Tsen-Tsen Jin v Lee
2016 NY Slip Op 32662(U)
September 8, 2016
Supreme Court, New York County
Docket Number: 651637/2015
Judge: Shirley Werner Kornreich
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
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651637/2015
JIN, DR. TSEN-TSEN
vs
LEE, MARGARETTE
Sequence Number : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE 7/27/16
MOTION SEQ. NO. ______

The following papers, numbered 1 to _____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). 9-23
Answering Affidavits — Exhibits ______ No(s). 49-64, 78
Replying Affidavits ______ No(s). 72

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 9/8/16

______, J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE
☒ Cross-motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---X

DR. TSEN-TSEN JIN, DR. SOMAM MARY WONG, individually and derivatively on behalf of GOLDEN WHEEL CONDOMINIUM,

Index No.: 651637/2015

DECISION & ORDER

Plaintiffs,

-against-

MARGARETTE LEE, IK-JONG KANG, AG/WOO CENTRE STREET OWNER, LLC, and GOLDEN SKYLINE, LLC,

Defendants.

---X

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001, 002, and 003 are consolidated for disposition.

Defendants Margarette Lee, Ik-Joon Kang, AG/Woo Centre Street Owner, LLC (the Sponsor), and Golden Skyline LLC (GSL) move, pursuant to CPLR 3211, to dismiss the amended complaint (the AC). The original plaintiffs, Drs. Tsen-Tsen Jin and Somam Mary Wong (the Original Plaintiffs), who commenced this action individually and derivatively on behalf of the Golden Wheel Condominium (the Condo), oppose the motions and cross-move to substitute the Golden Wheel Condominium Board of Managers (the Board) as the plaintiff. Defendants oppose the cross-motion. For the reasons that follow, defendants' motions are granted in part and denied in part and plaintiffs' cross-motion is granted.[1]

[1] The caption is to be amended as set forth herein. The parties are directed to ensure that the information on the New York State Courts Electronic Filing system (NYSCEF) is changed to reflect the substitution of the Board as the plaintiff. If claims are not asserted against certain defendants (e.g., GSL) in a subsequent amended pleading, such defendants should be excluded from the caption.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (*see* Dkt. 2)[2] and the documentary evidence submitted by the parties.

This action concerns a building located at 139 Centre Street in Manhattan (the Building). The Building is composed of commercial condominium units and a residential penthouse on the ninth floor (referred to by the parties and herein as PH2). The Board accuses Lee, an attorney and real estate investor who controlled the Sponsor and, until July 31, 2014, was a member of the Board, of committing malfeasance. Lee, along with her husband, Kang, are PH2's tenants and owners. The AC alleges that "Lee developed a plan to create a lavish penthouse suite for herself and her husband, with a very low tax rate, a very low common charge, and the advantage of being the only residential tenant in an otherwise commercial building. In short, Lee used her superior knowledge of real estate to craft herself the perfect New York City condominium apartment – even if it meant taking over parts of the common areas that were reserved for every owner in [the Building], making false statements to the Unit Owners, and defrauding the entire condominium." AC ¶ 12. Lee, using her control of the Sponsor and the Board, also allegedly caused the Condo to spend money on services, such as personal security, that benefited only her and not the rest of the Building. Lee, moreover, is alleged to have caused her real estate development company, non-party Young Woo & Associates, LLP (YWA), to do "a shoddy job building many parts of [the Building], leaving areas unfinished," and is accused of "issuing an offering plan with numerous material deficiencies, and selling condominium units that were far smaller than advertised." *See* AC ¶ 13. PH2 encompasses an entire floor and a large terrace, as well as the Building's only assigned parking space, but is responsible for a disproportionally low

[2] References to "Dkt." followed by a number refer to documents filed in this action on NYSCEF.

fraction of the Condo's common charges relative to the area it occupies. Additionally, PH2 is alleged to pay less than its proportional share of the Building's electricity bills. Lee denies the Board's allegations and contends that her plan to purchase and occupy PH2 was disclosed to the unit owners.

By way of background, the Condo was initially marketed with a Commercial Condominium Offering Plan (the Offering Plan) dated December 3, 2007. The Offering Plan indicated that the Building's top floor, including what is now PH2, was to be divided into separate commercial offices. *See* Dkt. 29 at 5 ("The Building will initially include one hundred forty-four (144) Office Units that will be situated on floors two through penthouse 2"). Those offices were to be connected by hallways, which would be designated as common areas. This is consistent with a June 27, 2007 architect's report, which states that the Building will be occupied by commercial offices, that the ninth floor terrace would be accessible from multiple PH2 units,[3] and that the PH2 units would each be used as offices. *See* Dkt. 51 at 4-5, 11-12; *see also* Dkt. 52 (architect's drawings of PH2 offices.). PH2's common interest was, in total, set as 3.757%. It did not include the terrace, which, like the hallways, was listed in the Offering Plan as part of the common areas. There also is a 4,000 square foot area comprised of the eighth floor roof. The AC notes that "in the description of property included in the offering plan, it states that the PH2 terraces are on the north and east sides of the building – not the west side." *See* AC ¶ 22.

The Offering Plan was amended nine times between July 10, 2008 and December 23, 2011. *See* Dkt. 30-38 (the Amendments). The second amendment, dated September 2, 2008 (the Second Amendment), among other things, permitted the PH2 units to be used for residential purposes and permitted the Sponsor "**without further amendment to the Plan**, to combine the

[3] As noted above, PH2 is on the ninth floor. PH1, which is not at issue in this case, is on the eighth floor. *See* Dkt. 51 at 12.

Units on floor PH2." *See* Dkt. 31 at 3 (emphasis added). The ninth floor common areas, terrace and eighth floor roof would become part of the combined PH2 unit. The Second Amendment provided PH2 would get the only reserved parking spot in the Building, which was located in a portion of the loading dock, part of the common area. Attached to the Second Amendment is a revised architect's report, dated July 21, 2008, which no longer lists separate PH2 office units, only identifies a single "Total PH2 Floor" and, unlike the lower floors (with the exception of PH1), no longer was given a "Commercial" Unit Designation. *See id.* at 19.

Less than one month after the revised architect's report was issued, and approximately two months before the Second Amendment was issued, on July 15, 2008, Lee formed GSL, a Delaware LLC, for the purpose of acquiring the PH2 units, combining them, and residing there with her husband, Kang. On July 23, 2008, GSL entered into contracts to purchase the PH2 units.

The third amendment to the Offering Plan is dated January 30, 2009. *See* Dkt. 32 (the Third Amendment). It states that as of November 25, 2008, contracts for more than 15% of the Condo's units had been executed and that "[a] principal of one purchaser is an affiliate of Sponsor." *See id.* at 2. Exhibit B to Attachment 2 of the Third Amendment discloses that GSL is the purchaser and that "[a] principal of [GSL] is principal of the entity that is serving as a development manager of Sponsor under the Development and Management Agreement described in the 'Identity of Parties' section of the Plan." *See id.* at 15. Section 2 of the Third Amendment also discloses that, as permitted by the Second Amendment, the PH2 units were being combined. It provides, in pertinent part:

> In furtherance of Paragraph 2 of the Second Amendment, **the Units on floor PH 2 have been combined, together with the hallway on such floor, into a single Unit, to be known as "Unit PH2." The terrace comprising the roof above the 8th floor (the "8th Floor Terrace") shall be a Limited Common Element for**

> **the exclusive use of Unit PH2.** If Unit PH2 shall be subdivided in the future, such terrace shall be a Limited Common Element for the exclusive use of such Unit or Units on floor PH2 which shall have direct access to such terrace

See id. at 2-3 (emphasis added). The combined PH2 unit, which included previously designed common areas, "was still only responsible for 3.757% of the common charges." *See* AC ¶ 33.

Lee began constructing PH2 into a residence in early 2009. In March 2009, the Sponsor obtained a certificate of occupancy for the Building that did **not** include any residential areas. Lee joined the Board on June 1, 2009 and remained a board member until July 31, 2014. The day after Lee joined the Board, on June 2, 2009, the Sponsor amended the Building's certificate of occupancy to change PH2 to a residence. "After July 2009, Lee built a terrace on the square shaped roof on the west side of PH2. [The Board alleged that this] area was – and still is – part of the general common areas belonging to the entire condominium." *See* AC ¶ 38. GSL closed on its acquisition of PH2 on April 4, 2010, paying $5,932,645. The AC claims that "Lee moved into PH2 soon after. At this point, her condominium occupied at least 10,500 square feet, including the terrace and the roof area she turned into a terrace. Even though PH2 now occupied almost an entire floor of [the Building], Lee and [GSL] were only responsible for less than 4% of the common charges. PH2 also enjoys the commercial real estate tax rate, which is far lower than the tax rate for typical residential condominiums. PH2 also pays very little in electricity bills,[4] averaging $200 for the entire floor, approximately 1/10th of the cost other Unit Owners are

[4] This is not the only instance of malfeasance alleged with electricity. *See* AC ¶ 63 ("the commercial unit electricity sub meters on the first floor were set to record 1/10th the actual usage. On information and belief, Lee and [the Sponsor] did this deliberately to make the units more attractive to potential buyers, even though it cost the other units over $100,000.").

paying." *See* AC ¶¶ 40-42. On July 29, 2011, GSL transferred its ownership of PH2 to Lee and Kang, allegedly for no compensation.[5]

In addition to the Board's complaints about how Lee acquired PH2, it alleges that Lee used her position of control over the Sponsor and the Board to engage in self-dealing:

> Lee also used the [Board] and [the Sponsor] to sign contracts for 24-hour security and building personnel. These excess employees are unnecessary for the commercial units, which are mostly offices and are not open late into the night. Instead, **the sole purpose of these employees is to provide security for Lee and Kang.**[6]
>
> Lee and Kang use the 24-hour security personnel as lobby attendants, having them let in guests at all hours when there are parties, or merely visitors. In fact, Lee and Kang use the 4,000 square foot space on the west side of PH2 as a make-shift art gallery for Kang's work, using security personnel to shuttle visitors in and out of PH2. This massive expenditure does not benefit the rest of the Unit Owners in any meaningful way, although they are paying for it out of the common charges.

See AC ¶¶ 46-47 (emphasis added).

The Board also claims that the Sponsor caused the Building to be constructed with significant defects:

> **[The Building] was not built to the specifications in the offering plan**, and it was not built according to the representations made by [non-party Charlotte Cheung, who was affiliated with the Sponsor and was a director at YWA,] on [the Sponsor's] behalf when she was advertising and selling units. **Almost none of the plans and square footage representations in the offering plans and other materials were accurate**. Many unit owners were stunned to discover that their units were too small. Recently, a [representative of non-party Newmark Knight Grubb Frank (Newmark), the management company contracted to manage the Building] **admitted that none of the building plans were accurate**. In 2010, Lee

---

[5] The AC claims that GSL "has stated in recent court filings that it is still the owner of PH2. These statements appear to be false and part of Lee's continuing attempts to disguise the PH2 fraud." *See* AC ¶ 45. The AC does not cite to such court filings.

[6] Lee and Kang are now unit owners. The parties do not address the applicability of the business judgment rule on this motion. The court, therefore, simply assumes – only for the purposes of this motion – that the security allegation is pleaded as a conflicted, self-interested transaction that amounts to a breach of fiduciary duty.

> signed a contract with Newmark for rates far in excess of what other property management companies would charge, costing [the Condo] at least $30,000 a year. Cheung told purchasers that [the Building] would include a back-up generator to protect the various doctors' offices in the condominium. **That backup generator was never installed, and many unit owners were surprised when they lost power during hurricane Sandy in 2012**. The façade of the building was supposed to be in good condition. But in 2012, Newmark, Lee, and others, discovered that the façade was crumbling, and would require [the Condo] to pay as much as $400,000 to repair. The HVAC units were supposed to be under warranty, but [the Sponsor] never made the payments, so the warranty was withdrawn. A back-flow pump was never finished by [the Sponsor], and once the issue was discovered, it cost [the Condo] thousands to repair. The terrace areas leak, flooding several units on the top floors when there is a rainstorm. The doctors wanted a space in the lobby area to designate where each doctors' office was located, and other information for patients. Instead, **Lee had [the Condo] pay Kang to show his artwork**. The basement area was not finished, and was effectively unusable. It cost thousands to repair and make usable as a meeting area. Similarly, the atrium was unfinished, and had to be finished at [the Condo's] expense, costing over $60,000.

See AC ¶¶ 48-58 (paragraph numbering and breaks omitted; emphasis added).

The AC further claims that the Board, until recently, suffered from serious dysfunction due to Lee's actions. The court will not address these allegations and the related litigation since they are not pertinent to this motion, particularly since, as discussed herein, demand futility is no longer relevant.

On May 12, 2015, the Original Plaintiffs commenced this action by filing a complaint in which they asserted direct and derivative claims. They filed the AC on June 3, 2015, which asserts four causes of action, numbered here as in the AC: (1) breach of fiduciary duty against Lee; (2) aiding and abetting breach of fiduciary duty against the Sponsor; (3) ejectment against GSL, Lee, and Kang; and (4) fraud against the Sponsor. *See* Dkt. 2. On August 27 and 28, 2015, defendants filed the instant motions to dismiss on the grounds of lack of standing, failure to plead demand futility, the statute of limitations, and failure to state a claim. On October 13, 2015, the Original Plaintiffs and the Board opposed the motions to dismiss and cross-moved to

substitute the Board as the plaintiff. The court reserved on the motions after oral argument. *See* Dkt. 83 (3/10/16 Tr.).

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Defendants' arguments seeking dismissal due to the Original Plaintiffs' purported lack of standing and for failure to plead demand futility are moot.[7] The court grants the Board's cross-motion to be substituted as the plaintiff and to assert all of the causes of action directly.

CPLR 1021 provides that "[a] motion for substitution may be made by the successors or representatives of a party or by any party." *See* Siegel, NY Prac § 184 (5th ed 2011) ("Whenever an occurrence during an action logically indicates that an interest in the case has passed from one of the parties to an outsider, the outsider may as a rule be substituted for the party ... Any 'transfer of interest' during the action, such as by assignment of the claim by the plaintiff, is also a permissible ground for substitution of the transferee, ...The above list is not exhaustive of events permitting substitution. Common sense appears to be the major criterion.") (citations omitted). In an action initially commenced by a shareholder derivatively on behalf of the company, the company can take over the action and prosecute the claims directly. *See James v Bernhard*, 106 AD3d 435 (1st Dept 2013), citing *Tenney v Rosenthal*, 6 NY2d 204, 209-10 (1959); *see also Obeid v Hogan*, 2016 WL 3356851, at *8 (Del Ch 2016) (Laster, V.C.) (company has the right to take control of litigation initially commenced derivatively by stockholder), accord *Zapata Corp. v Maldonado*, 430 A2d 779, 782-85 (Del 1981). The substitution of a company as the plaintiff may be done on a motion under CPLR 1021. *See James*, 106 AD3d at 435.

There is no doubt that the Board has the legal right to prosecute the claims asserted herein on behalf of the Condo's unit owners. *See Residential Bd. of Managers of Zeckendorf Towers v Union Square-14th St. Assocs.*, 190 AD2d 636, 637 (1st Dept 1993) ("With respect to the first

---

[7] It should be noted that the bulk of defendants' moving briefs are devoted to these issues, not failure to state a claim. The court will not address the parties' arguments with respect to standing, demand futility, and the suitability of the Original Plaintiffs as derivative plaintiffs, since they are no longer relevant.

cause of action alleging fraud in the sale of condominium units, the IAS Court correctly determined that plaintiff condominium board has standing to make such a claim on behalf of the individual condominium unit owners by reason of explicit statutory authority namely, Real Property Law § 339-dd,[8] under which the board of managers of a condominium is empowered to maintain an action on behalf of the condominium owners with respect to any cause of action relating to the common elements of more than one unit") (citation and quotation marks omitted); *see also Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646, 648 (1st Dept 2013).

Since the Board has standing, this case need not be dismissed for lack of subject matter jurisdiction, even if the Original Plaintiffs lacked standing (an issue the court need not and does not reach). Contrary to the arguments proffered by defendants, in this court, "lack of standing is not a jurisdictional defect." *HSBC Bank USA v Dalessio*, 137 AD3d 860, 863 (2d Dept 2016), quoting *JP Morgan Mort. Acquisition Corp. v Hayles*, 113 AD3d 821, 823 (2d Dept 2014); *see CDR Creances S.A.S. v Cohen*, 77 AD3d 489, 491 (1st Dept 2010) ("lack of standing defenses do not implicate subject matter jurisdiction"); *HSBC Guyerzeller Bank AG v Chascona N.V.*, 42 AD3d 381, 383 (1st Dept 2007) (McGuire, J., concurring) (plaintiff's "lack of standing ... did not deprive Supreme Court of subject matter jurisdiction"), citing *Sec. Pac. Nat'l Bank v Evans*, 31 AD3d 278, 280 (1st Dept 2006) (lack of standing, unlike lack of subject matter jurisdiction, can be waived). Thus, even if the Original Plaintiffs did not have standing (again, an issue this court need not decide), standing has now been established with the substitution of the Board as plaintiff. To be sure, an action commenced by a plaintiff without standing does not stop the

---

[8] Real Property Law (RPL) § 339-dd provides, in pertinent part:

> Actions may be brought or proceedings instituted by the board of managers in its discretion, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one unit.

running of the statute of limitations, permit the application of the relation back rule under CPLR 203(f), or permit plaintiff to avail itself of the benefits of CPLR 205(a). *See U.S. Bank Nat. Ass'n v DLJ Mort. Capital, Inc.*, 141 AD3d 431 (1st Dept 2016); *see generally ACE Secs. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 52 Misc3d 343 (Sup Ct, NY County 2016) (Friedman, J.). Hence, if the Original Plaintiffs lacked standing, the timeliness of the Board's claims must be evaluated as of the date of their cross-motion, not the date this action was commenced. However, as discussed herein, none of the Board's claims became time barred between May 12, 2015, the date this action was commenced, and October 13, 2015, the dated the Board cross-moved to be substituted as plaintiff. Consequently, even if the Original Plaintiffs lacked standing to commence this action, this court still has subject matter jurisdiction and the Board, which has standing, may proceed because its claims are timely.

Turning now to the merits, defendants contend that (1) the claim that the Sponsor aided and abetted Lee's alleged breaches of fiduciary duty claim is insufficiently pleaded; (2) the breach of fiduciary duty claim for unlawful taking of the common areas is time barred; (3) all of the breach of fiduciary duty claims have no merit; (4) the fraud claim under RPL § 339-i(1)(iv) is improperly pleaded and has no merit; and (5) the claim for ejectment is not viable. The court addresses these arguments in turn.

First, with respect to the aiding and abetting claim, defendants complain that the AC does not allege "who on behalf of the Sponsor had the alleged awareness, provided the alleged assistance or maintained the alleged reliance" and that the alleged wrongful conduct is not sufficiently specified. *See* Dkt. 23 at 15.[9] The court disagrees. The AC sets forth the Sponsor's

---

[9] Presumably, the Sponsor is sued for aiding and abetting, and not as the primary tortfeasor, because there does not appear to be "authority for imposing a fiduciary duty upon ... a

involvement, particularly Lee's actions which occurred by virtue of her control of the Sponsor and the Board. Lee's ability to engage in the complained-of conduct (discussed further below) would not have been possible without the Sponsor. This suffices to plead the substantial assistance prong. *See Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 (1st Dept 2015), citing *Kaufman v Cohen*, 307 AD2d 113, 126 (1st Dept 2003) ("A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.") (internal citations omitted). The underlying alleged wrongs, as discussed below, are pleaded with sufficient detail.

Next, defendants argue that, pursuant to CPLR 214(4), the claim for breach of fiduciary duty against Lee has a three-year statute of limitations which has elapsed. They contend that the statute of limitations began to run, at the latest, on January 30, 2009, when the Third Amendment, which disclosed the combination of the PH2 units, was issued. In opposition, the Board takes the position that a six-year limitations period applies because the claim is equitable and fraudulent in nature. *See DiBartolo v Battery Place Assocs.*, 84 AD3d 474, 476 (1st Dept 2011) ("Where, as here, a suit alleging breach of fiduciary duty seeks **both equitable relief and money damages**, a six-year statute of limitations applies") (emphasis added). And, regardless of the applicable limitations period (and dispositive even if the action is deemed to have been commenced on October 13, 2015), the doctrine of fiduciary tolling renders the claim timely. The Board is correct on both counts.

The Court of Appeals has explained:

---

condominium sponsor, for the benefit of ... potential unit purchasers." *See Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 (1st Dept 2011).

> New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8).

IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 (2009) (internal citations omitted).

Moreover, it is well settled that "the statute of limitations on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role." *Access Point Med., LLC v Mandell*, 106 AD3d 40, 45 (1st Dept 2013), citing *In re Barabash's Estate*, 31 NY2d 76, 80 (1972); *see Herman v 36 Gramercy Park Realty Assocs., LLC*, 131 AD3d 422 (1st Dept 2015) ("Because the underlying fraud, constructive fraud and breach of fiduciary duty claims against Michael Offit in his capacity as trustee, brought in a related action, had not accrued until his resignation as trustee less than six years before this action was commenced, the conspiracy cause of action that depended on those claims was timely") (internal citation omitted); *Robinson v Day*, 103 AD3d 584, 586 (1st Dept 2013); *Westchester Religious Institute v Kamerman*, 262 AD2d 131 (1st Dept 1999). Since Lee's actions were taken in her capacity as a member of the Board, in which she owed fiduciary duties to the Board and the unit owners, the statute of limitations was tolled during her tenure on the Board between June 1, 2009 and July 31, 2014. *See Bd. of Managers of Fairways at N. Hills Condo. v Fairway at N. Hills*, 193 AD2d 322, 327 (2d Dept 1993) ("a sponsor-appointed board of managers of a condominium owes a fiduciary duty to the unit purchasers"); *see 40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 156 (2003) ("The Board was under a fiduciary duty to further the collective interests of the

cooperative"), accord *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 (1990).[10] The statute of limitations ran for approximately four months prior to Lee joining the board (January 30 to June 1, 2009), and for approximately one year and two-and-a-half months after she stepped down from the Board (July 31, 2014 to October 13, 2015) – collectively amounting to less than three years. Thus, even if a three-year limitations period applies, the claim is timely.

Nonetheless, despite their timeliness, certain of the breach of fiduciary duty claims are dismissed. The claims asserted against Lee fall into three categories: (1) Lee's combining the PH2 units and taking the roof and common areas; (2) Lee's mismanagement of the Condo; and (3) Lee's self-dealing. The Board avers:

> The first scheme is Lee's secret plan – using shell company [GSL] – to turn the top floor of [the Building] into a sprawling apartment for herself, while forcing much of the costs onto the rest of the condominium. At a minimum, this scheme stretched from 2008 until Lee and Kang were assigned PH2 by [GSL] on July 29, 2011. In fact, Lee still occupies and controls the Disputed Area. PH2 is a blatant self-interested transaction, and **a violation of Lee's duty to disclose material facts**.

See Dkt. 49 at 20 (emphasis added).

Defendants respond that the PH2 unit combination was fully disclosed in the Offering Plan and Amendments and, therefore, cannot amount to a breach of fiduciary duty. Specifically, the Second Amendment permitted the PH2 units to be combined and made into a residence, and the Third Amendment disclosed that this was actually being done by GSL, which was disclosed as an affiliate of the Sponsor. Defendants are correct. The Board does not allege that it or any of the unit owners objected to these disclosures prior to purchasing their units, nor do they explain why the combination was actually wrongful. The Board merely suggests the combination of PH2 was problematic because it was a "self-interested" transaction (even though, as noted, the

[10] The rules set forth in *Levandusky* have been applied to both condos and co-ops. *See Perlbinder v Bd. of Managers of 411 E. 53rd St. Condo.*, 65 AD3d 985, 989 (1st Dept 2009).

self-interested nature was actually disclosed) and that the Offering Plan and Amendments are somehow ambiguous or unclear about Lee's intentions.[11] But, self-interested and conflicted transactions, when they are disclosed, are not always actionable wrongs. *See Irene David Realty. Inc. v Moyal*, 107 AD3d 430, 431 (1st Dept 2013) (commercial co-op conflicted transactions can be ratified); *Bd. of Managers of Soho Greene Condo. v Clear, Bright & Famous LLC*, 106 AD3d 462, 463 (1st Dept 2013) (same, with condo).

Regardless, the Board does not cite any authority supporting the proposition that a fully disclosed self-interested transaction can later be sued upon if the parties harmed know of the transaction and do not object. More to the point, no authority is proffered suggesting that a unit owner who purchases her unit with full knowledge of the Sponsor's principal's intention to purchase another unit on favorable terms can, after purchasing her unit, sue the Sponsor's principal for breach of fiduciary duty. While it is true that Lee may have controlled the Sponsor and the Board when the Second and Third Amendments were issued, she, of course, did not compel the unit owners to purchase despite the information in the Offering Plan disclosing Lee's

---

[11] The Board contends that:

> [Lee's] arguments fail because there was no way that anyone reading these documents would realize that these details in the condominium Offering Plan, and Amendments, were specifically drafted not to benefit the condominium as a whole, but instead were designed so that Lee could build PH2 – a blatant self-interested transaction. If what Lee was doing was so obvious, why did she use a shell corporation to hide it? Lee was [the Sponsor's] principal, [the Sponsor] created the Offering Plan and Amendments, and the details of the Offering Plan and Amendments – spread over many years – all happen to sync together to benefit Lee and PH2 (and no one else). This is not a coincidence, and this broad scheme was not at all apparent from these document. Moreover, even if this was disclosed, it is still a self-interested transaction at the expense of the rest of the condominium and a violation of her fiduciary duties.

See Dkt. 20 at 21.

intentions with respect to PH2. No duress is alleged. Indeed, the Board does not allege that any Board member not controlled by the Sponsor or any unit owners ever complained until this lawsuit, which was filed more than six years after the Third Amendment was issued.[12] As pleaded, the Board's fiduciary duty claim regarding the combination of the PH2 units fails to state a claim.

In reality, the claim appears to allege that the sponsor *fraudulently induced* the unit owners into purchasing their units. The Board contends that the Offering Plan and Amendments are ambiguous as to Lee's plan to combine the PH2 units and appropriate the common areas. The Board does not, however, explain why Lee's interpretation is incorrect, what portions of the Amendments are ambiguous, or why such issues have legal significance. If the Board can plead that the manner in which the PH2 units were combined and acquired by Lee contravened the Offering Plan and its Amendments, and the claims are not preempted by the Martin Act,[13] the Board may replead. If the Offering Plan and Amendments are inaccurate, then, perhaps, Lee may have failed to disclose a material fact. The Board, however, must explain these inaccuracies in detail. As pleaded and defended in the Board's opposition brief, the claim is not supported with any specific explication of what facts were not accurately disclosed. The claim, therefore, is dismissed with leave to replead if possible.

The complaint also includes accusations that the units purchased did not conform to the specifications in the Offering Plan and the Amendments and that the Building was shoddily

[12] The Second Amendment permitted the challenged combination "without further amendment to the Plan". *See* Dkt. 31 at 3. Nonetheless, the unitholders were actually provided notice of the combination in the Third Amendment.

[13] *See Bd. of Managers of S. Star v WSA Equities, LLC*, 140 AD3d 405 (1st Dept 2016), accord *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgmt. Inc.*, 18 NY3d 341, 349 (2011), and *Kerusa Co. v W10Z/515 Real Estate Ltd. P'ship*, 12 NY3d 236, 239 (2009).

constructed and left unfinished. These accusations, perhaps, could be alleged as a breach of contract claim against the Sponsor. However, no such cause of action is included. Again, leave to replead is granted as to this claim if it can be properly pleaded and if it is not time barred.

That being said, the second and third categories – Lee's mismanagement of the Condo and self-dealing – are well pleaded fiduciary duty claims. Lee owed the Board fiduciary duties of care and loyalty by virtue of her control of the Sponsor and her status as a member of the Board. *See Bd. of Managers*, 193 AD2d at 327; *see also Barbour v Knecht*, 296 AD2d 218, 224 (1st Dept 2002). The allegations regarding deficient construction by YWA (Lee's development company) and the fraud with respect to the electric meters are serious claims of malfeasance. Defendants dispute the truthfulness of these allegations, but merely raise issues of fact on this motion to dismiss. While they challenge Lee's motives for doing a poor construction job in a building she intended to reside in,[14] motive is not an element of the claim. More importantly, defendants do not actually provide documentary evidence refuting the allegations of shoddy construction. Likewise, with respect to the electricity allegations, defendants' submission of a few months of (purported) electricity records does not conclusively demonstrate that, over the entire relevant period, electricity usage was properly measured and allocated.

The self-dealing allegations also are properly pleaded. A fiduciary cannot use the principal's funds to pay for something only benefiting the fiduciary. *See In re Lawrence*, 24 NY3d 320, 344 (2014) ("Self-dealing occurs when [a fiduciary] takes advantage of his position in a transaction and acts in his own interests rather than in the best interests of the client."); *see also Perlbinder*, 65 AD3d at 989 (business judgment rule does not apply in cases of self-

---

[14] Lee controlled the construction company, so she may well have had a motive to conceal defects.

dealing). The payment for 24-hour security when the other commercial tenants only occupy the Building during the day may well be improper.[15]

Turning now to the fraud claim asserted against the Sponsor, that claim is insufficiently pleaded.[16] "The elements of a cause of action for fraud [are] 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); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Here, the fraud claim is that the Offering Plan falsely claimed that the Condo's common interest was allocated in accordance with RPL § 339-i(1)(iv), which provides:

> Each unit shall have appurtenant thereto a common interest as expressed in the declaration. Such interest shall be ... (iv) upon floor space, subject to the location of such space and the additional factors of relative value to other space in the condominium, the uniqueness of the unit, the availability of common elements for exclusive or shared use, and the overall dimensions of the particular unit.

See Cohen v Bd. of Managers of 22 Perry St. Condo., 278 AD2d 147, 148 (1st Dept 2000).

Defendants correctly contend that, pursuant to CPLR 3016(b), the Board's fraud claim must be pleaded with specificity. *See Pludeman v Northern Leasing Sys., Inc.,* 10 NY3d 486, 491 (2008). As defendants further correctly contend, the Board does not explain how RPL § 339-i(1)(iv) was violated. Its opposition brief's treatment of the issue is both terse and conclusory. Nowhere does the Board explain how the way in which the common interests were allocated was erroneous. The board simply states that the Sponsor violated § 339-i(1)(iv) because it "allocated the common charges to benefit Lee and to make the Retail Units easier to

---

[15] As noted earlier, the court assumes this constitutes actionable malfeasance since the applicability of the business judgment rule was not argued on this motion.

[16] Now that the Board is the plaintiff, there is no doubt that it has standing to assert the fraud claim under RPL § 339-dd. *See Residential Bd. of Managers.*, 190 AD2d at 637.

sell. As a result, the other units were damaged because they paid more than their share of the overall cost of running [the Building]." *See* Dkt. 49 at 27.[17] Nor does the Board explain how or why the disclosed allocation in the Offering Plan is incompatible with § 339-i(1)(iv). Instead, the Board disputes the notion that "a unit owner could carefully review the various disclosures and somehow uncover how [the Sponsor] was really allocating the common charges." *See id.* at 28. It is unclear if the Board is conceding that the common charges were, in fact, accurately disclosed, or if such disclosure was too difficult for a purchaser to understand.[18] The Board simply suggests that such disclosures are incompatible with an allocation under § 339-i(1)(iv) without explaining why this is so. Moreover, the Board does not indicate when the subject units were purchased relative to when the alleged misrepresentations were made, or even which unit owners were defrauded.[19] CPLR 3016(b) requires this specificity. Without these facts, it is impossible to defend. The fraud claim, therefore, is dismissed with leave to replead.

Finally, as clarified at oral argument, the Board seeks to eject Lee and Kang from the roof, which the Board contends is part of the common area. *See* Dkt. 83 (3/10/16 Tr. at 47).[20] This claim appears to be predicated on PH2's rights to the common area being in conflict with

---

[17] Similarly, at oral argument, the Board's counsel stated that the fraud claim was based on the common area not being "effectively fairly distributed" because PH2 "really got much more of a [bang] for [its] buck". *See* Dkt. 83 (3/10/16 Tr. at 47). He appears to be complaining that the allocation, despite being disclosed, is fraudulent because it supposedly is unfair. No authority is cited to support this proposition.

[18] The Board does not explain why these *commercial* unit owners (many of whom are doctors) could not retain counsel to do so.

[19] After all, on the fraud claim, the Board is not suing in its own right, but on behalf of the unit owners. Hence, the reasonableness of the individual unit owners' reliance will have to be assessed.

[20] While this claim also is asserted against GSL, GSL, according to the Board, no longer owns PH2. No other claim is asserted against GSL, which is dismissed from this action. That it is a "shell company" is of no moment if it does not own or occupy PH2.

the Offering Plan. Lee and Kang contend that the Third Amendment discloses that the roof, as well as the terrace, are part of the combined PH2 unit. In opposition, the Board fails to address this argument (*see* Dkt. 49 at 29), although the Offering Plan and Amendments appear ambiguous as to the issue and at oral argument, the ambiguity as to whether the Third Amendment was referring to the terrace or the roof was raised. The ejectment claim is dismissed without prejudice and with leave to replead if the Board can provide an actual explanation for why PH2, under the Third Amendment, does not have exclusive right to the roof, and if a declaratory judgment cause of action regarding the roof area is pleaded or if the fraud claim is validly repleaded. Accordingly, it is

ORDERED that the parties' respective motions are decided as follows: (1) the Board's cross-motion to be substituted as plaintiff is granted, and the Board is substituted (for Tsen-Tsen Jin and Somam Mary Wong) as the plaintiff in this action *nunc pro tunc* to October 13, 2015; (2) the breach of fiduciary duty claim with respect to the acquisition and combination of the PH2 units (a portion of the first cause of action), the fraud claim (the fourth cause of action), and the ejectment claim (the third cause of action) are dismissed without prejudice and with leave to replead consistent with this decision; and (3) the motions to dismiss are otherwise denied; and it is further

ORDERED that this action shall bear the following caption:

--X

THE GOLDEN WHEEL CONDOMINIUM BOARD OF MANAGERS, Index No.: 651637/2015

Plaintiff,

-against-

MARGARETTE LEE, IK-JONG KANG, and AG/WOO CENTRE STREET OWNER, LLC,

Defendants.

---X

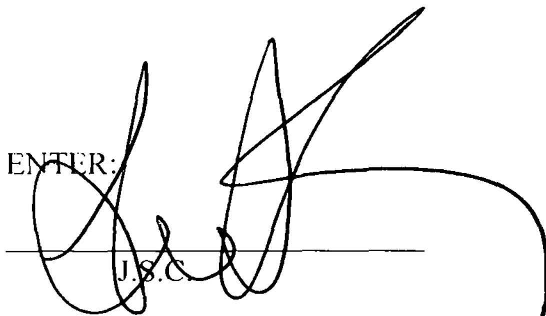
And it is further

ORDERED that the Board's deadline to file a second amended complaint is 30 days from the entry of this order on the NYCSEF system; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on September 27, 2016, at 11:30 in the forenoon.

Dated: September 8, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C