

Sentry At QB, LLC v Xi Hui Wu
2019 NY Slip Op 35262(U)
September 11, 2019
Supreme Court, Queens County
Docket Number: Index No. 701659/2019
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

SENTRY AT QB, LLC, SENTRY OPERATING
CORP., DING KWONG WAI /k/a JOHN WAI
and BENJAMIN WAI,

Index No.: 701659/2019

Motion Date: 7/11/19

Plaintiffs,

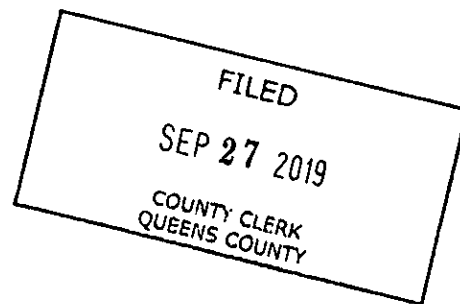
Motion No.:

- against -

Motion Seq.: 5

XI HUI WU a/k/a STEVEN WU, CHUN PETER
DONG, 9008 QUEENS BLVD LOFT LLC, SUM
TSANG CHENG, WING FUNG CHAU, WING FUNG
HOME REALTY GROUP, INC., HOK KWAI
CHAU, WAN BIN LU, XUI QIN LIN, and
CHOI YIM CHI,

Defendants.



The following electronically filed documents read on this motion
by defendant Xi Hui Wu, defendant Chun Peter Dong, and defendant
TCJ Construction, Inc. for, inter alia, an order pursuant to CPLR
3211(a)(1) and (7) dismissing the complaint against them and by
defendant 9008 Queens Blvd. Loft LLC for, inter alia, an order
pursuant to CPLR 3211(a)(1) and (7) dismissing the eighth through
seventeenth causes of action as asserted against it:

Table with 2 columns: Document Name, Papers Numbered. Includes rows for Notice of Motion-Affidavits-Exhibits, Answering Affidavits-Exhibits, and Reply Affidavits-Memorandum of Law.

Upon the foregoing papers it is ordered that the motion is
granted to the extent that the tenth, eleventh, twelfth,
thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and
nineteenth causes of action are dismissed as against all of the
moving defendants pursuant to CPLR 3211(a)(7).

I. The Allegations of the Amended Complaint

The amended complaint alleges the following:

Defendant 9008 Queens Blvd. Loft LLC (the seller) sold real property to plaintiff Sentry at QB LLC, as assignee (collectively with plaintiff Sentry Operating Corp., plaintiff John Wai and plaintiff Benjamin Wai the purchaser parties). Sentry LLC is the owner of the premises as the assignee of a purchase and sale agreement between Sentry Corp. and the defendant seller. The Wai plaintiffs are officers of Sentry Corp which is the only member of Sentry LLC. Defendant Wu and defendant Dong are managing members of the defendant seller (collectively the seller parties). Defendant Wu is also the principal owner and president of defendant TCJ Construction, Inc.

In mid 2016, the seller parties and the purchaser parties discussed the sale of premises known as 89-52/-02 Queens Blvd., Elmhurst, NY (formerly St. John's Hospital) and an adjacent five story parking garage (collectively the premises). The seller had been engaged in making renovations to the premises for the purpose of converting it into residential and commercial space. Defendant Wu had hired his company, defendant TCJ, to be the general contractor for the renovations as early as December, 2013. The renovations had not been completed by mid-2016, and the purchaser parties did not want to buy the property without a permanent CO. The original contract of sale between the defendant seller and the plaintiff buyer required the seller to "obtain the issuance of a permanent Certificate of Occupancy for the Premises by Closing." The original contract also provided that the seller would place \$5,000,000 owed on the sale in escrow and that if the seller failed to obtain a permanent CO within nine months after the closing, the purchaser could draw on the escrow to pay for expenses needed to obtain the CO. Wu and Dong never had the seller open the escrow account. Under the original contract, the seller was to pay interest and principal on a mortgage (the Superior mortgage) until the issuance of a TCO for the entire premises, and the sum now due and payable is \$64,000,000.

For tax purposes, the purchaser parties wanted to complete the sale by December 2016. Wu and Dong made false statements that construction had nearly been completed. In the first amendment to the contract of sale dated November 16, 2016 (when the seller still had not obtained a TCO or CO, causing the purchaser parties to encounter problems with financing), the defendant seller agreed to provide plaintiff Sentry with a purchase money mortgage in the amount of \$20,000,000 payable twelve months after the closing. The defendant seller and defendant Wu personally agreed

to remove all liens, pay interest on "all mortgages", and pay "all real estate taxes and related charges" until a TCO was issued for the entire premises.

In November 2016, Wu and TCJ made false statements to Ben Wai and the purchaser parties to induce them to proceed with the transaction, assume the Superior Mortgage, execute seller notes, guaranty agreements, and affidavits for confessions of judgment. Moreover, Wu, Dong, and TCJ were aware of construction defects and hid the defects from the purchaser parties so that they would execute the seller notes and other documents. These false representations concerned construction on the facade, commercial and residential plumbing, commercial HVAC work, defective electrical work, and other matters.

In a second amendment to the contract dated December 1, 2016, the seller agreed to "be responsible and liable for all costs after closing of the following items" until the issuance of TCO or CO, including mortgage interest and construction costs. The second amendment also provided for an increase to \$25,000,000 in the purchase money mortgage to be given by the defendant seller. The seller was to give the purchase money mortgage through the issuance of "seller's notes" executed by the buyer. Plaintiff John Wai, plaintiff Ben Wai, and Sentry Corp. provided guarantees of the seller's notes and affidavits. Until the Superior mortgage was fully satisfied, the seller was barred from filing the affidavits pertaining to confessions of judgment or seeking recovery under the guarantee agreements or otherwise trying to enforce the seller's notes.

Pursuant to a third agreement to the contract dated March, 2017, Sentry LLC paid the seller \$560,000 "to be used solely in connection with the completion of construction of the Premises".

A group of conspirators misused their control as lenders, seller, and general contractor and breached the original contract and its amendments. In particular, the seller breached its obligation to pay principal and interest on all mortgages, and, as a result, the premises will be sold in foreclosure. The seller also breached a "best efforts" clause in the original contract and in the second amendment pertaining to the completion of the project. TCJ and Wu also performed grossly negligent or fraudulent construction work which resulted in an inability to obtain a TCO or CO for the entire premises. The seller failed to create or release a \$5,000,000 escrow account that could be used to obtain a permanent CO. When post-closing lis pendens were filed and not satisfied by the seller and Wu, the purchaser parties lost the ability to refinance.

II. Discussion

A. The Standards

A party moving for judgment dismissing one or more causes of action asserted against him or her pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence must show that the documentary evidence submitted is "such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim" (Fernandez v. Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702 [3d Dept. 1992]; see Galvan v. 9519 Third Avenue Restaurant Corp., 74 AD3d 743 [2d Dept. 2010]; Fontanetta v. Doe, 73 AD3d 78 [2d Dept. 2010]). In the case at bar, the branch of the motion based on CPLR 3211(a)(1) is either non-dispositive or moot.

In determining a motion brought pursuant to CPLR 3211(a)(7), "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Antoine v. Kalandrishvili, 150 AD3d 941, 941 [2d Dept. 2017]; see 1455 Washington Ave. Assocs. v. Rose & Kiernan, 260 AD2d 770, 770-771 [3d Dept 1999]; Esposito-Hilder v. SFX Broadcasting Inc., 236 AD2d 186 [3d Dept. 1997]).

B. The First Through Seventh Causes of Action

The first through seventh causes of action allege breach of contract against defendant Dong, defendant Wu, and defendant TCJ although none of them is a party to the sales contract. "It is axiomatic that '[w]ithout [an] agreement. . . there can be no contract [and] [w]ithout a contract there can be no breach of the agreement'" (Schaffe v. SimmsParris, 82 AD3d 867, 868 [2nd Dept. 2011], quoting Franklin v. Carpinello Oil Co., 84 AD2d 613, 613 [3d Dept. 1981]).

Moreover, as a general rule, a member of a limited liability company "cannot be held liable for the company's obligations by virtue of his status as a member thereof" (Retropolis, Inc. v. 14th St. Dev. LLC, 17 AD3d 209, 210 [1st Dept. 2005], citing Limited Liability Company Law §§ 609, 610).

The plaintiffs allege that Wu, Dong, and TCJ are alter egos of the defendant seller, and they seek to pierce the corporate veil for the purpose of imposing personal liability upon them.

The doctrine of piercing the corporate veil applies to limited liability companies, and case law relevant to corporations provides guidance (see Grammas v. Lockwood Assocs., LLC, 95 AD3d 1073, 1074-75 [2d Dept. 2012] ["a party may seek to hold a member of an LLC individually liable despite [the] statutory proscription by application of the doctrine of piercing the corporate veil"]; Retropolis, Inc. v. 14th St. Dev. LLC, 17 AD3d 209 [1st Dept. 2005]; Williams Oil Co. v. Randy Luce E-Z Mart One, LLC., 302 AD2d 736 [3d Dept. 2003]). The issue of whether the corporate veil should be pierced is often a factual one (see e.g., Williams Oil Co. v. Randy Luce E-Z Mart One, LLC., 302 AD2d 736 [3d Dept. 2003]).

Although an individual may form a corporation to limit his or her personal liability (see Superior Transcribing Service, LLC v. Paul, 72 AD3d 675 [2d Dept. 2010]), equity will "pierce the corporate veil" to permit the assertion of claims against individuals who control the corporation where necessary to prevent fraud or injustice (see Matter of Morris v. New York State Dept. of Taxation and Finance, 82 NY2d 135 [1993]; Damianos Realty Group, LLC v. Fracchia, 35 AD3d 344 [2d Dept. 2006]). "The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation" (Matter of Morris v. New York State Dept. of Taxation and Finance, 82 NY2d 135, 141 [1993]).

"Generally, piercing the corporate veil requires a showing that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury" (Damianos Realty Group, LLC v. Fracchia, 35 AD3d 344 [2d Dept. 2006]; Matter of Morris v. New York State Dept. of Taxation and Finance, 82 NY2d 135 [1993]). A principal's domination of a corporation alone is not sufficient to justify piercing the corporate veil (see East Hampton Union Free School Dist. v. Sandpebble Builders, Inc., 66 AD3d 122 [2d Dept. 2009]; First Capital Asset Management, Inc. v. N.A. Partners, L.P., 300 AD2d 112 [1st Dept. 2002]).

In the case at bar, the plaintiffs made sufficient allegations of wrongdoing to withstand the dismissal of their claim to pierce the corporate veil (see Grammas v. Lockwood Assocs., LLC, 95 AD3d 1073 [2d Dept. 2012]). These allegations include: (1) the defendant seller, Wu, and TCJ abandoned the premises immediately after the closing, (2) prior to the closing Wu, Dong, and TCJ knew about major construction defects and

intentionally concealed them from the purchaser, (3) Wu and Dong caused the defendant seller to falsely promise the completion of construction on a "best efforts" basis, (4) Wu and Dong caused the defendant seller to falsely misrepresent that it had the authority to sell the premises, and (5) Wu and Dong never caused the defendant seller to open the \$5,000,000 escrow account to be used to complete construction and instead used the proceeds of the sale to pay personal expenses.

The factors that will be considered in determining whether to pierce the corporate veil include a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (see Superior Transcribing Service, LLC v. Paul, 72 AD3d 675 [2d Dept. 2010]). Stated more fully, "[i]ndicia of a situation warranting veil-piercing include: '(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own'" (Shisgal v. Brown, 21 AD3d 845, 848 [1st Dept. 2005], quoting Passalacqua Bldrs. v. Resnick Devs. S., 933 F.2d 131, 139 [2d Cir. 1991]; see Peery v. United Capital Corp., 84 AD3d 1201 [2d Dept. 2011]).

In the case at bar, the plaintiffs pled sufficient factors to withstand the dismissal of the claims based on the doctrine of piercing the corporate veil, including, that (1) Wu diverted funds Sentry LLC advanced to the defendant seller to pay for his personal expenses, (2) Dong assigned to himself a \$5,000,000 seller note for no consideration, (3) the managing member of the defendant seller is the same as the president of TCJ, (4) Dong caused the defendant seller to provide a personal friend with an undermarket lease, (5) Wu transferred or sold participation interests in the seller notes that were payable to the defendant seller to satisfy his personal debts, and (6) Wu and Dong comingled their own assets with the assets of the defendant seller by using millions of dollars from the sale of the premises

to satisfy personal debts and left the defendant seller without enough funds to meet its obligations to the plaintiff.

The court notes that whether the plaintiff's case can withstand a motion for summary judgment is a matter not taken into consideration here (see Victory State Bank v. EMBA Hylan, LLC, 169 AD3d 963 [2d Dept. 2019]; Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34 [2d Dept. 2006]).

C. The Eighth Cause of Action

The eighth cause of action seeks a declaration of the rights and obligations of the parties. While it is true that ordinarily a declaratory judgment cannot be brought where there exists a remedy at law which affords the plaintiff complete relief (see Empire 33rd LLC v. Forward Ass'n Inc., 87 AD3d 447 [1st Dept. 2011]), in the case at bar, the eighth cause of action is viable because declaratory "relief is available where the declaration will have the immediate and practical effect of influencing the parties' current conduct" (Buller v. Goldberg, 40 AD3d 333, 333 [1st Dept. 2007]). The plaintiffs seek a declaration that, inter alia, the defendant seller, Wu, Dong, and TCJ (as alter egos) are obligated to pay interest on all mortgages, real estate taxes, and related charges until the issuance of a TCO. Moreover, the cause of action for a declaratory judgment is not the only cause of action in the complaint, and its prosecution will not prejudice the defendants.

D. The Ninth Cause of Action

The ninth cause of action is for fraud based on fraudulent misrepresentation and fraudulent concealment.

It is true that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 [1987]; OP Solutions, Inc. v Crowell & Moring, LLP, 72 AD3d 622 [1st Dept. 2010]). "A fraud claim may coexist with a breach of contract cause of action only where the alleged fraud constitutes the breach of a duty separate and apart from the duty to abide by the terms of the contract" (Verizon New York, Inc. v. Optical Commc'ns Grp., Inc., 91 AD3d 176, 179-80 [1st Dept 2011]). In the case at bar, the plaintiffs adequately stated a cause of action based on fraud that is sufficiently independent from their breach of contract claims (see Alizio v Perpignano, 67 AD3d 833 [2d Dept. 2009]). Causes of action for breach of warranty and a cause of action for fraud may, in a

proper case, be asserted together (see Rosenblum v. Island Custom Stairs, Inc., 130 AD3d 803 [2d Dept. 2015]). Moreover, the defendants allegedly made fraudulent misrepresentations about construction defects after the original contract was signed, but before the closing, to induce the plaintiff buyer to proceed with the transaction (see DynCorp v. GTE Corp., 215 F. Supp. 2d 308 [S.D.N.Y. 2002]).

A cause of action based on fraudulent concealment requires a plaintiff to allege "(1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury, [and] in addition, a cause of action to recover damages for fraudulent concealment requires. . . an allegation that the defendant had a duty to disclose material information" (Ozelkan v. Tyree Bros. Envtl. Servs., 29 AD3d 877, 878 [2d Dept. 2006] [internal citations and quotation marks omitted]; Bannister v. Agard, 125 AD3d 797 [2d Dept. 2015]). Under the special facts doctrine, even "absent a fiduciary relationship between parties, there is nonetheless a duty to disclose when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (Pramer S.C.A. v. Abaplus Int'l Corp., 76 AD3d 89, 99 [1st Dept. 2010]). In the case at bar, the plaintiffs alleged that prior to the closing, the defendants alone knew of certain defects in the construction of the building. The defendants also allegedly made false statements about the condition of the building, and false representations may be sufficient to constitute active concealment (see Simone v. Homecheck Real Estate Servs., Inc., 42 AD3d 518 [2d Dept. 2007]).

Contrary to the assertion made by the defendants, the "as-is" clause and general disclaimers in the original contract do not bar the cause of action for fraud. A general disclaimer and merger clause in a contract do not bar an action to recover damages for fraud (see Lee v. Goldstrom, 135 AD2d 812 [2d Dept. 1987]). An as-is clause or general disclaimer does not bar a cause of action for fraud where the claim is based on information peculiarly within the defendant's knowledge (see TIAA Glob. Investments, LLC v. One Astoria Square LLC, 127 AD3d 75 [1st Dept. 2015]; Schooley v. Mannion, 241 AD2d 677 [3d Dept. 1997]). In the case at bar, the plaintiffs alleged that there were construction defects known only to the defendants prior to the closing. The plaintiff discovered construction defects in the electrical wiring, sprinkler system, plumbing, and the HVAC system only after the closing.

Finally, with respect to the allegation that the defendant seller falsely represented "that it would complete construction on a best efforts basis after the closing", it is true that a fraud claim must be based on a misrepresentation of a present fact, and the defendants contend that the representation "is clearly a statement of intent to act in the future, and is thus non-actionable [as] fraud." However, the misrepresentation of a present intent to perform in the future is a misrepresentation of a present fact and is actionable (see Braddock v. Braddock, 60 AD3d 84, 89 [1st Dept. 2009]). "[A] promise to confer a benefit in the future. . . is only actionable when the defendant had no intention of fulfilling the promise at the time it was given" (Braddock v. Braddock, 60 AD3d 84, 89 [1st Dept. 2009]).

E. The Tenth Cause of Action

The tenth cause of action is for breach of the covenant of good faith and fair dealing. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 153 [2002]). The tenth cause of action is dismissible as duplicative of the breach of contract claims because it arises from the same facts (see MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 AD3d 287, 297 [1st Dept. 2011]). The court notes that Dong, Wu and TCJ are not parties to the contract, and "[a]bsent the existence of a contract, a claim alleging breach of the implied covenant of good faith and fair dealing is legally unavailing" (Keefe v. New York Law Sch., 71 AD3d 569, 570 [1st Dept. 2010]; see Cusack v. Greenberg Traurig, LLP, 109 AD3d 747 [1st Dept. 2013]). The plaintiffs would have to avail themselves of the doctrine of piercing the corporate veil.

F. The Eleventh Cause of Action

The eleventh cause of action, which is for unjust enrichment, is dismissible. The existence of a valid and enforceable written agreement governing the dispute bars recovery in quasi contract for events arising out of the same subject matter (MG W. 100 LLC v. St. Michael's Protestant Episcopal Church, 127 AD3d 624 [1st Dept. 2015]). The rule applies even to parties who were not signatories to the contract (see Kordower-Zetlin v. Home Depot U.S.A., Inc., 134 AD3d 556 [1st Dept. 2015]).

G. The Twelfth Cause of Action

The twelfth cause of action is for lender liability. The plaintiffs allege, inter alia, that "the conspirators had a

fiduciary duty to Purchaser Parties where they acted as lender, seller, and general contractor and agent to Purchasing Parties". "[A] lender-borrower relationship is typically governed by its contractual terms, and it is rare that any fiduciary relationship may arise out of the acts the lender takes pursuant to that contract" (In re E. End Dev., LLC, 2017 WL 1277443, 6 [Bankr. E.D.N.Y. 2017]). In the case at bar, the plaintiffs' allegations do not suffice to establish anything more than an ordinary commercial relationship (see In re Mid-Island Hosp., Inc., 276 F3d 123 [2d Cir. 2002]).

H. The Thirteenth Cause of Action

The thirteenth cause of action, which is also for lender liability, is premised on the allegation that the "conspirators had complete control over the purchaser parties" because they were responsible for obtaining CO's, completing construction, and clearing violations. The plaintiffs failed to adequately allege facts showing that the theory of lender liability based on control is even applicable to the case at bar. The purchasing parties are not seeking here to impose liability on the seller parties for the acts of the former. "The general rule is that the mere loan of money by one corporation to another does not automatically make the lender liable for the acts and omissions of the borrower" (Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F2d 1098, 1104 [5th Cir. 1973]). In any event, the plaintiffs failed to adequately allege that "the creditor assumed actual, participatory, total control of the debtor" (Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., supra, 1105 [5th Cir. 1973]).

I. The Fourteenth Cause of Action

"Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct" (Vigoda v. DCA Prods. Plus Inc., 293 AD2d 265, 266 [1st Dept. 2002]). The plaintiffs allege that "[l]eading up to Closing and shortly thereafter, the Seller, Wu, Dong and TCJ Construction provided false and misleading information regarding the status of the issuance of a TCO and construction to Purchaser Parties with the understanding that such information would be provided to NYCB and later to DB for financing options." The cause of action is deficient because NYCB allegedly declined to finance the project, not because of false information, but rather because of "the conspirators inability to make sufficient progress toward a TCO or Permanent [CO]" and because it contains conclusory allegations about a potential relationship with DB (see Shawe v. Kramer Levin

Naftalis & Frankel LLP, 167 AD3d 481 [1st Dept. 2019]). Moreover, "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (Carvel Corp. v. Noonan, 3 NY3d 182, 192 [2004]).

J. The Fifteenth Cause of Action

The fifteenth cause of action alleges that the seller and TCJ entered into an agreement which required the latter to complete the renovation of the premises and that the plaintiff buyer was a third party beneficiary of the agreement "by virtue of its status as purchaser of the Premises". One who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental" (Edge Management Consulting, Inc. v. Blank, 25 AD3d 364, 368 [1st Dept. 2006]). In the case at bar, there is no express contractual language stating that the contracting parties intended to confer a benefit upon the purchaser, which is generally a requirement in construction contracts (see Dormitory Auth. v. Samson Constr. Co., 30 NY3d 704 [2018]). Moreover, the seller did not know the buyer until the negotiations for the sale of the property in 2016, more than two years after the signing of the construction contract.

K. The Sixteenth Cause of Action

The sixteenth cause of action alleges negligent construction by TCJ. The plaintiffs' claim for negligent construction states a breach of contract cause of action and not a cause of action for negligence (see Feinman v. Parker, 252 AD2d 869 [3d Dept. 1998]; Merritt v Hooshang Const., Inc., 216 AD2d 542 [2d Dept. 1995]; 431 Conklin Corp. v Rice, 181 AD2d 716 [2d Dept 1992]). Insofar as the tort of negligence is concerned, the defendant did not adequately allege that TCJ violated a legal duty independent of the contract (see Feinman v. Parker, 252 AD2d 869 [3d Dept. 1998]). TCJ had a contractual duty to perform its work with due care, that is, in a workmanlike manner (see Corrado v East End Pool & Hot Tub, Inc., 69 AD3d 900 [2d Dept. 2010]). "The gravamen of the negligence cause of action in this case is that the work performed under the contract was performed in a less than skillful and workmanlike manner. Such a cause of action sounds in breach of contract, not negligence" (Corrado v East End Pool & Hot Tub, Inc., 69 AD3d 900, 900 [2d Dept. 2010]; Mack-Cali Realty, L.P. v. Everfoam Insulation Sys., Inc., 129 AD3d 676 [2d Dept. 2015]).

L. The Seventeenth Cause of Action

The seventeenth cause of action alleges that the defendants committed a fraud upon the court when Dong filed the affidavits pertaining to the confessions of judgment on February 4, 2019. The seventeenth cause of action alleges: "Dong failed to disclose to the Queens County Clerk the significant set-offs and subordination provisions governing the affidavits." The defendants argue that the seventeenth cause of action amounts to a collateral attack on the confessions of judgment and that a party's remedy for fraud committed during a legal proceeding lies exclusively in that lawsuit itself, requiring him to move pursuant to CPLR 5015 to vacate the judgment instead of beginning a second plenary action to collaterally attack the judgment (see Maa-Sharda, Inc. v. First Citizens Bank & Tr. Co., 149 AD3d 1484, 1485 [4th Dept. 2017]). However, the rule applicable to confessions of judgment is that "a defendant debtor who seeks to attack the validity of a judgment by confession on the ground of fraud must proceed by plenary action" (Affenita v. Long Indus., Inc., 133 AD2d 727, 728 [2d Dept. 1987]; see Malhado v. Cordani, 153 AD2d 673 [2d Dept. 1989]).

Nevertheless, the plaintiffs fail to state a cause of action for fraud on the court. Looking to federal cases for guidance, the Court of Appeals has written: "Characteristic of federal cases finding such fraud is a systematic and pervasive scheme, designed to undermine the judicial process and thwart the nonoffending party's efforts to assert a claim or defense by the offending party's repeated perjury or falsification of evidence" (CDR Creances S.A.S. v. Cohen, 23 NY3d 307, 319 [2014]). The seventeenth cause of action does not allege conduct rising to this level. The court is mindful of Richmond Capital Group LLC v Megivern (2018 WL 6674300 [N.Y. Sup. Ct. Nov. 28, 2018]) where the court found a fraud on the court involved in filing confessions of judgment, but there, "[p]laintiff repeatedly made false, sworn statements to the Court that resulted in the Court entering a Judgment for an inflated amount, extorted money from Defendants based on empty promises and heavily pressured Defendants to enter into a Settlement Agreement to prevent Defendants from shedding light on Plaintiff's deceitful acts." Finally, the court notes that the seventeenth cause of action does not allege that the plaintiffs' right to set offs are beyond dispute. The defendants, on the other hand, allege that "the Affidavits of Confession of Judgment were entered based upon the Seller's position that Plaintiffs are not entitled to any off-sets."

M. The Eighteenth Cause of Action

The plaintiffs base their eighteenth cause of action, which is for aiding and abetting fraud, on the allegation that "Wu, Dong and/or TCJ Construction substantially assisted in the fraud by providing Purchaser Parties with false and misleading statements, performing shoddy construction work and falsely filing the Affidavits with the Queens County Clerk." In order to state a cause of action for aiding and abetting fraud, a plaintiff must allege an underlying fraud, a defendant's knowledge of the fraud, and substantial assistance by the defendant in the achievement of the fraud (see High Tides, LLC v. DeMichele, 88 AD3d 954 [2d Dept. 2011]). The eighteenth cause of action is adequately pled.

N. The Nineteenth Cause of Action

The nineteenth cause of action is for aiding and abetting a breach of fiduciary duty. In order to state a cause of action for aiding and abetting a breach of fiduciary duty, a plaintiff must allege the breach of a fiduciary duty owed to plaintiff, the defendant's knowing inducement or participation in the breach, and resulting damages (see Baron v. Galasso, 83 AD3d 626 [2d Dept. 2011]). The plaintiffs failed to adequately allege that the seller owed a fiduciary duty to the purchaser parties (see Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804 [2d Dept. 2011]).

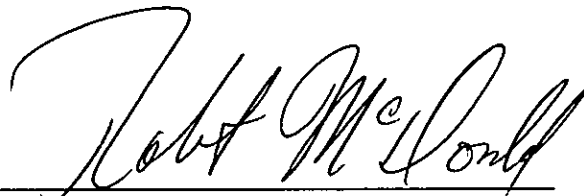
O. The Twentieth Cause of Action

The twentieth cause of action is for tortious interference with contract by Wu, Dong, and TCJ. The elements of a cause of action for tortious interference with contract include "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413, 424 [1996]; see O'Connor v. Shultz, 166 AD3d 1104 [3d Dept. 2018]). "Generally, when an officer or director acts on behalf of his corporation, he may not be held liable for inducing his corporation to violate its contractual obligations unless his activity involves separate tortious conduct or results in personal profit" (Di Nardo v. L & W Indus. Park of Buffalo, Inc., 74 AD2d 736, 736 [4th Dept. 1980]); Stern v. H. DiMarzo, Inc., 77 AD3d 730 [2d Dept. 2010]). The twentieth cause of action adequately alleges that Wu, Dong, and TCJ committed tortious acts and personally profited from the breach.

Accordingly, and for the above stated reasons, it is hereby

ORDERED, that the motion is granted to the extent that the tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and nineteenth causes of action are dismissed as against all of the moving defendants pursuant to CPLR 3211(a)(7).

Dated: September 11, 2019
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

FILED
SEP 27 2019
COUNTY CLERK
QUEENS COUNTY