SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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MITCHELL HURLEY,

Plaintiff,

-against- Index No.: 653098/13

KENGO WATANABE, KIKO WATANABE, LAIGHT ST. CONDO DEV., INC., VANGUARD CONSTRUCTION AND DEV. CO., INC., SUE ELLEN DEFRANCIS DESIGN ELEMENTS, INC., DESIGN BY LONGORIA, METROPOLIS GROUP, INC, AND JOHN AND JANE Does NO. 1 THROUGH 10,

Defendants.

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ANIL C. SINGH, J.

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff, the purchaser of a newly built condominium unit in Manhattan (the Unit), seeks compensation from defendants relating to alleged delays in contract performance and closing on the Unit. The building project's sponsor, defendant Laight St. Condo Dev., Inc. (LSCD or Sponsor), and defendants Kengo Watanabe and Yuko Watanabe (together, the Watanabes or the individual defendants) and the construction manager for the project, defendant Vanguard Construction and Development Company, Inc. (Vanguard), move to dismiss the amended complaint (complaint) against them. LSCD and the Watanabes (together, the LSCD Defendants) also seek legal fees.

Plaintiff alleges that the Watanabes signed the condominium offering plan (the Plan)[1] for

[1] "An offering plan is a contract between the sponsor and the unit purchasers. Its purpose is to sell . . . apartments within a building" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*,

the building project, and that they are LSCD's only officers and employees. The other defendants in this action are companies or firms that allegedly worked on, or performed services for, the project, which consisted of six residential units and additional commercial space in lower Manhattan.

The Complaint

Plaintiff alleges that he first visited the site in September 2012, at which time the Unit appeared to be virtually complete, and entered into a contract, dated December 20, 2012, to purchase the Unit (the Agreement). Documentary evidence submitted demonstrates that at least some of the Agreement's terms were negotiated. Plaintiff further alleges that before executing the Agreement, LSCD's agents confirmed that the Unit and other units in the building were "basically finished" and stated that issuance of a certificate of occupancy (COO or TCO) was imminent, which would permit plaintiff to close on the Unit "promptly" and that they expected that closing would happen "very soon" probably in December 2012 or January 2013 (complaint, ¶¶ 5, 30). Plaintiff alleges that a December 17, 2012 email message from LSCD's agent to LSCD's architect reveals that the building had been locked for a few weeks, and that no work was being performed. Before purchasing the Unit, plaintiff alleges that he visited the project and that the floors, tiles, doors, windows, bathtubs, shower and many other fixtures of the Unit were in and the walls painted, and that while there was work to be done on the Unit and the building, that the major construction work was complete.

Plaintiff contends that on December 21, 2012, LSCD sent out an email stating that construction was a few weeks behind and that it was unlikely that a closing would occur until

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285 AD2d 244, 247 [1st Dept 2001] [internal citation omitted], affd 98 NY2d 144 [2002]).

mid-February 2012. Plaintiff believes that LSCD knew at this time that the process of obtaining a COO or TCO, required to close on the Unit, was far more than a few weeks behind schedule, and that it would be impossible to close in February. Plaintiff further states that when he visited the Unit in mid-January 2013, it appeared that defendants had removed certain appliances and fixtures. Plaintiff believes that these fixtures and equipment were installed to induce him to sign the Agreement, but then put into another unit to enhance its appearance for sale.

Plaintiff alleges that on February 2, 2013, LSCD advised that the TCO would be applied for in the next week or two, but that LSCD knew that it had not taken steps to or filed the paper work to apply. Plaintiff states that on or about February 22, 2013, his broker inquired about the TCO and was informed by the defendants' agents that the Watanabes were away, but were supposed to apply for the TCO that week. Three days later, LSCD's counsel wrote to plaintiff advising that LSCD was working on getting the TCO, and that the spring looked promising.

In early March 2013, plaintiff had a conversation with LSCD's counsel and advised him that time was of the essence to ensure that plaintiff could take advantage of the then prevailing low interest rate, and "warned [LSCD] that he would hold [it] liable if those rates increased before LSCD delivered the Unit" (*id.*, ¶ 53). By email dated March 26, 2013, LSCD's counsel advised plaintiff that a number of inspections needed to occur, but that LSCD was working diligently to obtain a TCO and anticipated closing in early May 2013. Plaintiff states that based on this false assertion, he forbore from commencing litigation.

Plaintiff alleges that by April 10, 2013, he had not received a 30-day notice to close and that LSCD's counsel refused to give him an update concerning specific aspects of the project. Plaintiff responded to the refusal with a letter, dated April 22, 2013, "cataloguing at length

[LSCD's] various breach of duty," threatening litigation and warning about the risk that plaintiff would incur increased interest rates associated with delays in closing (*id.*, ¶ 57).[2] Plaintiff contends that mortgage interest rates increased beginning in May 2013, and that, when plaintiff visited the building, on May 9, 2013, LSCD's project manager and agent (PM), in the presence of LSCD's president, Kengo Watanabe, made untrue statements, that certain inspections and items that had been holding up building completion had been resolved and others were scheduled, to deter plaintiff from commencing suit to force LSCD to complete the work and obtain a COO.

Plaintiff states that, a few days later, LSCD sent a "notice to close," scheduling a June 24, 2013 closing date, but adjourned with a rescheduled date to be determined. LSCD's counsel advised plaintiff that LSCD still had not obtained the TCO, but was working diligently to obtain it, and that new closing dates would be provided soon. Plaintiff states "upon information and belief," that LSCD's claim that it was prepared to close was false and intended to forestall plaintiff from commencing litigation and that LSCD's counsel's representations that LSCD was working diligently were knowingly false (*id.*, ¶¶ 64, 68).

Plaintiff alleges that on June 11, 2013, LSCD's counsel informed him that, according to LSCD's PM, "all construction items are done, and that issuance of the TCO is a matter of filing the paperwork" (*id.*, ¶ 80). On June 28, 2013, plaintiff's lender unexpectedly extended plaintiff's interest rate lock from July 15, 2013 until August 15, 2013 (*id.*, ¶ 75). Plaintiff advised LSCD of this on July 1, 2013. Plaintiff alleges that he repeatedly advised LSCD that he was willing and able to close at any time, and that during the Watanabes absence from the country, the plumber

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[2] In the April 22, 2013 letter, plaintiff requested prompt and regular status reports on all inspections and inspection requests until closing, and stated that he was trying to determine whether or not to sign an interest rate lock agreement (Hurley aff., exhibit 3).

cancelled his inspection, which LSCD had repeatedly told plaintiff was the final step required to obtain a TCO. Plaintiff states that LSCD did not cause all of the necessary paperwork to be filed for a TCO until some time after his mortgage interest rate lock expired on August 15, 2013, and that, to mitigate his damages, he entered into the new agreement with his bank at a higher rate than he would have enjoyed had Sponsor timely delivered the Unit (*id.*, ¶ 81). The TCO for the building was issued September 6, 2013. Plaintiff filed a summons with notice on September 9, 2013. The closing took place on October 16, 2013.

Plaintiff believes that defendants began to take action to obtain a TCO only after he advised that he suspected fraud and intended to commence litigation, and that had LSCD exercised ordinary diligence, all punch list items would have been completed within a few weeks, or months at most, of plaintiff's September 2012 visit, but that defendants sat on their hands, with the building locked with no construction proceeding, or work performed to obtain a COO, for weeks or months. Plaintiff concludes that the lag time from September 2012,[3] when the unit and building were represented as basically finished, until August 2013, when his interest rate lock expired, could only be the product of bad faith, and that the Watanabe's absences from New York, for vacation and otherwise, at critical junctures, including when the plumbing was to be inspected, demonstrate LSCD's lack of diligence.

Plaintiff alleges, upon information and belief, that LSCD entered into contracts with unit purchasers, but wanted to later be able to sell to different buyers at higher prices if the real estate market swung up. Plaintiff states that because the housing market was rising rapidly after his

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[3] The complaint contains a "2011" date, but does not contain factual allegations to support the contention that LSCD made representations to plaintiff then.

purchase, LSCD repeatedly delayed, hoping that buyers would cancel out of uncertainty that LSCD would deliver the units, as interest rates were also rapidly rising.

Plaintiff states that his belief is based on LSCD's counsel's response, to one of plaintiff's inquiries, that plaintiff was free to cancel the contract if he was unhappy with the delays. Plaintiff contends that LSCD demonstrated its desire that buyers cancel by failing to schedule his walk-through inspection for weeks, only to agree to schedule it, within hours, when plaintiff suggested that the inspection might cause him to elect to rescind.

Plaintiff contends that the Plan's seventh amendment also demonstrates LSCD's bad faith, as it applied to buyers that signed a purchase contract after the date of that amendment, despite that all of the units were then already under contract. This amendment limited a buyer's opportunity to rescind to no later than August 12, 2013, and plaintiff believes that this deadline was a ploy to force buyers to either exercise their contractual rescission rights by then, or gamble as to whether LSCD would deliver their units. Plaintiff also alleges that within months prior to his commencement of this suit, LSCD hired an appraisal service to determine the market value of the units, despite that they were sold, and concludes that the only purpose for doing so was to establish new asking prices if buyers rescinded.

The first seven causes of action of the complaint, against LSCD and the Watanabes are for: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) intentional misrepresentation and fraud; (4) negligent misrepresentation and fraud; (5) fraudulent inducement; (6) constructive fraudulent conveyance; and (7) actual fraudulent conveyance. The eleventh cause of action is against Vanguard for tortious interference with the Agreement.

In support of its motion, LSCD provides excerpts from the Plan and Agreement (together

the Plan Documents). The Plan advised purchasers that LSCD anticipated the first closing of a unit to occur on or about July 1, 2012, but that if that closing did not occur on June 30, 2013 or before, the purchaser was to be afforded a right of rescission. The Plan also provided that even if the first closing occurred on July 1, 2012, or the 12 months thereafter, that subsequent closings, on other units, might be further and substantially delayed beyond June 30, 2013, if a TCO had not been issued for a unit or the floor on which the unit was located. In the event of a delay in a subsequent unit closing, the Plan provided that if LSCD was in compliance with Plan obligations and diligently pursuing completion of construction and issuance of a COO, a purchaser would not be entitled to a right of rescission, to make claims for delay damages or to be excused from paying the full unit price. In bold, the Plan advised prospective purchasers to carefully consider the possibility of delays in making a purchase determination (Lederman aff., exhibit D at 82-83).

Special Risk 24 of the Plan stated:

> " The First Year of Condominium operation is estimated to be July 1, 2012 through June 30, 2013. As in any new construction project, given the vagaries of the construction process, it is difficult to predict with precision the date Sponsor will first be able to close title to the Residential Units. Accordingly, it is a special risk of this Offering Plan that the First Residential Closing may occur sooner or later than the projected First Year of Condominium operation and closing to certain Residential Units may occur substantially before or after closing for other Residential Units"

(*id.*, exhibit F at 2, ¶ 4).[4] The Agreement required LSCD to give buyers no less than 30 days written notice before the closing, and stated that the closing would occur only after or concurrently with the issuance of a TCO or COO for either the building or the Unit. Under the

[4] Prior to the purchase of any unit in the building, the Plan was amended to change the anticipated first unit closing date from January 1, 2012 to the July 1, 2012 date specified above, and "Special Risk 24" amended to state that the first year of condominium operation was estimated to be July 1, 2012 through June 30, 2013.

section of the Plan entitled "RIGHTS AND OBLIGATIONS OF SPONSOR," LSCD stated that it would:

> "diligently, expeditiously and at [LSCD's] own cost, complete the construction of the Units and Common Elements substantially in accordance with the plans and specifications described herein. If any work still remains to be done to complete such work, provided such work will not prevent the issuance of a permanent Certificate of Occupancy, [LSCD], at [LSCD's] own cost and expense will perform or cause all such work to be performed and will supply or cause all material therefor to be supplied and will pay for such work and materials and discharge or bond all mechanics' liens which may be filed as a result of the construction of the Units or Common Elements"

(*id.*, exhibit D at 105). LSCD was also obligated to, at its sole cost, obtain a COO or TCO for the unit prior to the closing (Hurley opposition aff., exhibit 6 at 106).

The Plan provided that the Agreement could not "contain, or be modified to contain, any provision waiving Purchaser's rights" or "abrogating Sponsor's obligations under the . . . Plan or under Article 23-A of the General Business Law" (*id.*, exhibit C at 84). In the event of any conflict between the Agreement and the Plan, the conflict was to be resolved by the Plan (*id.*, exhibit A, ¶ 35). The Agreement states that it supersedes any and all understandings and agreements between the parties, constitutes the entire agreement between them, and that no oral representations or statements shall be considered a part of it (*id.*, ¶ 23).

Discussion

1. LSCD's Motion to Dismiss

"On review of a pre-answer motion to dismiss a complaint for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein" (*MatlinPatterson ATA*

Holdings LLC v Federal Express Corp., 87 AD3d 836, 839 [1st Dept 2011]). While the test is not whether a cause of action has been properly stated, the complaint "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" (*id.* at 839 [citation and internal quotations omitted]), and the court need not accept as true "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence" (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [citation and internal quotations omitted]) or mere speculation (*see Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). Under CPLR 3211 (a) (1), dismissal is warranted if the documentation definitively disposes of the claim (*Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]).

"To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1st Dept 2013]). LSCD argues that plaintiff's breach of contract claim should be dismissed because: 1) there was no breach; 2) the Agreement limits available remedies to rescission or specific performance; and 3) the damages plaintiff seeks were not within the reasonable contemplation of the parties and are too speculative.[5] LSCD also argues that if plaintiff wanted to close by a certain date, and to be able to collect damages, that this should have been negotiated, but that documentary evidence establishes that plaintiff did not obtain a specific closing date or a right to damages in the event that the closing did not occur by a certain date. LSCD notes that the Plan

[5] Defendant also argues that the Agreement's merger clause precludes damages for any implied covenant to close by January 2013 or another specific date, but at oral argument, plaintiff clarified the complaint by representing, on the record, that his contract claim is not based on any representation made by defendants outside of the Agreement.

warned that, due to the vagaries of construction, the first closing of a unit might not occur until after June 30, 2013, with subsequent unit closings possibly occurring substantially after that, and provided a right of rescission if the closing did not occur by June 30, 2013. LSCD also notes that a closing took place approximately two months after plaintiff's interest rate lock expired.

In opposition, plaintiff acknowledges that the Agreement does not contain a closing date, but argues that his contract claim is not for the failure to close by a certain date, presumably meaning August 15, 2013 when his interest rate expired. Plaintiff contends that even though the Agreement did not contain a deadline, or time-of-the-essence language, LSCD breached because, under the law, a party is required to close within a reasonable period of time. Plaintiff states that his claim is based on LSCD's failure to perform its express obligation under the contract, and law, to diligently pursue completion of construction on the Unit, obtain a COO and close within a commercially reasonable period of time, which resulted in his damages. Plaintiff argues that the Plan allows plaintiff to recover for delay-based claims if LSCD did not diligently pursue construction completion and a COO, or otherwise was not in compliance with its obligations, and that page 51 of it expressly provided him with a right to recover damages arising from delays caused by LSCD's failure to diligently pursue completion of construction and issuance of a COO,[6] and that he suffered damages because of LSCD's diligence failure.

Plaintiff's relationship with LSCD was governed by the Plan Documents.

"Under well-established principles of contract interpretation, agreements are

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[6] Page 51 of the Plan provides that, even if the first closing occurred by June 30, 2013, subsequent unit closings might be substantially delayed if no TCO had been issued for the unit or the floor on which the unit was located, in which event, provided that the Sponsor was diligently pursuing completion and the issuance of a COO, there was no right to rescission or damages (Hurley aff., exhibit C at 51; Lederman aff., exhibit D at 82-83).

> generally construed in accord with the parties' intent, and the best evidence of the parties' intent is what they say in their writing. Thus, where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document, and extrinsic evidence is not to be considered"

(*Osprey Partners, LLC v Bank of N.Y. Mellon Corp.*, 115 AD3d 561, 561-562 [1st Dept 2014] [internal citation and quotation marks omitted]). In this case, concerning construction of a new building, the Plan provided that the closing on the first unit in the building, anticipated to occur on July 1, 2012, could be delayed beyond June 30, 2013, with subsequent closings possibly substantially further delayed. Although generally where a contract does not contain a closing date, the law implies a reasonable time for performance, a plain reading of the Agreement would preclude a finding of breach for an October 2013 closing, so long as LSCD was complying with its contractual obligation to perform diligently. The Agreement also limits the rescission and damages rights due to delays of any purchaser of a unit that closed subsequent to the first closing, provided that LSCD was diligently complying with its obligations. Documentary evidence submitted demonstrates that a TCO for the building was issued in September 2013 and that plaintiff's unit closed in October 2013. The exception (on page 51) upon which plaintiff relies concerns delays that occurred after the first closing, but there was no unwarranted delay, as less than a month passed between the issuance of the TCO in September 2013 and the closing on plaintiff's unit in October 2013.

However, the Plan also contains an express obligation that LSCD diligently and expeditiously complete construction (Lederman aff., exhibit D at 105), and plaintiff alleges that LSCD intentionally halted or delayed work, sitting idle instead of performing its obligations for weeks or even months. Assuming that LSCD simply halted construction, for reasons other than

the general vagaries inherent in the construction process, this would not constitute diligence or expedition, and would constitute a breach of LSCD's contractual obligations. While the LSCD defendants assert that plaintiff's theory that they wanted to obtain new buyers is counterintuitive, as buyers under contract would unlikely rescind during a rising real estate market, motive is not an element of breach of contract, and the claim is stated.[7]

Defendant argues that the contract claim must be dismissed because plaintiff did not negotiate to set a closing date, and did not set a date for closing, or send out a time-is-of-the-essence notice, or demonstrate that he was ready, willing or able to close. Plaintiff states that he informed plaintiff that he was ready and able to close, and argues that since LSCD had not yet obtained a COO, due to its lack of diligence and breaches of contract, it would have been futile to unilaterally schedule a closing. The LSCD defendants rely on *Alavian v Zane* (101 AD3d 475, 475 [1st Dept 2012]). In *Alavian*, the Court dismissed the plaintiff's claim that the defendants tortiously interfered with the closing of sale of two cooperative apartments, stating that there was a closing, despite substantial delay, and therefore no breach of the contract, an essential element of a tortious interference claim. Defendants contend that there was also no breach here, as a closing occurred in October 2013. *Alavian* does not address, or negate, a contract claim, between two contracting parties, for damages occasioned by one such party's conduct in purposely stopping or abandoning obligations where it has an express contractual obligation of diligent and expedient performance.

In reply, LSCD asks the court to take judicial notice of the difficult construction situation faced by many, especially in lower Manhattan, after Superstorm Sandy and the nor'easter that

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[7] There is no allegation in the complaint that any unit buyer exercised a right to rescind.

followed in late 2012. While these extreme weather conditions may have caused construction delays, LSCD did not demonstrate that this was the cause of a delay in moving, and may not do so in reply (*see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992], and an inference that these storms caused the complained of delays may not be drawn in defendants' favor on a 3211 (a) (7) motion.

Defendants argue that the Agreement's limitation of liability bars plaintiff's claim. This clause, which the parties amended, through a rider to the Agreement, provides that:

> "[t]he Seller's liability under this . . . Agreement for failure to complete and/or deliver title for any reasons whatsoever, other than for willful default, shall be limited to the return of the money deposited hereunder (with interest, if any), and upon the return of said money, this Agreement shall be null and void and the parties hereto released from any and all liability hereunder. However in the case of Seller's willful default, Purchaser shall have the right to specific performance. In any event, the Seller shall not be required to bring any action or proceeding or otherwise incur any expense to render the title to the Unit marketable or to cure any objection to title"

(Lederman aff., exhibit B [rider at 2, ¶ 5]). Such provisions are generally enforceable, with public policy exceptions for a party that seeks to escape liability for damages arising from grossly negligent conduct or significant intentional wrongdoing (*see Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244 [1st Dept 2007]). While defendant provides parole evidence that plaintiff sought a clause that provided damages for failure to close or complete, but was unsuccessful in obtaining this language, such parole evidence may not be considered absent an ambiguity in the provision's language. On its face, the provision does not directly implicate plaintiff's claim, as no title issue or failure to complete the unit/project is now alleged. In addition, the Plan does not permit a contractual provision that waives buyers' rights or abrogates the Sponsor's Plan obligations, one of which is diligence in construction. Moreover, "[a]

limitation conditioned on the inability to convey title contemplates the existence of a situation beyond the control of the parties" (*9 Bros. Bldg. Supply Corp. v Buonamicia*, 299 AD2d 529, 530 [2d Dept 2002]). Plaintiff's claim is that LSCD defendant purposely stopped performance for reasons that were not merely events beyond its control.

Defendants argue that the damages that plaintiff seeks, for the loss of a favorable interest rate and for living costs, are not proper or compensable consequential damages and are speculative.[8]

> "The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the contract was made. The breaching party need not have foreseen the breach itself, however, or the particular way the loss came about. It is only necessary that loss from a breach is foreseeable and probable"

(*Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993] [citation omitted]).

> "Where a contract is silent on the subject, courts, employing a commonsense approach, must determine what the parties intended by considering the nature, purpose and particular circumstances of the contract known by the parties . . . as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made"

(*Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183–184 [1st Dept 2007] [internal quotation marks and citation omitted], *affd* 14 NY3d 791 [2010]). "[B]are notice of special consequences which might result from a breach of contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient [to impose liability for special damages]" (*Kenford Co. v County of Erie*, 73 NY2d 312, 320 [1989][internal quotation marks

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[8] "[G]eneral damages permit recovery of the value of the very performance that defendant promised; and (2) special damages, also called consequential damages, seek to compensate a plaintiff for additional losses, other than the value of the promised performance, incurred as a result of defendant's breach" (Glen Banks, Contract Law § 22:17 [28 NY Prac, Contract Law § 22:17] [Note: online treatise]).

and citation omitted]).

Plaintiff relies on *Regan v Lanze* (47 AD2d 378, 383 [4th Dept 1975], *revd on other grounds*, 40 NY2d 475 [1976]). *Regan* involved a delay in the conveyance of real property allegedly due to the seller's refusal to correct title defects. The Court allowed damages of the purchaser's increased mortgage interest rates, over the mortgage term, for the failure to convey marketable title on the closing date, reasoning that the increased rate was "a predictable consequence arising out of a delay in conveying title" (*id.* at 383). *Regan* was a specific performance action, as was *Bregman v Meehan* (125 Misc 2d 332, 338 [Sup Ct, Nassau County 1984]), also cited by plaintiff. In *Lotito v Mazzeo* (132 AD2d 650, 651 [2d Dept 1987]), which cites *Bregman*, the Court distinguished an action for damages from one for specific performance stating:

> "[i]n an action to recover damages for the breach of a contract for the purchase of real property, the measure of damages is the difference between the contract price and the market value at the time of the breach, together with reasonable attorney's fees and other expenses necessarily incurred in reliance upon the contract, with interest from the date of the breach. In contrast, in an action for specific performance, the court has broad discretion in fashioning an appropriate remedy and, thus, the court may award the purchaser damages representing an increase in mortgage rates resulting from the seller's delay in conveying title [internal quotation marks and citation omitted]"

(*see also Sharma v Skaarup Ship Mgt. Corp.*, 916 F2d 820, 825 [2d Cir 1990], *cert denied* 499 US 907 [1991] [citing *Lotito*, 132 AD2d at 651 and stating that the measure of damages "applies when a seller of a home breaches and the buyer is forced to assume higher interest rates in purchasing another home as a result of the breach").

To demonstrate the contemplation of plaintiff and LSCD, plaintiff relies on a mortgage contingency clause, which conditions his obligation to purchase the Unit on his ability to obtain a

loan commitment for a 30-year mortgage from a lender within 45 days. However, the mortgage could be "at the prevailing fixed rate or [an] *adjustable* rate of interest" (Hurley opposition aff., exhibit B, at 1 [emphasis added]). Moreover, "Special Risk No. 9" of the Plan, permitted a purchaser to finance any portion of the purchase price through a lender, but specifically stated that "no representation, warranty or assurance is given by the Sponsor, or any other person on its behalf, as to the availability, cost, terms or other conditions of such financing" (Lederman aff., exhibit D at 6). These provisions demonstrate that the parties knew that plaintiff intended to attempt to obtain a mortgage, but that LSCD would not be responsible for whether or not plaintiff did so or was able to obtain or maintain a specific interest rate. In light of this language, and that the Agreement contemplated what might have been substantial length of time, in fact, years, before performance might be completed, during which time interest rates could rise or fall, a conclusion that the parties contemplated that LSCD would assume liability for interest rate fluctuations is unwarranted. Plaintiff's decisions to enter into a mortgage lock, and the timing of his decision, as well as the mortgage market fluctuations, were not items over which defendant had control or connection. In addition, the parties' contemplations must be viewed from the time that they entered into the contract, not based on later correspondence from plaintiff that he was at risk of losing his interest rate, and plaintiff's breach of contract claim is dismissed to the extent that it seeks these damages.

However, plaintiff also claims that he was otherwise injured, in that he had to rent living quarters due to the delay. Defendants have not demonstrated that additional living expenses would not have been a foreseeable consequence of a purposeful delay. That plaintiff ultimately may not be able to prove that he incurred injury, as argued by LSCD at oral argument, is not a

proper subject of a CPLR 3211 motion, as plaintiff is not required to prove that he will ultimately prevail.

LSCD moves to dismiss the second cause of action for breach of the covenant of good faith and fair dealing. LSCD argues that the claim is duplicative, that the covenant cannot be inconsistent with express contractual provisions, and that plaintiff has not been deprived the bargain of a good interest rate and a specific closing date because he did not bargain for these, they were not promised, and the Plan stated that no representation was made as to the cost of financing. Plaintiff argues that LSCD was expressly obliged to complete construction and obtain a certificate of occupancy from which arises an implied duty to ensure that the persons that LSCD hired to discharge those obligations did so expeditiously and skillfully.

The contract and the breach of duty of good faith and fair dealing claims are duplicative, as the same allegations underlie both the cause of actions and the latter claim is "properly dismissed for failure to allege actual ascertainable damages arising in connection with [the] claims, which were nonduplicative of the damages asserted in connection with its breach of contract claims" (*Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010]; *Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014] [claim may not be maintained where "the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract" [internal citation and quotation marks omitted]).

The third, fourth and fifth causes of action of the complaint are for, respectively, intentional misrepresentation, negligent misrepresentation, and fraudulent inducement. Plaintiff alleges that, prior to the Agreement's execution, LSCD's agents, identified at oral argument as

real estate brokers, made the following untrue statements to induce him to purchase: (1) that the building and unit were "basically finished"; (2) that the issuance of a COO was imminent, and therefore plaintiff would be able to close on the unit promptly; (3) that closings were expected very soon, and probably in December 2012 or January 2013; (4) that the Sponsor was working diligently to finish punch list items and to obtain a TCO; (5) that final touches on the Unit would be finished soon, that a TCO issued soon and that, therefore, the unit could "close any day"(complaint, ¶¶ 5-7, 30, 32).

Plaintiff also alleges that, after he executed the Agreement, the following misrepresentations were made: (1) that on December 20, 2012, Sponsor's agent represented that the other defendants were working diligently to obtain a TCO and that the closing of the Unit would probably occur in January 2013 (*id.*, ¶ 43);[9] (2) that on December 21, 2012, LSCD's counsel notified buyers that although defendants had anticipated that a TCO would be issued in January, that construction was behind schedule, and it was unlikely that closing would occur until mid-February (*id.*, ¶ 45); (3) that on February 2, 2013, the LSCD stated that "'the TCO would be applied for in the next week or two'" (*id.*, ¶ 50); (4) that on March 26, 2013, LSCD's counsel advised that LSCD was working diligently to obtain a TCO and anticipated closing in early May 2013 (*id.*, ¶ 54); (5) that on or around May 9, 2013, the Watanabe's PM represented that the items that had been holding up the TCO were the boiler inspection; the plumbing/water approval; the fire safety inspection; and sidewalk repair, but that the boiler had already been inspected and approved, the plumbing and water had already been approved, the fire safety

[9] The complaint is unclear as to whether this statement was made before or after the signing of the Agreement. Plaintiff is given the favorable inference that it was after, as there is an allegation of an essentially similar statement made before the signing.

inspection was scheduled that day, and the sidewalk work would begin the following Monday, and would be finished in two weeks or less (*id.*, ¶ 61-62); (6) that on or around June 12, 2013, LSCD's counsel stated that LSCD was working diligently to obtain a TCO and that new closing dates would be provided shortly (*id.*, ¶ 68); (7) that the remaining obstacles to obtaining a TCO, the approval of the building's boiler and final certifications by the plumber were on the cusp of completion (*id.*, ¶ 71); and (8) that, at an unspecified time, LSCD would make the Unit available for closing within a few weeks (*id.*, ¶ 116). Plaintiff further alleges that LSCD's closing notice set the closing date for June 24, 2013, which was adjourned, but that this was not a genuine closing date (*id.*, ¶ 64).

In the third and fourth causes of action, plaintiff asserts that, before and after he signed the Agreement, LSCD deceived him into believing that it was working diligently towards finishing the Unit and obtaining a TCO and that the closing was imminent. Plaintiff further asserts that, based on these untrue assertions, he refrained from commencing an action compelling LSCD to take the actions necessary to obtain a TCO/COO and deliver the Unit to him within a matter of a few weeks or months, which would have enabled him to benefit from lower interest rates and avoid 10 months of rental payments. Plaintiff also claims that, but for the misrepresentations, he would never have agreed to buy the Unit, but instead would have bought a comparable apartment for prompt delivery at the then-prevailing lower interest rates and housing market prices and avoided rental payments (*id.*, ¶ 125). Plaintiff alleges that defendant had a position of confidence and trust with plaintiff and unique or specialized knowledge unavailable to plaintiff, and that LSCD's principals, as members of the board of the condominium association, owed fiduciary duties to plaintiff.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). "The elements of a claim for negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*MatlinPatterson ATA Holdings LLC*, 87 AD3d at 840 [citation and internal quotation marks omitted]). These claims are subject to CPLR 3016 (b), which is satisfied when the facts in the complaint "permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). "[I]n certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud" to demonstrate the claim (*id.* at 493).

In moving for dismissal, LSCD argues that the fraud/misrepresentation claims should be dismissed because the claims are duplicative of the contract claim and do not allege the breach of a duty collateral to a contract duty, and/or because they concern non-actionable promissory statements or predictions about future acts or intentions to perform. LSCD also argues that plaintiff's reliance was not reasonable and that plaintiff does not state fraud damages.

In opposition, plaintiff contends that his misrepresentation claims are based on false statements as to past and present facts made after the Agreement was signed, such as the representation that LSCD had been and was diligently working when it was doing nothing, and is not premised on LSCD's failure to meet timing projections regarding completion of construction and obtaining a TCO. Plaintiff argues that several of the alleged misrepresentations are collateral

to the Agreement, in that he alleges that LSCD misrepresented the extent of its efforts to diligently complete construction and obtain a TCO and how it would do so, that the closing was imminent, and construction only a few weeks behind schedule, and that certain necessary inspections were completed or scheduled to occur. Plaintiff points, as an example, to his allegations concerning LSCD's PM's statement about the boiler, plumbing, fire safety inspection, and sidewalk work, that he claims he later learned were untrue. Plaintiff states that, but for these statements, he would not have entered into the Agreement, and that LSCD, a holder of superior knowledge, had a duty to tell plaintiff the truth with respect to its work on the project.

Plaintiff's argument, that he would not have entered into the Agreement because of false statements that were made after he had already entered into the Agreement, is unpersuasive. Plaintiff commenced this lawsuit alleging the falsity of the statements and thereafter closed, thereby affirming the contract. While plaintiff states that his claim is not based on LSCD's failure to meet timing projections, the damages in a fraud claim must result from the alleged fraud committed (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). The favorable interest rate losses plaintiff alleges were not caused by a false statement about when the sidewalk would be repaired or the boiler inspected, but by the fact that the Unit was not ready until after plaintiff's interest rate lock expired. Plaintiff's rental cost damages are also necessarily due to a later, rather than an earlier, closing. Because the alleged misrepresentations upon which plaintiff claims that he relied did not cause the damages that plaintiff seeks, he may not recover for them.

In addition, plaintiff's alleged losses, based on the fact that there was no closing before his interest rate expired and that he could not reside in his unit sooner, are intrinsically connected to the alleged delays in performance, that is, LSCD's alleged failure to perform in a diligent and

expeditious manner. This duty of performance is not collateral to the Agreement, but an express obligation in it, upon which plaintiff bases his contract claim against LSCD. Consequently, plaintiff's misrepresentation claims, which seek the same damages as his contract claim, are duplicative and dismissed (*see Rockefeller Univ. v Tishman Constr. Corp. of N.Y.*, 240 AD2d 341, 342 [1st Dept 1997]).[10]

Plaintiff also contends that he would not have entered into the contract, but for the misrepresentations, and would have obtained a different apartment at the then lower prevailing real estate and mortgage interest rates. However, the measure of damages for fraud

> "is computed by ascertaining the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain. Damages are to be calculated to compensate plaintiff's for what they lost because of the fraud, not to compensate them for what they might have gained. Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud"

(*Lama Holding Co.*, 88 NY2d at 421 [internal quotation marks and citations omitted]; *Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010] [damages for fraudulent acts should "compensate plaintiffs for what they lost because of the fraud, not for what they might have gained"]). In other words, compensation is meant to restore a party to the position he or she occupied before the commission of the fraud by compensating for actual

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[10] Although it is unnecessary to reach the issue of reliance, the court has reviewed the DOB's website which provides extensive information to the public regarding the status of different types of building inspections, including at the subject building. Justifiable reliance is not found if a plaintiff could have discovered the truth by ordinary intelligence or with reasonable investigation. In opposition to LSCD's claim that plaintiff's reliance was not justified, as he did not avail himself of public information available to him, plaintiff responds only that the website is opaque, but fails to state what information he sought that he could not have obtained on the site.

pecuniary loss, and not the benefit of a hypothetical agreement plaintiff might have entered instead of the allegedly fraudulent one or for lost profits (*Lama Holding Co.*, 88 NY2d at 421-422). Plaintiff does not argue otherwise, and does not claim a reduction in the value of the Unit he purchased due to the fraud, but that real estate prices rose.

To the extent that the complaint alleges the loss of the opportunity to go to court to obtain mandatory injunctive relief, forcing the completion of the construction and the issuance of a TCO from DOB more rapidly, a viable claim for damages is not stated. Plaintiff can only speculate that, had he been granted such extraordinary relief, the time of it would have coincided with his agreement with his lender.

Plaintiff's fifth cause of action, for fraudulent inducement, is based on the alleged misrepresentations made before plaintiff executed the Agreement. Plaintiff alleges that he relied on these statements and would not have entered into the Agreement had he know of their falsity. Similar to his misrepresentation and breach of contract claims, plaintiff alleges a loss of $500,000.[11] The elements of a claim for fraudulent inducement are: "a material representation, known to be false, made with the intention of inducing reliance, upon which [the plaintiff] actually relie[d], consequentially sustaining a detriment" (*Frank Crystal & Co. Inc. v Dillmann*, 84 AD3d 704, 704 [1st Dept 2011] [internal quotation marks and citations omitted]).

In addition to LSCD's arguments that are listed above, LSCD also argues that this claim should be dismissed because plaintiff has affirmed the contract, did not seek rescission, as might be available under common law, and had a contractual right to rescission that he is chose not to

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[11] Plaintiff states in his memorandum of law that the misrepresentation claims (third and fourth causes of action) are based on LSCD's conduct after the Agreement's execution.

exercise. In opposition, plaintiff argues that he alleges numerous examples of knowingly false statements made by LSCD to induce him to enter into the Agreement, including lies about the status of the work and progress being made. Specifically, plaintiff points to the statement that work was being diligently performed, which constituted a present fact. For purposes of a CPLR 3211 motion, LSCD's agent's December 17, 2012 message, stating that the building was locked with no work being performed for weeks, sufficiently demonstrates the knowingly false element of the claim. However, the other pre-Agreement statements constitute statements of prediction or future expectations, which cannot give rise to a fraudulent inducement claim (*ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008]).

As addressed above, plaintiff claims that he would not have entered into the Agreement had he known that the statement that work was being diligently performed was untrue, but he affirmed the Agreement, during the pendency of this action, after filing the complaint allegations indicating that he knew of the falsity. Furthermore, plaintiff is not entitled to fraud damages of lost profits, the loss of a hypothetical alternative bargain he might have obtained, or the cost of acquiring and maintaining the property (*VisionChina Media Inc.*, 109 AD3d at 56-57). In addition, plaintiff's allegation that he incurred rental expenses is duplicative of the contract damages that he seeks. Finally, plaintiff's nonconclusory allegations do not sufficiently support the claim of a scheme or the damages he seeks, and the fifth cause of action is dismissed.

LSCD moves to dismiss plaintiff's sixth and seventh causes of action for fraudulent conveyance, against LSCD, as failing to state a claim, premature and improperly seeking attachment. In the sixth cause of action, plaintiff alleges that he is a creditor under Debtor and Creditor Law (DCL) § 270, and that LSCD conveyed or will convey property to the Watanabes

and others for less than fair consideration, and was or will be rendered insolvent and that LSCD was or is about to be engaged in a business or transaction for which the property remaining is unreasonably small capital or has or will incur debts beyond its ability to pay as they mature. Plaintiff argues that he alleges the kind of constructive fraudulent conduct that the DCL was designed to combat—the transfer by a single-purpose real estate entity of sales proceeds to its equity holder, rending the entity unable to pay valid claims of its current and future creditors—and that the complaint sufficiently alleges that LSCD was stripped of its assets in bad faith with the intention of defeating its creditor's ability to recover on his claim.

DCL § 273 provides that "[e]very conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." While plaintiff is not required to plead with particularity under this section of the DCL (*Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149 [2d Dept 2009]), he is required to state some factual underpinnings to support the elements of the claim, but has not done so. Moreover, to the extent plaintiff alleges a claim pursuant to DCL § 273-a, "the existence of an unsatisfied judgment is an essential element of this [cause of] action" (*Frybergh v Weissman*, 145 AD2d 531, 531 [2d Dept 1988]; *see Matter of Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004]). There is no judgment in this case and the sixth cause of action is dismissed.

In the seventh cause of action, plaintiff alleges that LSCD has conveyed or will convey property to the individual defendants, and others, with actual intent to hinder, delay or defraud creditors, and that such conveyances were made at a time when LSCD was insolvent, or will be made at a time when LSCD will be rendered insolvent by the conveyance. Plaintiff alleges that

he seeks to annul or restrain such transfers, and for attorney's fees pursuant to DCL 276-a.[12]

DCL § 276 provides that: "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors," and must be pleaded with particularity (*Menaker v Alstaedter*, 134 AD2d 412, 413 [2d Dept 1987]). While CPLR 3016 requires only that facts be pleaded from which an inference of fraud may be drawn, the complaint is devoid of nonconclusory factual allegations of an improper conveyance or that LSCD would be unable to pay a judgment, or an explanation of the support for allegations made upon information and belief.

The LSCD defendants move to dismiss plaintiff's claim that the Watanabes should be jointly and severally liable for LSCD's obligations because they certified the offering plan. In *Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC* (Sup Ct, NY County, April 2, 2012, Bransten, J., index No. 103991/11, *affirmed as amended* 106 AD3d 542 [1st Dept 2013]), the trial court dismissed the plaintiff's breach of contract cause of action against the non-sponsor defendants, members of the sponsor, where the members signed the offering plan's certification. The plaintiff in *184 Thompson St.* alleged that members of the sponsor LLC were liable on the contract because the purchase agreement incorporated by reference the offering plan provisions. The trial court stated that the plaintiff's claim failed to allege that the sponsor's members were parties to the purchase agreement, and that the appellate

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[12] Defendants argument that plaintiff seeks to effect a de facto attachment is unpersuasive. Such an order "directs the sheriff to take constructive and sometimes actual hold of a defendant's property, so that it can be applied to the plaintiff's judgment in the action, should the plaintiff prevail" (*VisionChina Media Inc.*, 109 AD3d at 59). Plaintiff has not sought this relief.

cases cited by the plaintiff upheld fraud claims against non-sponsor defendants who signed certification in their individual capacities, but not breach of contract actions under those facts. The First Department affirmed, stating that non-sponsors may not be held liable for plaintiff's claims premised solely on the alleged violations of the offering plan. Plaintiff here also does not allege that the individual defendants signed the Agreement in their personal capacity, and the breach of contract claim is dismissed against them.

Plaintiff seeks to pierce LSCD's corporate veil, alleging that the Watanabes are LSCD's sole shareholders, that the company is funded by their personal assets and lacks adequate capital to satisfy its liabilities, as it has no income other than what might be received if the units closed,[13] conducts no business other than related to the project and does not maintain corporate formalities. Plaintiff alleges, upon information and belief, that the Watanabes dominate LSCD and used the company to carry out the fraud and wrongdoing described in the complaint. Plaintiff states that it would be inequitable to allow the Watanabes, the owners of LSCD, to perpetuate the alleged wrongs and transfer to themselves LSCD assets that could be made available to pay plaintiff's damages.

A party seeking to pierce the corporate veil bears a heavy burden of demonstrating that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The party must also establish that the controlling corporation "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice

[13] Plaintiff has not updated this allegation to reflect that at least his unit closed.

against that party such that a court in equity will intervene" (*id.* at 142). That LSCD was financed with family money, as opposed to a lender, does not demonstrate undercapitalization. The allegation that LSCD does not maintain corporate formalities is conclusory (*see Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 211 [1st Dept 2005]) and the complaint does not otherwise contain particularized, nonconclusory, factual allegations sufficient to support a veil piercing/alter ego claim (*id.*). As the fraudulent conveyance claims have been dismissed, plaintiff's argument that the veil should be pierced based on those allegations is unpersuasive.

Defendants seeks to dismiss plaintiff's claim for punitive damages. Such damages "require a demonstration that the wrong complained of rose to a level of such wanton dishonesty as to imply a criminal indifference to civil obligations" (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 60 [2004] [internal quotation marks and citation omitted]). Plaintiff argues that sponsor's conduct was reprehensible, in that the project sat dormant, despite its near completion, for a full year, to intimidate buyers into rescinding their contracts, thereby permitting sponsor to resell the units at higher prices. Plaintiff's complaint allegations demonstrate that, in September 2012, punch list items and inspections remained to be performed, approvals obtained, sidewalk and other work done, and a TCO or COO obtained by LSCD. The allegations also reveal that work was performed in the building, and efforts were made to obtain an TCO or COO between the time that plaintiff signed the Agreement and September 2013, when the TCO was issued. Plaintiff states that the floors in the Unit were not finished until October 15, 2013. Therefore work was performed. During this time, New York City suffered two extreme weather events, one of which was Superstorm Sandy. The Agreement did not restrict the Watanabes from leaving the country, for vacation or otherwise, and despite plaintiff's assertions otherwise, their

temporary absences do not constitute wanton behavior. The complaint also does not adequately demonstrate that an actionable misrepresentations about the Unit was made to others, or to the public at large, and the complaint's remaining nonconclusory allegations are inadequate to support a claim for punitive damages, which is dismissed.

As a claim remains, at this juncture it is unnecessary to reach LSCD's request for attorney's fees. LSCD's assertion that plaintiff's request for legal fees must be rejected as frivolous, without more, is not a sufficient showing for dismissal.

2. Vanguard's Motion to Dismiss the Complaint

In the eleventh cause of action of the complaint, plaintiff alleges that he is a party to the Agreement, which required LSCD to obtain a COO and deliver the Unit for closing within a reasonable time period. Plaintiff further alleges that Vanguard knew of plaintiff's contract with LSCD and either took steps, or failed to take steps, in performing, and that this conduct or omission caused LSCD to breach the Agreement. Plaintiff submits an affidavit in which he states that LSCD's representatives have claimed, on more than one occasion, that Sponsor's failure to obtain a COO and to close in a reasonable time was caused by Vanguard's misconduct in connection with construction and in obtaining a permit for the Unit and building. Vanguard argues that there was no actual breach of plaintiff's contract with LSCD, nor has plaintiff alleged that Vanguard used improper or wrongful means to interfere with the Agreement. Vanguard also adopts the LSCD Defendants' arguments.

The elements of a claim for tortious interference with contract are "the existence of [the plaintiff's] valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co.,*

Inc. v Cintas Corp., 8 NY3d 422, 426 [2007]). Plaintiff's allegations do not show Vanguard's intentional procurement of a breach of the Agreement (*id.*; *see Lama Holding Co*, 88 NY2d at 424 ["[t]ortious interference with contract requires . . . defendant's intentional procurement of the third-party's breach of the contract without justification]; *Levine v Yokell*, 258 AD2d 296, 296 [1st Dept 1999] [claim required that defendant "intentionally *procured* an actual breach by the contracting party [emphasis added]])." While plaintiff alleges that Vanguard either took steps or failed to take steps in performing, there is no allegation from which the inference may be drawn that Vanguard's conduct was anything other than inadequate performance of its own, separate, agreement with LSCD. Plaintiff provides no authority to demonstrate that such conduct suffices to demonstrates the procurement of a breach of the Agreement, which is a different, separate, agreement. As the cause of action is dismissed, it is unnecessary to reach Vanguard's other arguments for dismissal.

As plaintiff represents that he is not asserting a contract claim against Vanguard, Vanguard's motion to strike paragraph 17 of the complaint, which states that, upon information and belief, plaintiff is a third-party beneficiary of Vanguard's construction agreement with LSCD is moot. In any event, Vanguard submits a copy of its agreement with LSCD which demonstrates that plaintiff was not an intended beneficiary of that agreement.

Conclusion

In light of the foregoing, it is

ORDERED that the motion of defendants Laight St. Condo Dev., Inc. and Kengo Watanabe and Yuko Watanabe to dismiss the complaint (motion sequence No. 001) is granted to the extent that the amended complaint is dismissed as against defendants Kengo Watanabe and

Yuko Watanabe and the Clerk of Court is directed to dismiss and sever the action against these two defendants, and the second, third, fourth, fifth, sixth and seventh causes of action of the amended complaint, plaintiff's claim for punitive damages, and the portion of the first cause of action that seeks damages for plaintiff's alleged loss of a favorable interest rate are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant Vanguard Construction and Development Company, Inc. (motion sequence No. 002) to dismiss the complaint against it is granted and the action is severed and dismissed as against said defendant.

Dated:

Aug 5, 2014

AUG 05 2014

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE