

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

2019 NY Slip Op 30613(U)

March 12, 2019

Supreme Court, New York County

Docket Number: 105137/2011

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

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 Sequence No. 012

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,
G46, LLC, THE G HOLDINGS TRUST,
GAMCREFK TRUST, NY WILLIAM ST., LLC,
INTEGRATED CAPITAL PARTNERS, INC.,
STEVEN M. ETKIND, RACHEL FOSTER, and
ALAIN KODSI,

Defendants.

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Melissa Crane, J.S.C.,

By this motion, defendants Steven M. Etkind (Etkind), Rachel Foster (Foster), Alain Kodsi (Kodsi) and Gamcrefk Trust (Gamcrefk, together with Etkind, Foster and Kodis, collectively, Moving Defendants) seek an order of this court (1) pursuant to CPLR 3211 (a), dismissing the amended complaint, dated May 1, 2018 (Amended Complaint) as to Moving Defendants; and (2) pursuant to CPLR 2221, granting leave to renew and reargue the motion of Board of Managers of Be@WilliamCondomium (Plaintiff) for leave to supplement the summons and initial complaint to substitute Moving Defendants in the place of the "John Doe" defendants named in the caption of the initial complaint and for an extension of Plaintiff's time to effect

service of process upon Moving Defendants of the supplemental pleadings (Motion to Supplement; motion sequence number 009). Plaintiff opposes Moving Defendants' motion to dismiss, renew and reargue. For the following reasons, the motion is denied.

BACKGROUND

The facts relevant to this action and this motion, unless otherwise indicated, are from the Amended Complaint (NYSCEF #308) and documents Plaintiff submitted in connection with the Motion to Supplement (NYSCEF #161-194).

This action arises in connection with the construction of the condominium building located at 90 William Street, New York, New York by defendant 90 William St. Development Group LLP (Sponsor) and its affiliates. The Amended Complaint alleges that, besides designing and constructing the Building with many defects, Sponsor and its affiliates also made a series of fraudulent conveyances to the named defendants in the initial complaint, as well as the "substituted parties" (including Moving Defendants) whom Plaintiff sought to add to this action via the Motion to Supplement. The Amended Complaint also alleges that, as a result of the fraudulent conveyances made to the various defendants -- corporate affiliates of Sponsor and insiders holding economic interests in Sponsor -- Sponsor was rendered insolvent and unable to pay its debt to Plaintiff and the condominium's apartment unit owners.

This action was commenced on April 29, 2011 by the filing a summons and notice. Pursuant to multiple court orders issued between 2011 and 2013, the deadline for Plaintiff to serve defendants with the summons and notice was extended several times. On December 5, 2013, Plaintiff filed and served the summons and first complaint upon the initially named defendants. Thereafter, through extensive and protracted discovery, that Sponsor and other

named defendants allegedly obstructed, Plaintiff eventually identified a number of business entities and individuals, including Moving Defendants, who allegedly received fraudulently conveyed funds. On September 13, 2017, Plaintiff filed the Motion to Supplement, seeking to add certain "substituted parties" (including Moving Defendants) in place of the "John Doe" defendants in the initial complaint, and for an extension of time to serve the additional defendants. By order of the court (Judge Rakower) dated April 30, 2018, the Motion to Supplement was granted without opposition (NYSCEF #293; Granting Order).

On June 20, 2018, Moving Defendants filed this motion to dismiss, renew and reargue (NYSCEF #305) and the memorandum of law in support of the motion (NYSCEF #306; Moving Brief) with related exhibits (NYSCEF #307-312). Plaintiff filed its memorandum of law in opposition (NYSCEF #323; Opposition Brief) and related exhibits (NYSCEF #314-322). Moving Defendants then filed their reply memorandum of law in further support of the motion (NYSCEF #324; Reply Brief).

ANALYSIS

I. Motion to Renew

Moving Defendants argue that Plaintiff failed to exercise due diligence in identifying them before the expiration of the statute of limitations, as well as in seeking to substitute and serve them after identifying them. Moving Brief at 6. Specifically, they argue that Plaintiff did not avail itself of discovery to identify the John Doe defendants until two and one-half years after they commenced this action. Moreover, even after identifying Moving Defendants in April 2015 -- when Plaintiff took the deposition of Louis V. Greco, Jr. (Greco), a principal of Sponsor, who, along with Mario Procida, are the ultimate decision makers with respect to the development and

business affairs of Sponsor and its affiliates -- Plaintiff did not file the Motion to Supplement until September 2017, almost one and one-half years later. *Id.* at 7. Because of the alleged lack of due diligence, Moving Defendants argue that Plaintiff should not have been granted leave to substitute Moving Defendants in place of the John Doe defendants, and the Granting Order should not have been issued. *Id.* Thus, Moving Defendants request leave of court, pursuant to CPLR 2221(e), to renew the Motion to Supplement. *Id.*

To prevail on a motion for leave to renew, CPLR 2221 (e) requires: (1) the motion must be specifically identified as such; (2) the motion must be based on new facts not offered on the prior motion that would change the prior court determination, or the motion must show there has been a change in the law that would change the prior determination; and (3) the motion must contain a reasonable justification for the failure to present such facts on the prior motion.

Plaintiff counters that the motion to renew must be denied because Moving Defendants do not present any "new facts" that were not already disclosed in the papers filed in connection with the Motion to Supplement, including the memorandum of law and affirmation of counsel in support of the motion, as well as the exhibits annexed thereto. Opposition Brief at 4-6 (citing affirmation statements that described due diligence efforts expended by Plaintiff in identifying the John Doe defendants, and that Sponsor and other defendants failed to comply with discovery obligations and failed to appear for depositions). Plaintiff also counters that, even though Greco in his deposition referenced some of the then unknown defendants, "he did not know or was unable to remember" pertinent facts, such as their relationships with Sponsor and other defendants, and the nature of the payments made to them by Sponsor. *Id.* at 6 (citing Greco deposition transcript).

In reply, Moving Defendants argue that Plaintiff failed to disclose in the Motion to Supplement that "Plaintiff ignores the two-and-a-half year delay between the commencement of this action and the filing of the [initial] complaint," which is a "new fact." Reply Brief at 3. In effect, they argue that had Plaintiff filed the initial complaint in April 2011 when it commenced this action, the discovery demands could have been served two-and-a-half years prior to 2014. Thus, according to the Moving Defendants, the lengthy delay does not demonstrate due diligence by Plaintiff in identifying unknown defendants. *Id.* at 5.

This argument is unpersuasive. Sponsor and certain defendants (i.e. the Procida Entities, as the Amended Complaint defines) made a substantially similar argument when they opposed Plaintiff's motion for partial summary judgment (NYSCEF # 225; motion sequence #011) (Related Motion). This court denied the cross motion in a decision dated March 12, 2019 (Related Decision). For the same reasons, the court denies this motion. Suffice it to say, Moving Defendants' assertion that an alleged lack of due diligence was a "new fact" that Plaintiff needed to disclose in the Motion to Supplement is unconvincing. Calling an allegation a "new fact" does not make it so, and Plaintiff had adequately disclosed their efforts in identifying the unknown parties prior to the running of the statute of limitations in the Motion to Supplement. (*See e.g.*, NYSCEF #315 (brief in support of motion at 8-10 under the heading: "Plaintiff Exercised Due Diligence to Timely Identify the Substituted Parties Prior to the Running of the Statute of Limitations"). In the same brief, Plaintiff set forth in detail the reasons why it was entitled to a nunc pro tunc extension of time to serve the supplemental pleadings upon the substituted parties, as well as the merits of the fraudulent conveyance claim against such parties, including Moving Defendants. *Id.* at 11-21.

The argument that Greco had identified Moving Defendants in his April 2015 deposition and "Plaintiff could have substituted Movants a year-and-a-half earlier" (Reply Brief at 5-6), is unavailing. Again, a bare allegation of the lack of due diligence does not constitute a "new fact" within the meaning of CPLR 2221 (e). Even assuming the allegation might somehow be a "new fact," the court records showed that Plaintiff made the required disclosures in connection with the Motion to Supplement, as the extensive relevant history evidences, including Plaintiff's efforts to identify previously unknown defendants, and the explanations of the relationships among the various defendants in the context of the fraudulent conveyance claim.

Pursuant to CPLR 2221 (e), a motion to renew must show, among other things, that the motion is based on new facts not offered on the prior motion that would have changed the prior court determination. Because this motion to renew does not credibly present any new facts, it must be denied.

2. Motion to Reargue

CPLR 2221 (f) sets forth the guidelines for determining a combined motion for leave to reargue and leave to renew. The statute provides, in relevant part, that the motion must "identify separately and support separately each item of relief sought," and the court, when determining the combined motion, must "decide each part of the motion as if it were separately made." *Id.*

Realizing that their allegations of Plaintiff's failure of due diligence "might not be considered new facts" to support their motion to renew, Moving Defendants assert that "leave to reargue, rather than to renew, should be granted for the same substantive reasons set forth in the motion to renew." Reply Brief at 8.

Based on Moving Defendants' own admission, it is evident that the motion to reargue is

not separately supported by new or additional facts or laws, as CPLR 2221 (f) requires. Because the motion to renew is denied, as explained above, the motion to reargue must also be denied based upon the "same substantive reasons." Further, because Moving Defendants have not alleged or shown that the court had overlooked or misapprehended any issue of law or fact in determining the Motion to Supplement, this motion to reargue must be denied. *Jones v City of New York*, 146 AD3d 690, 690 (1st Dept 2017).

3. Motion to Dismiss Fraudulent Conveyance Claim

Besides challenging the Motion to Supplement and the related Granting Order pursuant to CPLR 2221, Moving Defendants seek to dismiss the fraudulent conveyance claim (eighth cause of action) asserted against them in the Amended Complaint pursuant to CPLR 3211 (a) (7).

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is to determine whether plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002) (internal quotation marks omitted). The pleadings are afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). On the other hand, while factual allegations in a complaint should be accorded "all reasonable inferences that may be gleaned from those facts," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration, particularly if the allegations are contradicted by documentary evidence. *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (allegations consisting of bare legal conclusions or incredible facts that are

contradicted by documentary evidence are not entitled to favorable treatment). "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2d Dept 2005) (internal quotation marks and citation omitted). Dismissal of the complaint is warranted when the allegations of the complaint. *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590 (2005).

The sole cause of action asserted against Moving Defendants in the Amended Complaint is the fraudulent conveyance claim arising under New York's Debtor and Creditor Law (DCL). Plaintiff asserts this claim also against Sponsor and the Procida Entities and the court addressed this issue in the Related Decision. As to Moving Defendants and related defendant entities, the Amended Complaint alleges, Gramcrefk, a member of Sponsor until December 2008, is a trust where Kodsi and Foster are its grantors and Foster is one of its beneficiaries, and defendant Greco is its trustee. Amended Complaint, ¶ 26. Etkind, a member of Sponsor and a member and manager of defendant Integrated Capital received payments from Sponsor on behalf of Integral Capital. *Id.*, ¶ 29. Foster, who is married to Kodsi and is a business partner of Greco, is the sole member of defendant Dream SDS, which, in turn, is a member of defendant William Holding. *Id.*, ¶ 30. Kodsi, the husband of Foster, is a grantor of Gamcrefk and a business partner with Greco. *Id.*, ¶ 31.

Specifically, with respect to the fraudulent conveyances, the Amended Complaint asserts that some of the Sponsor Defendants (such as Sponsor, William Holding and SDS William, among others) are special purpose entities formed solely to serve as the sponsor or developer of

the condominium and have no other business. *Id.*, ¶ 145. Sponsor Defendants and Sponsor Investors do not have material assets other than the condominium units they were selling pursuant to the Offering Plan and the proceeds of those sales. *Id.*, ¶ 146. Sponsor Defendants were indebted to an institutional lender and, had to pay over substantially all the sales proceeds to that lender. Nevertheless, they retained a substantial portion of the proceeds and distributed them to certain defendants, including, Procida Controlled Defendants and Sponsor Investors, among others (Equity Distributions). *Id.*, ¶¶ 147, 148. Allegedly, the Equity Distributions were within the exclusive knowledge of Sponsor Defendants, were transfers of property of Sponsor Defendants, and made without fair consideration. *Id.*, ¶¶ 149-151. Certain Sponsor Defendants were either insolvent prior to the Equity Distributions or were rendered insolvent thereby. Alternatively, Sponsor Defendants made the Equity Distributions with the intent or belief that insolvency would result. *Id.*, ¶ 152. Some or all of the Equity Distributions were made while Sponsor Defendants was engaged in, or was about to be engaged in, a business for which the property remaining after the Equity Distributions was of unreasonably small capital. *Id.*, ¶ 153. Besides constructive fraudulent conveyances, Sponsor Defendants made the Equity Distributions with the intent to hinder or defraud present and future creditors, including Plaintiff, and these conveyances were not made in the usual course of business, but were made without adequacy of consideration, or made to ensure that Sponsor Defendants' retain control of the property after conveyance. *Id.*, ¶ 154. The Amended Complaint seeks to recover the Equity Distributions under the DCL.

As an initial matter, Moving Defendants argue that the Amended Complaint does not show how they could have received funds in the fraudulent conveyance, and even if it does,

“Plaintiff never specifically alleges that [defendants] Williams Holding, Dreams SDS and Gamcrefk were insolvent, were rendered insolvent, or retained insufficiently small capital at the time of Equity Distributions,” as required for a fraudulent conveyance claim under DCL. Moving Brief at 8-9.

The argument is unpersuasive. Pursuant to the DCL, to state a cause of action for constructive fraudulent conveyance, plaintiff only needs to allege: plaintiff was a creditor of the transferor; a transfer was made by the transferor without adequate consideration, thus rendering the transferor insolvent or leaving the transferor with unreasonably small capital. DCL, §§ 273-274; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 (2011). Here, even though the Amended Complaint does not specifically state that Moving Defendants were recipients of the Equity Distributions, it alleges that Sponsor Defendants made the Equity Distributions to “certain defendants, *including but not limited to*, SDSP, the Procida Control Defendants or Sponsor Investors.” Amended Complaint, ¶ 148 (emphasis added). Further, the Amended Complaint alleges, among other things, that Gamcrefk – the family trust Foster and Kodsi established – was a member of Sponsor. Foster was the sole member of SDS, which in turn was a member of William Holding that received the transfers from Sponsor. *Id.*, ¶ 16, 26, 30-31, 146-148. In light of such allegations, it may be inferred that Kodsi and Foster received indirect transfers from Sponsor through these defendant entities. Therefore, the Amended Complaint satisfies the pleading requirements.

Moving Defendants also argue that the constructive fraudulent conveyance claim fails because Plaintiff does not allege a “fiduciary or confidential relationship” between it and the debtor. Moving Brief at 9-10; Reply Brief at 10-11, citing *Sutton Apts. Corp. v Bradhurst 100*

Dev. LLC, 107 AD3d 646 (1st Dept 2013). For the reasons stated in great detail in the Related Decision, this argument is unpersuasive.

Next, Moving Defendants argue Plaintiff does not state the intentional fraudulent conveyance claim against them with specificity, as CPLR 3016 (b) requires. Moving Brief at 10-11; Reply Brief at 11-13, citing, *Menaker v Alstaedter*, 134 AD2d 412, 413 (2d Dept 1987); *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 (2d Dept 2010). They further argue that Plaintiff's allegation, that the Equity Distributions were not in the usual course of business because they were made without consideration to "entities that functioned as investment vehicles for the condominium project" is too tenuous. Reply Brief at 13. In effect, they argue that the Equity Distributions were "normal distributions" that are "typically made to entities that serve as investment vehicles," even though these investor entities and vehicles are personal and business acquaintances of the Sponsor. *Id.* (without citing any supporting caselaw).

These arguments are equally unpersuasive. Courts have generally looked at the following elements to determine whether "badges of fraud" or 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).

Plaintiff has adequately alleged facts to show "badges of fraud" or intent to defraud in connection with the Equity Distributions. As discussed above, the Amended Complaint alleges, among other things: Gamcrefk was a member of Sponsor and is a family trust established by

Kodsi and Foster, and Greco is the trustee for Gramcrefk; Etkind is also a member of Sponsor, and a current or former manager of Integrated Capital, another member of Sponsor; and these allegations are “bolstered by discovery [taken] in this action.” Opposition Brief at 16 (citing deposition transcripts). Therefore, the fraudulent conveyance claim under DCL § 276 is pleaded “in sufficient detail to satisfy the heightened requirement of CPLR 3016 (b)” *Matter of Uni-Rty Corp. v New York Guangdong Finance, Inc.*, 117 AD3d 427, 488-489 (1st Dept 2014) (internal quotation marks and citations omitted). *See also ABN AMRO Bank*, 17 NY3d at 228 (stating that “these allegations, taken together and drawing all reasonable inferences of favor of plaintiffs . . . sufficiently allege an intent on the part of defendants to defraud plaintiffs under section 276”) (internal citation omitted). Moreover, courts have held that a plaintiff does not have to 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 strength of the inference” of actual fraud).

Accordingly, the motion to dismiss the eighth cause of action sounding in constructive and actual fraudulent conveyance under the DCL is denied.

CONCLUSION

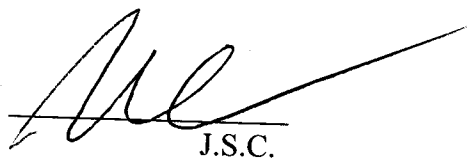
Based upon the foregoing, it is hereby

ORDERED that the motion of defendants Steven M. Etkind, Rachel Foster, Alain Kodsi and Gamcrefk Trust (Moving Defendants) seeking leave of court to dismiss, renew and reargue (motion sequence number 012) is denied in all respects; and it is further

ORDERED that Moving Defendants are directed to serve an answer to the Amended

Complaint within 20 days after service of a copy of this order with notice of entry.

DATED: March 12, 2019



J.S.C.

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