Board of Mgrs. of 150 E. 72nd St. Condominium v Vitruvius Estates LLC
2018 NY Slip Op 31213(U)
June 15, 2018
Supreme Court, New York County
Docket Number: 160831/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 49

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THE BOARD OF MANAGERS OF 150 EAST 72ND STREET CONDOMINIUM,

Plaintiffs

- against -

VITRUVIUS ESTATES LLC and HARRY MACKLOWE,

Defendants.

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Index No. 160831/2016
(Motion Seqs. 001-002)

O. Peter Sherwood, J.

Plaintiff Board of Managers of 150 East 72nd Street Condominium commenced this action to recover damages against defendants arising out of, among other things, purported construction defects in its condominium building and units, and defendants' alleged failure to provide required minimum reserve funds in accordance with the Administrative Code of the City of New (Administrative Code) . Defendant Vitruvius Estates LLC is the sponsor of the condominium development (the sponsor). Defendant Harry Macklowe is the principal of the sponsor (the principal).

In Motion Sequence No. 001, the sponsor moves to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7). In Motion Sequence No. 002, the principal moves for the same relief.

BACKGROUND

The sponsor was formed to convert a 12-story apartment building, located on 150 East 72nd Street in Manhattan, into condominium ownership. On August 27, 2012, an offering plan providing for the establishment of condominium ownership of the property was accepted for

filing with the New York State Attorney General. The sponsor thereafter issued several revisions to the offering plan. On September 11, 2013, the fifth amendment to the offering plan declared the plan effective.

Plaintiff commenced this action against the sponsor and the principal asserting the following causes of action against both defendants: (1) failure to fund the condominium's reserve fund in accordance with the Administrative Code; (2) breach of contract for inadequately funding the reserve; (3) breach of contract for various construction defects; (4) negligence; (5) violation of 15 USC § 1703(a)(2); and (5) fraud and/or negligent misrepresentation. Defendants move separately to dismiss the complaint insofar as asserted against them. For the reasons that follow, the sponsor's motion (Motion Sequence No. 001) is granted in part and denied in part, and the principal's motion (Motion Sequence No. 002) is granted in its entirety.

DISCUSSION

Plaintiff's Capacity to Maintain this Action

As an initial matter, in seeking to dismiss the complaint pursuant to CPLR 3211(a)(3), both defendants contend that the complaint fails allege that plaintiff has the legal capacity to maintain this action because it does not set forth whether and/or how it was authorized to file the complaint in accordance with its governing by-laws. In response, plaintiff contends that on a motion pursuant to CPLR 3211(a)(3), the moving party has the burden of establishing that a plaintiff lacks the capacity to maintain an action.

Plaintiff further asserts that, in any event, it has the capacity to prosecute this action on behalf of the individual condominium unit owners under Real Property Law § 339-dd, pursuant to which the board of managers of a condominium may institute an action on behalf of two or

more condominium unit owners "with respect to any cause of action relating to the common elements or more than one unit." Plaintiff also annexes a copy of a certificate, dated January 3, 2017, adopting a resolution passed by it at a meeting held on November 30, 2016, at which a quorum was present, authorizing the commencement of this action (Exhibit 3 to Affirmation [of Courtney J. Lerias] in Opposition to Motion to Dismiss).

In response to plaintiff's opposition, defendants withdrew this prong of their respective motions, without prejudice to their right "to question" the January 3, 2017 "document and the underlying facts as to the purported authorization process in the course of discovery" (Reply Memorandum for Vitruvius Estates LLC, at 1, n 3; Reply Memorandum for Harry Macklowe, at 3, n3). Therefore, the issue of whether defendants are entitled to dismissal of this action pursuant to CPLR 3211(a)(3) is not before the Court on these motions.

Standard for Motion to Dismiss under CPLR 3211(a)(1) and (a)(7)

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Dismissal is warranted pursuant to CPLR 3211(a)(1) "only where 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]; see *Leon v Martinez*, 84 NY2d at 88). "If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" (*Kolchins v*

Evolution Mkts., Inc., 128 AD3d 47, 58 [1st Dept 2015]).

"In assessing a motion under CPLR 3211 (a) (7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d at 88 [internal quotations marks and citations omitted]). "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it , . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "It is true that in considering a motion to dismiss brought pursuant to CPLR 3211 (a) (7), the court must presume the facts pleaded to be true and must accord them every favorable inference . . . . However, factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016][internal quotations marks and citation omitted]).

First Cause of Action: Failure to Establish a Reserve Fund in the amount required by the Administrative Code

Section 26-703(a) of the Administrative Code states:

> "Within thirty days after the closing of a conversion pursuant to an offering plan the offeror shall establish and transfer to the . . . condominium board of managers, a reserve fund to be used exclusively for making capital repairs, replacements and improvements necessary for the health and safety of the residents of such buildings."

Section 26-703(b) of the Administrative Code sets forth two options for calculating the amount of the reserve fund. One of those options is to establish a fund in an amount equal to "three per cent of *the total price*" (Administrative Code § 26-703[b][i] [emphasis added]). This option, referred to as "the Total Price Method" (*Board of Mgrs. of 184 Thompson St. Condominium v*

184 Thompson St. Owner LLC, 106 AD3d 542, 542 [1st Dept 2013]), was used by the sponsor in the instant case to establish the reserve fund.

Section 26-702 (b)(2) of the Administrative Code defines the term "total price" in the context of a condominium conversion as follows:

> "the sum of the cost of all units in the offering *at the last price which was offered to tenants in occupancy prior to the effective date of the plan* regardless of number of sales made"

(Administrative Code § 26-702[b][2] [emphasis added]). Under section 26-703 (c) of the Administrative Code, the offeror may take a credit against the mandatory initial contribution to the reserve fund for the actual cost of certain capital replacements, up to a cap equal to the lesser of the actual cost of the capital replacement work or 1% of the total price of the units offered for sale (Administrative Code § 26-703[c]).

A condominium association, on behalf of the unit owners, may seek damages against a sponsor for underfunding the condominium's reserve fund (*see* Vincent Di Lorenzo, New York Condominium and Cooperative Law § 4:7 [f] [2d ed]; *Turtle Bay Towers Corp. v Welco Assocs.*, 228 AD2d 189 [1st Dept 1996]). Here, the first cause of action seeks damages for defendants' alleged failure to adequately fund the condominium's reserve in accordance with the requirements of the Administrative Code. Specifically, it alleges that that the sponsor failed to fund the reserve fund in an amount equal to 3% of the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date of the plan. It also alleges that the sponsor underfunded the reserve by taking a credit for alleged capital replacements to which it was not entitled.

The complaint states in this regard that the sponsor funded the reserve fund in the amount

of only $1,566,192.00, whereas section 26-703 of the Administrative Code required it to establish a fund in the amount of $6,700,546.50. As such, the sponsor underfunded the reserve fund by $5,134,354.50. Plaintiff seeks damages in the amount of this shortfall, plus civil penalties in the amount of $1,000 "per day for each day that the Reserve Fund remains underfunded from November 22, 2013 to the date it is fully funded" (Complaint, at 17, ¶ 94).

Defendants assert that this cause of action should be dismissed pursuant to CPLR 3211(a)(1) because the documentary evidence (i.e. the original offering plan and amendments to the original offering plan) refute plaintiff's allegation that the sponsor underfunded the reserve fund. However, contrary to defendants' contention, the documentary evidence does not utterly refute plaintiff's claim that the sponsor failed to fund the reserve fund in the amount required by section 26-703 of the Administrative Code. The relevant chronology and content of the offering plan and amendments are as follows.

The original offering plan was accepted for filing by the New York State Attorney General on August 27, 2012 (*see* Affirmation of Robin Kelly in Support of Defendants' Motions to Dismiss at 3, ¶ [5][a]; Affirmation of Courtney J. Lerias in Opposition at 1, ¶ 4). It recited that 29 residential units[1] and 4 commercial units were being offered for sale for a total offering price of $210,441,550 (Offering Plan, at 1, 21 [Exhibit 2 to Affirmation of Courtney J. Lerias in Opposition]). The prices for each of these units were set forth in Schedule A (*id.* at 21-22), which is not part of the record.

The original offering plan stated that tenant purchasers had the right to purchase their respective units within 90 days from the presentation date of the plan at the purchase price set

[1] The original offering plan noted with respect to the number of residential units being offered for sale, that units would be combined in the future, thereby reducing the total number of residential units.

forth in Schedule A (*id.* at 22). It further provided:

> "If prior to the expiration of any exclusive purchase period, which begins prior to the Closing Date, Sponsor amends the terms and conditions of this offering to be more favorable to Tenant Purchasers, a Tenant Purchaser who executed and submitted a Purchase Agreement . . . before Sponsor amended the terms of this Plan shall benefit from the more favorable terms and conditions"

(Offering Plan, at 82 [Exhibit C to Affirmation of Robin Kelly in Support of Defendants' Motions to Dismiss]).

The first and second amendments to the original offering plan were submitted to and accepted for filing by the Attorney General on November 20, 2012 and January 15, 2013, respectively (*see* Affirmation of Robin Kelly in Support of Defendants' Motions to Dismiss at 3, ¶ [5][b],[c]). The first and second amendments are not part of the record.

The third amendment, accepted for filing by the Attorney General on July 11, 2013, stated:

> "Each tenant in occupancy on the date of this Amendment is accepted for filing (a 'Tenant') shall have the right to purchase the Unit in which they reside . . . by executing a Purchase Agreement . . . within 30 days from the date this Amendment is accepted for filing. The purchase price for the Tenant's Apartment Unit shall be fifty percent (50%) less than the purchase price listed on the "Schedule A," annexed hereto as Exhibit 'B.'
>
> . . . Any Tenant who previously executed and submitted a Purchase Agreement to purchase the Tenant's Apartment Unit . . . prior to the Presentation Date of this Amendment is entitled to the benefits of the more favorable terms and conditions set forth in this Amendment"

(Third Amendment to Offering Plan at 2-3, ¶ 3-4 [Exhibit D to Affirmation of Robin Kelly in Support of Defendants' Motions to Dismiss]). Schedule A listed the purchase prices for 24 residential units and 4 commercial units in the building, for a total price of $221,371,550 (Schedule A, *id.*). According to defendants, with the 50% discount offered to tenants in

occupancy, "this equaled a discount price of (a little less than) $1,235 square foot" (Affirmation of Robin Kelly in Support of Defendants' Motions to Dismiss at 5, ¶ 10[b]).

The fourth amendment to the offering plan, accepted for filing by the Attorney General on July 17, 2013, provided: "Sponsor hereby changes the Purchase Prices for certain Units as set forth on 'Schedule A' annexed hereto as Exhibit 'A'" (Fourth Amendment to Offering Plan at 1, Exhibit E to Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss). Schedule A listed the prices for the same 24 residential and 4 commercial units, for a total price of $223,351,550 (*id.*). The fourth amendment to the offering plan did *not* mention, or include a specific section, offering discounts to tenants in occupancy.

The fifth amendment to the offering plan, accepted for filing by the Attorney General on September 11, 2013, provided: "The Plan is hereby declared effective" (Fifth Amendment to Offering Plan at 1, ¶ 1 [Exhibit F to Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss]). An affidavit annexed to the fifth amendment, stated: "The Plan will be declared effective upon the acceptance of the Fifth Amendment" (Affidavit, Exhibit A to Fifth Amendment to Offering Plan [Exhibit F to Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss]). The fifth amendment further stated:

> "Each tenant in occupancy on the date this Amendment is accepted for filing (a 'Tenant') shall have the right to purchase the Unit in which they reside ('Tenant's Apartment Unit') by executing a Purchase Agreement . . . within 30 days from the date this Amendment is accepted for filing. *The purchase price for the Tenant's Apartment Unit shall be equal to $1200 per square foot* as set forth in the 'Schedule of Purchase Prices for Tenant's Apartment Units,' annexed hereto as Exhibit 'C.'
>
> . . . Sponsor grants to each of the Tenants who are still in occupancy of their Tenant's Apartment Unit a new exclusive period for 30 days from the date of this Amendment . . . to purchase the Tenant's Apartment Unit. Any Tenant who previously executed and submitted a Purchase Agreement to purchase the Tenant's Apartment Unit . . .

> prior to the Presentment Date of this Amendment is entitled to the benefits of the more favorable terms and conditions set forth in this Amendment"

(Fifth Amendment to Offering Plan at 1-2, ¶ 3-4 [Exhibit F to Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss][emphasis added]).

Exhibit B to the fifth amendment of the offering plan listed the prices for the same 24 residential and 4 commercial units, for a total price of $223,351,550 (Exhibit B to Fifth Amendment to Offering Plan [Exhibit F to Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss]). Exhibit C listed discounted prices for the three residential units apparently still occupied by tenant purchasers (Exhibit C to Fifth Amendment to Offering Plan [Exhibit F to Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss]).

The fifth amendment also stated:

> "Sponsor is taking a credit of $783,096.00 (the 'Reserve Fund Credit') for the following work:
>
> a) Plumbing System: Work includes replacement of piping, insulation and of new pumps and new gas services lines in the Building.
>
> b) Windows: Work includes replacement of existing windows and installation of new windows in the Building; and any associated waterproofing work.
>
> c) Boiler Replacement: Work includes replacement of boiler system; and any associated piping replacement.
>
> d) Electrical System: Upgrade work includes new risers, panels and switchgear.
>
> e) Passenger Elevator Upgrade: Modernization of all passenger elevator equipment and controllers.
>
> The aforementioned work will cost approximately $3,322,720.11. . . . After the credit is taken, there will be $1,566,192.00 remaining in the Reserve Fund. The Reserve Fund Amount is based upon the last price offered to tenants, which is calculated by price per square foot offered to tenants across the whole Building"

(Fifth Amendment to Offering Plan at 2, ¶ 5 [Exhibit F to Affidavit of Robin Kelly in Support of

Defendants' Motions to Dismiss]).

Defendants contend that the sponsor properly funded the reserve fund in an amount which was 3% of the sum of the cost of all residential units at the last price offered to tenants "in occupancy prior to the effective date of the plan" (Administrative Code § 26-702 [b][2]), which was $1,200 per square foot price as set forth in the fifth amendment. They contend that the entire square footage of the residential units in the building totals 65,258 and therefore, the "total price" as defined by section 26-702(b)(2) of the Administrative Code was $78,309,600 (i.e., $1,200 x 65,258). Three percent of that amount equals $2,349,288 ($78,309,600 x .03). This, defendants maintain, was the sponsor's required contribution before any reserve fund credits.

Plaintiff asserts that it was improper for the sponsor to use the price offered to tenants in occupancy in the fifth amendment to calculate the "total price" because the fifth amendment stated that the plan "is hereby declared effective." Plaintiff highlights in this regard that section 26-702 (b)(2) of the Administrative Code defines the term "total price" in the context of a condominium conversion as:

> "the sum of the cost of all units in the offering at the *last price which was offered to tenants in occupancy* ***prior to the effective date of the plan*** regardless of number of sales made"

(Administrative Code § 26-702[b][2][emphasis added]). Plaintiff also points out that the First Department has held that the "last price" as set forth in the Administrative Code does not mean "the price in effect during the exclusive purchase period, i.e., the so-called 'insider's price'" (*Turtle Bay Towers Corp. v Welco Assocs.*, 228 AD2d at 189-190). Rather, it means "the price in effect *just prior* to the effective date" (*id.* at 189 [emphasis added]; *see Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d at 542-543).

Therefore, the "total price" cannot be based upon the $1,200 per square foot offered in the fifth amendment inasmuch that offer was made contemporaneously with the plan being declared effective. Plaintiff maintains that accordingly, the price offered to tenants in occupancy in the fourth amendment forms the proper basis for calculating the "total price" under section 26-702(b)(2). In addition, plaintiff contends that defendants improperly excluded the four *commercial* units in the building from the "total price" calculation inasmuch as section 26-702(b)(2) defines the term to include "the sum of the cost of *all* units in the offering" (Administrative Code § 26-702[b][2] [emphasis added]), not just residential units.

The court agrees with plaintiff's contention that the $1,200 per square foot offer made in the fifth amendment cannot form the basis for calculating the "total price" under section 26-702(b)(2) because this was not the price "in effect *just prior* to the effective date" of the plan (*Turtle Bay Towers Corp. v Welco Assocs.*, 228 AD2d at 189 [emphasis added]). However, the court disagrees with plaintiff's position that the prices set forth in Schedule A of the fourth amendment should form the proper basis for the calculation. The fourth amendment did not include a specific section offering discounts to tenants in occupancy and also incorporated by reference the original offering plan and prior amendments to the original offering plan, which did offer a discounted rate to tenants in occupancy (*see also* 13 NYCRR § 23.5 [amendments to offering plan are deemed part of the offering plan]). The "last price which was offered to tenants in occupancy prior to the effective date of the plan" was the price set forth in the third amendment to the offering plan (i.e., 50% less than the purchase price listed on the schedule annexed to the third amendment). Since the defendants concede that this amounts to a higher price per square foot than the $1,200 they used to calculate the total price, their contention that

the documentary evidence refutes plaintiff's claim that the sponsor underfunded the reserve fund is without merit.

That said, plaintiff's contention that it was improper for the sponsor to exclude the four commercial units from the calculation of the "total price" is also without merit. In this regard, defendants draw this court's attention to a May 4, 2015 memorandum prepared by the New York State Department of Law Real Estate Finance Bureau, which stated that "commercial units" are to be excluded when calculating the "total price" under the Administrative Code (New York State Department of Law, Real Estate Finance Bureau, Memorandum re: Guidance on Compliance With the NYC Reserve Fund Law [May 4, 2015], Exhibit K to Reply Affidavit of Robin Kelly). The memorandum was reviewed and approved by the Department of Housing Preservation and Development (DHPD) (*see id.* at 1, n 1). DHPD is the entity charged with enforcing this chapter of the Administrative Code, including section 26-703 (*see* Administrative Code § 26-708[e]).

"Interpretation of a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (*Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 173 [1988]; *see Great Lakes-Dunbar-Rochester v State Tax Commn.*, 65 NY2d 339, 343 [1985]). However, where "the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). "In such circumstances, the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper

interpretation from the statutory language and legislative intent" (*Matter of Belmonte v Snashall*, 2 NY3d 560, 566 [2004] [internal quotation marks and citations omitted]).

In this case, interpreting sections 26-702(b)(2) and 26-703(b) of the Administrative Code in order to determine whether commercial units should be included in calculating the "total price" for the purposes of funding the condominium's reserve seemingly requires no special competence, or understanding of underlying practices on the part of the DHPD. Nevertheless, the DHPD's interpretation is neither irrational nor unreasonable and the text of the Administrative Code itself indicates that it was not intended for commercial units to be included in the calculation. First, section 26-703(a) of the Administrative Code states that the reserve fund mandated by that section is to "be used exclusively for making capital repairs, replacements and improvements necessary for the health and safety of *the residents* of such buildings" (Administrative Code § 26-703[a][emphasis added]), implying that the fund is to be used only for making capital repairs, replacements and improvements to dwelling units. Also, as the memorandum prepared by the New York State Department of Law Real Estate Finance Bureau points out, section 26-702(b)(2) of the Administrative Code makes reference to "bona fide purchasers" which under General Business Law article 23-A (the Martin Act), constitute purchasers of dwelling units (*see* General Business Law § 352-eeee [1][b], [2][c][1]). Therefore, the court concludes that the sponsor properly excluded the commercial units from the calculation of the total price.

Nevertheless, dismissal of the first cause of action insofar as asserted against the sponsor is not warranted because, as discussed above, the sponsor failed to establish that it used the "last price which was offered to tenants in occupancy prior to the effective date of the plan" to calculate the total price. Furthermore, the complaint alleges in connection with the first cause of

action that the sponsor was not entitled to a reserve fund credit and the documentary evidence does *not* establish, as a matter of law, that the sponsor took the appropriate reserve fund credit against the mandatory contribution.

In this regard, section 26-703(c) of the Administrative Code provides that the offeror

> "may claim and receive credit against the mandatory initial contribution to the reserve fund for the actual cost of capital replacements which he or she has begun after the plan is submitted for filing to the state department of law and before the plan is declared effective; provided, however, that any such replacements must be set forth in the plan together with their actual or estimated costs and further provided, that such credit shall not exceed the lesser of the actual cost of the capital replacements or one per cent of the total price."

The Administrative Code defines the term "Capital Replacement" as follows:

> "*a building-wide replacement* of a major component of any of the following systems: (1) elevator; (2) heating, ventilation and air conditioning; (3) plumbing; (4) wiring; (5) window; or, a major structural replacement to the building; provided, *however, that replacements made to cure code violations of record shall not be included*"

(Administrative Code § 26-702 [c][emphasis added]).

Here, defendants submitted no evidence refuting the complaint's allegation that the capital replacements listed in the fifth amendment were not "building-wide" replacements. Nor did they submit evidence refuting the allegation that the work was not commenced during the qualifying period set forth in section 26-703(c) of Code (i.e., after the offering plan was submitted for filing and before it was declared effective). In addition, plaintiffs note that the offering plan indicated that there were a number of elevator code violations. To the extent the capital replacement work listed in the fifth amendment cured such violations, taking a credit for such work would be improper. In light of the foregoing, the complaint states a cause of action against the sponsor for under-funding the condominium's reserve fund.

The Principal's Individual Liability

Turning to the issue of whether the first cause of action should be dismissed insofar as asserted against the principal, the principal asserts that plaintiff failed to adequately allege any basis in law to assert any of the claims raised in the complaint against him in his individual capacity. With respect to the first cause of action, the only basis upon which plaintiff seeks to hold the principal liable is under an alter-ego/veil piercing theory.

The principal correctly asserts that since the sponsor is a Delaware limited liability company (LLC), plaintiff's alter-ego/veil piercing claims are governed by Delaware Law (see *EB Ink Tech., LLC v Lamocu Holdings, LLC*, 2016 NY Slip Op 32339[U], *8 [Sup Ct, NY County 2016]["It is well settled that '[t]he question of whether defendants' corporate veils should be pierced will be determined by the laws of each defendant's state of incorporation'" and courts in New York "therefore, apply Delaware law when the plaintiff seeks to pierce the corporate veil of a Delaware LLC"][citations omitted]; *Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC*, 45 Misc 3d 1204[A], 2014 NY Slip Op 51461[U], * 17 [Sup Ct, New York County 2014]; *Fletcher v Atex, Inc.*, 68 F3d 1451, 1456 [2d Cir 1995][under New York choice of law rules, the state of incorporation's law governs veil piercing]).

"To state a veil-piercing claim under Delaware law a plaintiff must plead facts supporting an inference that a corporation, through its alter ego, has created a sham entity designed to defraud investors and creditors" (*Walnut Hous. Assoc. 2003 L.P. v MCAP Walnut Hous. LLC*, 136 AD3d 403, 404 [1st Dept 2016]). Courts in Delaware "apply the alter ego theory rather strictly and, in determining the sufficiency of the claim, will often consider a combination of factors including whether a company was adequately capitalized or solvent, whether corporate formalities were observed, whether the dominant shareholder siphoned company funds and

whether, in general the company simply functioned as a facade for the dominant shareholder" (*id.*).

Here, the complaint alleges that the principal signed the certification of the offering plan (Complaint at 16, ¶ 82). It further alleges that "the sole purpose of [the] LLC's entity status is to shield [the principal] from liability for actions like those complained of herein," and "is a mere instrumentality and alter ego of [the principal], which is operated and controlled by [the principal] to advance his personal and financial interests" (Complaint at 16, ¶¶ 82-85). These allegations are conclusory and insufficient to support a veil-piercing claim (see *Walnut Hous. Assoc. 2003 L.P. v MCAP Walnut Hous. LLC*, 136 AD3d at 404 [under Delaware law, "[a] claim for veil-piercing will be dismissed at the pleading stage . . . if the allegations are merely conclusory"]). Therefore, the first cause of action is dismissed insofar as asserted against the principal.

Second Cause of Action: Breach of Contract (Reserve Fund)

In the second cause of action, plaintiffs allege that defendants "breached those provisions of the Offering Plan regarding the Reserve Fund, which were incorporated by reference into the Purchase Agreements, by underfunding the Reserve Fund" (Complaint, at 18, ¶ 96). In light of the foregoing discussion regarding the sponsor's underfunding the reserve fund, plaintiff has stated a viable breach of contract claim against the sponsor in this respect. As such, that branch of the sponsor's motion which is to dismiss this cause of action insofar as asserted against it is denied.

The Principal's Individual Liability

The principal seeks to dismiss this cause of action insofar as asserted against him on the ground that he cannot be held individually liable for the alleged breach of offering plan by the

sponsor given the lack of privity. The principal is correct. Plaintiff's reliance on the principal's certification of the offering plan is misplaced. A principal cannot be held individually liable for the breach of contract alleged by plaintiff merely by his certification of the offering plan in his representative capacity on behalf of the sponsor, which he did in accordance with the requirements of the Martin Act and the implementing regulations promulgated thereunder (*see Board of Mgrs. of the 125 N. 10th Condominium v 125North10, LLC*, 150 AD3d 1065, 1066 [2d Dept 2017]; *see Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d at 544; *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284, 1287-1288; *see also Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 245-246 [2009]). Further, as discussed above, the complaint does not plead sufficient facts to hold the principal personally liable under a corporate veil piercing theory. Therefore, the second cause of action is dismissed insofar as asserted against the principal.

Third Cause of Action: Breach of Contract (Construction Defects)

In the third cause of action, plaintiff alleges that the sponsor failed to comply with the terms of the purchase agreements in that the sponsor constructed the condominium and units "in a manner that materially and substantially contradict the terms, conditions and representations set forth in the 'Description of Property' contained in the Offering Plan" (Complaint at 18-19, ¶ 101). Further, the sponsor breached its obligations under the purchase agreements and offering plan to remediate the construction defects detailed in the complaint, which include a poorly designed HVAC tower that is not compliant with Occupational Safety and Health Administration regulations, improper separation/sealing of vertical sections of the building, missing code required firestopping at demising walls, ceilings and floors of the units, lack of insulation,

improper insulation of steam risers, and unsealed penetrations, cracking and spalling in the building facade. In addition, the sponsor failed to comply with the terms of the Sponsor Certification by not setting forth complete, current, and accurate terms in the offering plan. Instead, it omitted material facts and made untrue statements of material fact in the offering plan, causing it "to be fraudulent and deceptive" (Complaint at 19, ¶ 103). In connection with this cause of action, plaintiff seeks "compensatory monetary damages" believed to be "at least $10,000,000.00, for the construction defects caused, by said uncorrected construction defects to the Condominium and the Units contained therein" (Complaint at 19, ¶ 107).

The only basis proffered by the sponsor for dismissing this cause of action insofar as asserted against it is that plaintiff failed to plead that it has the legal capacity to maintain this action. However, as discussed above, defendants have withdrawn this argument.

Defendants also assert that plaintiff conceded in its opposition papers (in the context of arguing that its negligence claim is not duplicative of this breach of contract claim) that the alleged construction defects detailed in the complaint arose mostly from work the sponsor had no obligation to perform under the offering plan. Defendants contend that in light of the position taken by plaintiff in its opposition papers, the third cause of action for breach of contract should be dismissed. Nonetheless, plaintiff still maintains that defendants agreed pursuant to the offering plan to perform at least some of the work that resulted in the construction defects detailed in the complaint. Therefore, that branch of the sponsor's motion which was to dismiss the third cause of action insofar as asserted against it is denied. However, for the reasons discussed above, the third cause of action is dismissed insofar as asserted against the principal.

Fourth Cause of Action: Negligence

In the fourth cause of action, plaintiff seeks to recover damages for negligence, alleging

that "[t]he Sponsor had a duty to exercise reasonable care and skill according to standard practices in its trade in the design and oversight of the repairs and improvements to the Condominium and the Units contained therein for both work set forth in the Offering Plan and work not set forth in the Offering Plan" (Complaint at 20, ¶ 111). The complaint states that "[t]he Sponsor breached said duty in that they designed and/or oversaw the repairs and improvements to the Condominium and the Units contained therein in a manner resulting in [the] numerous construction defects" detailed in the complaint (Complaint at 20, ¶ 112). Further, defendants' negligence in this regard caused non-compliance with "the specific industry standards called for by applicable code and laws" (Complaint at 20, ¶ 113). In connection with this cause of action, plaintiff seeks "compensatory monetary damages, in the amount of at least $10,000,000.00, for the construction damages caused, by said uncorrected defects to the Condominium and the Units contained therein" (Complaint at 21, ¶ 116).

Defendants contend that the above negligence claim must be dismissed as duplicative of the third cause of action alleging a breach of contract. As noted above, plaintiff contends in response that the negligence claim is not duplicative of the breach of contract claim in that it alleges that defendants performed at least some work that was *not* contractually required by the offering plan which resulted in numerous construction defects. In its opposition papers, plaintiff takes the position that, in fact, "substantially all" of the work performed by defendants "appears to be not contractually required by the Offering Plan" (Memorandum of Law in Opposition to Defendant's Motion to Dismiss, at 11). Plaintiff asserts that defendants had a duty to perform the "non-contractual work" in accordance with local industry standards and that a legal duty independent of a contractual obligation can be imposed upon defendants based upon the parties'

relationship and obligations to one another.

In reply, defendants assert that by advancing the foregoing argument, plaintiff concedes that its construction defect claims arise in negligence, not pursuant to a contract. Defendants contend that under a negligence theory, plaintiff is not entitled to recover for economic loss such as the cost of repairs for actual damages. Furthermore, a person performing work that he or she is not contractually obligated to perform is only liable in negligence if his or her efforts made things worse than they otherwise would have been. Since the complaint does not contain any allegations implying the non-contractual work performed by the sponsor somehow exacerbated any existing conditions in the building, the cause of action should be dismissed. For the reasons that follow, the fourth cause of action is dismissed.

"In the absence of a breach of duty, independent of the contract, which results in injury, a tort claim will not lie" (*IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp.*, 152 AD2d 451, 453 [1st Dept 1989]). In other words, "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark- Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 [1987] [internal citations omitted]). "Merely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*id.* at 390).

Here, the fourth cause of action for negligence is based upon the same facts underlying the third cause of action for breach of contract and both causes of action seek identical damages for the construction defects alleged in the complaint. The gravamen of these causes of action is

that defendants promised, by way of the offering plan or otherwise, to perform certain work that they either failed to perform, or failed to perform in a competent manner. These failures caused various conditions, characterized in the complaint as "construction defects," that do not conform to the representations and promises set forth in the offering plan, applicable codes or laws, and/or industry standards. In essence, plaintiff is seeking "enforcement of [its] bargain" and therefore, should "proceed under a contract theory" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). Accordingly, the fourth cause of action is dismissed pursuant to CPLR 3211(a)(7), as duplicative of the third cause of action alleging breach of contract.

Fifth Cause of Action: Violation of 15 USC § 1703(a)(2)

In the fifth cause of action, plaintiff seeks compensatory and punitive damages, as well as costs and attorney's fees, for defendants' alleged violation of the federal Interstate Land Sales Full Disclosure Act (ILSFDA) (15 USC § 1701 *et seq.*). Defendants seek to dismiss this cause of action on the ground that the sales involved in this case are exempt from the disclosure requirements of ILSFDA. Defendants are correct.

ILSFDA "is designed to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers" (*Flint Ridge Dev. Co. v Scenic Rivers Assn. of Okla.*, 426 US 776, 778 [1976]) and "[t]o that end . . . [,] imposes various requirements on parties who sell land via instrumentalities of interstate commerce" (*Tenza v Tag Court Square, LLC*, 803 F Supp 2d 279, 282 [SDNY 2011]). "The Act's disclosure requirements and antifraud prohibitions apply in the event of a sale or lease of, or offer to sell or lease, a 'lot'" (Di Lorenzo, New York Condominium and Cooperative Law § 2:9; *see* 15 USC § 1703[a]). Courts "agree that sales of realty in the condominium form are

embraced by the term 'lot'" (*Beauford v Helmsley*, 740 F Supp 201, 209 [SDNY 1990]; *see Board of Mgrs. of the Crest Condominium v City View Gardens Phase II, LLC*, 35 Misc 3d 1223[A], 2012 NY Slip Op 5026[U][Sup Ct, Kings County 2012]; *Cruz v Leviev Fulton Club, LLC*, 711 F Supp 2d 329, 331 [SDNY 2010]). However, as is relevant here, 15 USC § 1702(a)(2) expressly exempts "the sale or lease of any improved land on which there is a residential . . . building" from the disclosure requirements of the ILSFDA (15 USC § 1702[a][2]). "This clearly exempts conversions of existing structures to condominiums" (Di Lorenzo, New York Condominium and Cooperative Law § 2:9; *see Beauford v Helmsley*, 740 F Supp at 210 ["The HUD and judicial interpretation of the Act to include condominium ownership within the meaning of 'lot' does not serve, however, to extend the coverage of the Act to sales of improved, developed realty, whether or not of condominium form"]).

Here, defendants submit evidence that the sponsor converted a building that already existed to condominium ownership (*see* Moving Affidavit [of Robin Kelly] in Support of Defendants' Motions to Dismiss at 2, ¶ 3 & Exhibit B]). In opposition, plaintiff does not dispute that this was a conversion of an existing structure to condominium ownership (*see* Memorandum of Law in Opposition to Motion to Defendants' Dismiss, at 8). Therefore, the disclosure requirements set forth in the ILSFDA do not apply. As such, pursuant to CPLR 3211(a)(1), the fifth cause of action cause of action is dismissed.

Sixth Cause of Action: Fraud and/or Negligent Misrepresentation

In the sixth cause of action, plaintiff alleges that in connection with the sale of the units, the sponsor falsely represented to each unit owner that (1) it would close off an interior set of stairs located on the ground floor of the residential lobby which enter into one of the commercial

units in the building and (2) the building's facade was "safe" (Complaint at 25, ¶ 136). The complaint alleges that "[p]ursuant to the Certification in the Offering Plan, the sponsor represented that it would be complete, current and accurate in the terms of the Offering Plan, not omit material facts, not make untrue statements of material facts, and not cause the Offering Plan to be fraudulent or deceptive" (Complaint at 25, ¶ 137). The sponsor "knew and/or should have known that each of the above representations were false and misleading when made" (Complaint at 25, ¶ 138). Further, these false and misleading statements were made to induce unit owners to purchase units in the building. The complaint states that the "aforesaid representations were false when made and were, upon information and belief, known by the Sponsor to be untrue when made and were, upon information and belief, made either with intent to deceive or through reckless and/or negligent oversight, for monetary gain and without regard to the harm [it] could or would cause to the Unit Owners" (Complaint at 25-26, at ¶ 140).

According to the complaint, the unit owners represented by plaintiff "justifiably relied upon each of the affirmative false representations in deciding to enter into purchase agreements" (Complaint at 26, ¶ 144). By reason of the "fraud and/or negligent misrepresentation (a) Unit owners have been deprived of the homes they were promised, (b) they have been unable to fully use or enjoy their Units for the purpose for which the Units were purchased, (c) Unit Owner's total individual and collective investment in the Condominium has been vitiated, (d) the Units are unmarketable, and (e) Unit Owners must necessarily incur additional monetary damage to remediate the existing New York City Building Code violations and to repair and remediate the individual Units and the Building" (Complaint at 26-27, ¶ 145). In connection with the foregoing, plaintiff seeks monetary damages in the amount of at least $20,000,000.00, as well as

$10,000,000.00 in punitive damages.

Closing off of Interior Stairs

Defendants contend that plaintiff's fraudulent misrepresentation cause of action, insofar as it relates to the representation that the sponsor would close off the interior stairway, should be dismissed as redundant of the breach of contract claim. Further, defendants point out, the offering plan includes the following disclaimer: "Sponsor shall not be obligated to correct, repair, or replace any and all defects . . . except as expressly provided in this Plan" (Offering Plan, Exhibit C to Affidavit of Robin Kelly).

"A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (*First Bank of Ams. v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]; *see Bencivenga & Co., CPAs, P. C. v Phyfe*, 210 AD2d 22, 22 [1st Dept 1994]["A cause of action based upon breach of contract cannot be converted into one for fraud merely by alleging that defendants did not intend to fulfill the contract"]). However, as plaintiff points out, "a misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]; *see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]). The Court of Appeals has held that a promise made with a present and undisclosed intention of not performing it may constitute a misrepresentation of present fact sounding in fraud (see *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Here, even assuming the complaint sufficiently alleges a present and undisclosed intention not to perform the promise to close off the stairway, the circumstances of the wrong are not stated in sufficient detail. Where a cause of action is based upon "misrepresentation" or "fraud," "the circumstances constituting the wrong" must "be stated in detail" (CPLR 3016 [b]). Here, there are no allegations concerning who made the misrepresentation that the sponsor would close off the interior stair entry or when such misrepresentation was made. Therefore, the allegations of misrepresentation and fraud in this regard are not pleaded with sufficient particularity (*see id.; Daly v Kochanowicz*, 67 AD3d 78, 89-90 [2d Dept 2009]; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1st Dept 1994]). In addition, "a lack of separate relationship distinct from the contract precludes a claim of negligent misrepresentation" (*Fort Ann Cent. Sch. Dist. v Hogan*, 206 AD2d 723, 724 [3d Dept 1994]).

Safety of Building's Facade (Local Law 11)

New York City Local Law 11 requires property owners of buildings greater than six stories in height to conduct periodic inspections and file technical examination reports with the New York City Department of Buildings (DOB) on the condition of the exterior walls (facades) and appurtenances of such buildings (*see* Administrative Code §§ 28-302.1 et seq.; 1 RCNY § 103-4). The periodic examinations are conducted "to determine whether the exterior walls (facades) and appurtenances thereto are either safe, unsafe, or safe with a repair and maintenance program" (1 RCNY § 103-4[a]; *see* 1 RCNY § 103-4[b][3][iii]).

"Safe" is defined as: "A condition . . . not requiring repair or maintenance to sustain the structural integrity of the exterior of the building and that will not become unsafe during the next five years" (1 RCNY § 103-4[a]). "Safe with a repair and maintenance program" (SWARMP) is

defined as: "A condition . . . that is safe at the time of inspection, but requires repairs or maintenance during the next five years in order to prevent its deterioration into an unsafe condition during that five-year period" (1 RCNY § 103-4[a]). The category of "unsafe condition" is defined as: "A condition . . . that is hazardous . . . and requires prompt repair" (1 RCNY § 103-4[a]).

According to the complaint, the sponsor represented in the initial offering plan that the most recent Local Law 11 Inspection Report for the subject building was the Amended Sixth Cycle Report, dated April 21, 2008, which reported that the condition of the building's facade was "safe" (Complaint at 15, ¶ 75). However, the most recent report was the Cycle 7 Report, which was filed with the DOB on June 8, 2012. According to the complaint, that report "sets forth that the building's condition can only be considered safe after repairs and maintenance," which the sponsor never completed (Complaint at 15, ¶¶ 78-79). The complaint alleges that "by representing that the Cycle 6 Report, rather than the Cycle 7 Report, was the latest Local Law 11 Inspection Report for the building, the Sponsor represented to prospective purchasers that the condition of the facade was safe, when, in fact, the Sponsor knew that the condition of the facade would only be considered safe after repairs and maintenance" (Complaint at 16, ¶ 80).

In seeking to dismiss this claim, defendants contend that it is preempted by the Martin Act (General Business Law art 23-A). "'The Martin Act makes it illegal for a person to make or take part in a public offering of securities consisting of participation interests in real estate unless an offering statement is filed with the Attorney General' and numerous disclosures are made pursuant to the statute and its implementing regulations" (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 350 [2011], quoting *Kerusa Co. LLC v W10Z/515 Real Estate Ltd.*

Partnership, 12 NY3d at 243). The implementing regulations adopted by the New York State Attorney General

> "detail the format and content of offering plans and filings, including the word-for-word representation that must be made in the certification to be sworn to by the sponsor and the sponsor's principals in the offering plan (13 NYCRR 20.4 [b]); and the requirements for offering plan amendments, including the direction that "'[a]n amendment must include a representation that all material changes of facts or circumstances affecting the property or the offering are included unless the changes were described in prior amendment(s) submitted to but not yet filed with the Department of Law' (13 NYCRR 20.5 [a] [2])"

(*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d at 244).

"The Attorney General bears sole responsibility for implementing and enforcing the Martin Act [and] there is no private right of action under the statute" (*id.* [internal quotation marks and citations omitted]). The Court of Appeals has held that a "private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability" (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]; see *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d at 239 [holding that "a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act (General Business Law art 23-A) and the Attorney General's implementing regulations (13 NYCRR part 20"]).

Here, the evidence submitted by defendants establishes that on June 24, 2011, they executed a certification of the initial offering plan, that was annexed to the initial offering plan as

Exhibit 11, stating that the plan and any documents amending or supplementing it would not omit any material fact or contain "any representation or statement which is false" (Certification of Offering Plan, Exhibit 11 to Exhibit C of Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss). The initial offering plan states: "Set forth in Part II of the Plan is a copy of the most recent Local Law 11 Inspection Report for the Property" (Offering Plan at 181, § LL entitled "SPONSOR'S STATEMENT OF BUILDING CONDITIONS," Exhibit 2 of Affirmation of Courtney J. Lerias in Opposition to Motion to Dismiss). The Local Law 11 Report annexed to the initial offering plan was the Sixth Cycle Report, dated April 21, 2008 (Table of Contents to Offering Plan, Exhibit C of Affidavit of Robin Kelly in Support of Defendants' Motions to Dismiss; Sixth Cycle Report, Exhibit M to Reply Affidavit of Robin Kelly). That report categorized the building's facade as "safe" (*id.*).

The complaint alleges that this was an affirmative misrepresentation because the most recent Local Law 11 Inspection Report for the building was the Seventh Cycle Inspection report filed with the DOB on June 8, 2012 (Complaint at 15, ¶ 77). Defendants argue that assuming, as the complaint alleges, the inspection cycle seven report was not filed until June 8, 2012, the most recent examination report at the time they certified the offering plan was, in fact, the cycle six report. Defendants maintain that the failure to disclose the existence of a subsequent examination report in the amendments to the offering plan amounts to an omission rather than an affirmative misrepresentation. Therefore, it does not give rise to a private cause of action. Defendants are correct.

Non-disclosure/omission claims are not pre-empted by the Martin Act (*see Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 607 [1st Dept 2011]["Plaintiffs' claims are not

preempted by the Martin Act (General Business Law art 23-A) since, with respect to each cause of action in the complaint, plaintiffs allege not that defendant omitted to disclose information required under the Martin Act but that it affirmatively misrepresented, as part of the offering plan, a material fact about the condominium"]). However, here, even accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference, the cycle six report was the most recent Local Law 11 Inspection Report for the building filed with the DOB at the time of the certification of the initial offering plan. Therefore, the allegations do not set forth an affirmative misrepresentation claim. Rather, they essentially allege that the amendments to the initial offering plan fail to reflect the existence of a subsequently filed Local Law 11 inspection report. This does not give rise to a private cause of action (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d at 239). Therefore, the sixth cause of action is dismissed in its entirety.

Civil Penalties

Lastly, it is noted that defendants contend that the first and second causes of action improperly seeks civil penalties pursuant to section 26-708(b) of the Administrative Code. In this regard, plaintiff seeks "civil penalties in the amount of $1,000 per day for each day that the Reserve Fund remains underfunded from November 22, 2013 to the date it is fully funded" (Complaint at 17-18, ¶¶ 94, 97). Section 26-708(b) of the Administrative Code states:

> "Any person who violates or assists in the violation of section 26-703 of this chapter shall also be subject to a civil penalty of [$1,000] per day for each day that the reserve fund required by section 26-703 of this chapter is not established"

(Administrative Code § 26-708 [b]). Assuming a violation of section 26-703 occurred in this case, the Administrative Code charges the DHPD with enforcing section 26-703 (*see*

Administrative Code § 26-708[e]). Therefore, defendants assert, DHPD is the entity responsible for imposing civil penalties for violations of the chapter and such penalties are not recoverable by a condominium association as damages in a civil action. Plaintiff does not refute defendants' position on this point.

In accordance with the foregoing, it is hereby

ORDERED that those branches of defendant Virtuvius Estate LLC's motion which were to dismiss the fourth, fifth, and sixth causes of action insofar as asserted against it are granted and those causes of action insofar as asserted against Virtuvius Estate LLC are dismissed (Mot. Seq. 001); and it is further

ORDERED that those branches of defendant Virtuvius Estate LLC's motion which were to dismiss the first, second, and third causes of action are denied (Mot. Seq. 001); and it is further

ORDERED that defendant Harry Macklowe's motion to dismiss the complaint insofar as asserted against him is granted, the complaint is dismissed insofar as asserted against him, and the Clerk is directed to enter judgment accordingly (Mot. Seq. 002); and it is further

ORDERED that the action is severed and continued against the remaining defendant Virtuvius Estate LLC; and it is further

ORDERED that defendant Virtuvius Estate LLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: June 15, 2018

ENTER:

O. Peter Sherwood, J.S.C.