Board of Mgrs. of the Lincoln Condominium v SDS Lincoln LLC
2020 NY Slip Op 31118(U)
April 20, 2020
Supreme Court, Kings County
Docket Number: 500394/15
Judge: Edgar G. Walker
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At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, on the 20th day of April, 2020.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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BOARD OF MANAGERS OF THE LINCOLN CONDOMINIUM,

Plaintiff,

- against - Index No. 500394/15

SDS LINCOLN LLC, G46, LLC, LINDA GRECO, LOUIS V. GRECO, JR., SECOND DEVELOPMENT SERVICES, INC., G HOLDINGS TRUST, TOM KOWALSKI, R.A. and TKA STUDIO INC.,

Defendants,

-against-

WETHERALL ROOFING & CONTRACTING, INC.,

Additional Defendant.

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The following e-filed papers read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	121-122, 135-138
Opposing Affidavits (Affirmations)	166-167, 156-157
Reply Affidavits (Affirmations)	177

Upon the foregoing papers, defendants Tom Kowalski, R.A. and TKA Studio Inc. (Architect defendants) move for an order, pursuant to CPLR 3212, dismissing the complaint as against them.

Defendants SDS Lincoln, LLC (Sponsor) and defendants G46 LLC (G46), Linda Greco, Louis V. Greco, Jr., Second Development Services, Inc. (Second Development) and G Holdings Trust (G Holdings) (collectively, SDS defendants) move for an order, pursuant to CPLR 3211 (a) (7) and 3212, granting them partial summary judgment: (1) dismissing the

first, third, sixth, seventh and eighth causes of action as against the Sponsor and dismissing the request in the complaint for punitive damages and (2) dismissing the complaint in its entirety as against the Member defendants. On January 13, 2015, the Board of Managers of the Lincoln Condominium (the Board) commenced this action on behalf of the unit owners of the subject condominium building at 153 Lincoln Place in Brooklyn seeking damages for alleged construction and design defects in the condominium conversion project. The Sponsor was formed pursuant to Articles of Organization, which were certified on February 9, 2007. G46, Linda Greco, Louis V. Greco, Jr., Second Development and G Holdings (collectively, Member/Affiliate defendants) are members and/or affiliates of the Sponsor. Linda Greco, in her capacity as a member of the Sponsor and a member of G46, executed the February 16, 2007 Operating Agreement and also the June 3, 2008 Sponsor Certification, which was incorporated by reference into the Offering Plan. A Temporary Certificate of Occupancy was issued for the Building effective January 15, 2009, the first unit closing was held on February 17, 2009, and a final Certificate of Occupancy was issued for the Building on July 5, 2011.

In connection with the Lincoln Condominium Offering Plan, each unit purchaser executed a Purchase Agreement with Sponsor, as seller, paragraph 8 of which states that:

> "8. Purchaser Bound by Offering Plan. The Seller has exhibited and delivered to me and I acknowledge receipt of the Offering Plan at least 72 hours prior to the execution of this Purchase Agreement. I have read and agree to be bound by the proposed Declaration, By-Laws and Offering Plan of the said Condominium (and the Schedules, Plans and Exhibits attached thereto) all of which are incorporated by reference and made a part of this agreement with the same force and effect as if set forth in full herein. Any conflict between the offering plan and the purchase agreement is to be resolved in favor of the offering plan. I acknowledge that I am purchasing a Condominium Unit in a Condominium to be formed, and that, except as stated in this agreement (and as set forth in the Declaration, By-Laws, Exhibits and Offering Plan), *I have not relied on any representations or other statements of any kind or nature made by the Seller or otherwise*, including but not limited to any relating to the description, size or dimensions of the Unit

> or rooms therein, and the estimated common charges or other expenses in connection therewith" (emphasis added).

Paragraph 17 of the Purchase Agreement, entitled "Construction of Unit by Seller," provides in relevant part that:

> "17. Construction of Unit by Seller. The Seller agrees, at its own cost and expense to renovate the aforementioned Unit in accordance with the requirements as to materials and workmanship of the local municipal authorities having jurisdiction and further agrees that when completed, same will be in substantial accordance with the plans as filed with the Building Department . . ."

In its complaint, the Board sets forth the following eight causes of action for: (1) breach of the Purchase Agreement and Offering Plan against the Sponsor, G46 and Linda Greco; (2) breach of the implied housing merchant warranty, pursuant to General Business Law (GBL) § 777 *et seq*., against the SDS defendants; (3) fraud in the inducement against the SDS defendants; (4) breach of the "Design Contracts" against the Architect defendants; (5) fraudulent inducement against the Architect defendants; (6) fraudulent conveyances under Debtor and Creditor Law [DCL] §§ 273 and 278 against the SDS defendants; (7) fraudulent conveyances under DCL §§ 274 and 278 against the SDS defendants; and (8) fraudulent conveyances under DCL §§ 276 and 278 against the SDS defendants.

The complaint alleges that "[t]he Building suffers from three primary egregious defects": (1) "the Building's roofing system components were constructed using substandard methods and materials, none of which are watertight"; (2) "the Building's windows are poorly designed, constructed and/or installed using substandard methods and inappropriate materials - - thereby contributing to the Building's water intrusion problems and premature deterioration"; and (3) "the interior heating, ventilating, and air conditioning ("HVAC") system servicing the Building is poorly and inefficiently designed" (NYSCEF doc No. 21 at 1-2).

On March 4, 2016, the Architect defendants answered the complaint and asserted six affirmative defenses, including the statute of limitations. On May 27, 2016, the SDS defendants answered the complaint and asserted eleven affirmative defenses, including the statute of limitations.

The Architect Defendants' Summary Judgment Motion

The Architect defendants now move for summary judgment dismissing the Board's fourth (breach of contract) and fifth (fraud in the inducement) causes of action against them. The Architect defendants argue that both claims are barred by the three-year statute of limitations because this action was commenced on January 13, 2015, more than three years after the they completed their architectural services prior to the issuance of the Building's final Certificate of Occupancy on July 5, 2011. In addition, the Architect defendants contend that the Board's breach of contract claim should be dismissed because there was no privity between the them and the Board, and the Board was not a third party beneficiary to its June 14, 2006 architectural services contract with Second Development. The Architect defendants submit a copy of their architectural services contract, which explicitly provides, at paragraph 9.7, that "[n]othing contained in this Agreement shall create a contractual relationship with or cause of action in favor of a third party against either the Owner or Architect." The Architect defendants argue that the Board's fraud claim should also be dismissed because it is duplicative of the Board's contract claim and is further precluded by the Martin Act.

Here, the fourth cause of action against the Architectural defendants' for breach of contract alleges that:

> "The Architect Defendants breached their obligations under the Design Contracts in that, among other things, they failed properly to supervise and/or inspect construction work at the Building, failed properly to ensure that the construction work at the Building was performed in accordance with its plans and specifications (including the plans and specifications filed with the DOB), failed accurately to prepare the

> Description of Property, and failed accurately to prepare the floor plans and architectural illustrations upon which sales and promotional material for the Condominium were based" (NYSCEF doc No. 21 at 18).

Initially, the Board's claim for breach of contract based upon the failure of the Architect defendants' failure to perform under the Design Contracts is unavailing as the Board fails to establish that it was in privity with the Architect defendants (*see Leonard v Gateway II, LLC,* 68 AD3d 408 [1st Dept 2009], citing *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.,* 190 AD2d 636, 637 [1st Dept 1993]). Indeed, the architectural services contract between the Architect Defendants and Second Development explicitly provides that "[n]othing contained in this Agreement shall create a contractual relationship with or cause of action in favor of a third party against either the Owner or Architect." "Where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties . . . that provision is decisive" (*Nepco Forged Products v Consolidated Edison Co. of N.Y.*, 99 AD2d 508, 508 [2d Dept 1984]; *see Board of Managers of Alexandria Condominium v Broadway/72nd Assoc.*, 285 AD2d 422, 424 [1st Dept 2001]).

To the extent that the Board is asserting a claim against the Architect defendants for professional malpractice based upon the Architect defendants' alleged failure to use reasonable care in the performance of their professional architectural services, such calim is untimely. CPLR 214 (6) provides that "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" is subject to a three-year statute of limitations. According to the Court of Appeals, "[t]he pertinent inquiry is . . . whether the claim is essentially a malpractice claim" (*In re R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542 [2004]). A claim for architectural malpractice "begins to accrue upon the

completion of performance and the consequent termination of the parties' professional relationship, which must be viewed in light of the particular circumstances of the case" (*Napoli v Moisan Architects*, 77 AD3d 895, 895 [2d Dept 2010]).

The Architect defendants satisfied their prima facie burden of establishing their entitlement to judgment, as a matter of law, by demonstrating that the Board's professional malpractice cause of action began to accrue when the Building's final Certificate of Occupancy was issued on July 5, 2011, more than three years prior to the commencement of this action (*Vlahakis v Belcom Dev., LLC*, 86 AD3d 567, 568 [2d Dept 2011] [holding that "the cause of action against (architect) Petruso accrued . . . on August 1, 2006, when the certificate of occupancy was issued and Petruso's obligations under the contract with Belcom ceased"]; *Bd. of Managers of 550 Grand St. Condo. v Schlegel LLC*, 43 Misc 3d 1211(A), * 4 [Sup Ct Kings County 2014] [holding that "if the architect is contractually required to obtain a certificate of occupancy, the date of the certificate's issuance is the end point of the client's professional relationship with its architect"]).

Consequently, the Board's fourth cause of action dismissed.

The Board's fifth cause of action against the Architect defendants for fraudulent inducement is also subject to dismissal because that claim is preempted by the Martin Act. The Martin Act is a disclosure statute designed to protect the public from fraud in the sale of real estate securities, and the Attorney General is charged with enforcing its provisions and implementing regulations (*see Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243-244 [2009]; *CPC Intl. v. McKesson Corp.*, 70 NY2d 268, 276-277 [1987]). A private cause of action for fraud may lie only where its basis is distinct from the Martin Act and it "is not entirely dependent on the Martin Act for its viability" (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.,* 18 NY3d 341, 353 [2011]). Claims are not

preempted by the Martin Act where it is alleged "not that defendant omitted to disclose information required under the Martin Act but that [defendant] affirmatively misrepresented, as part of the offering plan, a material fact about the condominium" (*Bhandari v Ismael Leyva Architects, P.C.,* 84 AD3d 607, 607 [1st Dept 2011]). However, "a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute" (*Assured Guar. [UK] Ltd.,* 18 NY3d at 353).

Here, the Board's fifth cause of action alleges, in relevant part, that:

> "The Architect Certification contains express representations by the Architect Defendants that the Offering Plan (a) did not omit any material fact; (b) did not contain any untrue statement of a material fact; (c) did not contain any fraud, deception, concealment or suppression; (d) did not contain any promise or representation as to the future which was beyond reasonable expectation or unwarranted by existing circumstances; and (e) did not contain any representation or statement which was false, where they knew the truth, could with reasonable effort have known the truth, made no reasonable effort to ascertain the truth, or did not have knowledge concerning the representations or statements made.
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> * * *
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> "The affirmative representations made by the Architect Defendants in the Architect Certification and the Description of Property were made for the specific purpose of inducing prospective Unit Owners to purchase units of the Condominium, and the prospective Unit Owners reasonably relied upon said representations and were thereby induced to purchase their units" (NYSCEF doc No. 21 at 20, 21).

While the Board argues that its fraud claim is based upon *affirmative* misrepresentations rather than omissions and is, therefore, not preempted by the Martin Act, the complaint fails to allege any affirmative misrepresentations that were not required under the Martin Act. The Architect's Certification merely implemented, verbatim, the statutory and regulatory language that is mandated by the Martin Act (GBL § 352-e; 13 NYCRR §20.1). Plaintiff's

claim for fraudulent inducement against the Architect defendants cannot be maintained since it is based on the failure to disclose construction and design defects in the Offering Plan filed with the Attorney General pursuant to the Martin Act. But for the Martin Act and the Attorney General's implementing regulations, the disclosures did not have to be made in the Offering Plan. Thus, the Board's entire fraudulent inducement claim is preempted as it is premised on a violation of the Martin Act and would not have existed absent the statute (*see Kerusa Co. LLC*, 12 NY3d at 244–245).

As a result, the fifth cause of action for fraudulent inducement is dismissed.

The SDS Defendants' Motion for Summary Judgment

The SDS defendants move to dismiss the first, third, sixth, seventh and eighth causes of action asserted as against the Sponsor and the complaint in its entirety as against the Member/Affiliate defendants. The SDS defendants also seek dismissal of the claim for punitive damages.

The Board's first cause of action for breach of the Purchase Agreement and Offering Plan states a viable claim against the Sponsor because the Sponsor executed the Offering Plan, which was incorporated by reference into the Purchase Agreement. In fact, in their reply affirmation, the SDS defendants expressly withdraw that part of their motion for dismissal of the first cause of action as against the Sponsor (NYSCEF doc No. 177 at 2, n 1).

As a result, that part of the SDS defendants' motion for an order dismissing the first cause of action as against the Sponsor is denied.

The Board's third cause of action for fraudulent inducement is subject to dismissal because it is preempted by the Martin Act. While the Board argues that its third cause of action for fraudulent inducement is not preempted by the Martin Act because the claim is

based on affirmative misrepresentations of "*existing* facts" contained in the Offering Plan, the Board presumably relies upon the following allegations in paragraph 98 of its complaint, in which the Board describes the alleged misrepresentations:

> "Specifically, the Sponsor Certification contained representations by the Sponsor Defendants certifying that (a) the Offering Plan set forth the detailed terms of the offering of units of the Condominium; (b) the Offering Plan was complete, current, and accurate; (c) the Offering Plan afforded potential investors, purchasers, and participants an adequate basis upon which to found their judgment; (d) the Offering Plan did not omit any material fact; (e) the Offering Plan did not contain any untrue statement of a material fact; (f) the Offering Plan did not contain any fraud, deception, concealment, suppression, or false pretense; (g) the Offering Plan did not contain any promise or representation as to the future which was beyond reasonable expectation or unwarranted by existing circumstances; and (h) the Offering Plan did not contain any representation or statement which was false, where the Sponsor Defendants knew the truth, could with reasonable effort have known the truth, made no reasonable effort to ascertain the truth, or did not have knowledge concerning the representations or statements made" (NYSCEF doc No. 21 at 15-16).

However, the foregoing representations in the Sponsor Certification merely recited, verbatim, the statutory and regulatory language mandated by the Martin Act (GBL § 352-e; 13 NYCRR §20.1). Because the complaint fails to allege any affirmative misrepresentations by the SDS Defendants that were not specifically required under the Martin Act, dismissal of the Board's third cause of action for fraudulent inducement is warranted (*see Kerusa Co. LLC*, 12 NY3d at 244-245).

Moreover, notwithstanding the Martin Act, the fraudulent inducement claim is subject to dismissal as it is duplicative of the breach of contract claim. A cause of action to recover damages for fraud does not lie where the only fraud asserted relates to an alleged breach of contract (*see Stangel v Chen*, 74 AD3d 1050, 1052 [2d Dept 2010]). In other words, a fraud claim fails when an alleged breach of contractual duties and the supporting allegations do not concern representations that are collateral or extraneous to the terms of the parties' agreement

(*see Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2d Dept 2009]). There is no allegation that the Unit Owners relied on any representation of the Sponsor not contained in the Offering Plan or that the alleged misrepresentations "resulted in any loss independent of the damages allegedly incurred for breach of contract" (*Pugni v Giannini*, 163 AD3d 1018, 1020 [2d Dept 2018]; *see Doukas v Ballard*, 135 AD3d 896, 897 [2d Dept 2016]).

As a result, the third cause of action is dismissed.

The Board alleges that following the repayment of its obligations to the financing lender the Sponsor completed additional closings but did not retain the sales proceeds. Instead, the Sponsor distributed those proceeds pro rata to the member/affiliate defendants in accordance with their equity interests in the Sponsor and/or the Condominium (the "Equity Distributions"). The Board alleges that the Equity Distributions were transfers of the property of the Sponsor which are fraudulent under the DCL as they were made without consideration and left the Sponsor insolvent (sixth cause of action under DCL § 273), were made while the Sponsor was engaged in, or was about to be engaged in, a business or transaction for which the property remaining in its hands after such distribution would leave it with an unreasonably small amount of capital (seventh cause of action under DCL § 274) and were made by the Sponsor with actual intent to hinder, delay and defraud creditors of the Sponsor, including the Condominium and the Unit Owners (eighth cause of action under DCL § 276).

The SDS defendants seek dismissal of the sixth and seventh causes of action, which assert claims for constructive fraudulent conveyance under the DCL, on the ground that the Condominium and the individual unit owners are not "creditors" of the Sponsor. The SDS defendants further argue that the fraudulent conveyance causes of action should be dismissed because they fail to allege fraudulent intent with particularity, as required by CPLR 3016.

Section 270 of the DCL broadly defines "creditor" as any "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent." Applying the DCL's broad definition of "creditor," the Second Department recently upheld a fraudulent conveyance claim against a condominium sponsor because the board of directors simultaneously asserted a breach of contract claim against the sponsor, and thus, was a "creditor" of the sponsor within the meaning of the DCL (*Bd. of Managers of E. River Tower Condo. v Empire Holdings Grp., LLC*, 175 AD3d 1377, 1379 [2d Dept 2019] [holding that "the plaintiff sufficiently alleged that it is a creditor of the sponsor since it asserted a breach of contract cause of action against the sponsor, even though said cause of action was unmatured at the time of the alleged conveyances"]).

Similarly unavailing is the contention that the Board's constructive fraudulent conveyance claims fail because the Board did not plead fraudulent intent with particularity. The Second Department has held that the DCL does not require a showing of actual motive or intent to defraud (*see Zanani v Meisels,* 78 AD3d 823, 824 [2d Dept 2010]), and therefore dispenses with the particularity of pleading under CPLR 3016 (b) (*see Gateway I Grp., Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149 [2d Dept 2009] ["the plaintiff was not required to plead violations of Debtor and Creditor Law §§ 273, 273-a, 274, and 275, with such heightened particularity pursuant to CPLR 3016 (b)"]).

Here, the complaint adequately states causes of action under DCL § 273 and 274 based on the transfers of equity distributions from the Sponsor to the member/affiliate defendants (see *Bd. of Managers of E. River Tower Condo.*, 175 AD3d at 1379; *Board of Mgrs. of the Lore Condominium v Gateway IV LLC*, 169 AD3d 617, 618 [1st Dept 2019]). The SDS defendants do not submit evidence to establish the absence of issues of fact with respect to the sixth and seventh causes of action (*see Board of Mgrs. of 14 Hope St.*

Condominium v Hope St. Partners, LLC, 40 Misc 3d 1215[A], 2013 NY Slip Op 51201[U] [Sup Ct, Kings County 2013]).

Accordingly, that part of the SDS defendants' motion to dismiss the sixth and seventh causes of action is denied.

However, with respect to the eighth cause of action, the Board alleges merely that "[u]pon information and belief, some or all of the Equity Distributions were made by the Sponsor with actual intent to hinder, delay and defraud creditors of the Sponsor, including the Condominium and the Unit Owners." The Board's cause of action pursuant to DCL § 276 "requires proof that the transferor actually intended to hinder, delay, or defraud' any present or future creditors" (*Zanani*, 78 AD3d at 825, quoting Debtor and Creditor Law § 276). Since "[d]irect evidence of [actual] fraudulent intent is often elusive ... courts will consider 'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004], *lv denied* 3 NY3d 612 [2004] [internal quotation marks omitted]; see also Matter of Shelly v Doe, 249 AD2d 756, 758 [3d Dept 1998]). "Badges of fraud" from which fraudulent intent may be inferred include: (1) a close relationship between the parties to the transaction, (2) secrecy and haste in making the transfer, (3) the inadequacy of consideration, (4) the transferor's knowledge of the creditor's claim, or a claim so likely to arise as to be certain, and the transferor's inability to pay it, and (5) the retention of control of property by the transferor after the conveyance (*see Dempster*, 4 AD3d at 498; *Board of Mgrs. of 14 Hope St. Condominium*, 40 Misc 3d 1215[A], 2013 NY Slip Op 51201[U] at *7 [internal quotation marks and citations omitted]).

Here, the Board's eighth cause of action fails to allege with the requisite specificity a cause of action upon which relief can be granted sounding in actual fraud. The complaint

simply parrots and tracks the statutory language of Debtor and Creditor Law § 276, without referencing any of the aforementioned "badges of fraud." No evidence of fraudulent intent is identified (see CPLR 3016 [b]). Thus, the Board's eighth cause of action is insufficiently pleaded and fails to state a cause of action (*see Board of Mgrs. of the Lore Condominium*, 169 AD3d at 618).

Accordingly, the eighth cause of action is dismissed.

Turning to that part of the motion to dismiss the complaint as against the Member/Affiliate defendants, the SDS defendants argue that the Board's attempt to impose liability on these defendants for the Sponsor's contract obligations is "untenable" because they are not parties to the Purchase Agreements between the unit purchasers and the Sponsor. The Board's claims against these defendants are based on their status as affiliates and/or members of the Sponsor, and seek to hold them liable for the Sponsor's acts or omissions under a veil-piercing theory. The SDS defendants assert that the conclusory allegation in paragraph 105 of the complaint that the Sponsor's affiliates "exercised complete dominion and control over the Sponsor . . ." is insufficient to pierce the corporate veil since "the [c]omplaint fails to allege facts indicating that any of the [Member/Affiliate defendants] engaged in a single act amounting to an abuse or perversion of the corporate form." The SDS defendants contend that "the Complaint alleges no facts, but only bare, conclusory statements purporting to meet the essential elements required for a veil piercing, which is legally insufficient" and that "the documentary evidence submitted with this motion demonstrates that the corporate form was scrupulously followed." The SDS defendants further assert that the fact that Linda Greco signed the Sponsor Certification in the Offering Plan "does not subject her to individual liability to the Board, whether arising in tort, contract or otherwise."

It is well-settled that "a member of a limited liability company will not be held liable for the liabilities of the company solely by reason of being a member of the company or acting in such capacity or participating in the conduct of the business of the company (*Bd. of Managers of Beacon Tower Condo. v 85 Adams St., LLC*, 136 AD3d 680, 681 [2d Dept 2016] [citing Limited Liability Company Law § 609 (a)]). "To state a veil piercing claim, the plaintiff is required to show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015] [internal citations and quotation marks omitted]). "In addition, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Fernbach, LLC v Calleo*, 92 AD3d 831, 832 [2d Dept 2012] [internal citations and quotation marks omitted]). "Generally considered are such factors as whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form . . . such that one of the corporations is a mere instrumentality, agent and alter ego of the other" (*John John, LLC v Exit 63 Dev., LLC*, 35 AD3d 540, 541 [2d Dept 2006], quoting *Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 893-94 [3d Dept 2003]).

Here, the Board's complaint, at paragraph 105, contains a single, conclusory allegation of veil-piercing:

> "G46, Linda Greco, Louis Greco, Second Development Services, and [G Holdings] *exercised complete dominion and control over the Sponsor* in making . . . affirmative misrepresentations and directly

> participated in the fraud in the inducement alleged herein" (NYSCEF doc No. 21 at 17 [emphasis added]).

The SDS Defendants correctly contend that this allegation, without more, is insufficient to pierce the corporate veil. An allegation of domination and control is not, standing alone, sufficient to state a cause of action for personal liability against a corporate owner. "Were that so, then . . .virtually every cause of action brought against a corporation that is wholly or principally owned by an individual conducting corporate affairs could be extended ipso facto to the owner personally. Such a result would render the principle of limited liability illusory"(*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 132 [2d Dept 2009], *affd* 16 NY3d 775 [2011]). "For this logical reason, a sufficient complaint for piercing the corporate veil must also contain allegations that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice . . . such that a court in equity will intervene (*id.* [citation and internal quotation marks omitted]). "The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil" (*Flushing Plaza Assoc. #2 v Albert*, 102 AD3d 737, 739 [2d Dept 2013]; *see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]). Here, the Board fails to plead any of the necessary factors to establish domination and control, including failure to adhere to formalities, personal use of funds, commingling of assets, and inadequate capitalization (*see Olivieri Const. Corp. v WN Weaver St., LLC*, 144 AD3d 765, 766-767 [2d Dept 2016]; *Grammas v Lockwood Assoc.*, LLC, 95 AD3d 1073, 1075 [2d Dept 2012]).

Moreover, to the extent the Board seeks to attach liability against G46 and Linda Greco for breach of the Purchase Agreement and Offering Plan based on their certifications, this claim is also subject to dismissal insofar as a plaintiff may not seek damages for breach of contract against the individual principals of a sponsor based solely upon their certification of the offering plan in their representative capacities, in accordance with the requirements of the Martin Act (*Bd. of Managers of 125 N. 10th Condo. v 125North10, LLC*, 150 AD3d 1065, 1066 [2d Dept 2017], *leave to appeal dismissed*, 30 NY3d 959 [2017], *reargument denied*, 30 NY3d 1086 [2018]).

As a result, that part of SDS defendants' motion to dismiss the complaint as against the Member/Affiliate defendants is granted to the extent of the first and second causes of action.

Finally, that branch of that part of the SDS defendants' summary judgment motion seeking dismissal of the Board's request for punitive damages in the complaint is granted.

"Punitive damages are available to vindicate a public right only where the actions of the alleged tortfeasor constitute either gross recklessness or intentional, wanton or malicious conduct aimed at the public generally, or were activated by evil or reprehensible motives" (*Rodgers v Duffy*, 95 AD3d 864, 866 [2d Dept 2012]). "Punitive damages may be awarded when the defendant's conduct has a high degree of moral culpability . . . The conduct need not be intentional and it is sufficient if it is so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others" (*Rinaldo v Mashayekhi*, 185 AD2d 435, 436 [3d Dept1992]). "Such wantonly negligent or reckless conduct must be sufficiently blameworthy, and the award of punitive damages must advance a strong public policy of the State by deterring its future violation" (*Randi A.J. v Long Island Surgi-Center*, 46 AD3d 74, 81 [2d Dept 2007]). Here, defendants' alleged misconduct is not so reckless

or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others. Consequently, the Board's request for punitive damages in the complaint is dismissed.

The foregoing constitutes the decision and order of the court.

ENTER

J. S. C.