Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC
2020 NY Slip Op 30576(U)
February 27, 2020
Supreme Court, New York County
Docket Number: 103991/2011
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BOARD OF MANAGERS OF 184 THOMPSON STREET CONDOMINIUM,

Plaintiff,

- v -

184 THOMPSON STREET OWNER LLC,

Defendant.

INDEX NO. 103991/2011

MOTION DATE 10/04/2019, 10/01/2019

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 363, 364, 368, 369, 370, 371, 374, 375, 376

were read on this motion for SUMMARY JUDGMENT OR TRIAL ON STIPULATED FACTS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 365, 366, 372, 373, 377

were read on this motion for SUMMARY JUDGMENT OR TRIAL ON STIPULATED FACTS.

This case is about the condominium conversion of an apartment building at 184 Thompson Street, New York, New York (the "Building"). Defendant 184 Thompson Street Owner LLC was the "Sponsor" behind the conversion, responsible for pricing the condominium units, establishing a reserve fund for the Building, and undertaking certain capital improvement work on the Building, among other things. Plaintiff Board of Managers of 184 Thompson Street Condominium (the "Board") alleges that the Sponsor (i) miscalculated the amount of the reserve fund, (ii) claimed reserve fund credits to which it was not entitled, and (iii) performed shoddy repair work in the Building for which the Board is entitled to damages.

Years of litigation have winnowed the parties' dispute to three discrete issues, which the parties now ask the Court to resolve, either as a matter of summary judgment or bench trial determination, on the basis of stipulated facts:

1. **What is the correct amount of the reserve fund?** The options are: (A) 3% of the total tenant-offeree price; (B) 3% of the total non-tenant-offeree price; or (C) 3% of (A) plus $71,100, the additional amount paid by Mr. Rangoolie for Apartment 1N.
2. **What reserve fund credit, if any, can the Sponsor claim for elevator modernization?** The options here are: (A) the full amount of the modernization costs; (B) the amount of the modernization costs minus $15,000, which is the stipulated cost of only curing the code violations; or (C) zero.
3. **Is the Board entitled to recover as damages the costs it has incurred for repairing the Sponsor's allegedly defective work in the Building?** The options here are Yes or No.

See Def.'s Mot. for S.J. at 2-3.

For the reasons set forth in greater detail below, the Court finds that:

1. the Sponsor correctly calculated the correct amount of the reserve fund to be 3% of the total tenant-offeree price – that is, Option A to question 1 above;
2. the Sponsor is entitled to a reserve fund credit for elevator modernization costs, except for the $15,000 portion attributed (by stipulation) to curing code violations – that is, Option B to question 2 above; and
3. the Board is not entitled to damages for the repair costs it incurred following the Sponsor's work – that is, No to question 3 above.

BACKGROUND

The Offering Plan for the Condominium Conversion

1. Insider Price vs. Outsider Price

In September 2005, the Sponsor submitted a non-eviction Condominium Offering Plan (the "Offering Plan") to the Office of the New York Attorney General (the "AG") for review. Stipulated Facts in Supp. of Motions ("Stipulated Facts" or "SF"), ¶2. The Offering Plan included important details about, *inter alia*, how much the condominium units would cost, how much the Sponsor would contribute to a dedicated fund for Building improvements, and other obligations the Sponsor would undertake. *See* Joint Ex. M-1 (NYSCEF Doc. No. 337).[1] On August 10, 2006, the Offering Plan, as modified by the AG as part of its review, was accepted for filing. *Id.* ¶3.

Under the Offering Plan – and in accordance with applicable law – tenants of the Building at the time the Offering Plan was accepted for filing had an exclusive 90-day period in which they could purchase their apartments at a reduced price (the "Exclusive Period"). *Id.* ¶5. Schedule A to the Offering Plan listed this reduced price – the "Price to Tenant-Offerees" – for each apartment unit in the Building. *See* Joint Ex. M-1. This reduced price is also sometimes termed the "Insider Price." During the Exclusive Period, a tenant in occupancy could accept the Sponsor's offer by submitting a Purchase Agreement at the Insider Price stated in the Plan, which the Sponsor then was legally bound to accept. *Id.* ¶6. In the column next to the Insider Price, Schedule A also listed the "Price to Non-Tenant-Offerees" – the higher "Outsider Price" – for each apartment. Joint Ex. M-1.

[1] Unless otherwise noted, all exhibit designations refer to exhibits attached to the Stipulated Facts.

2. Establishing the Reserve Fund

The Offering Plan also set forth the amount the Sponsor intended to contribute to the "reserve fund." New York law – namely, Section 26-703 of the New York City Administrative Code (the "Reserve Fund Law") – requires, as part of a condominium conversion, that sponsors establish "a reserve fund to be used exclusively for making capital repairs, replacements and improvements necessary for the health and safety of the residents of such buildings." Reserve Fund Law, § 26-703(a); Joint Ex. M-1 at 91. Just how much money the Sponsor was required to deposit into the reserve fund is one of the main disputes in this case.

The Reserve Fund Law required the Sponsor to deposit "three per cent of the total price," with "total price" defined as "the sum of the cost of all units in the offering at **the last price which was offered to tenants in occupancy prior to the effective date of the plan** regardless of number of sales made." Reserve Fund Law § 26-702(b)(2) (emphasis added).[2] As noted above, the Offering Plan showed two columns of prices in Schedule A. The aggregate Price to Tenant-Offerees, for all apartments in the Building, was $83,172,200. *Id.* ¶7. The aggregate Price to Non-Tenant-Offerees was $92,348,000. *Id.* ¶20.[3] The Effective Date of the Offering Plan was February 21, 2007. *Id.* ¶¶21-22.

The Reserve Fund Law also allows the Sponsor to "claim and receive credit against the mandatory initial contribution to the reserve fund for the actual cost of capital replacements," defined to mean "a building-wide replacement of a major component" of certain systems.

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[2] The statute also permits calculating the amount of the reserve fund based on sales occurring over a five-year period, but that is not the method the Sponsor elected to use here. *See* Reserve Fund Law, § 26-703(b)(ii).

[3] Following several amendments to the Offering Plan, to correct pricing errors, the total Price to Tenant-Offerees was reduced to $83,077,700, *id.*, ¶16, and the total Price to Non-Tenant-Offerees was changed to $93,229,000, *id.*, ¶20.

Reserve Fund Law, § 26-703(c); *id.*, § 26-702(c). "[R]eplacements made to cure code violations," however, "shall not be included" in calculating the credit. *Id.* § 26-702(c). And the total credit cannot exceed the actual cost of the capital replacements, or 1% of the "total price," whichever is less. *Id.* ¶26-703(c).

In the Offering Plan, the Sponsor announced that it "intend[ed] to take a [reserve fund] credit against the mandatory initial contribution" in the amount of $831,722. SF ¶11. That credit, as the Offering Plan shows, was contingent on the Sponsor making capital improvements to several different systems in the Building:

> At the current time, the capital replacements and costs thereof which Sponsor intends to commence after the Plan is submitted for filing, but before the Plan is declared effective, and as to which Sponsor intends to take a credit against the mandatory initial contribution to the fund, consist of the following:
>
> | | |
> |---|---|
> | Windows/Terrace Doors | $340,000.00 |
> | Roofs and Terraces | $282,700.00 |
> | Security | $25,000.00 |
> | HVAC | $94,500.00 |
> | Electrical | $53,208.00 |
> | Elevators | $215,000.00 |
> | | |
> | Total Qualifying Work | $1,010,408.00 |
> | | |
> | TOTAL CREDIT (max.) | $831,722.00 |

SF, ¶¶11, 42; *see* Joint Ex. M-1, at 91-92.

On April 27, 2007, the Sponsor established and funded the Reserve Fund in an amount equal to 3% percent of the total Price to Tenant Offerees – *i.e.*, 3% of $83,172,200 – less a credit of $831,722, for a total actual contribution of $1,663,444.00. *Id.* ¶24.

The Board Challenges the Adequacy of the Reserve Fund, the Calculation of the Credits, and the Sponsor's Work in the Building

1. Determining the Amount of the Reserve Fund

At the time the Offering Plan was filed, one of the tenants in occupancy in the Building was Andy Ramgoolie, who lived in Apartment 1N. SF ¶26. During the Exclusive Period, Mr. Ramgoolie did not submit a Purchase Agreement at the Price to Tenant-Offerees stated in the Offering Plan. *Id.* ¶27. The Exclusive Period expired on November 20, 2006. *Id.* ¶12. The following month, in December 2006, Mr. Ramgoolie approached the Sponsor about purchasing Apartment 1N. *Id.* ¶28. The Insider Price for the apartment was $639,000, while the Price to Non-Tenant-Offerees was $711,000. *Id.* ¶¶31-32.

On December 28, counsel for Sponsor sent Mr. Ramgoolie's attorney a letter containing copies of a purchase agreement for Apartment 1N, at the Non-Tenant-Offeree price. *Id.* ¶33. The next month, on January 25, 2007, Mr. Ramgoolie's attorney protested that the Sponsor's offering price was "incorrect," and that it should have reflected the Insider Price of $639,000. *Id.* ¶34; Ex. R. But the Sponsor refused to sell Apartment 1N at that price to Mr. Ramgoolie, because he had not sent in a signed purchase contract at the Insider Price before the Exclusive Period ended. *Id.* ¶35. Then in April 2007, after the Effective Date of the Offering Plan, Mr. Ramgoolie's attorney tried offering a compromise price of $664,900, which the Sponsor rebuffed. *Id.* ¶36; Ex. S. Eventually, on June 22, 2007, Mr. Ramgoolie purchased Apartment 1N for the Non-Tenant-Offeree price of $711,000. *Id.* ¶¶37-39.[4]

[4] Other than Mr. Ramgoolie, it is stipulated that no other tenant was provided with a contract or sought to purchase any apartments during the "gap period" between the end of the Exclusive Period and the Effective Date. *Id.*, ¶40.

In the Board's telling, the travails of Mr. Ramgoolie showed that "the last price which was offered to tenants in occupancy prior to the effective date of the plan" was, in fact, the Price to Non-Tenant-Offerees. Reserve Fund Law § 26-702(b)(2). According to the Board, then, the Sponsor should have used the aggregate Outsider Price, not the aggregate Insider Price, to calculate its contribution to the reserve fund – increasing the Sponsor's obligation from 3% of $83,172,000 to 3% of $92,348,000. The Sponsor maintains that its discussions with Mr. Ramgoolie did not alter the "last price . . . offered to tenants" under the Reserve Fund Law.

2. Calculating the Reserve Fund Credit for Elevator Modernizations

The amount of allowable reserve fund credit is also disputed. In the Offering Plan, the Sponsor claimed reserve fund credits for, among other things, elevator upgrades in the Building. At the time of the condominium conversion, the Building had six outstanding elevator violations to its name, dating back to 1994. *Id.* ¶44. The parties stipulate that curing these violations – and doing nothing more – would have cost $15,000. *Id.* ¶49. As it happened, the Sponsor did more, spending over $200,000 on "a total modernization" of the passenger elevators that replaced many components of the elevator system (*e.g.*, "new hoist and governing ropes," "new car doors," and "entire cab enclosure to be completely relined"). The overhaul also cured the existing code violations. *Id.* ¶¶46, 48.

The dispute now is whether the Sponsor can claim reserve fund credits for all, some, or none of the elevator repair work. Under Reserve Fund Law § 26-702(c), the Sponsor can claim credit for a "[c]apital replacement" "provided, however, that replacements made to cure code violations of record shall not be included." In the Sponsor's view, "the elevator credit should not be reduced at all" because "the old violations were cured, at no or negligible additional cost, as part of the elevator modernizations work." Def.'s Mot. for S.J. at 10. "At worst," the Sponsor

contends, "the elevator credit should be reduced by $15,000.00, resulting in a de minimus shortfall in funding the Reserve Fund in the amount of $450.00." *Id.* The Board, meanwhile, argues that the Sponsor should get *no* credit for the elevator work because "one of the significant purposes for which the elevator work was undertaken was to remove violations of record, and the contract did not differentiate between the portion of the work to cure violations and the portion done for other purposes." Pl.'s Mot. for S.J. at 16.

3. The Sponsor's Allegedly Defective Work in the Building

Lastly, the Board alleges that certain work performed by the Sponsor in the Building – ostensibly to improve the Building – was in fact riddled with defects, including problems with the HVAC system, the windows and doors, and the roof. SF ¶50. In July 2009, an architectural and engineering consulting firm, retained by the Board, issued a report (the "HLZA Report") detailing the physical conditions in the Building, recommending proposed corrective action, and estimating the cost of the recommended fixes. *See* SF Exs. AA1-AA2. To remedy those defects, the Board seeks twofold relief here: (i) to retroactively bar $21,500.00 of the Sponsor's claimed HVAC credit, and $333,800.00 of the claimed window-and-door credit, due to the alleged defects; and (ii) to recover $219,202.70, plus interest, in invoiced repair costs, SF ¶51(e);

From the Sponsor's standpoint, the Board "is not entitled to additional damages because the Offering Plan provided for the 'AS-IS' sale of the Building." *Id.* ¶55. Specifically, in a section titled "Special Risk Factors," the Offering Plan stated:

> Sponsor shall not be obligated to correct, repair, or replace any or all defects relating to construction of the Units, the Common Elements, or to the installation or operation of any appliances, fixtures, or equipment therein, except as expressly provided in this Plan. Sponsor will not warrant the materials or workmanship of any Unit or of the Common Elements. The Housing Merchant Implied Warranty Law (General Business Law Article 36-B) is not applicable to this offering. Purchasers are advised that certain conditions or deficiencies have been noted in the architect's and engineers' reports contained in Part H of this Plan beginning on

> page D-3 as being in fair or poor condition or with certain work recommended, including condition of apartment interiors, stairs, cellar common area finishes, fences and gates and hollow metal doors. Sponsor has not undertaken to perform any work as to those conditions. **The Units are being sold "as is" on the date of the Purchase Agreement subject to reasonable wear and tear and to Sponsor's obligations under the Plan and law to maintain the Unit.**

Joint Ex. M-1 at vi, ¶8 (emphasis added). In addition, the Offering Plan notes expressly that "[t]he roofing [of the Building] is not bonded or guaranteed," but "is in fair condition and can be expected to last a minimum of another 2-4 years with routine maintenance." *Id.* at D-15.

Procedural History

This action was commenced by the filing of a summons and complaint on April 1, 2011. *Id.* ¶D. The original complaint asserted six causes of action related to underfunding the reserve fund, including claims that credits were improperly taken for capital replacements. The Board alleged claims for (1) declaratory judgment, (2) injunction, (3) breach of contract, (4) breach of contract, (5) fraud and/or negligent misrepresentation, and (6) fraud and/or negligent misrepresentation, and sought to impose personal liability upon principals of Sponsor. *Id.* ¶E.

1. *Bransten I*

By decision entered April 11, 2012, as modified by order entered April 26, 2012 (collectively, "*Bransten I*"), this Court (Bransten, J.) dismissed part of the relief requested on the first cause of action, dismissed the second, third, fifth and sixth causes of action, and all claims against principals of the Sponsor, leaving the Sponsor as the only remaining defendant. *Id.* ¶H. In *Bransten I*, the Court endorsed "the conclusion that the Sponsor properly calculated '[t]otal price,' under section 26-702(b)(2)." Ex. B at 12 (*Bransten I* Op.). The Court held that the Board "fail[ed] to make a prima facie showing that it is entitled to summary judgment" on the reserve funding issue, but declined to grant summary judgment in the Sponsor's favor. *Id.* at 13-14.

The Court's decision was affirmed by the Appellate Division, First Department on May 16, 2013. *Id.* ¶I; *see* 106 A.D.3d 542 (1st Dep't 2013). The First Department held that "[u]nder the plain language of the governing statutes, the 'total price' referred to in § 26-703(b)(i) is not 'the price in effect during the exclusive purchase period, *i.e.*, the so-called 'insider's price,'" but rather the 'last price . . . offered to tenants in occupancy prior to the effective date of the plan.'" 106 A.D.3d at 543, citing *Turtle Bay Towers Corp. v. Welco Assoc.*, 228 A.D.2d 189, 189-90 (1st Dep't 1996). And the appellate court "agree[d] with the motion court that the record contains no conclusive evidence that the tenant-offeree prices set forth in the offering plan were increased prior to the plan's effective date." *Id.*

2. *Bransten II*

Following a round of amended pleadings and counterclaims, both parties moved for summary judgment. *Id.* ¶O. By Decision and Order dated September 5, 2018 ("*Bransten II*"), this Court (Bransten, J.) resolved various issues relating to those motions, but found issues of fact concerning two key issues. *See* No. 103991/2011, 2018 WL 4278388, at *1 (Sup. Ct. N.Y. Cty. Sep. 07, 2018). *First*, the Court denied summary judgment as to the amount of the reserve fund, because "there remain[ed] questions as to whether the tenants were offered to purchase their units at the higher price prior to the effective date of the offering plan," referring to Mr. Ramgoolie as well as another tenant not relevant to this motion. *Id.*, at *2; SF ¶Q. *Second*, the Court denied summary judgment on whether a credit was properly taken for elevator modernization, because the "provided evidence . . . fail[ed] to conclusively weigh in favor of either party and present[ed] a triable issue of fact." No. 103991/2011, 2018 WL 4278388, at *2-3.

Bransten II did not address, however, whether any of the Sponsor's work in the Building was defective, or whether reserve fund credits were available for defective work.

DISCUSSION

The facts submitted on these motions are not disputed, and the parties agree that the issues presented are appropriate for resolution on the record as submitted. *Cobalt Blue Corp. v. 184 West 10th Street Corp.*, 227 A.D.2d 50 (1st Dep't 1996); *Wright v. Ellsworth Partners, LLC*, 173 A.D.3d 1409, 1410 (3d Dep't 2019) (affirming grant of partial summary judgment based on stipulated facts), *leave to appeal denied*, 34 N.Y.3d 907 (2019). To the extent the issues do raise fact questions, the parties seek resolution as a judgment after trial on the stipulated facts.

A. Reserve Fund Computation Issue

As the First Department in *Bransten I* framed it, the relevant question is whether "the tenant-offeree prices set forth in the offering plan were increased prior to the plan's effective date." Ex. C. Based on the stipulated facts, the Court finds that the tenant-offeree prices were *not* increased. Although one tenant (Mr. Ramgoolie) purchased his apartment after the Exclusive Period at the higher "non-tenant" price, that one-off transaction did not change retroactively the lower price that was offered by the Sponsor "to tenants."

The Offering Plan reflected "the last price which was offered to tenants in occupancy prior to the effective of the [P]lan," Reserve Fund Law § 26-702(b)(2), and "the sum of the cost of all units" in the Building at that price was $83,172,00. Neither the original Offering Plan nor any of the subsequent amendments offers the Outsider Price to tenants in occupancy. And the Board does not cite to any case in which a sponsor's reserve-fund obligations change without a corresponding amendment to the offering plan showing a uniform change in the prices offered to

tenants in occupancy. There is no precedent, in other words, for the position that the one-off sale of Apartment 1N should reformulate the Sponsor's funding obligations.

As the Court previously noted, the First Department's decision in *Turtle Bay Towers* "supports the conclusion that the Sponsor properly calculated '[t]otal price,' under section 26-702(b)(2)." Ex. B at 12. In that case, the sponsor initially established an Insider Price at $782.00 per share, then "increased [it] to $1,000 to both tenants in occupancy and to outsiders, which share price remained in effect until the conversion closing." Def.'s Mem. of Law in Opp., Ex. A (*Turtle Bay Towers* Trial Court Op. dated April 12, 1995). Because "the last price offered to tenants in occupancy before the effective date of the plan was $1,000 per share," the reserve fund "therefore must be calculated" based on that amount. *Id.* To be clear, *Turtle Bay Towers* indicates that the "last price . . . offered" for purposes of the statute is not always synonymous with the Insider Price in effect during the Exclusive Period. 228 A.D.2d at 189-90. That is, a *uniform* change to the prices offered to tenants, after the Exclusive Period but prior to the Effective Date, could still change the Sponsor's reserve-fund calculus. But that is not what happened here. Notwithstanding the one-off sale of a single apartment at the Outsider Price, the "last price . . . offered to *tenants*" in this case was the Insider Price reflected in the Offering Plan.

Reading § 26-702(b)(2) to require the reserve fund to wax and wane with the price of a single apartment, such as Mr. Ramgoolie's, is unworkable and could lead to absurd results. *See Lubonty v. U.S. Bank Nat'l Ass'n*, 34 N.Y.3d 250 (2019) ("We must also interpret a statute so as to avoid an unreasonable or absurd application of the law."), *reargument denied*, No. 2020-43, 2020 WL 772895 (N.Y. Feb. 18, 2020); *Roberts v. Tishman Speyer Properties, L.P.*, 62 A.D.3d 71, 81, *aff'd*, 13 N.Y.3d 270 (1st Dep't 2009) ("[A] court, in discerning the meaning of statutory language, must avoid objectionable, unreasonable or absurd consequences."). The "[t]otal price"

is an aggregation of "all units in the offering," and there is no uniform way to extrapolate the "[t]otal price" from the price of one unit. That is why a change to the "[t]otal price" must depend on a uniform change to the prices offered to all tenants. Again, no evidence of such a change is presented here: the Sponsor and Mr. Ramgoolie wrangled over whether the Insider Price applied to his specific apartment, not to the "tenants" at large.

To get around this practical problem, the Board interprets the "offer" on Apartment 1N as implying a uniform shift from one set of prices to another – effectively, from the Insider Price column to the Outsider Price column in Schedule A. That way, at least in the Board's view, the "last price . . . offered" on Apartment 1N also signals the aggregate prices for all the other apartments in the Building. But suppose the Sponsor had offered Mr. Ramgoolie a price not included in Schedule A – for example, a compromise price like the one his attorney had tried to pitch. Had the Sponsor accepted the compromise price right before the Effective Date, it is unclear how that price could then scale up to determine the "[t]otal price" for purposes of the Sponsor's reserve fund obligation.[5]

The Board's interpretation arguably could also lead to manipulation *by Sponsors*. For example, a Sponsor seeking to lower its reserve requirement could offer a *below*-Insider price to a single tenant just before the effective date. Under the Board's reading, the Sponsor could then claim that the "last price … to tenants" had dropped, thus triggering a reduction in the reserve fund. Such a result would not be consistent with the statutory scheme.[6]

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[5] The Board rejects the idea, embodied in Option (C), that the Sponsor's funding obligation could be raised by the difference between the Insider Price and the price of Mr. Ramgoolie's apartment. Pl.'s Opp. to Def.'s Mot. for S.J. at 9 (describing that option as "without merit").

[6] In addition, the communications between the Sponsor and Mr. Ramgoolie did not constitute an "offer[ ] to tenants in occupancy" under the Reserve Fund Law. As a matter of contract law, a

For the foregoing reasons, the Court grants summary judgment to the Sponsor on the issue of the reserve fund computation: the reserve fund is properly calculated as 3% of the total tenant-offeree price of $83,077,000 listed in the Sixth Amendment to the Offering Plan. *See* Def.'s Mot. for S.J. at 2.

B. Elevator Credit Issue

Next, the Court finds that the Sponsor is entitled to a reserve fund credit equal to the elevator modernization costs, minus the stipulated cost of only curing the code violations. It is a "well-established rule that statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous." *Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019) (internal citations omitted); *New York State Land Title Ass'n, Inc. v. New York State Dep't of Fin. Servs.*, 169 A.D.3d 18, 25 (1st Dep't 2019) ("Statutory construction requires that all parts of a statute . . . be given effect[.]") (internal citations omitted). Only Option B, *supra*, gives effect to both of the relevant portions of the Reserve Fund Law. Credit is given for capital-replacement work, as the statute provides, and credit is disallowed for work that can be ascribed to "cur[ing] code violations of record," as the statute provides. *See* Reserve Fund Law, §§26-702, 26-703. This result also balances the two apparent aims of the statutory scheme – to encourage large-scale improvements, and to prevent sponsors from reaping a windfall for repairs they need to perform anyway. *See Bd. of Managers of 184 Thompson St. Condominium v. 184 Thompson St. Owner*

"sufficiently definite offer" is "such that its unequivocal acceptance will give rise to an enforceable contract." *Kolchins v. Evolution Markets, Inc.*, 31 N.Y.3d 100, 106 (2018). The Sponsor reserved the right to reject any submitted contract, so Mr. Ramgoolie's "unequivocal acceptance" of the Outsider Price would not necessarily "give rise to an enforceable contract" with the Sponsor. *See* Joint Ex. M-1. By contrast, during the Exclusive Period, the Sponsor was legally bound to accept any tenant's Purchase Agreement at the Price to Tenant-Offerees stated in the Offering Plan. SF ¶6.

LLC, 106 A.D.3d 542, 543-44 (1st Dep't 2013) ("[T]he statutory intent [is to] encourage[e] sponsors to perform needed capital replacement work in conjunction with condominium conversions.").

The other options proposed by the parties elevate one part of the statute at the expense of another: the Sponsor's favored interpretation (Option A) reads out the caveat about code violations, while the Board's (Option C) would needlessly cabin the capital-improvement provision. The Board's reading would also create perverse incentives, dissuading sponsors from undertaking "building-wide replacement[s]" if any part of the overhaul would also "cure code violations of record." Simply put, "[a] bad result suggests a wrong interpretation." *Simonelli v. City of New York*, 276 A.D. 405, 406 (1st Dep't 1950), *aff'd*, 301 N.Y. 752 (1950); *Breen v. Bd. of Trustees of New York Fire Dep't Pension Fund*, 299 N.Y. 8, 19 (1949) ("The general rule of statutory construction is that it is always presumed, with reference to a statute, that no unjust or unreasonable result was intended by the Legislature and the statute, unless the language forbids, must be given an interpretation and application consonant with that presumption.").

The Board suggests that the Sponsor could have avoided this problem by "separately contract[ing] to remove the violations." Pl.'s Mot. for S.J. at 21. But that would make no sense on the facts of this case. It would be the equivalent of requiring a Sponsor to paint a wall prior to knocking it down and building a better one. In any event, the question still remains whether the Sponsor's failure to do so should result in a complete loss of the credit, or instead a reduction proportionate to the costs of addressing the code violations. The latter course is the better one, because it harmonizes the statutory text while still policing against the kind of chicanery that the Board purportedly fears. If a Sponsor tries to exploit the Reserve Fund Law by claiming the cost of curing code violations as a "[c]apital replacement," any ill-gotten gain would evaporate once

the cost attributable to curing code violations were deducted from the claimed credit, as Option B provides. In this case it is undisputed that the Sponsor's elevator modernization work went far beyond the repairs required by the code violations.

As such, the Court grants summary judgment to the Sponsor on the issue of the elevator-repair credit: the credit against the reserve fund for elevator modernization should be the amount of the rehabilitation costs, $224,762, less the sum of $15,000 which the parties stipulate would have been the cost of making repairs to cure violations. *See* Def.'s Mot. for S.J. at 2.

C. The Board's Entitlement to Damages for the Sponsor's Allegedly Defective Work

As noted above, the Board seeks two different kinds of relief stemming from the Sponsor's allegedly defective work in the Building. The Board contends that (i) a portion of the Sponsor's reserve fund credits should be disallowed; and (ii) the Board should be awarded damages in the amount required to remediate the defects in the Building's HVAC system, windows and doors, and roof. SF ¶54. For the reasons described below, the Court concludes that the Board is not entitled to either form of relief.

1. Disallowance of Reserve Fund Credits

As a conceptual matter, any damage wrought by the Sponsor's work should result in an award of monetary damages, not a disallowance of reserve fund credit.[7] The allowance of

[7] Contrary to the Sponsor's position, the decision in *Bransten II* does not preclude the Board from litigating the propriety of the HVAC and window-doorway credits. In *Bransten II*, the Court "consider[ed] the text of the statute" to determine "whether each service for which a credit is claimed falls within the plain meaning of the statute." SF Ex. K at 5. The Court found that both the HVAC and the window-doorway systems fell within the ambit of Reserve Fund Law § 26-702(c), but did not reach the question whether the Sponsor's work on those systems qualified for credit. The law of the case doctrine, therefore, is inapplicable. *Gee Tai Chong Realty Corp. v. GA Ins. Co. of New York*, 283 A.D.2d 295, 296 (1st Dep't 2001) (declining to apply law of the case doctrine because "the record demonstrates that the issue . . . was never submitted for the court's decision").

reserve fund credits derives from statutory authority (*i.e.*, §§ 26-702-26-703), and the Board cites no statutory authority, either in the Reserve Fund Law or elsewhere, that contemplates a disallowance of credit for defects in the Sponsor's work. *See* Pl.'s Mot. for S.J. at 17-18. Nor does the Board cite a single case interpreting the statute to permit revoking a capital-replacement credit for work that was undertaken but found to be slipshod. *See id.* The statute *does* prohibit the Sponsor from claiming credits for "replacements made to cure code violations," § 26-702(c), but includes no analogous provision governing defective work.

Moreover, disallowing the capital-replacement credit does not correspond, in a reasonably certain way, to the contractual harm allegedly suffered by the Board. "The fundamental purpose of compensatory damages is to have the wrongdoer make the victim whole . . . commensurate with the loss or injury sustained from the wrongful act." *E.J. Brooks Co. v. Cambridge Security Seals*, 31 N.Y.3d 441, 448 (2018); *Rubin v. Baumann*, 177 A.D.3d 421, 422 (1st Dep't 2019) ("It is a fundamental principle of contract law that an award of damages should put plaintiff in the same position as he or she would have been in if the contract had not been breached."). As the Board acknowledges, "[a]n offering plan is a contract between the sponsor of a condominium and the board of managers." Pl.'s Mot. for S.J. at 19. But disallowing the credit is not "commensurate with the loss or injury sustained from" the Sponsor's alleged breach. *See* 31 N.Y.3d at 448. The reserve fund credit measures "the actual cost of capital replacements," while the Board's alleged damages purport to measure the actual cost of repairing that work. *See* SF ¶51. The appropriate remedy here, if the Sponsor in fact botched the work it promised to perform in the Building, is contract damages reflecting the costs the Board incurred to fix the Sponsor's work.

Therefore, on the issue of disallowing reserve fund credits, the Board is denied summary judgment and summary judgment is granted to the Sponsor.

2. Contract Damages

The next question is whether, on the record before the Court, the Board is entitled to damages under its contract claim. "The elements of such a claim are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Markov v. Katt*, 176 A.D.3d 401, 401-02 (1st Dep't 2019). The Board's prima facie case for this cause of action consists of invoices documenting the costs associated with repairing the Building's electrical systems, the windows and doors, and the roof. SF ¶¶51, 54. In addition, the Board proffers the HLZA Report, issued on July 2, 2009, which the Board says "identifies numerous defects, including with respect to those aspects of the Building that the Sponsor represented in the Offering Plan that it would undertake to repair as Capital Replacements." Pl.'s Mot. for S.J. at 8; *see* SF ¶50.

The Sponsor's main argument is that the "as is" clause in the Offering Plan invalidates the Board's claim as a matter of law. The Offering Plan included the "as is" clause "subject to . . . [the] Sponsor's obligations under the Plan and law to maintain the Unit." Joint Ex. M-1, at vi. The "as is" clause defeats "contract claims . . . which are based on the architect's description of the [B]uilding's condition included in the [O]ffering [P]lan and incorporated in the purchase agreements." *Bd. of Managers of the Chelsea Condominium v. Chelsea 19 Associates*, 73 A.D.3d 581 (1st Dep't 2010). But to the extent the Board's contract claim "is based on . . .

exceptions to the 'as is' clause . . . the 'as is' clause does not bar the claim." *Bd. of Managers of Loft Space Condo. v. SDS Leonard, LLC*, 142 A.D.3d 881, 882 (1st Dep't 2016).[8]

The Board's contract claim raises fact questions about whether the challenged work comes within the contractual exceptions to the "as is" clause. The "as is" clause is "subject to . . . [the] Sponsor's obligations under the Plan," and the Sponsor expressly undertook several "obligations under the Plan." The Sponsor represented that "[a]ll windows and sliding glass doors in Residential Units in the Building [were] being replaced," Joint Ex. M-2 at D-12-13, that "[a] restoration and roofing contract ha[d] already been awarded, covering the rehabilitation of all of the balconies, brick replacement, re-pointing re roofing [sic]," *id.* at D-56, and that it planned to make capital improvements to a number of the building's systems, Joint Ex. M-1 at 91-92. In the Board's view, "the work that the Sponsor performed in these categories was defective, causing the Board to spend a significant amount of money to fix the defective work." Pl.'s Reply in Support of Mot. for S.J. at 9. Because the "as is" clause does not necessarily cover the work that is being disputed, the Board's claim cannot be dismissed as a matter of law.

Ordinarily, on a motion for summary judgment, that is where the Court's analysis would end – "issue-finding, rather than issue-determination, is the key to the procedure." *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957); *Yourth v. Boggs*, 33 A.D.2d 549, 549 (1st Dep't 1969). But on these motions, "[t]he parties are jointly asking the Court to determine" the remaining issues "either as a matter of summary judgment or bench trial based upon stipulated facts, which will allow for final judgment and resolution of this matter, subject

[8] The Sponsor distinguishes *Loft Space* on the ground that it "involved violations of law, not expiration of the useful life of a roof." Def.'s Opp. to Mot. for S.J. at 12. That factual distinction notwithstanding, the legal principle in *Loft Space* remains sound: exceptions to an "as is" clause do not receive the protections of the "as is" clause.

only to appeal of legal issues." Def.'s Mot. for S.J. at 1; *see* Pl.'s Mot. for S.J. at 3 ("The Board and Sponsor have stipulated as to the relevant facts they believe to be required for this Court to resolve the outstanding issues in this case, either on a summary judgment basis or as a trial on stipulated facts."). Accordingly, the Court turns to determining, as a mixed question of law and Stipulated Fact, whether the Board has *proven* its contract claim for damages.

On this record, the Board fails to prove a prima facie case because the evidence it offers does not establish that the Sponsor breached the Offering Plan, or that the alleged breach resulted in the claimed damages. The Board alleges that "the Sponsor breached the Offering Plan" because the work it performed "was defective" – that is, the work was not "done in a skillful and workmanlike manner." Pl.'s Mot. for S.J. at 21. The only evidence submitted by the Board is the HLZA Report, which described conditions in the Building more than two years after the first condominium unit was sold.

The findings in the HLZA Report do not prove the Board's prima facie case. For the terrace door replacement, the Board stipulates that it replaced two terrace doors (Apartments 6G and 6H) in 2012, over five years after the condominium conversion. SF ¶51(d). But the HLZA Report does not discuss defects in the terrace doors for those apartments. *See* Joint Ex. AA-1 at 59. As for the roofing, the Offering Plan disclosed that the roof "can be expected to last a minimum of another 2-4 years with routine maintenance," Joint Ex. M-1 at D-15, and also that a "roofing contract ha[d] already been awarded, covering the rehabilitation of all of the . . . re roofing," *id.* at D-56. The HLZA Report found "the re-roofing job that was executed was not done so in a manner that would be considered appropriate and in-line with industry standards," Joint Ex. AA-1 at 570, but does not conclusively show that the roofing defects were caused by the Sponsor's alleged work, rather than normal wear and tear or some other factor.

Therefore, the Court finds that the Board has not met its burden of proof on the claim for contract damages.

* * * *

Accordingly, it is

ORDERED that the Sponsor's motion for summary judgment is Granted with respect to the Reserve Fund Computation Issue, insofar as the reserve fund is properly calculated as 3% of the total tenant-offeree price of $83,077,000 listed in the Sixth Amendment to the Offering Plan; it is further

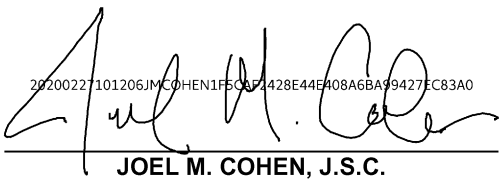
ORDERED that the Sponsor's motion for summary judgment is Granted with respect to the Elevator Credit Issue, insofar as the credit against the reserve fund for elevator modernization should be the amount of the rehabilitation costs, $224,762, less the sum of $15,000 which the parties stipulate would have been the cost of making repairs to cure violations; it is further

ORDERED that the Sponsor's motion for summary judgment is Granted with respect to the disallowance of reserve fund credits for allegedly defective work undertaken by the Sponsor; it is further

ORDERED that the parties' motions for summary judgment are Denied with respect to the Board's Entitlement to Damages for the Sponsor's Allegedly Defective Work; and it is further

ORDERED AND ADJUDGED that, based on the Stipulated Facts, the Board is not entitled to damages for the Sponsor's Allegedly Defective Work.

This constitutes the Decision and Order of the Court. The parties are directed to submit a proposed Judgment for Court approval, consistent with the foregoing.



2/27/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE