

**New York City Energy Efficiency Corp. v Suria**

2019 NY Slip Op 30724(U)

March 15, 2019

Supreme Court, New York County

Docket Number: 655339/2017

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 655339/2017

NEW YORK CITY ENERGY EFFICIENCY CORPORATION,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001; 002

- v -

RAVINDRANATH SURIA, BFC002 11 WEST 126TH STREET
LLC, BUILDFORWARD CAPITAL LLC, 11 WEST 126TH
HOLDINGS LLC, VAMANA REAL ESTATE EQUITIES I, LP, DAVID
FINEHIRSH, URBAN ARTISAN DM1 LLC, 11 WEST 126TH
STREET LENDER 1 LLC, 11 WEST 126TH STREET LENDER 2
LLC, AND JOHN AND JANE DOES 1-100,
Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 36, 37, 38, 39, 41, 43, 44

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 40, 42

were read on this motion to/for DISMISS

In this action regarding an alleged fraudulent conveyance of a mortgage, defendants Ravidranath Suria, BFC002 11 West 126th Street LLC, Buildforward Capital LLC, 11 West 126th Holdings LLC, and Vamana Real Estate Equities I, LP (collectively, the Suria Defendants) move in motion sequence 001 to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a claim. In motion sequence 002, defendants David Finehirsh and Urban Artisan DM1 LLC (UA) move to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7). Finehirsh and UA also move to dismiss the Notice of Pendency that was previously at issue in this matter; however, pursuant to the Cancellation of Notice of Pendency submitted by plaintiff on March 5, 2019, that issue is now moot (NYSCEF #54-55).

Plaintiff, for its part, alleges: (1) fraudulent conveyance of a mortgage under New York Debtor-Creditor Law (DCL) §§ 276, 278, or 279 against all defendants; (2) attorneys' fees pursuant to DCL §§276 and 276-a against all defendants; (3) conversion against BFC002 and 11 West Holdings; and (4) unjust enrichment or constructive trust against BFC002 and 11 West Holdings. During the pendency of these motions, plaintiff discontinued this action with prejudice as to defendants 11 West 126th Street Lender 1 LLC and 11 West 126th Street Lender 2 LLC (NYSCEF #53 - Stipulation of Discontinuance). The decision and order is as follows:

## Allegations

Plaintiff in this matter is New York City Energy Efficiency Corp. (NYCEEC), a not-for-profit specialty finance company. Defendant Suria is a former hedge fund manager and now real estate investor. Plaintiff alleges that Suria controls the defendant entities BFC002, Buildforward, Vamana and 11 West Holdings (NYSCEF # 1 – Complaint at ¶4-7). Defendant BFC002 is a special purpose entity owned and/or controlled by Suria (*id.* at ¶4). Defendant Buildforward is the sole member and manager of BFC002 and is also owned and/or controlled by Suria (*id.* at ¶5). Defendant 11 West Holdings is a special purpose entity formed to acquire and hold the Property. There are two members in 11 West Holding: defendants Vamana and Urban Artisan DMI LLC (UA).

Defendant David Finehirsh, a real estate developer, is the founder and principal of UA, which is the administrative member of 11 West Holdings (*id.* at ¶10). Though no longer defendants, 11 West 126th Street Lender 1 LLC (11 West Lender 1) and 11 West 126th Street Lender 2 LLC (11 West Lender 2) are special purpose entities formed by Millbrook Realty Capital (Millbrook), a lender of last resort owned and operated by brothers Charles and Marc Yassky (*id.* at ¶10).

This action concerns a project to develop a “passive house” -- a highly energy efficient structure -- in Harlem in the city, county, and state of New York. The property was acquired by Suria entity 11 West Holdings on June 26, 2014, with a plan to create a six-unit condominium. In Fall 2014, Suria’s entity Buildforward approached NYCEEC to solicit a loan for the project (*id.* at ¶17). NYCEEC agreed to lend up to \$2.9 million (*id.*).

NYCEEC's financing took the form of a participation loan extended in name and secured by a first mortgage on the property in favor of BFC002 (*id.* at ¶23). On or about November 21, 2014, BFC002 and NYCEEC entered into a participation agreement pursuant to which NYCEEC purchased from BFC002 an undivided 100% interest in the loan for a price of \$600,000 (*id.* at ¶24). BFC002 did not contribute to the loan (*id.*).

NYCEEC alleges that following substantial delays and cost overruns in the project, Suria approached NYCEEC in the first quarter of 2016 for the remaining \$2.3 million of NYCEEC’s up to \$2.9 million commitment. NYCEEC claims that at this point in the project, the cost had ballooned from \$5.9 million in 2014 to over \$7.8 million in 2016. To accommodate the expanded debt financing needs of the project, on March 8, 2016, 11 West Holdings and BFC002 executed a series of documents to increase the loan amount up to \$4,600,000, which was secured by a modified first mortgage on the Property in favor of BFC002 (*id.* at ¶39). The loan was to be advanced in installments requisitioned by 11 West Holdings for payment of construction costs as incurred (*id.* at ¶42).

Contemporaneously with the increase in the loan, BFC002 and NYCEEC entered into an amended and restated participation agreement, dated March 8, 2016 (Participation Agreement), in which NYCEEC agreed to purchase from BFC002 an undivided interest in the loan of not less than a minimum percentage of 63.043% of the loan and not more than a maximum amount of \$2.9 million (*id.* at ¶45). As before, while legal title to the loan and mortgage remained in the name of BFC002, NYCEEC, at all relevant times, maintained a 100% beneficial ownership of the loan and mortgage (*id.* at ¶ 55). Moreover, NYCEEC maintained control over the mortgage as, pursuant to the Participation Agreement, BFC002 had to and did relinquish any power to transfer, assign or modify the Loan or Mortgage to NYCEEC (*id.* at ¶¶ 46, 50). Indeed, BFC002 incorporated its lack of capacity to sell, compromise or extinguish NYCEEC's ownership of the Loan and Mortgage into BFC002's fundamental governance document, the BFC002 Limited Liability Company Agreement (*id.* at ¶¶31-33).

NYCEEC claims that between March 8 and November 10, 2016, it fulfilled the loan request and provided \$1.8 million to the project, bringing its funding to \$2.4 million. At that time, NYCEEC claims that NYCEEC's funding was the sole source of debt on the project and that it funded 100% of the loan. NYCEEC alleges that a mere month after NYCEEC increased its funding to \$2.4 million, Buildforward requested the final \$500,000 to bring NYCEEC's total to its maximum amount of \$2.9 million. NYCEEC at this point demanded additional information from Suria and Suria entities. NYCEEC alleges that despite the withholding of information by Suria, it agreed to advance an additional \$200,000 and a second payment of \$300,000 at a later date. Suria promised a bridge loan as well, but it never materialized, and Suria allegedly disappeared until February 2017.

In February 2017, NYCEEC claims that Suria admitted to NYCEEC that the project was underwater and that losses were forthcoming (*id.* at ¶64). NYCEEC responded that it would not be willing to restructure the financing or convert into equity any portion of their lien. Suria was then again silent until April 2017, when he again informed NYCEEC that the project was stopped because of cost overruns and that he was trying to obtain financing. NYCEEC offered to finance more of the project, but requested more information which Suria refused to provide.

Unbeknownst to NYCEEC, Suria attempted to refinance the loan instead of seeking equity investors. Suria worked with the Yassky defendants to form the 11 West Lender 1 and 11 West Lender 2 entities that would later refinance the original loan.

NYCEEC alleges that on or about June 23, 2017, the defendants engaged in a series of transactions designed to (i) refinance the loan and (ii) assign and modify the mortgage in order to eliminate the mortgage owned by NYCEEC and to encumber the property with new mortgage debt provided by the new lenders. The transactions involved: (a) 11 West Holdings, with BFC002, Buildforward, Vamana, Suria, UA, and

Finehirsh – executing a new mortgage granting to 11 West Lender 1 a first mortgage lien on the property, free and clear of any liens or encumbrances, including the mortgage in which NYCEEC owned a 100% interest, in order to secure new debt of \$944,502.44; (b) contemporaneously, BFC002 assigned the NYCEEC mortgage to 11 West Lender 1; (c) 11 West Holdings then executed a Consolidated, Amended and Restated Mortgage, Assignment of Leases and Rents and Security Agreement (11 West Lender 1 Mortgage) in favor of 11 West Lender 1, purporting to consolidate the Mortgage (securing up to \$4.6 million, \$2.6 million of which had been funded by NYCEEC) with the new mortgages granted to 11 West Lender 1 Assignment, in order to secure a modified amount of debt owing to 11 West Lender 1 totaling \$2 million; and (d) 11 West Holdings, acting in concert with BFC002, Buildforward, Vamana, Suria, UA and Finehirsh, executed in favor of 11 West Lender 2 both a “Building Mortgage, Assignment of Leases and Rents and Security Agreement” and a “Project Mortgage, Assignment of Leases and Rents and Security Agreement” (collectively, the “11 West Lender 2 Mortgages”), granting to 11 West Lender 2 a second mortgage lien, junior to the 11 West Lender 1 Mortgage, to secure purported loans of \$3,660,888.80 and \$339,111.20 (*id.* at ¶¶85-94). In effect, defendants assigned and eliminated NYCEEC’s mortgage and NYCEEC alleges that it has received nothing for the elimination of its mortgage worth \$2.6 million.

### Standard on Motion to Dismiss

Defendants variously move pursuant to CPLR 3211(a)(1), (3), and (7) to dismiss NYCEEC’s complaint. In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). “The court must determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon*, 84 NY2d at 88). In particular, under CPLR 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88). However, the court need not accept “conclusory allegations of fact or law not supported by allegations of specific fact” or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

### Fraudulent Conveyance Claims

Defendants’ respective motions for dismissal of NYCEEC’s first and second causes of action are denied. NYCEEC alleges that defendants violated NY DCL §§ 276, 278, or 279. Section 276 provides that “[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” In a fraudulent conveyance action, “[l]iability is imposed on parties who participate in the fraudulent transfer of a debtor’s property and are transferees of the assets and beneficiaries of the conveyance” (*Constitution Realty*,

*LLC v. Oltarsh*, 309 AD2d 714, 716 [1st Dept 2003]). “Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on ‘badges of fraud’ to support his case, i.e., circumstances so commonly associated with fraudulent transfers ‘that their presence gives rise to an inference of intent’” (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [citations omitted]). Some examples are “a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance” (*id.*). If pleaded in detail, the “badges of fraud” can satisfy the heightened particularity requirement of CPLR 3016(b) required in fraud case (*see Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 428 [1st Dept 2014]).

NYCEEC's complaint alleges that: (1) the transfer by BFC002 to 11 West Lender 1 of the mortgage owned by NYCEEC, and the simultaneous consolidation of the mortgage into a new mortgage; and (2) the transfer of the new mortgage from 11 West Holdings to 11 West Lender 2, encumbered the property and purport to be recorded ahead of NYCEEC's mortgage. NYCEEC also points to a variety of “badges of fraud” such as: (1) that the transfer of the mortgage was made for inadequate consideration wherein BFC002 assigned the mortgage securing debt up to \$4.6 million to 11 West Lender 1 for no more than \$2 million in consideration, a steep discount; (2) misrepresentation and concealment regarding the transfers conducted by Suria and Finehirsh defendants, in violation of the disclosure obligation to NYCEEC, by claiming they were raising equity when in fact they were negotiating a refinancing of the NYCEEC owned mortgage; (3) that the intent of the Suria and Finehirsh defendants was to hinder, delay, or defraud NYCEEC by deliberately not seeking NYCEEC's consent, which was required for the refinancing; and (4) that the structure of the refinancing was deliberately designed to create obstacles for NYCEEC to reinstate the mortgage (NYSCEF #39 - Pl's Opp Memo at 22).

NYCEEC's complaint is specific and identifies conduct from which fraudulent intent can be inferred. Accepting NYCEEC's allegations as true and viewing them in the most favorable light, NYCEEC has identified that the transaction occurred with inadequate consideration, in secrecy, and in violation of obligations to NYCEEC. These badges of fraud allow for the inference that the transactions at issue here were fraudulent conveyances for purposes of the DCL.

Defendants Finehirsh and UA argue that NYCEEC's arguments are for naught because NYCEEC is not a “creditor” of theirs, and under the DCL, NYCEEC, as a participant in a “Participation Agreement” cannot maintain a DCL action against them (NYSCEF – Finehirsh/UA Memo of Law at ¶¶18-28). Finehirsh and UA cite *Bobker v Herrick Feinstein LLP*, 41 Misc 3d 1233(A), at \*3-4 (Sup Ct, New York County 2013) for the proposition that a “participation agreement is not a loan” and that the “sole recourse in the event of a default for the third-party participant lies against the lender”. However, the *Bobker* court was not addressing the DCL, and its

interpretation of what recourse a participant has is of limited value here. Defendants next cite to *In re Okura & Co., Inc.*, 249 BR 596, 608-9 (SDNY 2000), claiming that “courts are generally in agreement that a transfer of an undivided interest and participation in the context of a true participation does not allow the participant to assert a claim against the borrower”. *In re Okura* did not address the DCL and is a federal bankruptcy matter. Defendants also ask the court to look at *In re Yale Exp. System, Inc.*, 245 F.Supp 790, 792 (SDNY 1965) for the proposition that a participation agreement negates the existence of creditor status. However, *In re Yale* does not make a rule regarding the DCL; instead it shoots down an argument predicated on the DCL for purposes of federal bankruptcy and is therefore inapplicable to the issues in the present matter. Defendants also point to a string of out-of-state cases for the same proposition that a participation agreement precludes recovery on a fraudulent conveyance, but this court does not need to look to foreign law to resolve this matter (Finehirsh/UA Memo of Law at ¶20).

Indeed, DCL §270 offers a broad definition of “creditor” that encompasses a participant in a loan agreement (*see Shelly v Doe*, 249 AD2d 756, 757 [3d Dept 1998]). Under DCL §270 a “creditor” is “a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent”. It is undisputed that NYCEEC is a direct creditor of both transferors (BFC002 and 11 West Holdings) of the assets (the mortgage and property) at issue here. Therefore, there is no question that NYCEEC is a creditor of BFC002 and 11 West Holdings or that they are subject to the DCL.

As to the remaining defendants, “[l]iability is imposed on parties who participate in the fraudulent transfer of a debtor's property and are transferees of the assets and beneficiaries of the conveyance” *Constitution Realty, LLC v. Oltarsh*, 309 AD2d 714, 716 (1st Dept 2003). The complaint claims that Finehirsh and UA benefited from the alleged fraudulent conveyance of the mortgage and property, and that is unchallenged by defendants. As such, the DCL extends to the Finehirsh/UA defendants.

The Finehirsh/UA defendants additionally argue that NYCEEC must make a claim for veil piercing in this matter and that their failure to do so is fatal to their claims under the DCL (NYSCEF #27 at ¶¶29-36). However, NYCEEC has sued all entities involved in this matter individually, including Finehirsh personally. And, as addressed above, the DCL extends to beneficiaries of the fraudulent conduct so Finehirsh/UA are unable to escape from potential DCL liability on this motion to dismiss. As such, there is no need for veil piercing.

Turning to the Suria defendants’ arguments in favor of dismissal, they are similarly rejected. The Suria defendants argue that since this matter is governed by a contract -- the Participation Agreement, NYCEEC cannot maintain a fraudulent conveyance claim (NYSCEF #21 – Suria Def’s Memo of Law at ¶46). However, the cases cited by the defendants, such as *Crowley Mar. Assoc. v Nyconn Assoc.*, 292 AD2d

334 [2d Dept 2002] and *Ka Foon Lo v Curis*, 29 AD3d 525 [2d Dept 2006], relate to common law fraud and do not address the specific DCL statute at issue here. Indeed, most fraudulent conveyance claims have their origination in some contract, and it would be nonsensical if DCL claims were barred because of the existence of a contract. As such, NYCEEC's claims against all defendants under the DCL survive the motion to dismiss.

### Conversion and Unjust Enrichment Claims

The Suria defendants' motion to dismiss NYCEEC's third and fourth causes of action is granted. It is well settled under New York law that quasi-contract claims, such as claims for conversion, unjust enrichment, and constructive trust, fail when there is a binding written agreement between the parties (*see Hamrick v Guralnick*, 146 AD3d 606, 607 [1st Dept 2017] ["the unjust enrichment and constructive trust claims fail to state a cause of action since the subject matter thereof is governed by express written contracts"]; *Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 489 [1st Dept 2012] ["the motion court properly dismissed plaintiff's claims for conversion and unjust enrichment as 'the existence of a valid, written contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter'"]). It is clear that NYCEEC's claims originate from breaches of the various written agreements, such as the Participation Agreement, Servicing Agreement, Loan Agreement, and BFC002's governance document, that govern the relationships between the parties here. NYCEEC's complaint is replete with reference to these documents as the genesis for the conversion and unjust enrichment claims.

While NYCEEC argues that it can plead alternative causes of action for contract and quasi-contract claims<sup>1</sup>, it may only do so if: (1) there is a bona fide dispute about the existence of a contract; or (2) the contract does not cover the dispute at issue (*see Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237, 239 [1st Dept 1997]). There is no dispute about the existence of a contract here and it is apparent from NYCEEC's complaint that the contracts cover the disputes at issue here (such as defendants' failure to obtain NYCEEC's approval before the refinancing of the mortgages). Accordingly, NYCEEC's quasi-contract claims is dismissed.

Accordingly, it is hereby ORDERED that the complaint is discontinued with prejudice as to defendants 11 West 126<sup>th</sup> Street Lender 1 LLC and 11 West 126<sup>th</sup> Street Lender 2 LLC; it is further

ORDERED that the Suria defendants' and Finehirsh defendants' motion to dismiss NYCEEC's first and second causes of action are denied; it is further

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<sup>1</sup> It is noted that although the complaint does not specify "breach of contract," the allegations sound in breach of contract.

ORDERED that the Suria defendants' motion to dismiss NYCEEC's third and fourth causes of action is granted; it is further

ORDERED that defendant Finehirsh's motion to vacate the notice of pendency is denied as moot; it is further

ORDERED that the parties are to appear in Part 33, 71 Thomas St., New York, NY 10013 on May 8, 2019 at 9:30 AM for a preliminary conference; and it is further

ORDERED that the clerk of the court is directed to amend the caption as follows:

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NEW YORK CITY ENERGY EFFICIENCY CORPORATION,

Plaintiff,

- v -

RAVINDRANATH SURIA, BFC002 11 WEST 126TH STREET LLC, BUILDFORWARD CAPITAL LLC, 11 WEST 126TH HOLDINGS LLC, VAMANA REAL ESTATE EQUITIES I, LP, DAVID FINEHIRSH, URBAN ARTISAN DM1 LLC, AND JOHN AND JANE DOES 1-100

Defendants.

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X

This constitutes the decision and order of the court.

3/15/2019  
DATE

  
MARGARET A. CHAN, J.S.C.

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| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |                          |
| APPLICATION:          | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       | <input type="checkbox"/> |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER               | <input type="checkbox"/>            | SUBMIT ORDER          | <input type="checkbox"/> |
|                       | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
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