

**Board of Mgrs. of Be@William Condominium v 90
William St. Dev. Group LLC**

2019 NY Slip Op 30612(U)

March 12, 2019

Supreme Court, New York County

Docket Number: 105137/2011

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 15

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BOARD OF MANAGERS OF
BE@WILLIAM CONDOMINIUM,

Index No. 105137/2011
Motion Seq. No. 011

Plaintiff,

ORDER AND DECISION

-against-

90 WILLIAM ST. DEVELOPMENT GROUP LLC,
PROCIDA REALTY & CONSTRUCTION CORP. OF NY,
PROCIDA WILLIAM ST. LLC, SDS WILLIAM LLC,
SDS PROCIDA DEVELOPMENT MANAGEMENT
PARTNERS, 90 WILLIAM HOLDING LLC,
SDS PROCIDA DEVELOPMENT GROUP LLC,
SDS PROCIDA EQUITIES LLC, DREAM SDS LLC,
SDS46 LLC, MJP FUND I LLC, MARIO PROCIDA,
LOUIS V. GRECO JR., LINDA GRECO,
JOHN DOE SPONSOR ENTITIES 1-50, and
JOHN DOE PROCIDA ENTITIES 1-50,

Defendants.
-----X

Melissa Crane, J.S.C.,

By this motion, the Board of Managers of Be@William Condominium (Plaintiff) seeks partial summary judgment as to liability, pursuant to CPLR 3212, with respect to its: (1) first cause of action for breach of contract against 90 William St. Development Group LLC (Sponsor) for failing to provide a permanent certificate of occupancy (PCO) for the building located at 90 William Street, New York City (Building), and requesting this court issue an injunction compelling Sponsor to obtain the PCO; (2) cause of action for breach of contract against Sponsor for failing to construct the Building in accordance with the condominium's offering plan; and (3) eighth cause of action for fraudulent conveyance, under New York's Debtor and Creditor Law (DCL), against Sponsor and SDS Procida Equities LLC. (Procida Equities). In response and in

opposition to the motion, Sponsor and Procida Equities (Defendants) cross move for an order (1) vacating, pursuant to CPLR 2221 (a), seven prior CPLR 306-b extension orders the court issued between April 2011 and December 2013; (2) imposing monetary sanctions, pursuant to NYCRR 130-1.1, against Plaintiff and its counsel for abusing the CPLR 306-b extension procedures; and (3) dismissing the complaint.

Based upon the following reasons, the court grants Plaintiff's motion in part and denies defendant's cross motion in its entirety.

BACKGROUND INFORMATION AND ALLEGATIONS

The background information and allegations related to this motion rely primarily upon the affirmation of Jared Paioff, counsel for Plaintiff, dated January 8, 2018 (NYSCEF #226; Paioff Affirmation) and the exhibits annexed to it.

This action arises in connection with Sponsor's defective design and construction of the Building, as well as the fraudulent conveyances Sponsor made to the named defendants and the "substituted parties" whom Plaintiff sought to add to this action via a prior motion.

Plaintiff commenced this action on April 29, 2011 by filing a summons and notice. Pursuant to multiple court orders, the deadline for Plaintiff to serve defendants with the summons and notice was extended seriatim between 2011-2013, pursuant to CPLR 306-b. Eventually, on or about December 5, 2013, Plaintiff filed and served the summons and complaint in this action (Paioff Affirmation, ¶ 4; Complaint, exhibit 1). The Complaint asserts various causes of action against multiple defendants, including Sponsor's breach of the condominium's offering plan (Offering Plan) and purchase agreements with the unit owners, as well as Sponsor's payment or distribution of money to its members and insiders for no consideration (*id.*, ¶ 4;

Complaint, ¶¶ 44-98, 143-155). In February 2014, two groups of defendants filed their respective answers to the Complaint (*id.*, ¶ 5; Answers, exhibits 2 and 3). The breach of contract claim involves certain construction defects in the Building and Sponsor's failure to construct the Building in accordance with the specifications in the Offering Plan, as well as with applicable laws and building codes (*id.*). The breach of contract claim also relies upon Sponsor's failure to obtain a PCO for the Building, as the Offering Plan promised (*id.*; referencing Offering Plan, exhibit 4).

No later than March 31, 2011, Plaintiff apprised various defendants of the construction defects in the Building by sending a letter to Sponsor and its principals (*id.*, ¶ 7; letter, exhibit 5). Plaintiff retained an engineering firm, Rand Engineering & Architecture, P.C. (Rand), to evaluate the Building and estimate the cost of repair. In September 2012, Rand issued a report (*id.*, ¶ 9; Rand Report, exhibit 22). In June 2012, Rand also issued a firestopping and fireproofing report based upon its inspection of fireproofing materials installed in the Building (*id.*, ¶ 10; Firestopping Report, exhibit 24). Plaintiff also hired Robert Hansen Associates, Inc. (Hansen) to evaluate noise transmission and acoustical issues. Hansen issued a report in November 2011, that found the interior walls did not meet the acoustical requirements of the New York City Building Code (*id.*, ¶ 11; Hansen Report, exhibit 25). In addition, plaintiff hired SW Engineering, LLC (SW Engineering) to evaluate the feasibility and cost of improving the Building's lower-zone hot water heating system, that had experienced problems due to the installation of only one hot water heater in each zone, rather than the two the Offering Plan specified. In November 2014, SW Engineering issued its feasibility report concluding that it would cost \$60,000 to \$100,000 to correct the problem. Ultimately it cost the condominium

\$225,000 (*id.*, ¶ 12; SW Report, exhibit 26).

Documentary evidence uncovered in discovery and depositions of Sponsor's principals: Louis Greco, Jr. (Louis), Linda Greco (Linda) and Mario Procida (Procida), revealed the close and overlapping relationships among Sponsor, other named defendants and the substituted parties. Evidence also revealed that Sponsor transferred substantial sums from selling the condominium units to the other defendants and the substituted parties, leaving Sponsor without assets (*id.*, ¶ 13). As of December 29, 2008, Procida Equities and substituted parties, NY William St. LLC (NY William), G46 LLC (G46), Integrated Capital Partners Inc. (Integrated Capital) and Steven Etkind (Etkind)¹, were members of and held economic interests in Sponsor (*id.*, ¶ 14; Fifth Amendment to Operating Agreement, exhibit 6; Louis Greco deposition transcript, exhibit 7). Since 2009, Sponsor has transferred millions of dollars to these entities (*id.*, ¶ 15; referencing exhibits 8-13). By the end of 2010, Sponsor had only about \$64,000 in its bank account and no longer owned any assets (*id.*, ¶ 16; bank statement, exhibit 14). In October 2011, Sponsor closed its bank account, and in December 2012, it filed for dissolution (*id.*, ¶ 17; exhibits 15-16).

The Offering Plan provides that, in the event of Sponsor's dissolution, its principals must appoint financially responsible entities to assume Sponsor's obligations (*id.*, ¶ 18; Offering Plan at 83). However, Sponsor's principals failed to do so, even though they were apprised in March 2010 of the Building's construction defects and received notice in March 2011 of Plaintiff's

¹ These parties, together with other individuals and business entities, were substituted in the place of the "John Doe" defendants listed in the caption of this action, as explained in the Motion to Supplement (Paioff Affirmation, ¶ 14, n 1).

potential legal claims (*id.*; exhibits 5, 17). Moreover, the transferees or distributees have not produced any evidence that the payments or distributions were for fair consideration (*id.*, ¶ 19; exhibits 11-12). Meanwhile, there is ample evidence showing the close relationships between and among Sponsor and the transferees (*id.*, ¶¶ 20-28; referencing exhibits 18-21). Based on the close relationships and common control between Sponsor and the transferees, “it is likely that Sponsor’s principals retained control of the funds [that were] paid out as distributions” (*id.*, ¶ 29).

The Complaint, filed in early December 2013, asserted eight causes of action, including, breach of contract, fraud, negligent misrepresentation, professional malpractice and fraudulent conveyance, among others. Pursuant to an order of the court (Justice Rakower) of February 6, 2015 (NYSCEF # 79), all causes of action were dismissed except for breach of contract (first) and fraudulent conveyance (eighth). Plaintiff filed this motion on January 8, 2018.

In opposition to this motion for partial summary judgment on the surviving causes of action, Defendants (i.e. Sponsor and Procida Entities) seek dismissal pursuant to CPLR 306-b, without prejudice. Defendants also cross move to vacate all of the CPLR 306-b extension orders, and for monetary sanctions against Plaintiff and its counsel pursuant to NYCRR 130-1.1.

APPLICABLE LEGAL STANDARDS

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hosp.*, the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of

the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

68 NY2d 320, 324 (1986) (internal citations omitted); *Gammons v City of New York*, 24 NY3d 562, 569 (2014) (movant must tender sufficient evidence to show the absence of any disputed material issues of fact to warrant the court, as a matter of law, in directing summary judgment).

The courts routinely scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974) (because entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Moreover, the courts have held that bare allegations or conclusory assertions in pleadings are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Rotuba Extruders, Inc., v Ceppos*, 46 NY2d 223, 231 (1978). On the other hand, "[w]here different conclusions can reasonably be drawn from the evidence, the motion should be denied." *Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 (1992); accord *Jaffe v Davis*, 214 AD2d 330, 330 (1st Dept 1995) (conflicting inferences required denial of summary judgment motion). Pursuant to CPLR 3212 (e), a party may move for summary judgment with respect to only a part of a cause of action, including for partial summary judgment as to liability alone. *De Benedictis*

v Rahbar, 269 AD2d 134 (1st Dept 2000).

ANALYSIS

Plaintiff's first cause of action asserts a claim for breach of contract. To prevail, a plaintiff must establish: (1) existence of a contract; (2) plaintiff's performance; (3) defendant's breach; and (4) damages. *See e.g., VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 (1st Dept 2013); *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010).

I. Sponsor's Failure to Obtain a Permanent Certificate of Occupancy for the Building

Plaintiff's breach of contract claim primarily relies on Sponsor's failure to obtain a PCO for the Building. The Offering Plan requires that a PCO be procured within two years of the first closing of a condominium unit. To date, Sponsor has not obtained the PCO, despite the passage of more than seven years since the first closing. Plaintiff's brief (NYSCEF # 257) at 5-6 (citing Offering Plan provisions, supporting affidavit and deposition transcripts). Plaintiff also alleges that Sponsor has intermittently obtained a series of temporary certificates of occupancy (TCO), but the TCOs have often lapsed, requiring Plaintiff to make several motions in this court to compel Sponsor to renew them. *Id.* Plaintiff further alleges that it and the unit owners have complied with their obligations to Sponsor under the Offering Plan and purchase agreements, but Sponsor has failed to take the necessary steps to cure the defects in the Building that affect issuance of the PCO, thus adversely impacting the value of the units. *Id.*

Defendants do not dispute that Plaintiff has established the first two elements of the breach of contract claim. Nor do they refute the factual allegation that Sponsor has failed to obtain the PCO within the time frame specified in the Offering Plan. (*See Defendants' opposition*

(NYSCEF #262) at 19 (“Claim elements [1] and [2] aren’t at issue here”) and 22 (admitting that Sponsor’s inability to procure the PCO “could be characterized as a contractual breach”). Instead, Defendants blame the Buildings Department (DOB) for not issuing the PCO. Defendants also contend that, because the sponsor obtained so many TCOs, Sponsor has satisfied its obligations under the Offering Plan, or at least this constitutes “prima facie proof” that the Building was erected as promised in the Offering Plan. *Id.* at 24-25.

Defendants’ contentions are without merit. Courts have repeatedly upheld breach of contract claims based on a defendant’s failure to obtain a certificate of occupancy. *See e.g., Board of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 882 (1st Dept 2016) (finding that a TCO “merely creates a rebuttable presumption” that a building complies with applicable law, but does not constitute “documentary evidence” that warrants dismissal of the plaintiff’s claim; the defendant’s failure to obtain a PCO pursuant to the offering plan is a breach of the contract); *Hensen v Mitchell*, 288 AD2d 263, 265 (2d Dept 2001) (buyer was entitled to summary judgment on the issue of liability as to the breach of contract claim when seller failed to procure a certificate of occupancy contract required).

The court need not determine the related issue regarding whether the failure to obtain a PCO negatively impacts the value of the apartment units. Notably, Plaintiff’s breach of contract claim primarily seeks damages for Sponsor’s failure to obtain the PCO (and the cost to repair the defective conditions in the Building, as discussed below), not the diminished value of the units. Suffice it to say that, at a minimum, the costs, including legal costs to compel sponsor to renew the TCO’s costs associated with monitoring the status of the TCOs and their multiple lapses constitute damages for Plaintiff’s breach of contract claim. Plaintiff also alleges that Sponsor has

not presented any evidence that it took all necessary steps to obtain a PCO or that it applied for one. (Plaintiff's brief at 4; Paioff reply affirmation (NYSCEF # 266), ¶ 10.) Indeed, during oral argument, Sponsor's counsel failed to rebut this allegation. (Transcript (NYSCEF # 327) at 3-5 (counsel merely stated: "by virtue of the repeated resorts to the TCO[s] that we've done up to this point everything in our power to convince the building[s] department that a permanent certificate [of] occupancy is appropriate"). It is undisputed that obtaining the TCOs does not fulfill Sponsor's obligations under the Offering Plan, which expressly requires the procuring of a PCO.

Accordingly, the court grants partial summary judgment as to liability with respect to the Sponsor's failure to obtain a PCO, a breach of a material term of the Offering Plan. In this regard, Sponsor is also directed to procure a PCO for the Building within ninety (90) days of the notice of entry of this decision and order.

II. Sponsor's Failure to Construct the Building According to the Offering Plan

Plaintiff alleges that Sponsor failed to construct many aspects of the Building in compliance with the Offering Plan and New York City Building Code. Relying on its experts, Plaintiffs point to the lack of railings for the penthouse-level catwalk; insufficient insulation of exterior walls; deficient hot-water heating systems; inadequate soundproofing, fire-proofing and fire-stopping systems; and doorways non-complaint with the Americans with Disabilities Act (ADA). Plaintiff's brief at 2, 10-16 (citing Offering Plan provisions and Building Code violations).

Plaintiff asserts that the Offering Plan and the Building Code require a protective railing along the terrace catwalk area, but Sponsor failed to install any railing. In addition, the Offering Plan requires exterior walls be insulated with R-19 fiberglass thermal insulation, but Sponsor

installed the thinner R-11 insulation instead. Similarly, the Offering Plan required two hot water heating systems for each of the two “zones” in the Building, but Sponsor only installed one per zone. This resulted in the upper zones experiencing frequent malfunctions. This necessitated the installation of additional equipment at a cost of \$225,000. Further, Building Code requires fire-stopping and fire-proofing sealants in specific areas, but those the Sponsor used were either insufficient or damaged by water intrusion from the roof. Extensive remediation became necessary. Finally, soundproofing materials installed between the apartment partitions do not conform to the Building Code; while certain stairs, entrances and corridors do not comply with the ADA and Building Code. *Id.* In constructing the Building with these deficiencies, Plaintiff accuses Sponsor of breaching the specific terms of the Offering Plan. Plaintiff will need to expend substantial sums to bring the Building into compliance. *Id.* at 17.

In opposition, Sponsor avers that these deficiencies are “immaterial deviations in materials and workmanship, which one would find in any complex construction project,” and that the “operative question” is not whether Sponsor constructed the Building as Plaintiff’s hired experts would have done, but whether Sponsor designed the Building “as approved by [DOB].” (Defendants’ opposition at 20). In effect, Sponsor argues that in obtaining the TCOs, the DOB confirmed that Sponsor constructed the Building in compliance with the Building Code. Sponsor argues that the conflicting expert opinions, including that of Mario Procida who is a member of Sponsor and construction manager for the building, the “merely creates factual questions for resolution at trial,” that precludes the entry of summary judgment.

With one exception, Sponsor’s arguments are unavailing. First, just because the building may be in compliance with DOB requirements does not equate to defendant’s meeting their

contractual requirements. Obtaining a TCO merely provides a “rebuttable presumption” that a building complies with the Building Code, and does not constitute “documentary evidence” that this Building complies *both* with the Building Code and the Offering Plan specifications. Moreover, as Plaintiff points out, after DOB issued dozens of TOCs in the past, more recent DOB records reflect the inspection history of the Building, as follows: four failed inspections of the Building in October 2017; eleven unaddressed items for a “final sign off” for the Building; and a 2017 violation required Sponsor to “amend its previously-filed Building plans and specifications to reflect the Building’s true condition.” (Paioff’s reply affirmation, ¶¶ 7-9 (referencing exhibits 27-30); Plaintiff’s reply at 7-8). The foregoing rebuts the presumption that the Building, as constructed, has fully complied with the Building Code or the plans filed with DOB, as Sponsor asserts.

For the purpose of this motion, which does not seek exact monetary damages, it is unnecessary to address all the defective conditions in the Building. It is also unnecessary to determine whether Procida is an “impartial expert” because of his “direct personal interest in the outcome” of this litigation, or whether he is qualified to be an expert witness. (*See* Plaintiff’s reply at 8-9; claiming that Procida never practiced as an architect and does not hold a professional license or certification). This is because Sponsor has admitted that certain aspects of the Building were not constructed pursuant to the specifications of the Offering Plan. This constitutes a breach of the contract.

However, with respect to the insulation specifically, Mr. Procida, who has a B.A. in architecture and civil engineering, and who has experience on more than 500 construction projects, including this one, states “the difference in insulative values would have minimal to no

impact upon the units achieving any required interior heating or cooling temperatures.” This creates an issue of fact as to whether the failure to use the insulation called for in the contract was a material breach.

Accordingly, the court grants partial summary judgment as to liability only with respect to the first cause of action for breach of contract based on Sponsor's failure to construct the Building in accordance with the specifications of the Offering Plan.

III. Fraudulent Conveyance Claim Under the DCL

The eighth cause of action asserts constructive and actual fraudulent conveyance theories of recovery against defendants under the DCL statutes. (Complaint, ¶¶ 143-155; referencing, inter alia, DCL §§ 273-274 (constructive fraud) and DCL § 276 (actual fraud)). Plaintiff seeks summary judgment under both these theories.

A. Constructive Fraudulent Conveyance

Every conveyance made by a person who is or will be “rendered insolvent” is fraudulent to creditors, “without regard to his actual intent,” if the conveyance is made without “fair consideration” or when the property remaining in his hands is of “unreasonably small capital.” (See Debtor & Creditor Law § 270). Plaintiff alleges that since the beginning of 2009, Sponsor conveyed millions of dollars (listing specific amounts) to Procida Equities and those parties who were holders of economic interest in Sponsor, and that these payments deprived Sponsor of assets. This resulted in Sponsor's insolvency and inability to pay Plaintiff. According to the Plaintiff, in October 2011, Sponsor only had \$5 left in its bank account and, in December 2012, it filed for dissolution. *Id.* Additionally, Plaintiff alleges that these payments were not made for “fair consideration or any consideration at all” because there is “no evidence that they were

made in exchange for anything or to satisfy an earlier debt" (Plaintiffs brief at 18-22).

Defendants argue that "to state a cause of action to avoid an alleged constructive fraudulent conveyance, the plaintiff must allege three of the elements of *actual fraud*, misrepresentation of material fact, reliance and damages as well as '*the existence of a fiduciary or confidential relationship*' [between the plaintiff and the defendant]." (Defendants' opposition at 25 (emphasis added), citing *Levin v Kitsis*, 82 AD3d 1051, 1054 (2d Dept 2011) and *Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646 (1st Dept 2013)). Because the Complaint in this action does not allege a fiduciary or confidential relationship, Defendants argue that this motion for partial summary judgment "should not only be denied, but summary judgment dismissing the cause of action should be granted." *Id.* at 25.

Defendants' arguments are unpersuasive. Contrary to their assertion that a constructive fraudulent conveyance claim must allege "actual fraud," the claim may be asserted "without regard" to the defendant's "actual intent." (See e.g., *American Panel Tec. v Hyrise, Inc.*, 31 AD3d 586, 587 (2d Dept 2006) (constructive fraud under DCL §273 may be established upon proof of insolvency and lack of fair consideration, without a showing of actual intent to defraud). Notably, *Levin* did not involve a fraudulent conveyance claim under the DCL. Instead it dealt with common law constructive fraud. The Second Department in *Levin* dismissed the cause of action to recover damages for "constructive fraud" because "plaintiff failed to allege facts demonstrating that a fiduciary or confidential relationship existed between themselves and the appellants." (*Levin*, 82 AD3d at 1054, citing, inter alia, *Sentlowitz v Cardinal Dev. LLC*, 63 AD3d 1137, 1138 (2d Dept 2009); *Sokol v Addison*, 293 AD2d 600, 601 (2d Dept 2002)).

Here, the constructive fraudulent conveyance claim relies upon the DCL, not common

law constructive fraud . Therefore, it is unnecessary for Plaintiff to allege a fiduciary or confidential relationship. Indeed, the DCL does not require this allegation in order to plead the claim. Further, even though the First Department in *Sutton* stated (based on *Levin*) that a fiduciary relationship should be pleaded in connection with a DCL claim, subsequent decisions do not mention this requirement. See e.g., *Van Duzer Realty Corp., v 878 Educ., LLC*, 142 AD3d 814 (1st Dept 2016); *Eastern Concrete Materials, Inc./NYC Concrete Materials v DeRosa Tennis Contracs., Inc.*, 139 AD3d 510 (1st Dept 2016). Indeed, to require a fiduciary relationship would not make sense. Most debtor-creditor relationships are arms-length. Defendant's analysis would preclude the assertion of a constructive fraudulent conveyance claim in all these cases. (See e.g., *Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 594 (2012) (stating that "[a] debtor and creditor have no special relationship of confidence and trust . . . and the relationship is generally controlled by contract"))).

B. Actual Fraudulent Conveyance

Under DCL § 276, every conveyance made with the actual intent to hinder, delay or defraud present or future creditors is deemed to be fraudulent. Because actual intent is rarely susceptible to direct proof, the element of intent may be established from the circumstances surrounding the allegedly fraudulent act. *Marine Midland Bank v Murkoff*, 120 AD2d 122, 128 (2d Dept 1986). Courts generally look at "badges of fraud" to determine whether fraudulent intent exists: a close relationship between the parties; secrecy and haste in making the transfers; transfers not made in the ordinary course of business; inadequate consideration; transferor's knowledge of the creditor's claim and his inability to repay creditor; and transferor's retention of control over the transferred property after the conveyance. See e.g., *Dempster v Overview*

Equities, Inc., 4 AD3d 495, 498 (2d Dept 2004) (internal citations omitted).

To support its DCL 276 claim, Plaintiff first points to the close relationship between Sponsor and the transferees, including Procida Equities, who were corporate insiders or holders of economic interests in Sponsor. (Plaintiff's brief at 23 (citing affirmation and deposition transcripts)). Plaintiff then avers that these transfers were without consideration. Nor were they made in the usual course of business (*Id.* at 23-24 (citing affirmation and transcripts)). Plaintiff next avers that even though money transfers were made, "Sponsor's principals retained control over most of the funds conveyed" because the individual transferees, through their roles as managers or members in the business entities, continued to retain control over these funds. *Id.* at 24. Finally, Plaintiff argues that Sponsor's failure to appoint anyone to assume Sponsor's responsibilities following its dissolution, evinces its intent to defraud creditors, including Plaintiff and the apartment unit holders. Sponsor failed in this regard, even though the Offering Plan requires that "in the event of a dissolution or liquidation of the Sponsor . . . the principals of the Sponsor will provide financially responsible entities or individuals who will assume . . . all of the obligations of the Sponsor for those units under the Offering Plan . . ." *Id.* (quoting Offering Plan at 83, and referencing deposition transcripts).

In opposition, Defendants urge the court to deny the motion because Plaintiff has allegedly failed to prove one of the "badges of fraud." Namely, Plaintiff failed to prove that Sponsor knew of Plaintiff's claims at the time of the 2009 transfers. (Defendants' opposition at 28-2) Specifically, Defendants argue that Plaintiff failed to prove that defendants had actual knowledge in 2009 of the allegedly defective conditions in the Building.

Defendants' argument is without merit. The statute specifically states that it applies to

transfers made with the intent to defraud “present or future creditors,” and that such transfers are deemed fraudulent as to “both present or future creditors.” (DCL § 276). Clearly then, the statute does not require the debtor to know of the creditor’s claim at the time of the transfer. (*Nonas v Romantini*, 271 AD2d 292, 292 [1st Dept 2000]).

Defendants argue that Sponsor’s responsibility to appoint a responsible entity in the event the Sponsor dissolves only applies “when there are unsold units in the condominium.” (Defendants’ opposition at 30). Because Sponsor was dissolved in December 2012, “more than 3 years after the last unit was sold,” there was no requirement to appoint anyone. *Id.* Plaintiff does not rebut Defendants’ argument.

However, even if the Sponsor’s “failure to appoint” was not an indication of fraudulent intent, a plaintiff need not show all “badges of fraud” to support an actual fraud claim. (*See e.g., MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 (SD NY 1995) (applying New York law and stating that “badges of fraud will vary in significance, though the presence of multiple indicia will increase the inference” of actual fraud)). It is important that Defendants neither dispute that the majority of the “badges of fraud” Plaintiff asserts, nor do they refute that the Sponsor made the conveyances Plaintiff identified during the relevant time frame. Instead, they merely contend that Plaintiff does not adequately identify which of the conveyances were fraudulent. (Defendants’ opposition at 28). As a result, Plaintiff has sufficiently established, *prima facie*, that, while it was a creditor of Sponsor, Sponsor made many conveyances to insiders and related entities that bore “badges of fraud,” Defendants have not offered any explanation for these conveyances. Thus, there is no issue of fact to resolve. Accordingly, Plaintiff is entitled to summary judgment as to liability on its eighth cause of

action, sounding in constructive and actual fraudulent conveyance under the DCL statutes.

IV. Defendants' Cross Motion for Sanctions

In their cross motion, Defendants seek to vacate seven CPLR 306-b extension orders issued by the court (various judges) between April 2011 and December 2013, and request an imposition of sanctions against Plaintiff and its counsel for allegedly abusing the CPLR 306-b procedures. Defendants allege, among other things, that Plaintiff, through counsel, presented *ex parte* applications to the court, while engaging Sponsor in "so-called 'good faith negotiations' without alerting any defendant that it had commenced an action against them," which "indisputably prejudiced defendants," and that this conduct "entailed an audacious and protracted scheme to defraud" this court and defendants (Defendants' opposition at 5).

In response, Plaintiff avers that Defendants, through counsel, made the same motion on October 6, 2014, requesting the exact same relief sought herein (Prior Vacate Motion, NYSCEF #43), and that the Prior Vacate Motion relied on Plaintiff's alleged misrepresentations to the court for failure to attempt service of the summons with notice on defendants. (Plaintiff's reply at 18). Plaintiff also notes that this court "denied the Prior Vacate Motion" by order and decision dated February 5, 2015 (NYSCEF #79; a copy is annexed as exhibit 49 to the Paioff reply affirmation). Thus, Plaintiff argues that law of the case bars this cross-motion (*Id.* at 18). Plaintiff also argues that, pursuant to CPLR 3211 (e), an objection that the summons or complaint or summons with notice was not properly served is waived if the objecting party does not move for judgment on that ground within 60 days after service. Here, the Prior Vacate Motion was filed almost eight months after defendants filed and served their answer. This was untimely. *Id.* at 19.

It is undisputed that the court (Judge Rakower), in the February 5, 2015 decision, did not grant the relief Defendants requested in the Prior Vacate Motion. Yet, during oral argument held on June 6, 2018 with respect to this motion and the cross motion, Defendants' counsel contended that the prior court decision "doesn't constitute law in the case because it is not a merit based determination," and that it would be "entirely appropriate" for this court to "re-examine the issue." NYSCEF #327 (transcript at 19). Defendants' argument is unavailing. Because Judge Rakower did not grant Defendants an extension of time to move based upon an CPLR 3211 (e) objection, they have waived any argument that underlies this cross motion. *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269, 1271 (3d Dept 2017).

Moreover, even assuming that Judge Rakower's February 5, 2015 decision and order was not a "merit based determination" with respect to the Prior Vacate Motion, as Defendants argue, all of Plaintiff's prior requests for extension of time to serve pleadings were made prior to the expiration of the then-effective service deadlines, as Plaintiff points out in its papers, as part of its diligent effort to preserve its claims while pursuing good faith settlement negotiations with Sponsor, and that the parties in fact engaged in such negotiations, which constituted a valid basis for extending time to serve process under the "interest of justice" standard of CPLR 306-b. Plaintiff's reply at 20-24 (citing applicable case law and referencing deposition transcripts). Plaintiff's arguments are convincing. Significantly, Defendants fail to demonstrate, despite their exhortation to the contrary, that they have been "indisputably prejudiced" by the prior extension orders of this court. Indeed, Defendants have not pointed to any actual harm that they have suffered, or that Plaintiff has obtained any advantages therefrom. Therefore, the reliefs requested in their cross motion are denied, with prejudice.

Finally, Plaintiff claims that the cross motion is duplicative, untimely, frivolous and “riddled with deliberately and knowingly false statements.” Accordingly, Plaintiff asks for sanctions against the cross movants and their counsel. (Plaintiff’s reply at 27-29 (citing applicable case law and statutes)). While this position is persuasive, in the exercise of discretion, this court refrains from granting sanctions against Defendants. Instead, this court admonishes Defendants and their counsel that any further transgression in wasting the judicial resources of the court and those of their adversaries will result in the imposition of sanctions.

CONCLUSION

Based upon all of the foregoing, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment, as to the issue of liability only, is granted with respect to the complaint’s first cause of action (breach of contract) as set forth in this decision and eighth cause of action (fraudulent conveyance under Debtor and Creditor Law) against defendants 90 William St. Development Group LLC (Sponsor) and SDS Procida Equities LLC (Procida Equities and Sponsor, collectively, Defendants), and a trial with respect to the issue regarding damages shall be had before the court; and it is further

ORDERED that Sponsor is directed to obtain a permanent certificate of occupancy for the subject building located at 90 William Street, New York, New York, within ninety (90) days of the notice of entry of this decision and order; and it is further

ORDERED that within twenty (20) days from entry of this decision and order, plaintiff shall serve a copy of this decision and order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk’s Office and shall serve and file with the Clerk a note of issue and statement of readiness and shall pay the fee therefor, and the Clerk shall cause

the matter to be placed upon the calendar for the trial on the issue of damages; and it is further

ORDERED that all of the reliefs requested in Defendants' cross motion are denied with prejudice.

DATED: March 12, 2019



J.S.C.

HON. MELISSA A. CRANE
J.S.C.