” Complaint ¶ 118, Ex. 2, ¶ 2.3.3. The Titan Report also recommended the retention of structural and mechanical engineers, and an architect, to evaluate cracks in the ceilings, the ductwork system of certain chimneys, and for the filing of inspection reports. *Id.* The Titan Report further acknowledged “*significant areas of mold growth,*” which “*should be remediated as a maintenance item.*” *Id.* (emphasis in original). Finally, the Titan Report recommended that “the Board Members and Property Manager consider the Immediate & Short Term Reserves and Replacement Reserves proposed in this report and review these figures with appropriate general contractors and an attorney experienced in construction litigation.” *Id.*

In response to the recommendations in the Titan Report, the Condominium retained Patrick Perrone, Esq., of the law firm K&L Gates LLP (“K&L Gates”). K&L Gates allegedly recommended that the Condominium commence a lawsuit prior to the expiration of the applicable statute of limitations on October 10, 2011. Complaint ¶¶ 7, 10. K&L Gates’ fee to file a complaint was approximately \$50,000. *Id.*

DSW asserts that on October 6, 2011, the Condominium unit owners voted against commencing this lawsuit, while DSW, as a 30 percent owner of the Condominium, voted in favor of the lawsuit. *Id.*, ¶ 11. By letter dated October 9, 2011, DSW demanded that the

Condominium Board “vote in favor of filing a complaint against the Sponsor and the other potentially responsible parties to preserve the [Condominium’s] legal rights on the construction defects and fraud claims, where the statute of limitations would otherwise expire on October 10, 2011.” *Id.*, ¶ 14. Contrary to DSW’s demand, on October 9, 2011, the Condominium Board voted against commencing a lawsuit. *Id.*, ¶ 15. At the time of the vote, the Condominium Board allegedly consisted of defendants Koonce, Acquavita, Karen Gastiaburo (“Gastiaburo”), and DSW. *Id.*, ¶ 14.

DSW commenced this action by filing an original Complaint, dated October 11, 2011, which it twice amended as discussed above. All of DSW’s causes of action asserted in the Second Amended Complaint are asserted derivatively on behalf of the Condominium and its Board of Managers. *Id.*, ¶¶ 3, 4, 18, 119-364.

Discussion

The Court first considers motion sequence number 002, made by defendants Acquavita and Koonce to dismiss DSW’s thirty-fourth cause of action for breach of fiduciary duty, asserted against them in their individual capacities and as Board members.⁷

It is well settled that

[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under

⁷ Plaintiff also asserts this cause of action against Gastiaburo and Kyler Brown (“Brown”), individually and as Board members. However, neither of these defendants have moved to dismiss the breach of fiduciary duty cause of action.

CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994)(internal citations and quotation marks omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, “are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009)(citing *Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233, 233-34 (1st Dep’t 1994)).

DSW alleges that Acquavita, Koonce and non-moving defendant Gastiaburo breached their fiduciary duties by voting against commencing litigation, thereby depriving the Condominium Board of the opportunity to sue the Sponsor, developers, and other individuals and entities allegedly responsible for certain construction defects before the statute of limitations expired. Complaint ¶¶ 50-52, 337-339. With respect to Koonce, plaintiff alleges that instead of acting on the legal advice of K&L Gates to commence litigation, he improperly followed the advice of defendant Leo Esses, of the defendant law firm Cohen Tauber, not to sue. *Id.*, ¶¶ 51, 338. According to the Complaint, Koonce’s reliance on Esses’ advice was improper because Esses was allegedly conflicted due to his representation

of the Sponsor in a related action between DSW and the Sponsor.⁸ *Id.* The Complaint further alleges that in deciding to vote against commencing litigation, Koonce also improperly relied on the advice of fellow Board member Gastiaburo as well as Emily Wolf, Esq., who plaintiff asserts were the “Sponsor designee” and the “Sponsor spokesman,” respectively. *Id.* Finally, plaintiff alleges that Koonce breached his fiduciary duty by retaining Theresa Racht, Esq., who plaintiff alleges is also conflicted. *Id.*, ¶¶ 35, 51, 338.

Plaintiff makes virtually identical allegations against Acquavita; that is, that he breached his fiduciary duty by voting against commencing litigation based upon the advice of Esses, Gastiaburo, and Wolf (*id.*, ¶¶ 52, 339), and by retaining Theresa Racht. *Id.*, ¶¶ 35, 52, 339.

With respect to Gastiaburo, who does not move to dismiss the claim against her, DSW alleges that she was subject to a “very high standard of fiduciary duty” by virtue of her dual status as Board member and Sponsor designee, and was acting as a “Sponsor controlled Board member” under the direction and control of defendant Warburg Realty, the entity retained by Signature Bank to broker the sale of Condominium units. *Id.*, ¶¶ 36, 50, 337. DSW further alleges that Gastiaburo improperly “advised the unit owners polled at the October 6, 2011 meeting to vote against suing the Sponsor,” “stated four months prior to the

⁸ That action is *DSW Lenox LLC v. Rosetree on Lenox, LLC et al.*, Index No. 604124/07.

Board vote that the Board would never sue the Sponsor,” and “voted not to sue the Sponsor.” *Id.*, ¶¶ 50, 337.

Finally, the allegations asserted against non-moving defendant Brown, who is sued in his individual capacity, as Board member and as sales agent of Warburg Realty, are that he breached his fiduciary duty by using offering materials containing misrepresentations in order to induce the purchase of Condominium units, and also that he “back[ed] the retention of Theresa Racht, Esq.” *Id.*, ¶¶ 53, 340.

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct.” *Varveris v. Zacharakos*, 110 A.D.3d 1059, 1059 (2d Dep’t 2013) (internal quotation marks and citations omitted). While the moving defendants do not dispute the existence of a fiduciary relationship, they argue that the claim asserted against them should be dismissed because it is barred by the business judgment rule and because there is no allegation that they committed independent tortious acts.

“Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.” *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 537-38 (1990) (internal quotation marks and citation omitted). Under this rule, “[s]o long as the corporation’s

directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.” *Id.* at 538 (internal quotation marks and citation omitted); *see also Berenger v. 261 W. LLC*, 93 A.D.3d 175, 184 (1st Dept 2012) (“business judgment rule protects individual board members from being held liable for decisions...that were within the scope of their authority”).

However, “further judicial scrutiny is triggered in instances of breach of fiduciary duty, as evidenced by fraud, self-dealing, unlawful discrimination, bad faith or other misconduct by the Board.” *Cannings v. East Midtown Plaza Hous. Co., Inc.*, 2011 WL 5142033, *4 (Sup. Ct., N.Y. Co. Oct. 18, 2011), *affd* 104 A.D.3d 443 (1st Dept 2013). In order to trigger such scrutiny, “an aggrieved unit owner must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith.” *Lorne v. 50 Madison Ave. LLC*, 65 A.D.3d 879, 880 (1st Dep’t 2009)(internal quotation marks and citations omitted).

Plaintiff’s claim that the defendant Board members breached their fiduciary duties by voting against commencing litigation lacks both a factual and legal basis. Plaintiff specifically alleges that at a meeting held on October 6, 2011, “the purported Board members decided to poll the unit owners...to ask whether a complaint should be filed,” and all unit owners except DSW voted “against the suit.” Complaint, ¶ 11. Thereafter, “[o]n October 9, 2011, the Board voted against filing a complaint....” *Id.*, ¶ 15. To the extent that DSW’s

breach of fiduciary duty claim is based upon the fiduciary duties of Acquavita, Koonce, and Gastiaburo, as Board members, to act solely in the best interest of all shareholders in commencing suit, that claim is disproved by DSW's admission that the unit owners themselves voted against the lawsuit. *See e.g. 40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 156 (2003) (“by the unanimous vote of everyone present at the meeting, the cooperative resoundingly expressed its collective will,” and “[t]he Board was under a fiduciary duty to further the collective interests of the cooperative...[t]he Board's action thus bore an obvious and legitimate relation to the cooperative's avowed ends”).

Moreover, the Condominium Bylaws expressly authorize the Board to determine whether to “[b]ring...[an] action[] pertinent to the operation of the Property” (Offering Plan, Ex. F, § 2 (s)), and the Complaint does not allege that Acquavita, Koonce, or Gastiaburo acted outside their scope of authority. Nor do DSW's allegations explain in sufficient evidentiary detail, as required under CPLR 3016(b), how the actions of Acquavita, Koonce, or Gastiaburo constituted bad faith, or how their decision did not further the Condominium's purpose.

Further, the Complaint lacks any allegations that Acquavita, Koonce, or Gastiaburo had conflicts of interest, stood to profit personally, or “st[ood] in a dual relation which prevent[ed] an unprejudicial exercise of judgment.” *Auerbach*, 47 N.Y.2d at 631. At most, the Complaint alleges that these defendants relied upon the advice of Esses and/or Wolf, professionals who plaintiff claims were controlled by the Sponsor, and were, therefore,

conflicted. Yet, officers and directors are permitted to rely, in good faith, on opinions of attorneys and “other persons as to matters which the officer believes to be within such person’s professional or expert competence.” Business Corporation Law § 715 (h) (2) and § 717 (a) (2).

To rely on an advice-of-counsel defense, the defendant must “establish that his [or her] reliance on the advice was reasonable.” *Macnish-Lenox, LLC v. Simpson*, 2007 WL 3086028, *14 (Sup. Ct., Kings Co. Oct. 23, 2007) (internal quotation marks and citations omitted). Here, plaintiff has not alleged that the Board members’ reliance on the advice of Esses or Wolf (or Gastiaburo) was unreasonable or that they “mindlessly defer[red] to outside advice without fulfilling [their] obligation to conduct [their] own review of the pertinent facts.” *Id.* at *12-13.⁹ On the contrary, DSW concedes that Koonce, Acquavita, and Gastiaburo “discussed Esses’ advice to the Board not to sue the Sponsor,” along with the advice of other professionals. Complaint, ¶ 40. Moreover, DSW alleges that prior to the Board’s vote, the Sponsor had distributed the Sixth and Eighth Amendments to the Offering Plan, disclosing the Sponsor’s financial difficulties, and the Board had received and considered the Titan Report, which disclosed the alleged construction defects several months prior to the Board vote. *Id.*, ¶¶ 5-6, 27, 116, 118 and Ex. 2. The Board also heard the concerns of K&L Gates and DSW (*id.*, ¶¶ 5-8, 10, 14), and did not vote until after it had

⁹ While DSW argues in its motion papers that the Condominium Board “rubber-stamped” the advice of conflicted third parties (Memo in Opp., pp. 4, 9), this allegation is not included in the Complaint.

obtained input from all of these sources, including the results of the Condominium unit owners' vote. *Id.*, ¶¶ 11, 15. Thus, the Complaint fails to allege a legal or factual basis for concluding that the Board breached its fiduciary duties, or engaged in any improper conduct, merely by discussing the advice of Esses, Wolf, Gastiaburo, or any other individual or entity identified in the Complaint.

To the extent that Esses had a conflict of interest which might affect whether the Board could properly rely on his legal advice, Esses disclosed that potential conflict to the Board in advance of its vote not to sue. Esses submits as documentary evidence an email dated October 4, 2011 - two days before the unit owners' vote and five days before the Board vote - that he sent to Gastiaburo, Acquavita, and Koonce. Ex. B, Affirmation of Evon Idahosa (motion seq. no. 006). In the email, Esses states, in pertinent part, as follows:

“As per our conversation yesterday, I advised that a potential conflict arose this weekend to my firm continuing to represent both the Board and the Sponsor, as the Board was considering an action against, among others, the Sponsor for issues related to the construction of the building. As a result, I advised that I could not provide any legal advice to the Board (or the Sponsor) until such time as the decision was made whether the Board would pursue its claims against the Sponsor.”

Id. Thus, even assuming that Esses had a conflict of interest that could be imputed to the Board, his disclosure of the conflict refutes DSW's allegation that the Board was not fully informed.

Plaintiff makes similar allegations concerning attorney Theresa Racht which also do not support a cause of action for breach of fiduciary duty against the Condominium Board. Even assuming that Racht had a conflict of interest, DSW fails to explain how the conflict of an attorney who is not a Board member could be imputed to Koonce or Acquavita as misconduct sufficient to rebut the presumption of the business judgment rule. Other than conclusory allegations, which are insufficient as a matter of law (*Berardi v. Berardi*, 108 A.D.3d 406, 406 (1st Dept 2013)), the Complaint fails to allege any misconduct concerning Racht that would support a cause of action for breach of fiduciary duty against Acquavita or Koonce. In any event, by stipulation dated July 24, 2012, DSW voluntarily discontinued this action against Racht. *See also* Tr. 44:17-18, 11/27/12. In doing so, DSW no longer alleges any wrongdoing by Theresa Racht.

DSW alleges that the vote of the Condominium unit owners was “improper” (Complaint, ¶ 12), that the Condominium “Board as a whole has not been properly formed,” and that Wolfson was the only Board member properly appointed. *Id.*, ¶ 2. In addition, DSW alleges that “there are no Board minutes reflecting [the Condominium] Board meeting, in violation of the Bylaws,” and that, therefore, “the Board has been unduly constituted from inception.” *Id.*, ¶¶ 33, 168, 175. However, the Complaint fails to explain what, if anything, was improper about the Board’s vote, or any corporate formality that was not complied with in constituting the Board.

Nor does the Complaint articulate how a failure to take Board meeting minutes renders the Board “unduly constituted” or in any way nullifies the Board’s vote against litigation. In any event, defendants Kyrous Realty and Harriet Kyrous, the alleged managing agents of the Condominium (*id.*, ¶ 32), submit as documentary evidence meeting minutes dated October 10, 2011. Ex. C, Kyrous Aff. (motion seq. no. 010). Those Minutes, which indicate that Acquavita, Koonce, Gastiaburo, and Wolfson attended the meeting, provide, in pertinent part, as follows:

1. Recognition of Quorum and Call to Order
2. Majority of the Board of Managers voted (3 for / 1 against) that it is not in the condo’s best business judgment to pursue legal action against the sponsor, his agents and representatives. This decision was based on the wishes of 100% of the residential unit owners as expressed (and voted on with paper ballots) at the unit owners meeting on October 6, 2011. The residential unit owners base this belief on the fact that 1) the sponsor has no resources, 2) potential counter-claims would be forthcoming from the sponsor, and 3) legal action would take years and consume a considerable amount of the building’s resources.

The commercial unit owner is not in agreement with this decision and informed the board that he would be filing suit against the sponsor tomorrow for the building deficiencies as noted in the draft engineer’s report. He was informed that this action would not have the approval of the board.

...

Minutes taken by Lee Koonce, President.

Id. Thus, in addition to being conclusory, DSW's allegations concerning the formation of the Condominium Board and the Board's noncompliance with the formalities of the Bylaws are refuted by the Meeting Minutes, which evidence that the Board had a legitimate business justification for its decision and was acting in "the common and general interests of the corporation." *Matter of Levandusky*, 75 N.Y.2d at 538 (citation omitted).

DSW also alleges that Gastiaburo, as a Sponsor-designated Board member, should have been "disqualified from voting, because the Sponsor had lost its seat with the most recent sale of its last unit in the condominium." Complaint, ¶ 12. Assuming the truth of this allegation, Gastiaburo was no longer a Board member at the time of the vote, thereby reducing the Board to three members - Acquavita, Koonce and Wolfson - which was permitted under the Bylaws. *See* Offering Plan, Ex. F, § 1 ("[t]he number of Managers which shall constitute the whole Board shall not be less than three (3) and not more than four (4)"). Thus, excluding Gastiaburo from the Board vote, Acquavita and Koonce constituted a Board majority sufficient under the Bylaws to validate the vote against commencing the litigation. *Id.* at § 11 ("the votes of a majority of the Members of the Board of Managers shall constitute the decision of the Board of Managers").

DSW further alleges as a basis for its breach of fiduciary duty claim that Acquavita, Koonce, and Gastiaburo were all controlled by their employer, Warburg Realty, which, in turn, served the interests of the Sponsor only. Complaint, ¶¶ 50-52. However, the Complaint expressly alleges that each of these Board members (as well as Francoise Berthelot and Kyler

Brown) were also unit owners. The Complaint fails to explain how, as unit owners themselves, any of the Board members were motivated to vote adverse to the Condominium's interests. To the contrary, the success and profitability of the Condominium could serve only to enhance each of their individual ownership interests in the building. *c.f. Falkenberg v. Silver Village Condominium, LLC*, 2008 WL 620748, *9 (Sup. Ct., Suffolk Co. Jan. 16, 2008) (breach of fiduciary duty alleged where it was "against [the sponsor-designated members'] own personal financial interest to pursue a claim against the sponsor," but with no indication that these board members were also unit owners). Accordingly, DSW's allegations of the Sponsor's control over the Board, through Warburg Realty, fail to support DSW's claim for breach of fiduciary duty.

DSW alleges that defendant William Foley ("Foley"), another sales agent of Warburg Realty, sold Condominium units to unspecified Board members "at discounted prices, thus ingratiating those unit owners, who subsequently became Board members, with the Sponsor...." *Id.*, ¶ 37. DSW further alleges that Foley was "[a]t all times...acting within the direction and control, and under the express authority of, Warburg." *Id.* However, the Complaint does not identify the Board members who allegedly purchased their units through Foley or that the Board improperly relied upon his advice. Therefore, plaintiff's allegations concerning William Foley are conclusory and do not support its claim for breach of fiduciary duty. *See Cannings v. East Midtown Plaza Hous. Co., Inc.*, 2011 WL 5142033, *4 (Sup. Ct., N.Y. Co. Oct. 18, 2011), *aff'd* 104 A.D.3d 443 (1st Dept 2013).

According to DSW, at a February 2, 2011 meeting of the unit owners, Esses prevented a DSW member from placing her name on the ballot for an open Board seat. Complaint ¶ 41. However, the Complaint does not allege that DSW was entitled to more than the one Board seat held by Wolfson. Nor does it allege that preventing this DSW member from placing her name on the ballot had any impact on DSW's ability to vote at the October 2011 Board meeting that precipitated the instant action. Therefore, this allegation also fails to support DSW's claim.

In short, by the time the Condominium's Board voted against the lawsuit in October 2011, the Board members were fully informed of the alleged construction defects, the Sponsor's financial difficulties, and the pros and cons of commencing litigation, including the potential risk of the statute of limitations expiring. The Complaint fails to allege facts showing that the Board, in voting against commencing litigation, was not acting "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Auerbach*, 47 N.Y.2d at 629), and the claims involving the Condominium's Board "ascribe[] no independent tortious conduct to any individual director," rendering the claim for breach of fiduciary duty "deficient as a matter of law." *Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324, 326 (1st Dept 1998).

Instead, the Complaint here shows only that DSW disagreed with the Board's decision, which is insufficient to state a claim upon which relief may be granted. *See Parker v. Marglin*, 56 A.D.3d 374, 374 (1st Dept 2008) ("[p]laintiffs disagree with the board's

decisions as to the costs, means, allocation and methods employed in making repairs to the building, but fail to adduce evidence of self-dealing, fraud, or other acts constituting a breach of fiduciary duty sufficient to overcome the business judgment rule”); *40 W. 67th St. v. Pullman*, 296 A.D.2d 120, 126 (1st Dep’t 2002) (having failed to allege “a breach of fiduciary duty, ‘the exercise of [the co-op board’s powers] for the common and general interests of the corporation may not be questioned’”), *aff’d* 100 N.Y.2d 147 (2003).

Accordingly, even if, with the benefit of hindsight, “the results [of the Board members’ decision] show that what they did was unwise or inexpedient” (*Matter of Levandusky*, 75 N.Y.2d at 538)(internal quotation marks and citation omitted), the allegations of the Complaint fail to rebut the presumption that the Condominium Board was acting in good faith and within its scope of authority to further a legitimate corporate purpose. *See Lorne v. 50 Madison Ave. LLC*, 65 A.D.3d 879, 880 (1st Dep’t 2009).

In light of the above, plaintiff’s Complaint must be dismissed in its entirety. Every cause of action asserted in the Complaint seeks to remedy the same wrongs that the Board voted not to pursue. DSW cannot now circumvent the Board’s decision by stepping into its shoes and asserting its claims derivatively on behalf of the Condominium and the Board; to do so would undermine the very purpose of the business judgment rule. *Accord Ungerleider v. One Fifth Ave. Apartment Corp.*, 164 Misc.2d 118 (Sup. Ct., NY Co. 1995)(dismissing plaintiff’s derivative claims under the business judgment rule where co-op Board determined not to pursue them). Moreover, DSW fails to address the movants’ arguments as to the effect

of the business judgment rule on all of the motions before the Court.¹⁰ Accordingly, the claims asserted against the remaining moving defendants are also dismissed.

In addition, while certain defendants have not moved to dismiss - Karen Gastiaburo and Peter Rosenbaum, for instance - the business judgment rule presents a bar that applies equally to the claims asserted against them, and “[i]t would exalt form over substance” to await motions from the nonmoving defendants that would be granted as “compelled by the doctrine of the law of the case.” *Stylianides v. De Lorean Motor Co.*, 115 Misc.2d 861, 865 (Sup. Ct., NY Co. 1982). Therefore, upon a search of the record, the remaining claims asserted against the nonmoving defendants are dismissed.

The Court does not address the parties’ remaining arguments concerning statute of limitations, failure to state a cause of action, res judicata and CPLR 3013 and 3014. Finally, none of the moving defendants have demonstrated that they are entitled to sanctions, pursuant to 22 NYCRR § 130-1.1. Therefore, defendants’ requests for sanctions are denied.

The Court notes that motion sequence number 006 by Esses and Cohen Tauber seeks dismissal of cross-claims for indemnification and contribution which are asserted in the Answer of Gastiaburo, Brown, Foley, and Warburg Realty. As these cross-claims are

¹⁰ Most of the moving defendants argue that this action is precluded based on the business judgment rule and/or the results of the unit owner and Board member votes. See Memo. in Support (motion seq. no. 001), pp. 11-12; Memo. in Support (motion seq. no. 004), n.1, p. 5 (joining the arguments of other moving defendants on this issue); Memo. in Support (motion seq. no. 005), pp. 1, 6; Memo. in Support (motion seq. no. 006), pp. 1-2, 12, 14; Memo. in Support (motion seq. no. 007), p. 1; Kyrous Aff. (motion seq. no. 010), ¶¶ 3, 9-10.

contingent upon a finding of liability against Gastiaburo, Brown, Foley, and Warburg Realty on DSW's underlying claims, all of which are now dismissed, the cross-claims are dismissed as moot.

Accordingly, it is hereby

ORDERED that the defendants' motions to dismiss this action (motion seq. nos. 001, 002, 004, 005, 006, 007, 010, 018) are granted to the extent that the Second Amended Complaint and all cross-claims are dismissed, and the motions are otherwise denied, and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the decision and order of this Court.

Date: New York, New York

May 16, 2014

ENTER:



Saliann Scarpulla

J.S.C.