Peny & Co. v 936-938 Cliffcrest Hous. Dev. Fund Corp.
2016 NY Slip Op 30534(U)
March 30, 2016
Supreme Court, New York County
Docket Number: 850011/13
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X **Decision and Order**

PENY & CO.,

Plaintiff,

-against-

Index No. 850011/13

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND JOHN AND JANE DOES\ 1-10, ABC LLC 1-10, XYZ CORP. 1-10,

Defendants.

----------X

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION,

Third-Party Plaintiff

-against-

THE WAVECREST MANAGEMENT TEAM LTD., COMMUNITY CAPITAL BANK n/k/a CARVER FEDERAL SAVINGS BANK, LEE WARSHAVSKY, SHUHAB HOUSING DEVELOPMENT FUND CORPORATION, JOHN AND JANE DOES 11-20, the identity of such persons being unknown to the Third-Party Plaintiff, but intended to describe those persons who corruptly influenced their employer, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK to look away from their defalcations of the Third-Party Plaintiff's funds,

Third-Party Defendants.

----------X

JOAN A. MADDEN, J.

In this foreclosure action, defendant Cliffcrest Housing Development Fund Corporation

(Cliffcrest) moves, by order to show cause, for an order (1) granting it permission to file and serve a second amended verified answer, counterclaim, cross claim and third-party complaint, (2) dismissing the motion by The Department of Housing Preservation and Development of the City of New York (HPD) for a more definite statement, (3) ordering that claims against Carver Federal Savings Bank, as successor-in-interest to proposed third-party defendant Community Capital Bank (Carver) be discontinued without prejudice, (4) denying the motions to dismiss by third-party defendants Shuhab Housing Development Fund Corp. (Shuhab), the Wavecrest Management Team, Ltd. (Wavecrest),and Lee Warshavsky (Warshavsky) (together "the Shuhab defendants"), and (5) denying plaintiff Peny & Co.'s (Peny) motion for summary judgment. Peny opposes the motion. The Shuhab defendants oppose the motion and seek to dismiss the third party claims previously assert against them. HPD also opposes the motion.

BACKGROUND

Cliffcrest is tenant owned development company and the owner of the property located at 938 St. Nicholas Avenue, New York, New York ("the Building"). Cliffcrest became the owner of the Building through HPD's Third-Party Transfer Program ("TPT"), established by Local Law 37 of 1996, which provides an alternative to in-rem foreclosure. The goal of the program is to transfer tax-delinquent buildings in poor condition to new owners capable of rehabilitating the buildings and managing them as low income housing.

Pursuant to the TPT, residential properties, on which the City holds tax liens, are transferred, first, to a private not-for-profit entity and, then, to a sponsor which agrees to provide construction or permanent financing, typically, in conjunction with partial funding by HPD, in accordance with HPD guidelines. In this case, the Building was originally taken by the City in

rem and transferred to a not-for-profit Neighborhood Restore Housing Development Fund Corporation ("Neighborhood Restore") on May 17, 2001. On December 19, 2002, Neighborhood Restore transferred the Building to Shuhab, a sponsor selected by HPD through a Request for Proposal process. Shuhab appointed Wavecrest as the managing agent for the Building, and it is alleged that it acted in that capacity from December 2002 until September 2010. Warshavsky is Shuhab's principal and acted as Secretary and Treasurer of Cliffcrest.

HPD holds two mortgages on the Building which were originally provided as part of a joint construction loan, originated in 2002, with Fleet National Bank ("Fleet"), to provide construction financing to rehabilitate the Building (hereinafter "the HPD mortgages").[1] In connection with this financing, on December 19, 2002, HPD and Fleet executed a Construction Loan Participation Agreement ("Participation Agreement") to fund HPD's share of the construction.

The rehabilitation of the Building was purportedly completed in September 2006. On or about January 27, 2007, Shuhab transferred title to the Building to Cliffcrest and the conversion closed. The individual units in the Building were sold to the current unit owners as low-income cooperative apartments at prices below market value. As part of the transfer, Cliffcrest assumed the obligations under all the mortgages on the Building, including the HPD and Fleet mortgages,

---

[1]According to HPD, on September 29, 2006, three mortgages originally made and dated December 19, 2002, in the principal amount of $2,512,103, were consolidated into one mortgage under which Cliffcrest was required to pay interest at a rate of .62% per annum starting on November 1, 2006, in monthly installments through November 1, 2036. Also, on September 29, 2006, two mortgages originally made and dated December 19, 2002 in the principal amount of $947,500, were consolidated into a second HPD mortgage, which is "a standing loan" with no interest or payments required with the debt to be forgiven barring a default. Cliffcrest paid the interest under the first HPD mortgage until April 2012 but has not made any payments since that time.

and the construction loan was converted to a permanent loan.

On September 28, 2006, Cliffcrest executed and delivered to Carver's predecessor-in-interest Community Capital Bank ("CCB") a Mortgage Note ("the Note") evidencing a commercial loan made to it in the principal amount of $1,650,000, plus interest as set forth in the Note. Simultaneously with the execution of the Note, Cliffcrest executed and delivered to CCB a Mortgage, Assignment of Leases and Rents and Security Agreement ("the Mortgage"), which provided partial security for the money due and owing CCB under the Note. That same day, CCB assigned to Peny the Note and the Mortgage (together "the Loan Documents"). Peny submits documentary evidence showing that Peny paid CCB $1,650,000 for the assignment of the Note and the Mortgage. (*See*, Slama affirmation, exhibit 1-D, 1-E, 1-F.) The HPD mortgages are subordinate to the Peny mortgage.[2]

Procedural History

From 2006 until 2012, Cliffcrest made payments to Peny as agreed to under the Note and Mortgage without objection or reservation. However, Peny alleges that beginning in March 2012, Cliffcrest ceased making monthly payments of principal and interest due under the Loan Documents. It further alleges Cliffcrest failed to make payments for real estate taxes assessed against the Building and failed to provide proof of insurance covering the Building. Peny served Cliffcrest with a written Notice of Default dated November 13, 2012, and when Cliffcrest failed to cure its default, Peny commenced this foreclosure action, and filed an application for the

[2]Specifically, on September 29, 2006, HPD and CCB entered into a subordination agreement whereby HPD agreed that the HPD mortgages, shall be subject and subordinate in time and payment and to the liens, terms and covenants in the Loan Documents.

appointment of a temporary receiver, which the court granted by order dated March 17, 2015.[3]

Cliffcrest previously moved for leave to serve an amended verified answer, counterclaims, and third-party complaint ("Proposed First Amended Pleading"), which was opposed by Peny and HPD. The Proposed First Amended Pleading alleged that agents of HPD and Shuhab, and their co-conspirators "pilfered the rehabilitation loan proceeds for their own personal gains...[and] funneled the monies to general contractors who did not perform the repairs necessary to [the Property] required to make [the Property] livable." (Proposed First Amended Pleading, ¶'s 133, 135). It is further alleged that the HPD mortgage and the CCB mortgage were "nothing more than a sham," and that "to conceal the fraudulent CCB mortgage, Shubab caused its agent, Warshavsky to act as Secretary and Treasury of Cliffcrest so that Cliffcrest's independent existence would remain a sham and Cliffcrest would act solely on behalf of Shubab" (*Id,* ¶'s 137, 138). Additionally, it is alleged that on the date CCB mortgage was filed, Warshavsky, purportedly acting on behalf of Cliffcrest, assigned the CCB mortgage to Peny (*Id,* ¶ 139). Finally, it is alleged that "HPD officials were co-conspirators, together with Shuhab, in accepting bribes and kickbacks from construction loan proceeds, as they have now notoriously done in similar instances" (*Id,* ¶ 144).[4]

---

[3]While the application was made ex parte, this court required that Peny give notice of the application.

[4]In support of its motion, Cliffcrest submitted the affidavit of its President, Carlton Burroughs ("Burroughs"). Burroughs states that the construction work on the property began in 2002, and that the work was "shoddy" and complaints to both Shuhab and HPD regarding the poor quality of the work were ignored. According to Burroughs, HPD and Shuhab induced the tenants to invest their life savings in the purchase of the property and warned the tenants that if they did cooperate fully they would lose their investments. He also states that HPD and Shuhab managed the selection of contractors who were suppose to rehabilitate the property but instead stole the funds, and Cliffcrest received no value for the proceeds.

The Proposed First Amended Pleading asserted counterclaims, cross claims and third party claims for (1) rescission of the Note and Mortgage that are the basis of Peny's action on the ground that Cliffcrest was fraudulently induced into entering the Note and Mortgage; (2) fraud; (3) a permanent injunction barring Peny from proceeding to a judgment of foreclosure and sale and enjoining HPD, and the proposed third-party defendants to take all steps necessary to satisfy and discharge the note and mortgage and the notice of pendency filed in this action; (4) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1961 *et seq.;* and (5) violation of 42 USC § 1983 based on allegations that the RICO scheme specifically targeted African-Americans, Latino and immigrant citizens. Cliffcrest also sought to interpose the following four affirmative defenses: (1) failure to name a necessary party; (2) fraud; (3) failure to state a cause of action; and (4) unclean hands.[5]

Cliffcrest also submitted the affidavit of John D. Nakrosis, R.A., who attended the inspection of the property in November 2013, and states that he reviewed the portions of the relevant construction contract and some rehabilitation drawings. Nakrosis states that his "inspection of the [property] revealed a host of glaring deficiencies, construction defects and life safety hazard, which lead me to believe within a reasonable degree of engineering and architectural certainty that the work that was called for in the contract was never done and what little work was done was wholly deficient." Nakrosis, Affidavit ¶ 6.

[5] As against Peny, the proposed counterclaims and affirmative defenses of fraud and unclean hands were based upon the allegations that: (1) Warshavsky, who acted in the interest of Shuhab, and not Cliffcrest, assigned the CCB mortgage to Peny; (2) the assignment to Peny was made on the same day that CCB filed its mortgage; (3) the assignment of the mortgage from CCB to Peny was "for the purpose of creating a false front to enable [Peny] to claim holder in due course status even though it had actual knowledge or notice of the corrupt transactions that were the genesis of the mortgage and note" (*Id,* ¶ 106, 185); and that (4) Peny, or its predecessor (i.e. CCB) participated in HPD's scheme of defalcation and knew or should have known that Shuhab and Warshavsky were engaged in theft and fraud particularly as "HPD's corruption was routine and well known in banking circles" (*Id,* ¶ 103), and "[Peny] was advised by Shuhab that the mortgage payments were to be made directly to the New York City Preservation Corporation ("CPC") an affiliate of [Peny], [and that] upon information and belief CPC has knowledge of rampant fraud in the TPT Program, which is fairly imputed to [Peny] (*Id,* ¶ 127-128).

By decision and order dated June 20, 2014 (hereinafter "the June 20 order"), this court denied Cliffcrest's motion to amend as to the proposed counterclaims and affirmative defenses asserted against Peny; denied the motion to amend as against HPD as premature without prejudice to renewal in accordance with the June 20 order; and granted the motion as to the proposed third-party defendants, which included the Shuhab defendants and Carver, and directed that Cliffcrest serve an amended answer in conformance with the court's decision within 45 days without prejudice to a further order of the proposed cross claims against HPD.

On or about July 19, 2014, Cliffcrest served an Amended Verified Answer, Counterclaims, Cross Claims and Third-Party Complaint ("First Amended Pleading") in purported compliance with the June 20 order, which was rejected by HPD as contrary to such order. By notice of motion dated September 30, 2014, HPD moved for an order requiring Cliffcrest to provide a more definite statement of its Amended Answer (motion seq. no. 004).

On or about September 30, 2014, Shuhab and Warshavsky moved to dismiss the third party complaint (motion seq. no. 006), and Wavecrest and Carver separately sought the same relief (motion seq. nos.005 and 007, respectively). On or about October 30, 2014, Peny moved for an order granting it, *inter alia*, summary judgment against Cliffcrest, a default judgment against certain defaulting defendants and referring the matter to a referee to compute (motion seq. 008).[6] The motions were not opposed by Cliffcrest, whose attorney subsequently moved to withdraw as counsel. By order dated April 20, 2015, the court found that the motion to withdraw

---

[6]As the loan documents, including the Mortgage and Note were assigned from Peny to State of New York Mortgage Agency during the pendency of this action, the motion also seeks to substitute it as the proper party in place and instead of Peny pursuant to CPLR 1018 and 1021.

as counsel for Cliffcrest was moot in light of the filing of a notice of appearance by substitute counsel.

THE INSTANT MOTION

Cliffcrest now moves to amend its First Amended Pleading to assert claims, affirmative defenses, and allegations in a proposed Second Amended Verified Answer, Counterclaim, Cross Claim and Third-Party Complaint ("the Proposed Second Amended Pleading") and to address the prior motions by the other parties seeking various relief against Cliffcrest, which were submitted without opposition.

The Proposed Second Amended Pleading asserts the following claims[7] against Peny, HPD and the Shuhab defendants: (1) fraud; (2) conspiracy to commit fraud, (3) violation of the Federal Fair Housing Act,42 U.S.C. 3604(b) et seq; (4) negligent misrepresentation; (5)&(6) violation of the New York City Human Rights Law (New York City Administrative Code ("Admin. Code"), pursuant to § 8-107(5)(a)(2) based respectively on the Building tenants' race and status as recipients of public benefits; (7) violation of the civil rights of the Building's residents, pursuant to 42 USC 1983;(8) breach of contract; (9) breach of warranty of habitability; and (10) conversion.

The Proposed Second Amended Pleading also asserts the following affirmative defenses : (1) failure to state a cause of action, (2) unclean hands, (3) lack of standing, (4) failure to allege conduct which rises to the causes of action pleaded; (5) failure to mitigate damages; (6) failure to

---

[7]While the Proposed Second Amended Pleading is labeled as Second Amendment Verified Complaint and Cross Claims, Counterclaims and Third Party Claims, the pleading itself refers only to third-party claims and improperly identifies Peny as a third-party defendant. Nonetheless for the purposes of the motion, the court will consider the third-party claims asserted against Peny to be counterclaims.

plead its claims with sufficient particularity; (7) failure to allege prerequisite conduct necessary to sustain Peny's claims; (8) fraud and fraud in inducement and conspiracy to commit fraud by Peny and its predecessors.

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted). Here, as discovery is at its early stages and no depositions have been taken, there is no basis for denying the amendment on the grounds of prejudice or surprise. Accordingly, the only issue is whether the Proposed Second Amended Pleading is of sufficient merit.

Motion as to Peny

Cliffcrest moves to amend to add the following specific allegations regarding Peny in connection with the affirmative claims against it are as follows: (i) that Cliffcrest was advised by Shuhab that the "mortgage payments were made directly to New York City Community Preservation Corporation ("CPC"), an affiliate of [Peny], an entity which also actively participates in the TPT program,"(Proposed Second Amended Pleading at ¶ 219); (ii) that "upon information and belief CPC has been put on notice of the fraud in the TPT Program and both

CPC and [Peny] knew about the underlying fraud herein" (Id at ¶ 220); (iii) that "[a]s a sophisticated bank and financial entity, and particularly in the wake of the recent sub-prime mortgage crisis and more recent scandals regarding ...HPD low-income housing, both CPC and... [Peny] are required to perform due diligence on mortgages and related properties, including inspections of the properties, review of financials, disclosures, and other details, and well as ensuring the underlying basis for the loan is legitimate and not fraudulent" (*id*, at ¶ 221); (iv) that "[Peny], despite knowing of these fraudulent misrepresentations [relating to, *inter alia*, the completion of rehabilitation work and use of the loan moneys], still acquired the mortgages and notes from the original lenders and filed this action attempting to foreclose on the loans" (*id*, ¶ 272); (v) that "[Peny], a sophisticated entity that had in its possession sufficient documentation to discover the wrongdoing that had occurred at the Building, and that the Building's loans should never have been closed on in the first place, still sought foreclosure on the loans, in furtherance of a conspiracy to commit fraud upon Cliffcrest" (*id*, ¶ 273).

Peny opposes the motion, arguing that, as previously found in the court's June 20 order, there is no basis in law or fact for the proposed defenses and counterclaims against it, and that Cliffcrest's latest motion is unsupported by discovery or factual evidence. Moreover, Peny argues that to the extent the new pleading contains additional claims and defenses, they too are without merit. Under these circumstances, Peny argues that its motion for summary judgment, the appointment of a referee and other relief (motion seq. no. 008) should be granted.

As a preliminary matter, Peny's argument that the June 20 order is the law of the case and precludes Cliffcrest from again seeking to amend its answer is unavailing (see e.g. Feinberg v. Boros, 99 AD3d 119 [1st Dept 2012]; 28 NYJur2d Courts and Judges, §254 [Nov 2015]). At the

same time, however, to the extent the Proposed Second Amended Pleading contains the same or substantially similar allegations as the Proposed First Amended Pleading, there is no basis for the court to alter its prior determination.

With respect the proposed counterclaims and affirmative defenses based in fraud, to successfully plead fraud, it must be alleged that party charged with fraud made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996). Additionally, CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the incidents complained of. See P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373, 376 (1st Dept 2003)).

Here, the Proposed Second Amended Pleading is insufficient to provide a basis for a claim or defense of fraud as there are no allegations, or proof, that Peny made any material misrepresentations or omissions that induced any reliance by Cliffcrest. Instead, the Proposed Second Amended Pleading alleges only that although Peny knew, or had reason to know, about the alleged fraud committed by other persons or entities, it nonetheless acquired the Note and Mortgage from CCB, and then filed a foreclosure action against Cliffcrest. Moreover, while the Proposed Second Amended Pleading contains allegations that Peny participated in the conspiracy to commit fraud by filing the foreclosure action, it fails to specify Peny's role in the purported scheme which, in any event, allegedly relates to the financing for construction loan obtained in 2002 from Fleet, as opposed to the mortgage that was acquired by Peny in 2006. Furthermore,

Cliffcrest does not allege that it did not receive the funds from this mortgage, or that Peny did not pay consideration of $1,650,000 for the assignment of the mortgage.

Accordingly, the first and second counterclaims (identified as third party claims), for fraud and conspiracy to commit fraud as against Peny, and the eighth affirmative defense alleging fraud, fraud in the inducement and conspiracy to commit fraud are without merit. With respect to the remaining counterclaims against Peny, as there are no specified allegations against Peny to support such claims, these counterclaims, too, are without merit.[8]

The next issue concerns the viability of the remaining affirmative defenses. As the court noted in its June 20 order, the affirmative defense of failure to state a cause of action is a "mere surplusage," as it may be asserted any time even if not pleaded. Bernstein v. Freudman, 136 AD2d 490, 498 (1st Dept 1988). Moreover, here, Peny has made a prima facie showing of its right to foreclose by submitting the relevant mortgage documents, copies of the Note and related documents and has alleged, and provided evidence of, Cliffcrest's default. See Red Tulip LLC v. Neiva, 44 AD3d 204, 209 (1st Dept), lv dismissed, 10 NY3d 741 (2007)(noting that a "plaintiff may establish a prima facie right to foreclosure by producing the mortgage documents underlying the transaction and undisputed evidence of nonpayment").

The affirmative defenses of unclean hands, lack of standing, failure to allege conduct which rises to the causes of action pleaded, failure to mitigate, and failure to plead with

---

[8] In addition, as found in the June 20 order the claim against Peny for relief under 42 USC § 1983 is without merit on the additional ground that this section is not applicable to "merely private conduct" American Mfrs. Mut. Ins. Co. v Sullivan, 526 US 40, 50 (1999). Here, the Proposed Pleading does not allege that Peny has, in any way, acted other than in a purely private capacity.

particularity are primarily premised on allegations that certain conditions precedent were not completed in order to convert the Building to a cooperative, or to require the loan repayments to become due, and thus the loan was never in default nor was there injury to Peny. As specified in connection with the affirmative defense of unclean hands, the Proposed Second Amended Pleading alleges that these conditions precedent include, *inter alia*, "all requirements, terms and/or conditions of the [TPT] program, the requirements, terms and/or conditions of the Loan Documents, and all applicable rules, regulations, codes, and statutes" (Proposed Second Amended Pleading, ¶ 88). For example, it is alleged that a condition precedent to the proper conversion to a cooperative was that "approximately 85% of the residents must have signed subscription agreements, and that this never occurred, and upon information and belief, no more than 66% of the residents signed subscription agreements" (Id, ¶ 89). Another condition precedent alleged is "the completion of the rehabilitation and renovation work and/or that this work be substantially completed and none of these conditions occurred...[since] "there were numerous, significant defects after the work was 'completed'"(Id, ¶90). It is also alleged that Peny "participated in the conversion of the Building in that it purported to give the Loan to pay for renovation and rehabilitation of the Building and bolster reserves of the Building and that in the course of its participation [Peny] came to know of the improprieties and wrongdoing of the third-party defendants throughout the process [and] knew the conditions precedent for conversion were not met...(Id, ¶'s 92-93).

These affirmative defenses are without merit since the Loan Documents do not provide any conditions precedent or prerequisites before payment is due, nor can conditions be implied into the agreement. See Camaiore v. Farance, 50 AD3d 471, 471-472 (1st Dept 2008)(courts

may not "imply a condition which the parties chose not to insert in their contract")(internal citations and quotations omitted); Ashkenazi v. Kent South Associates, LLC, 51 AD3d 611, 611 (2d Dept 2008)("it must clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent")(internal citations and quotations omitted).

Next, as Peny argues, to the extent Cliffcrest asserts that the conditions to the Fleet loans assigned to HPD were not met, such allegations are irrelevant as neither Peny nor its assignor, CCP, were successors to Fleet or assignees of the Fleet loans. As to allegations that the Loan was not due until the conversion of the Building to a cooperative and the completion of rehabilitation and renovation work, such allegations are contrary to the Loan Documents which provide that monthly payments of interest and principal were due beginning on November 1, 2006. Furthermore, as the record shows Cliffcrest stopped making these payments in March 2012, Cliffcrest is in default. Moreover, to the extent the affirmative defense of lack of standing is based on allegations that Peny did not sustain any injuries, Peny points to the documents in the record showing that prior to the commencement of the foreclosure action, Peny was assigned the Mortgage and Note and Leases and Rents, for consideration, and that Cliffcrest defaulted on its obligations under the Loan Documents, thus causing injury to Peny.

As for allegations in connection with the affirmative defenses asserting that Peny is not a holder in due course based on defects in "the underlying Note, Mortgage and/or subsequent transfers and assignments" (Id, ¶'s 95, 107, 114, 124, 130), the court notes that pursuant to UCC 3–302[1], a holder in due course is (1) a holder, (2) who takes a negotiable instrument (3) for value, (4) in good faith, and (5) without notice that the instrument is overdue or has been dishonored, or of any defense or claim against it on the part of another. Regent Corp USA v.

Azmat Bangladesh Ltd, 253 AD2d 134, 142 (1st Dept 1999). "The inquiry into 'good faith' as defined by UCC 3–302 is what, in fact, the holder actually knew" Id. Likewise, the notice requires a showing of "actual knowledge" Id. In this connection, the Court of Appeals has held that a bank, as the purchaser of negotiable papers, "owes no obligation to investigate the financial position of its transferor nor is it bound to be alert for circumstances which might possibly excite the suspicions of wary vigilance." Chemical Bank of Rochester v. Haskell, 51 NY2d 85, 93 (1980)(internal citations and quotations omitted).

Here, Cliffcrest alleges, *inter alia*, that even if Peny "became a holder, it could not have become a holder in due course because it must have taken the Note and Mortgage with knowledge of valid claims and defenses of Cliffcrest in light of the residents' many complaints and outstanding issues in the Building and notice to [HPD] of the failure to comply with all required conditions precedent at the time the Loan allegedly came due" (Id, ¶ 101).

Notably absent, however, are allegations that Peny had actual notice of any bad acts which provided the underlying basis for the third-party claims and counterclaims. Accordingly, Peny is a holder in due course of the Note and Mortgage, and thus takes them for value and free from the claims asserted by Cliffcrest.[9]

Accordingly, Cliffcrest's motion to amend with respect to Peny is denied, and as set forth in a separate order, Peny's motion for summary judgment and for related relief (motion seq. no. 008) is granted.

---

[9]The court notes that even if it could be argued that factual issues existed as to Peny's holder in due course status, as the affirmative defenses are without merit for the reasons indicated herein, they must be dismissed.

Motion as to HPD and the Shuhab defendants

Cliffcrest argues that under the liberal pleading requirements of CPLR 3025(b) its motion to amend should be granted as to HPD and the Shuhab defendants, and that the Proposed Pleading is timely, meritorious and legally sufficient.

In opposition to the motion, HPD argues that the Proposed Second Amended Pleading, which alleges that Cliffcrest was victimized by a scheme to misappropriate loan monies, fails to adequately allege how the scheme functioned. With respect to allegations that the construction work performed at the Building failed to comport with the specifications of the scope of work, HPD argues that it had no authority over supervision or payment for construction work as those aspects of the work were assigned to Shuhab, to Fleet and their team. HPD also argues that the claims asserted by Cliffcrest are untimely, including that the claims for fraud, negligent misrepresentation and conversion which, it asserts, are governed by the one-year ninety-day statute of limitations provided for tort claims against the City of New York. HPD further argues that the claims against it in the Proposed Pleading fail to state a cause of action.

The Shuhab defendants oppose the motion and seek to dismiss the proposed third-party claims asserted against them, arguing that such claims are barred by the statute of limitations.

In reply, with respect to HPD, Cliffcrest contends HPD prematurely argues the merits of the action, by arguing that Cliffcrest needs to prove its claims in order to be granted leave to amend. Cliffcrest further argues that the proposed claims asserted against HPD, and in particular those alleging fraud, are sufficiently detailed to permit their addition. As to HPD's argument regarding the one-year and ninety-day statute of limitations, General Municipal Law § 50-i, Cliffcrest argues, it is not applicable as the claims it asserts against HPD are not "for personal

injury, wrongful death or damage to real or personal property," and that to the extent it can be argued that certain claims are untimely, the doctrine of equitable estoppel precludes the assertion of the statute of limitations defense by HPD and the Shuhab defendants.

As indicated above, the Proposed Second Amended Pleading asserts claims against the HPD and the Shuhab defendants for: (1) fraud; (2) conspiracy to commit fraud, (3) violation of the Federal Fair Housing Act,42 U.S.C. 3604(b) et seq; (4) negligent misrepresentation; (5)&(6) violation of the New York City Human Rights Law (New York City Administrative Code ("Admin. Code"), pursuant to § 8-107(5)(a)(2) based respectively on the Building tenants' race and status as recipients of public benefits; (7) violation of the civil rights of the Building's residents, pursuant to 42 USC § 1983;(8) breach of contract; (9) breach of warranty of habitability; and (10) conversion.. Here, for the reasons below, the motion to amend as against HPD and the Shuhab defendants is granted only to the extent of permitting the addition of the fraud claims.

The court will first address the fraud and conspiracy to commit fraud claims. The proposed fraud is based on allegations that from 2000 forward HPD and "made numerous misrepresentations to induce [the Building residents] to move forward with the conversion of the Building." (Proposed Pleading, ¶ 255). Specifically, it is alleged that the third-party defendants induced the Building residents to participate in HPD's TPT Program with promises of ownership and improving the quality of the Building, and that these third-party defendants would take all steps necessary to perform the rehabilitation and renovation process; that despite agreements outlining a scope of work and securing financing to pay for the work, at the completion of the process, the Buildings were shoddy condition, uninhabitable and dangerous; that the residents

relied on the third-party defendants' representations that the work would be completed in accordance with the scope of work and took loan proceeds which left the residents with an excess of $6,000,000 in debt, although the Building is in worse condition than before and required $11,889,405.31 in repairs to be in a livable condition; that representations were knowingly false and intended to induce reliance and defraud Cliffcrest of the benefits the residents believed they were receiving (Id, ¶'s 120-127). It is further alleged that the Building residents "justifiably relied on the third-party defendants' representations that they would not be saddled with a Building in which repairs were not made and be forced to repay loans that were stolen by ...Shuhab's contractor" (Id, ¶ 260), and that "the full extent of the debts and balances was not revealed until Wavecrest was removed as the management company [and that Wavecrest] continually made misrepresentations regarding the balance that was in the Building's accounts" (Id, ¶ 261).

It is also alleged that the Shuhab defendants fraudulently induced the residents to sign subscription agreements by making misrepresentations that if the agreements were not signed they "would be faced with a new developer who would acquire the Building and raise rents immediately to unaffordable levels," and Shuhab defendants also made misrepresentations that the 85% threshold of residents agreeing to the conversion had been met (Id, ¶'s 256-257). It is further alleged that HPD "oversaw and came to know of these misrepresentations, as it approved of the conversion of the Building but did not take any remedial steps to address these misrepresentations" (Id, ¶ 258).

The proposed claim for conspiracy to commit fraud alleges "a conspiracy to commit fraud against Cliffcrest by working together with Shuhab's contractor, a defunct entity, to form a scheme or plan of misrepresenting and omitting material facts about the Building so as to induce

them to purchase the units in the Building [and that] [t]his scheme or plan was furthered each time the third-party defendants evaded requests for information sufficient for the residents to understand the nature of the arrangement that they were entering into with third-party defendants" (Id, ¶ 265-266). It is further alleged that "rather than make the desperately needed renovations and rehabilitation of the Building the third-party defendants continually and perpetually hid the truth from Cliffcrest and its residents" (Id, ¶ 271).

With respect to the timeliness of the fraud claims, as a preliminary matter, contrary to HPD's argument, the one-year and ninety-day statute of limitations provided under General Municipal Law § 50-i , is inapplicable to the proposed fraud claims asserted against it. In fact, by its terms, the provision applies only to "personal injury, wrongful death, or damage to real or personal property alleged to have been sustained by wrongful act of such city...", and not to torts generally. See Rose v. New York City Health and Hospital Corporation, 122 AD3d 76 (1st Dept 2014)(holding that while General Municipal Law § 50-i does not apply to all tort actions, court was constrained by prior decisions to find notice of claim requirements applied to Whistleblower claim); Sebastian v. New York City Health and Hospital Corp., 122 AD3d 76, 79 (1st Dept 1995)(noting that General Municipal Law § 50-i "define(s) the torts for which a notice of claim is required only as personal injury, wrongful death, or damage to property and not torts generally"); Mills v. County of Monroe, 89 AD2d 776 (4th Dept 1982), aff'd 59 NY2d 307 (1983)(holding that the applicability of [General Municipal Law § 50-i) is confined to tort claims for personal injury, wrongful death, or damage to property and not to torts generally but finding that notice of claim

requirement applied based on applicable section of the County Law).[10] Here, although fraud is a tort, the fraud claims are not for personal injury or damage to real or personal property, rather they seek damages arising out of misrepresentations with respect to the TPT program, the failure to comply with specifications and scope of work defined in construction documents, including the misuse of the funds to be used for rehabilitation and renovations.

Thus, the applicable statute of limitations for the fraud claims is provided under CPLR 218(3), under which "[a] cause of action in fraud must be brought within six years from the time of the fraud or within two years from the time the fraud was, or with reasonable diligence could have been, discovered, whichever is longer." Yatter v. William Morris Agency, Inc., 268 AD2d 335, 336 (1st Dept 2000), citing CPLR 213 [8] and CPLR 203(g). The same limitation period governs claims for conspiracy to commit fraud. See Schlotthauer v. Sanders, 153 AD2d 731, 732 (2d Dept 1989). "An inquiry as to the time a reasonably diligent plaintiff could have discovered the fraud 'turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred.'" See, Rite Aid Corp. v. Grass, 48 AD3d 363, 364 (1st Dept 2008), quoting Ghandour v Shearson Lehman Bros., 213 AD2d 304, 305-306 [1995], lv denied 86 NY2d 710 (1995). "This inquiry involves a mixed question of law and fact, and, where it does not conclusively appear that a plaintiff had knowledge of facts from which the alleged

---

[10]HPD relies on and Sandpebble Builders, Inc. v. Mansir, 90 AD3d 888 (2d Dept 2011), which dismissed fraud and other claims against a former President of the Board of Education as untimely under General Municipal Law section 50-i. However, this case is not dispositive here since the court also relied on Education Law § 3813(2) which applies the provisions of this section to any action "founded upon tort." HPD also relies on Serkil LLC v. City of Troy, 259 AD2d 920 (3d Dept), lv denied, 93 NY2d 811 (1999). While Serkil considers the fraud claim to be within the purview of General Municipal Law section 50-i, it does not directly address this issue so that it is unclear whether it was raised in the litigation.

fraud might be reasonably inferred, the cause of action should not be disposed of summarily on statute of limitations grounds. Instead, the question is one for the trier-of-fact." Saphir Intern. S.A. v. UBS PaineWebber, Inc., 25 AD3d 315, 316 (1st Dept 2006)(internal citations omitted).

Both HPD and the Shuhab defendants argue that the proposed fraud claims are untimely since the First Amended Pleading which included third-party claims against them was filed on June 18, 2013,[11] more than six years after the claims accrued which, they argue was, at latest, in January 2007, when Cliffcrest obtained title to the Building. Moreover, HPD argues that the defects in construction became apparent prior to the 2007 closing and points to documentary evidence and allegations in the Proposed Pleading that as early as 2005,the Building's tenants association complained about the quality of construction work and the amount of debt caused by the construction, so that the purported fraud and/or wrongdoing should have been discovered at that time.

Cliffcrest counters that the proposed fraud claim is timely since although Cliffcrest knew about certain construction defects, it took years to discover the nature and extent of the defects and to discover the fraudulent conduct involving the misuse of the loan proceeds. Cliffcrest further asserts that its ability to discover the fraud was hampered by reassurance given by third-party defendants that the defects would be repaired. In addition, Cliffcrest argues that HPD's involvement continued after the 2006 conversion, and that the Proposed Second Amended Pleading includes documents showing HPD's involvement until 2012. Moreover, as to the

---

[11]There appears to be no dispute that the first amended pleading was sufficient to put HPD and the Shuhab defendants on notice of claims asserted against them in the Proposed Second Amended Pleading for the purpose of interposing the claims for statute of limitations purposes. See CPLR 203(f).

Shuhab defendants, Cliffcrest argues that these defendants continued to commit the fraud until at least September 2010, when Wavecrest was removed as the managing company for the Building, and Cliffcrest obtained access to the Building's financial information.

The court finds upon review of the record and the Proposed Second Amended Pleading that, at this juncture, it cannot be determined as a matter of law when Cliffcrest knew or should have known about the facts giving rise to the claims for statute of limitations analysis. The nature and extent of the construction defects particularly whether such defects were obvious or were structural defects and not readily apparent, impact on when the misrepresentations and underlying fraud should have been discovered. While the Proposed Second Amended Pleading alleges, and the record shows, that in 2005, the Building residents knew about certain construction defects and incomplete work, and its negative impact of the Buildings' finances, these facts alone are insufficient to demonstrate. under the circumstances here, that Cliffcrest knew or should have known of the alleged scheme to defraud the Building's residents of the loan money. This conclusion is supported by the longstanding involvement of Wavecrest in the management of the Building from December 2002 to September 2010, the influence the Shuhab defendants continued to exert after the transfer of the Building, and the reassurances given to residents that the construction defects would be remedied. See e.g. Saphir Intern., S.A. v. UBS PaineWebber, 25 AD3d at 316 (noting that "[w]hether a person had sufficient knowledge to discover a fraud necessarily involves a dispute over state of mind and conflicting interpretations of perceived events") (internal citation and quotation omitted); see also Financial Structures Ltd v. UBS AG, 77 AD3d 417 (1st Dept 2010)(motion court properly found that "the fraud cause of action fraud cause of action was not conclusively barred by the applicable two-year statute of limitations (see

CPLR 213[8]) because the parties' competing factual contentions render it impossible to determine, at this stage of the proceedings, when plaintiffs first became—or should have become—aware of the alleged fraud").

Next, with respect to whether the Proposed Second Amended Pleading is sufficient to state a cause of action for fraud as against HPD, to plead such a cause of action, it must be alleged that party charged with fraud made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996). Additionally, while "CPLR 3016 (b) requires factual allegations in support of each element of fraud... to meet such requirement a plaintiff need only provide sufficient detail to inform defendants of the substance of the claims" See Kaufman v. Cohen, 307 AD2d 113, 120 (1st Dept 2003)(internal citation and quotation omitted). In this connection, it has been held that the pleading requirements for fraud should "not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." Bernstein v. Kelo & Co., 231 AD2d 314, 320 (1st Dept 1997)(internal citation and quotation omitted). Next, to state a claim for conspiracy to commit fraud there must be allegations of fact from which it can be inferred that the party at issue entered into an agreement or understanding with the other defendants (against which particular acts of fraud were alleged) to cooperate in any fraudulent scheme. Abrahami v UPC Construction Co., Inc., 176 AD2d 180 (1st Dept 1991).

The Proposed Second Amended Pleading contains the following allegations as to HPD (1)

the application to HPD for the TPT program pledged to take into account input from the Building's tenant association and stated that "while rents (and maintenance once the Building became a cooperative) would rise that the extent of such rise would depend 'on the receipt of income and expense information, the completion of a work scope and budget, and the finalization of a rehabilitation financing plan approved by HPD (and possibly a participating bank") (Proposed Second Amended Pleading, ¶ 141); (2) HPD approved the TPT application and budget, which included the Scope of Work (Id, ¶'s 142, 143); (3) upon information and belief, HPD approved the agreement which indicated the scope of work which was entered into by Shuhab and the architect (Id, ¶ 145); (4) HPD hired and gave funds to Dellwood Construction Company ("Dellwood"), to perform the rehabilitation work, and approved the rehabilitation contract which company, upon information and belief, was defunct at the time that Shuhab entered the rehabilitation contract with it (Id, ¶ 152); (5) HPD approved the payment of a lump sum of $3,562,350 to Dellwood on July 5, 2002, even though the rehabilitation contract prohibited such lump sum payment, (Id, ¶'s 153-156); (6) under the December 19, 2002 Participation Agreement with Fleet HPD "agreed to jointly undertake the rehabilitation of the Building with Shuhab" (Id, ¶ 160); (7) Shuhab, HPD and their employees and agents stole the proceeds of the Fleet loan money totaling $4,544,743, through their respective agents and employees who "funneled the money through third party agents posing as general contractors" (Id ¶'s 160-162); (8) "upon information and belief, HPD facilitated these bad acts [of third party contractors who did not perform work but instead stole the money] which helped to defraud Cliffcrest and failed to taken any remedial steps" (Id, ¶ 165); (9) on October 1, 2004, an HPD Departmental memorandum written by Mike Popper "exposed serious deficiencies in the then on-going remediation of the Building" including

that several items had been removed from the scope of work while other items had not been completed (Id, ¶'s 183-184); (10) on August 2005, HPD sent the residents a letter stating that the Supervising Engineer for Bank of America (the successor bank to Fleet) certified that the rehabilitation work was "substantially completed" which was defined as 95% complete and as a result, an automatic rent increase was triggered; (11) on September 8, 2005, Building residents wrote a letter to HPD's commissioner regarding the deficiencies of the work under Shuhab's control and overseen by HPD but received no response (Id, ¶ 's 190-191); (12) on September 18, 2006, HPD approved the conversion of the Building to a cooperative, despite the problems with the construction and rehabilitation of the Building, and despite that the subscription agreement threshold of 85% of the residents agreeing to purchase their units was not met (Id, ¶ 213); (13) HPD loaned Cliffcrest an additional $415,317, which loan was signed by Warshavsky on behalf of Cliffcrest, as its Secretary and Treasurer (Id, ¶ 215); (14) HPD had involvement, control and oversight over the loan and rehabilitation of the Building as documented in 27 items which included emails, memorandum, letters and notices (Id, ¶ 249); (15) on or about May 21, 2013, two HPD officials [not identified as connected to the renovation of the Building] pleaded guilty to various charges including racketeering conspiracy, fraud and bribery related to the development of affordable housing in New York City (Id., ¶ 238); (16) on or about March 23, 2012[12], high ranking official Wendell Walters pleading guilty to bribery and racketeering charges for accepting

[12]It is also alleged, without connecting this information to this lawsuit, that "as recently as February 2015, there have been additional indictments against ...HPD officials for bribery and corruption, including HPD Housing Inspector Louis Soto and Associate Housing Inspector Oliver Ortiz...[and that] developers favored by HPD have also been implicated in the scandals...." (Id, ¶'s 240-241).

$2,500,000 in bribes from developers [with respect to other projects] (Id., ¶ 239).[13]

HPD argues that these allegations are insufficient to state a claim of fraud against it. In support of its argument, HPD relies on affidavits[14] and evidence which, it argues, contradicts the allegations in the Proposed Second Amended Pleading with respect to its role in supervising, and approving payment for, the construction work at the Building, which are central to Cliffcrest's fraud claims against it. In particular, HPD relies on certain provisions of the Participation Agreement between it and Fleet, as Lender, which HPD asserts demonstrates the primacy of Fleet and HPD's limited role with respect to controlling the use of the construction loan funds, including the whereas clause of the agreement which states that Fleet, as Lender, would "exercise

---

[13]The Proposed Second Amended Pleading also alleges that two audits performed by the New York City Comptroller's office in 2005 and 2009 of two unrelated HPD programs identified concerns regarding the potential for fraud and gave recommendations as to how the programs should be properly implemented (see Proposed Second Amended Pleading ¶'s 252-253). However, as the audits did not concern the program at issue here, such allegations are not directly relevant.

[14]HPD submits the affidavit of Christopher Deewes, former director of HPD's Participation Loan Program who states that HPD had a "limited role" prior to the construction loan closing, and that while HPD reviewed and approved the rehabilitation plans prepared by the engineers and/or architects hired by the Sponsor, it "did not select the architect or contractors and had no inspection or oversight role as the rehabilitation progressed [and] ... had no involvement in review the contractor's applications for progress payments or issuing payments" (Deewes Aff., ¶ 7). HPD also relies an affidavit from Christopher Allred an Assistant Commissioner of HPD's Division of Asset Management who attests to HPD's role on TPT projects "as a facilitator not as a manager" and states that while HPD would find the Sponsor for TPT projects, once the Sponsor was selected "HPD was only peripherally, involved, if at all, in selection of a private lender and did not select the architect, engineer or contractor " (Allred Aff. ¶4). According to Allred, with respect to the general contractor, the HPD reviewed such contractor for any history of criminal activity or defaults on City Projects but did not enter into a contract with that entity, and as for the engineer, HPD reserved right to object if it had a negative past experience with entity (Id. ¶ 5). He also states that HPD has no information with respect to the hiring or termination of Wavecrest as the managing agent for Cliffcrest (Id., ¶ 12, 14).

control, dominion and authority over the administration of the construction loan." HPD points out that the agreement provides that progress payments would be made by Fleet, and that Fleet "is the legal owner of the Construction Mortgage, and subject to HPD's rights as described in this agreement, the owner of the entire beneficial interest in the Construction Documents" (Participation Agreement ¶'s 3, 3(a)); that under the agreement HPD appointed Fleet as attorney-in-fact for HPD (Id, ¶ 7); that the agreement grants Fleet "full power and authority, to take or defer from taking any and all acts with respect to the administration of the mortgage" (Id, ¶ 7(k); and that if Fleet requests approval from HPD for any reason, HPD's non-response after seven days, is deemed to be approval of the request (Id., ¶ 14). " HPD also points out that it was not a party to the Construction Loan documents which were between Fleet and Shuhab.

HPD also cites that part of paragraph 7(A) of the Participation Agreement that provides that the substantial completion of work would be determined and certified by the Construction Supervisor selected by Fleet and provides that such certification "shall be binding and conclusive on all parties hereto." Notably, however, while not highlighted by HPD, this paragraph also provides that the Lender and HPD will "mutually approve" of the person designated as the Construction Supervisor; that "upon completion of the work, original duplicate counterparts of the certification "shall be sent to HPD not less than twelve (12) days prior to the closing date;" that the certification is not binding if objected to within five (5) days; and that "the Lender shall direct the Construction Supervisor to provide HPD with (a) copies of construction reports furnished to Lender, (b) upon the request of HPD, copies of other reports furnished to the Lender, including without limitation, site or other inspection reports, any change orders, any engineer's or builder's certifications, any lien waivers and/or relevant construction documentation delivered to

Construction Supervisor."

HPD also acknowledges that under the Participation Agreement, it had a role with regard to certain change orders as it had discretion to inspect if the cost of change orders exceeded a threshold amount, and concedes, as alleged in paragraphs 183-185 of the Proposed Second Amended Pleading, that it did in fact inspect under such circumstances. However, HPD points to evidence which purportedly shows that HPD "investigated the questions raised by the inspection and obtained satisfactory answers[15]" (Shaw Affirmation at 15).

HPD also challenges certain allegations in the Proposed Second Amended Pleading as incorrect, including that it was responsible for approving the conversion of the Building to cooperative ownership, and submits evidence that the responsibility belonged to the Attorney General of the State of New York. As for the indictments and/or convictions of certain HPD officials as alleged in the Proposed Second Amended Pleading, HPD points to its letter dated June 24, 2014, with attachments, including affidavits, submitted in response to a court order dated April 18, 2014, as modified by orders dated May 6, 2014 and June 19, 2014, in connection with discovery requests made by Cliffcrest for "investigative reports" allegedly produced by the City's Department of Investigation ("DOI") and Conflicts of Interest Board ("COIB") regarding former HPD staffers Wendell Walters, Luis Adorno, Michael Provenzano and Patrick Enright. In its response, HPD states the evidence indicates that only Walters had involvement in the TPT program, that his involvement did not begin until March 2005, when he took a new position as

---

[15]Specifically, HPD points to to documentary evidence that it raised these concerns with the lead lender (originally Fleet which, by that point, had merged with Bank of America) and its architect and was informed by the Lender's architect that HPD employee Michael Popper misunderstood the scope of the work, and point to a letter from Cliffcrest's dated January 26, 2005, from the Building's tenants' association indicating that the contractor employed by the Sponsor stated that the work was performed to its satisfaction.

Assistant Commissioner of the Division of New Construction within HPD's Office of Development, and that by such time, all the construction financing and rehabilitative work had been completed, and that a spreadsheet compiled by HPD prior to the commencement of this action shows that the Building was not implicated in the indictment against Walters.[16]

A party seeking to amend "need not establish the merit of its proposed new allegations... but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" MBIA v. Greystone, 74 AD3d at 499; see also, Fairpoint Companies, LLC v. Vella, 134 AD3d 645 (1st Dept 2015). Thus, "in considering the proposed amendment a court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment." Pier 59 Studios, LLP v. Chelsea Piers, LP, 40 AD3d 363, 366 (1st Dept 2007)(internal citation and quotation omitted).

Under this standard, the court finds that the motion to amend should be granted, as the Proposed Second Amended Pleading is sufficient to make a prima facie showing with respect to the fraud claims against HPD based on allegations that its employees and/or its agents made misrepresentations with respect to the TPT program, including misrepresentations regarding the

---

[16]However, Timothy Joseph, an Assistant Commissioner for the Division of Construction Services states in his affidavit that from 2000 to 2002, Mr. Provenzano was the Director of Construction Services for the Loan Program Bureau and one of the four bureaus he supervised was Technical Services for Development Programs which "was responsible for ascertaining whether a general contractor's construction output complied with the applicable scope of work, specifications and construction plans" (Joseph, ¶ 2 sub 4) and that Michael Popper, who drafted the October 2004 memorandum regarding alleged defects in the construction of the Building, was a supervisor in the bureau.

misuse of the loan monies for rehabilitation and renovations, that the Building residents relied on these misrepresentations, which were intended to, and did, induce justifiable reliance by the Building residents regarding the use of the loan monies and that they were damaged as a result. In light of this showing, even if the evidence submitted by HPD regarding its limited role in the underlying events were sufficient to establish a prima facie basis for granting it summary judgment, such evidence does not provide a ground for denying the motion to amend. Pier 59 Studios, LLP v. Chelsea Piers, LP, 40 AD3d at 366. In any event, the court finds that evidence submitted by HPD is insufficient to conclusively establish the nature and extent of HPD's role in the underlying transaction or its knowledge and involvement, if any, in the alleged fraud. Under these circumstances, while extensive documentary discovery has been provided to Cliffcrest, Cliffcrest must also be given an opportunity to depose HPD regarding these issues, and should not be relegated to relying on the statements in the affidavits submitted by HPD.

As for remaining proposed causes of action, for the reasons below, such causes of action are untimely and/or without prima facie merit, and, thus cannot be added. With respect to the proposed third cause of action for relief under the Fair Housing Act,[17] the statute of limitations for bringing such a claim is "two years after the occurrence of the termination of an allegedly discriminatory housing practice." 42 USC 3613 (a)(1)(A)."The 'continuing violation' doctrine applies when a plaintiff challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period." Grimes v. Fremont General Corp., 785 Fsupp 269, 292 (SD NY Co 2011))(internal citations omitted). "Where it applies, the

[17]The Fair Housing Act prohibits discrimination by providers of housing, such as landlords and real estate companies, as well as other entities, whose discriminatory practices make housing unavailable to persons due to their race, color, religion, sex, national origin, familial status or disability. 42 USC § 3601 et seq

doctrine delays the commencement of the statute of limitations period ... until the last discriminatory act in furtherance of the alleged discriminatory policy. Id.,citing Shomo v. City of New York, 579 F.3d 176, 181 (2d Cir.2009) (internal quotation marks omitted).

Here, while Cliffcrest argues that the effects of the alleged discrimination continued and warrant an extension of the statute of limitations, the last discrete act, discriminatory or otherwise, that could have allegedly occurred was in 2010, when Wavecrest was removed as managing agent. Moreover, while Cliffcrest argues that based on documentary evidence HPD's involvement in the Building continued until 2012, such unspecified involvement alone is insufficient to infer a continuing practice of discrimination. Accordingly, the motion is denied with respect to the Fair Housing Claims which would be untimely.

The fourth proposed claim, which seeks to recover for negligent misrepresentation,[18] is "covered by the six-year Statute of Limitations governing equitable actions in generally ...[and] accrues on the date of the alleged misrepresentation relied upon by the plaintiff[19]" Fandy Corp. v. Lung-Fong Chen, 262 AD2d 352, 353 (2d Dept 1999); see also CPLR 213; AHA General Contr. Inc. v. The Edelman Partnership , 291 AD2d 239, 240 (1st Dept 2002).

This claim is untimely as to the misrepresentations that provide the basis for this claim

---

[18]To establish a claim for negligent misrepresentation, plaintiffs must show: (1) an awareness by the defendant that the information provided was to be used for a particular purpose; (2) reliance by a known party in furtherance of that purpose; (3) reliance must be reasonable and foreseeable; (4) some conduct by the defendant linking it to that party and evincing the defendant's understanding of that party's reliance; and (5) there must be a relationship through contract or otherwise, so that the party has a right to rely on the other for information and the person giving the information owes a duty to give it with care. See Kimmel v. Schaefer, 224 A.D.2d 217 (1st Dept) aff'd , 89 N.Y.2d 257 (1996).

[19] As stated above, in connection with the fraud claims, HPD's argument that the statute of limitations under General Municipal Law § 50-i applies to this claim is without merit.

were made in connection with the renovation and rehabilitation that was purportedly completed, at latest, when title was transferred to Cliffcrest in January 2007, and the proposed claim was interposed more than six years later in June 2013. Moreover, while it is alleged that the extent of damage arising out of these misrepresentations was not discovered until September 2010, when Wavecrest was replaced with another management company, such allegation is insufficient to extend that limitations period since a negligent misrepresentation claim accrues notwithstanding whether or not the party allegedly injured by the misrepresentation is aware of such wrong or injury. See IFD Constr. Corp. v. Corddry Dietz & Zack, 253 AD2d 89, 93 (1st Dept 1999)(holding that "the aggrieved party need not be aware of the wrong or injury for the cause of action [for negligent misrepresentation] to accrue").

The fifth and sixth proposed claims, which seek relief under the New York City Human Rights Law, are subject to a three-year statute of limitations. Raghavendra v. Bollinger, 128 AD3d 416 (1st Dept 2015); Administrative Code of the City of New York § 8-502(d) ("[a] civil action commenced under this section must be within three years after the alleged unlawful discriminatory practice ... occurred."). The statute of limitations begins to run from the date of the allegedly discriminatory act (Henderson v. Town of Van Buren, 15 AD3d 980 (4th Dept), lv denied 4 NY3d 710 (2005). However, where a continued course of conduct is alleged, the limitation period runs from the last discriminatory act. Kimmel v. State, 49 AD3d 1210, (4th Dept 2008), lv to appeal dismissed, 11 NY3d 729 (2008).

Here, as the alleged acts of discrimination relate to the alleged fraudulent scheme of taking the moneys loaned to the Building's residents for rehabilitating and renovating the Building occurred before title to the Building was transferred to Cliffcrest in January 2007, the three-year

limitations period expired before these third-party claims were asserted in June 2013. Moreover, while the sixth proposed claim alleges a pattern of discrimination, such pattern of activity ended, at latest, in January 2007, when title was transferred to Cliffcrest.

The proposed seventh cause of action, for relief under 42 USC § 1983, alleges that the third-party defendants, under the color of state law in connection with the administration of the TPT program "deprived its residents of their constitutionally protected property interest in the Building without due process of law, at least in part due to racial, ethnic, and immigration animus and stereotyping" (Proposed Pleading, ¶ 16). "Causes of action asserted pursuant to section 1983 have a three-year statute of limitations in New York ... and accrue when the plaintiff knows or has reason to know of the injury which is the basis of [the] action." Way v. City of Beacon, 96 AD3d 829 (2d Dept 2012). Here, even assuming there are factual issues as to whether the action was timely commenced, the motion to amend to add this claim must be denied. To succeed on its claim for damages pursuant to 42 U.S.C. § 1983, Cliffcrest must establish (1) the deprivation of a protectable property interest, (2) by one acting under the authority of law. Town of Orangetown v. Magee , 88 NY2d 41, 52 (1996)(citation omitted). The hallmark of property "is an individual entitlement grounded in state law, which cannot be removed except for cause. " Id. (internal citations omitted). Here, assuming the Building residents had protectable property interest in the Building, the Proposed Second Amended Pleading does not allege that Cliffcrest was deprived of a right to that property, but, instead that the Building in which they have a property interest was not renovated and rehabilitated as promised. Accordingly, the proposed claim under this section is without merit and cannot be added.

The proposed eighth cause of action is for breach of contract,[20] which is governed by a six-year statute of limitations De Hernandez v. Bank of Nova Scotia, 76 AD3d 929, 930 (1st Dept 2010), lv denied 16 NY3d 705 (2011); CPLR 213(2). The cause of action accrues at the time of the breach even though "no damage occurs until later". Ely-Cruikshank Co, Inc. v. Bank of Montreal, 81 NY2d 399, 402 (1993). Moreover, "[k]nowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations running in a contract action" Id. (internal citations and quotation omitted). With respect to this claim, the Proposed Pleading alleges that "the third-party defendants entered into an intricate web of agreements regarding the Building all of which were shared amongst the third-party defendants and the residents of the Building and which were breached by the third-party defendants" (Proposed Pleading, ¶ 322). While the agreements are not specified, the gravamen of the claim is that the agreements to renovate and rehabilitate the Building were breached and the third-party defendants "absconded with the loan proceeds" (Id, ¶ 328). As these breaches occurred, at the latest, before title was transferred to Cliffcrest in January 2007, and as First Amended Answer was not filed until more than six years later, in June 2013, this claim is untimely.

The proposed ninth cause of action, for breach of the warranty of habitability, is based on alleged representations that the renovations were complete. As a preliminary matter while the third-party defendants argue that the proposed claim is untimely, the court notes that the warranty of habitability is "designed to give rise to an implied promise on the part of the landlord that both

---

[20]To prevail on a cause for action for breach of contract the plaintiff must prove "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426 (1st Dept 2010); see also, Clearmont Property, LLC v. Eisner, 58 A.D.3d 1052, 1055 (3rd Dep't 2009). A cause of action for breach of contract is governed

of the demised premises and the areas within the landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term." Park W. Mgmt. Corp., v. Mitchell, 47 NY2d 316, 327, cert. denied, 444 US 992 (1979); see. Real Property Law § 235-b. Under the warranty, the landlord warrants that "there are no conditions that materially affect the health and safety of the tenants." Id. at 317. Examples of such conditions include "insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation...or similar services which constitute the essence of the modern dwelling unit." Id. at 328. Thus, the allegations, here, as to the representations that the renovations were complete are insufficient to state a claim for breach of the warranty of habitability.

As for the statute of limitations, a claim for breach of the warranty of habitability must be commenced within six years of the breach. See Roman v. Emigrant Sav. Bank-Brooklyn/Queens, 111 AD3d 692, 692 (2d Dept 2013); Witherbee Ct. Assoc v. Greene, 7 AD3d 699, 701 (2d Dept 2004); CPLR 213(2). The proposed claim is also untimely since the representations regarding the renovations would have been made on or before the January 2007, before the transfer of title to Cliffcrest, or more than six years prior to the interposition of this claim with the filing of the First Amended Pleading in June 2013.

The proposed tenth cause of action for conversion is governed by a three year statute of limitations[21] which "runs from when that cause of action accrued–that is when the conversion occurred" (Sporn v. MCA Records, Inc., 58 NY2d 482, 488 (1983)), and "not from discovery or the exercise of diligence to discover" Viglant Ins. Co. Of America v. Housing Authority of City of

[21]As stated above, in connection with the fraud claims, HPD's argument that the statute of limitations under General Municipal Law § 50-i applies to this claim is without merit.

El Paso, Tex., 87 NY2d 36 (1995). Here, as the proposed conversion claim alleges the taking of certain of the Building's valuable fixtures and the loan funds, both which occurred before title was transferred in January 2007, such conversion occurred more than three years prior to the June 2013 interposition of the conversion claim. Moreover, as for Cliffcrest's argument that the three year the statute of limitations did not begin to run until there was a "demand and refusal to return the property," such argument is without merit since the third-party defendants did not have a right to possess the fixtures or the loan funds which were to required to be used to renovate and rehabilitate the property. Compare McGough v. Leslie, 65 AD3d 895 (1st Dept 2009)(demand and refusal rule applies in action against good faith purchaser of goods whose possession in lawful).

The remaining issue is whether equitable estoppel may be invoked under the circumstances here to preclude the third-party defendants from asserting the statute of limitations defense. "[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances" Badgett v. New York City Health and Hospitals Corp., 227 AD2d 127, 128 (1st Dept 1996). To successfully apply this doctrine to preclude a party from using a statute of limitations as a defense, it must be shown that the party's "affirmative wrongdoing ... produced the long delay between the accrual of the cause of action and the institution of the legal proceeding " Putter v. North Shore University Hosp., 7 NY3d 548, 552-553 (2006)(internal citations and quotations omitted). The wrongdoing must include "subsequent and specific actions" to the original wrongdoing that prevented the party seeking to invoke the doctrine from timely bringing suit. Id., quoting Zumpano v. Quinn, 6 NY3d 666, 674 (2006); see also Knobel v. Shaw, 90 AD3d 493(1st Dept 2011)("Equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which

forms the basis of plaintiff's underlying substantive cause of action")(internal citations and quotations omitted).

Here, Cliffcrest has failed to satisfy its burden of demonstrating acts and subsequent affirmative conduct by HPD or the Shuhab defendants which was distinct from the original wrongdoing that would support the application of equitable estoppel. Cliffcrest's assertions regarding the misrepresentations or acts of concealment which it alleges prevented it from bringing a timely action are the same acts underlying the fraud claims. In this connection, while Cliffcrest may not have been on notice of the third-party's wrongful conduct based on the construction defects that came to light before the conversion of the Building to a cooperative, there are insufficient allegations of affirmative acts of misconduct and/or concealment by HPD or the Shuhab defendants beyond the underlying fraud, with respect to the alleged misuse and conversion of the funds so as to preclude the third-party defendants from relying on the statute of limitations. See e.g. Zumpano v. Quinn, 6 NY3d at 674 (equitable estoppel does not apply to revive a lapsed claim in the absence of "affirmative steps to prevent [a party] from bringing a timely claim"); Lucker v. Bayside Cemetery, 114 AD3d 162, 175 (1st Dept 2013), lv denied 24 NY3d 901(2014)(finding that equitable estoppel did not apply where there was no showing that plaintiff "relied on later acts of deception or concealment to justify estopping defendants from relying upon the statute of limitations")

CONCLUSION

In view of the above, it is

ORDERED that the motion to amend is denied as to plaintiff Peny & Co., and plaintiff Peny & Co's motion for summary judgment is granted in accordance with this decision and as per

separate order filed under motion seq. no. 008; and it is further

ORDERED that the motion is granted as against The Department of Housing Preservation and Development of the City of New York and defendants Shuhab Housing Development Fund Corp., the Wavecrest Management Team, Ltd.,and Lee Warshavsky only to the extent of permitting the additional of the proposed first and second causes of action for fraud and conspiracy to commit fraud; and it is further

ORDERED that within 20 days of the date of this decision and order, defendant Cliffcrest Housing Development Fund Corporation shall efile and serve a Second Amended Verified Answer, and Third-Party Complaint consistent with this decision and order; and it is further

ORDERED that, on consent of Cliffcrest, the claims against Carver Federal Savings Bank, as successor-in-interest to proposed third-party defendant Community Capital Bank are hereby discontinued without prejudice as per separate order filed under motion seq. no. 007; and it is further

ORDERED that the motion by The Department of Housing Preservation and Development of the City of New York for a more definite statement (motion seq. no. 004) and the motions to dismiss by Wavecrest Management Team, Ltd. and Shuhab Housing Development Fund Corp. and Lee Warshavsky (motion seq. nos. 005 and 006, respectively) are denied as moot in accordance with this decision and as per separate orders.

DATED: March 21, 2016

J.S.C.

HON. JOAN A. MADDEN
J.S.C.