

Alekna v 207-217 W. 110 Portfolio Owner LLC

2021 NY Slip Op 30609(U)

March 2, 2021

Supreme Court, New York County

Docket Number: 156847/2016

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

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MARIANA DIMITROVA ALEKNA, BEATRIZ DA COSTA,
SAMUEL GILCHRIST, RACHEL OLSON, JOSE
SANTAMARIA, LAURA MAHLER, KELLY HOLLAND, MAX
HOLLAND, MICHAEL TIVE, JOHN COLE, MARY ELLEN
COLE, KRISTIN MANNONI, JOSEPH DEBART, WILLIAM
DEBART, ALEX BERRICK, ASHAN SINGH, LAMAR
SMALL, RACHEL PERKINS, SARA MUSE, KYUNG CHAN
ZOH, JIHOE KOO

INDEX NO. 156847/2016
MOTION DATE 02/07/2020
MOTION SEQ. NO. 005

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

207-217 WEST 110 PORTFOLIO OWNER LLC, 207
REALTY ASSOCIATES L.L.C., MANN REALTY
ASSOCIATES, GFB MANAGEMENT LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 170, 171, 172, 173,
174, 175, 176, 182, 183, 184, 185, 186, 187, 188, 190

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

ORDERED that the motion of defendants 207 Realty Associates L.L.C. and Mann Realty Associates to dismiss the second amended cross claims of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC (motion sequence no. 005) is granted to the extent of dismissing the first, third and fourth cross claims as against defendant Mann Realty Associates, and dismissing the first and fourth cross claims and that part of the third cross claim for contribution as against defendant 207 Realty Associates L.L.C., and the balance of the motion is otherwise denied; and it is further

ORDERED that the first, third and fourth cross claims as against defendant Mann Realty Associates and the first and fourth cross claims and that part of the third cross claim for contribution as against defendant 207 Realty Associates L.L.C. are dismissed; and it is further

ORDERED that counsel for defendants 207 Realty Associates L.L.C. and Mann Realty Associates shall serve a copy of this order along with notice of entry on all parties within 20 days; and it is further

ORDERED that within 20 days after service of this order with notice of entry, defendants 207 Realty Associates L.L.C. and Mann Realty Associates shall serve and file an answer to the second amended answer of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC.

In this rent overcharge action, defendants 207 Realty Associates L.L.C. (Realty) and Mann Realty Associates (Mann) (together, the Seller Defendants) move, pursuant to CPLR 3211 (a) (1) and (7) to dismiss the second amended cross claims of defendants 207-217 West 110 Portfolio Owner LLC (West) and GFB Management LLC (GFB) (together, the Buyer Defendants).

BACKGROUND

From 1997 to 2016, Realty owned a rental apartment building located at 207 Central Park North, New York, New York (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 175, Henry Novoa [Novoa] aff, ¶ 3). Mann served as the Building's managing agent (*id.*).

On January 22, 2016, Realty and nonparty 217 Realty Associates LLC, together as "Seller," and West, as "Purchaser," executed a "Purchase and Sale Agreement" (the PSA) whereby West agreed to purchase the Building, the adjacent building at 217 Central Park North, and "any and all of Seller's right, title and interest in and to the leases, licenses and occupancy agreements" for \$47.75 million (NYSCEF Doc No. 173, Michael B. Carlinsky [Carlinsky] affirmation, exhibit 1 at 5-6 [Sections 1.1 (d) and 1.3]). Article 4 of the PSA ("REPRESENTATIONS, WARRANTIES AND COVENANTS") reads, in relevant part:

"Section 4.1 Representations and Warranties of Seller. Seller hereby makes the following representations and warranties to Purchaser as of the Effective Date, which representations and warranties shall be deemed to have been made again as of the Closing, subject to Section 3.6(b) hereof:

...

(e) Leases. Exhibit J sets forth a list of all of the Leases and a rent roll for the Premises, and is accurate in all material respects as of the date prepared Seller has made available to Purchaser for review a copy of each Lease which is in Seller's possession and which is, to Seller's Knowledge, true and complete. All of the Leases are in full force and effect in accordance with their terms ... Seller has not within the 24 month period immediately preceding the date of this Agreement received from any tenant whose lease remains in full force and effect a written notice wherein such tenant asserts that

Seller has overcharged such tenant for rent. To Seller's Knowledge, during the 12 month period immediately preceding the date of this Agreement, there has been no organized rent strike or joint action by tenants' groups to withhold rent from Seller with respect to the Property.

...

Section 4.2 No Survival of Seller's Representations and Warranties. The representations and warranties of Seller set forth herein shall be updated as of the Closing in accordance with the terms of this Agreement, and shall not survive the Closing"

(*id.* at 17-18) (emphasis supplied). Article 8, entitled "DISCLAIMERS, WAIVERS, RELEASES AND INDEMNITY," provides as follows:

Section 8.1 NO RELIANCE ON DOCUMENTS. EXCEPT AS EXPRESSLY STATED HEREIN, SELLER MAKES NO REPRESENTATION OR WARRANTY AS TO THE TRUTH, ACCURACY OR COMPLETENESS OF ANY MATERIALS, DATA OR INFORMATION DELIVERED BY SELLER OR ITS BROKERS OR AGENTS TO PURCHASER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED HEREBY. PURCHASER ACKNOWLEDGES AND AGREES THAT ALL MATERIALS, DATA AND INFORMATION DELIVERED BY SELLER TO PURCHASER IN CONNECTION WITH THE TRANSACTION CONTEMPLATED HEREBY ARE PROVIDED TO PURCHASER AS A CONVENIENCE ONLY AND THAT ANY RELIANCE ON OR USE OF SUCH MATERIALS, DATA OR INFORMATION BY PURCHASER SHALL BE AT THE SOLE RISK OF PURCHASER, EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN. NEITHER SELLER, NOR ANY AFFILIATE OF SELLER, SHALL HAVE ANY LIABILITY TO PURCHASER FOR ANY INACCURACY IN OR OMISSION FROM ANY REPORT OR REPORTS DELIVERED BY SELLER TO PURCHASER.

Section 8.2 AS-IS SALE; DISCLAIMERS. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT OR IN ANY OTHER DOCUMENT EXECUTED BY SELLER AND DELIVERED TO PURCHASER AT THE CLOSING, IT IS UNDERSTOOD AND AGREED THAT SELLER IS NOT MAKING AND HAS NOT AT ANY TIME MADE ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND OR CHARACTER, EXPRESS OR IMPLIED, WITH RESPECT TO THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY

REPRESENTATIONS OR WARRANTIES AS TO A PARTICULAR PURPOSE OR THE PHYSICAL OR ENVIRONMENTAL CONDITION OF THE PROPERTY. PURCHASER ACKNOWLEDGES AND AGREES THAT UPON CLOSING SELLER SHALL SELL AND CONVEY TO PURCHASER AND PURCHASER SHALL ACCEPT THE PROPERTY 'AS IS, WHERE IS, WITH ALL FAULTS', AND SHALL ASSUME RESPONSIBILITY FOR THE PHYSICAL AND ENVIRONMENTAL CONDITION OF THE PROPERTY EXCEPT TO THE EXTENT EXPRESSLY PROVIDED OTHERWISE IN THIS AGREEMENT OR IN ANY OTHER DOCUMENT EXECUTED BY SELLER AND DELIVERED TO PURCHASER AT CLOSING. PURCHASER HAS NOT RELIED AND WILL NOT RELY ON, AND SELLER IS NOT LIABLE FOR OR BOUND BY, ANY EXPRESS OR IMPLIED WARRANTIES, GUARANTIES, STATEMENTS, REPRESENTATIONS OR INFORMATION PERTAINING TO THE PROPERTY OR RELATING THERETO (INCLUDING SPECIFICALLY, WITHOUT LIMITATION, OFFERING PACKAGES DISTRIBUTED WITH RESPECT TO THE PROPERTY) MADE OR FURNISHED BY SELLER, THE MANAGERS OF THE PROPERTY, OR ANY REAL ESTATE BROKER OR AGENT REPRESENTING OR PURPORTING TO REPRESENT SELLER, TO WHOMEVER MADE OR GIVEN, DIRECTLY OR INDIRECTLY, ORALLY OR IN WRITING, UNLESS SPECIFICALLY SET FORTH IN THIS AGREEMENT OR IN ANY OTHER DOCUMENT EXECUTED BY SELLER AND DELIVERED TO PURCHASER AT THE CLOSING. PURCHASER ALSO ACKNOWLEDGES THAT THE PURCHASE PRICE REFLECTS AND TAKES INTO ACCOUNT THAT THE PROPERTY IS BEING SOLD 'AS-IS.'

PURCHASER REPRESENTS TO SELLER THAT PURCHASER HAS CONDUCTED SUCH INVESTIGATIONS OF THE PROPERTY, INCLUDING BUT NOT LIMITED TO, THE PHYSICAL AND ENVIRONMENTAL CONDITIONS THEREOF, AS PURCHASER DEEMS NECESSARY OR DESIRABLE TO SATISFY ITSELF AS TO THE CONDITION OF THE PROPERTY AND THE EXISTENCE OR NONEXISTENCE OR CURATIVE ACTION TO BE TAKEN WITH RESPECT TO ANY HAZARDOUS MATERIALS ON OR DISCHARGED FROM THE PROPERTY, AND WILL RELY SOLELY UPON SAME AND NOT UPON ANY INFORMATION PROVIDED BY OR ON BEHALF OF SELLER OR ITS AGENTS OR EMPLOYEES WITH RESPECT THERETO, OTHER THAN SUCH REPRESENTATIONS, WARRANTIES AND

COVENANTS OF SELLER AS ARE EXPRESSLY SET FORTH IN THIS AGREEMENT. UPON CLOSING, PURCHASER SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING BUT NOT LIMITED TO, CONSTRUCTION DEFECTS AND ADVERSE PHYSICAL AND ENVIRONMENTAL CONDITIONS, MAY NOT HAVE BEEN REVEALED BY PURCHASER'S INVESTIGATIONS, AND EXCEPT WITH RESPECT TO MATTERS WHICH BY THE EXPRESS TERMS OF THIS AGREEMENT SURVIVE CLOSING, PURCHASER, UPON CLOSING, SHALL BE DEEMED TO HAVE WAIVED, RELINQUISHED AND RELEASED SELLER (AND SELLER'S OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS) FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION (INCLUDING CAUSES OF ACTION IN TORT), LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES) OF ANY AND EVERY KIND OR CHARACTER, KNOWN OR UNKNOWN, WHICH PURCHASER MIGHT HAVE ASSERTED OR ALLEGED AGAINST SELLER (AND SELLER'S OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS) AT ANY TIME BY REASON OF OR ARISING OUT OF ANY LATENT OR PATENT CONSTRUCTION DEFECTS OR PHYSICAL CONDITIONS, ENVIRONMENTAL CONDITIONS, VIOLATIONS OF ANY APPLICABLE LAWS AND ANY AND ALL OTHER FACTS, OMISSIONS, EVENTS, CIRCUMSTANCES OR MATTERS REGARDING THE PROPERTY.

Section 8.3 SURVIVAL OF DISCLAIMERS. THE PROVISIONS OF THIS ARTICLE VIII SHALL SURVIVE CLOSING OR ANY TERMINATION OF THIS AGREEMENT"

(*id.* at 22-24) (emphasis in original). The PSA also contains a broad merger clause, which provides that "[t]his Agreement contains the entire agreement between the parties hereto pertaining to the subject matter hereof and fully supersedes all prior written or oral agreements and understandings between the parties pertaining to such subject matter" (*id.* at 29 [Section 10.5]).

West received title to the Building by way of a "Bargain and Sale Deed Without Covenant Against Grantor's Acts" dated April 20, 2016 and recorded in the Office of the City Register on

May 4, 2016 (NYSCEF Doc No. 122, amended complaint, ¶ 4; NYSCEF Doc No. 160, Buyer Defendants' second amended answer, ¶ 206). GFB is the Building's current managing agent (NYSCEF Doc No. 160, ¶ 2).

On August 16, 2016, plaintiffs Mariana Dimitrova Alekna, Beatriz Da Costa, Samuel I. Gilchrist, Rachel Olson, Jose Santamaria, Laura Mahler, Kelly C. Holland, Max A. Holland, Michael G. Tive, John C. Cole, Mary Ellen Cole, Kristin Mannoni, Joseph Richard Debart, III, William Blair Debart, Alex Berrick, Ashan Singh, Lamar Small, Rachel L. Perkins, Sara Muse, Kyung Chan Zoh And Jihoe Koo (collectively, plaintiffs) commenced this action seeking monetary damages, attorneys' fees and injunctive and declaratory relief for alleged violations of the Rent Stabilization Law of 1969 (RSL) (Administrative Code of City of NY §§ 26-501, *et seq.*). Plaintiffs allege that their units were subject to the RSL because the Building had participated in the J-51 tax benefits program through June 2015 (NYSCEF Doc No. 122, ¶ 8). Plaintiffs, though, did not receive rent-stabilized leases or J-51 Riders (*id.*, ¶¶ 10-11). Instead, the Seller Defendants furnished them with free-market, non-stabilized leases and failed to list their units as rent-stabilized with the New York State Division of Housing and Community Renewal (DHCR) (*id.*, ¶¶ 14-16). Plaintiffs assert that nonparty Fairstead Capital (Fairstead) purchased the Building in January 2016 and was aware "that the Building suffered from significant J-51 exposure" (*id.*, ¶¶ 21-22). Plaintiffs also allege that Fairstead, through West, had purchased the Building "AS IS, WHERE IS, WITH ALL FAULTS" (*id.*, ¶ 25).

In their second amended answer, the Buyer Defendants allege that the Seller Defendants made numerous false and misleading statements about the lawful rents and the regulatory statuses of the apartments on the Building's rent roll and other documents so as to induce West to purchase the Building for more than its actual value (NYSCEF Doc No. 160, ¶¶ 210-212 and 236). The

Buyer Defendants claim the Seller Defendants illegally deregulated apartments or failed to register them as rent-stabilized for the period of time during which the Building received J-51 benefits (*id.*, ¶ 208). Importantly, under Section 4.1 (e) of the PSA, the Seller Defendants represented that the rent roll was accurate (*id.*, ¶ 226), but the Buyer Defendants maintain that the Seller Defendants “knew, but did not disclose, that the rent roll was false because it listed improperly deregulated apartments as exempt from rent regulation” (*id.*, ¶ 220). The Buyer Defendants plead four cross claims against the Seller Defendants for (1) breach of contract, (2) fraud and fraud in the inducement, (3) indemnification and contribution, and (4) rescission.

Shortly after commencing this action, plaintiffs and the Buyer Defendants executed a stipulation resolving the first cause of action and declaring that certain plaintiffs and their apartments were subject to the RSL (NYSCEF Doc No. 11, 1/16/17 stipulation at 3). Plaintiffs have also settled their action against the Seller Defendants (NYSCEF Doc No. 116, 1/30/19 stipulation; NYSCEF Doc No. 117, 8/21/19 order).

The Seller Defendants now move to dismiss the Buyer Defendants’ cross claims.

DISCUSSION

On a motion to dismiss brought under CPLR 3211, the court must “accept the facts as alleged in the complaint as 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” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law,” the motion will be denied (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, “allegations consisting of bare legal conclusions ... are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation

omitted)). “[T]he court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). “When documentary evidence is submitted by a defendant ‘the standard morphs from whether the plaintiff stated a cause of action to whether it has one’” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]). Whether a plaintiff can ultimately prevail on a claim is not part of the court’s calculus on a motion to dismiss (*see Stanger v Shoprite of Monroe, NY*, 180 AD3d 408, 409 [1st Dept 2020]).

Dismissal under CPLR 3211 (a) (1) is warranted “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]).

A. The First Cross Claim for Breach of Contract

This cross claim is predicated on an alleged breach of Realty’s representation and warranty in Section 4.1 (e) of the PSA about the accuracy of the rent roll (NYSCEF Doc No. 160, ¶ 241).

The Seller Defendants argue that this cross claim must be dismissed as against Mann, who is not a party to the PSA. As to Realty, they advance three arguments for dismissing this cross claim. First, the Seller Defendants contend that the merger doctrine and the “no survival” clause in Section 4.2 preclude the cross claim. Next, they submit that the rent roll was facially accurate since it lists each tenant’s current lease type, as required under the PSA. Last, the PSA does not

contain a seller's representation on whether any units had been improperly deregulated under the holding in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]). The Seller Defendants posit that the Buyer Defendants could have demanded the inclusion of a such representation, but they did not. The only representation about tenant rents related to whether Realty had received written notice of any rent overcharges within the 24-month period prior to the date of the PSA.

In opposition, the Buyer Defendants reject the contention that the merger doctrine and the no survival clause in Section 4.2 bar the cross claim since both are inapplicable where fraud is alleged. The "as is" disclaimer language in Section 8.2 is also inapplicable, since that provision excepts specific representations set forth elsewhere in the PSA. The Buyer Defendants submit that the representation in Section 4.1 (e) about the rent roll is one such exception. The Buyer Defendants also reject the Seller Defendants' description of the rent roll, since this statement is not based on the observation of one with personal knowledge of how the document was prepared. In any event, the Buyer Defendants maintain the rent roll is inaccurate because it lists the wrong rent-regulated statuses for the apartments. Finally, the Buyer Defendants claim that it was the Seller Defendants' burden to insist on including a specific disclaimer about the accuracy of the rent regulated statuses of the apartments as shown on the rent roll.

At the outset, Mann has demonstrated that it is not a proper party on this cross claim. "[A] breach of contract claim cannot be asserted against a non-signatory to the contract" (*Array BioPharma, Inc. v AstraZeneca AB*, 184 AD3d 463, 464 [1st Dept 2020]), and, here, Mann is not a signatory to the PSA. The Buyer Defendants have not addressed whether Mann may be held liable for breaching the PSA as nonparty to the agreement. Accordingly, the first cross claim against Mann is dismissed.

Turning to the cross claim against Realty, the plaintiff asserting a cause of action for breach of contract must prove the existence of a contract, the plaintiff's performance, the defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The PSA qualifies as documentary evidence for purposes of CPLR 3211 (a) (1) (*see Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016]). No party has challenged the validity of the PSA or West's performance thereunder.

The merger doctrine as applied to real estate transactions "provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract" (*TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 85 [1st Dept 2015]). "The only exception to this rule is where the parties clearly intended that the particular provision of the contract supporting the claim would survive the delivery of the deed" (*id.*). It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Thus, the merger doctrine prohibits varying the terms of the parties' contract (*see West 90th Owners Corp. v Schlechter*, 165 AD2d 46, 50-51 [1st Dept 1991], *lv dismissed* 77 NY2d 939 [1991]).

Here, the merger doctrine bars the breach of contract cross claim (*see 527 Smith St. Brooklyn Corp. v Bayside Fuel Oil Depot Corp.*, 262 AD2d 278, 278-279 [2d Dept 1999]). As stated above, Section 8.2 provides that any matters not expressly reserved in the agreement "shall be deemed to have [been] waived, relinquished and released" (NYSCEF Doc No. 173 at 24). Section 4.2 states that Realty's representations and warranties, including those concerning the accuracy of the rent roll found Section 4.1 (e), shall not survive the closing. When these two clear, unambiguous provisions are read together, the merger doctrine applies to extinguish any claim for

a breach of Section 4.1 (e) (*see Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 521 [2d Dept 2007] [dismissing a cause of action for breach of contract where the contract did not reserve a warranty as to a specific premises condition]).

The Buyer Defendants' argument that the merger doctrine is inapplicable where fraud is alleged is unpersuasive, at least in the context of a breach of contract claim (*see West 90th Owners Corp. v Schlechter*, 137 AD2d 456, 459 [1st Dept 1988] [dismissing the plaintiff buyer's breach of contract claim based on the defendant's representation about the length of one of the leases because that specific representation did not survive delivery of the deed to the plaintiff]). Several sections in the PSA (Sections 3.4, 3.5, 4.3 [c], 4.3 [d], 7.1, 8.3, 10.2, 10.9 and 10.13) expressly state that the representations made in them shall survive the closing. By contrast, the plain language in Section 4.2 makes clear that there is no carve out excepting the accuracy of the rent roll past the closing of title. The Buyer Defendants fail to point to any other contract provision providing for an exception. Accordingly, the first cross claim against Realty is dismissed. The court need not address the other arguments raised by the Seller Defendants in support of dismissal.

B. The Second Cross Claim for Fraud and Fraud in the Inducement

The fraud and fraud in the inducement cross claim is predicated upon the Seller Defendants' alleged misrepresentations about the unlawful apartment deregulations and illegal rents charged to the Building tenants (NYSCEF Doc No. 160, ¶ 247).

The Seller Defendants argue that this cross claim fails on four grounds. They contend that (1) the Buyer Defendants failed to plead the cross claim with particularity; (2) the fraud cross claim is duplicative of the contract cross claim; (3) the Buyer Defendants' due diligence belies any claim of justifiable reliance; and, (4) the Buyer Defendants' unreasonable delay in bringing this cross claim constitutes a waiver.

In response, the Buyer Defendants claim to have adequately pled each element necessary to sustain a claim for fraudulent inducement. In particular, they allege that the Seller Defendants misrepresented presents facts regarding the rent regulatory statuses of the apartments that induced them to enter the PSA and pay more for the Building than its actual worth. They further argue that during the due diligence period, the Seller Defendants failed to exchange any documents setting forth the true regulatory statuses of the apartments. Furthermore, the Buyer Defendants argue that the “as is” clause is inapplicable where, as here, there is an allegation of fraud.

A cause of action of action for fraud requires “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). “To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury” (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). The plaintiff must show that it justifiably relied on the misrepresentation (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]), and that it “was induced to act [or] refrain from acting to his detriment by virtue of the alleged misrepresentation or omission” (*Shea v Hambros PLC*, 244 AD2d 39, 46 [1st Dept 1998] [internal quotation marks and citation omitted]). As to causation, the “plaintiff must show both that defendant’s misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)” (*Vandashield Ltd v Isaacson*, 146 AD3d 552, 553 [1st Dept 2017] [internal quotation marks and citation omitted]).

For a cause of action sounding in fraud, CPLR 3016 (b) provides that “the circumstances constituting the wrong shall be stated in detail.” The plaintiff asserting a fraud claim need not provide “unassailable proof” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Rather, “the misconduct complained of [must] be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of” (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). Thus, a plaintiff satisfies CPLR 3016 (b) “when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*Pludeman*, 10 NY3d at 492).

Applying these precepts, the Buyer Defendants have pled a cross claim for fraud in the inducement with the requisite particularity. The Buyer Defendants allege that the Seller Defendants were aware that the Building had received J-51 tax benefits and that several of the apartments had been deregulated illegally. Specifically, they allege that the Building manager, Novoa, a Mann employee, was involved in *Altschuler v Jobman 478/480, LLC, NY*, Sup Ct, NY County, index No. 603556/2009 (NYSCEF Doc No. 160, ¶ 216). That lawsuit concerned how the receipt of J-51 tax benefits affected the plaintiff tenant’s rent and the rent regulated status of his apartment. The trial court did not find in the defendant landlord’s favor (*see Altschuler v Jobman 478/480, LLC, NY*, 2013 NY Slip Op 30208[U], *11-13 [Sup Ct, NY County 2013], *aff’d* 135 AD3d 439 [1st Dept 2016], *lv dismissed* 28 NY3d 945 [2016], *lv denied* 29 NY3d 903 [2017]). In this action, Novoa, the leasing agent in the *Altschuler* action, avers that he began handling leasing for the Building in 2013 (NYSCEF Doc No. 175, ¶ 10). He admits that he received a notice from DHCR in January 2016 directing landlords to re-register apartments that had been deregulated during the J-51 benefits period (*id.*). Despite Novoa’s awareness that the apartments in the Building should have been re-registered with DHCR as rent stabilized, the Seller Defendants allegedly took no action (NYSCEF Doc No. 160, ¶ 217), and intentionally failed to inform the

Buyer Defendants that the rent roll listing certain apartments as exempt from rent regulation was false (*id.*, ¶¶ 220-221). The Buyer Defendants further allege that the misrepresentations were made to induce them into purchasing the Building, since there were no other prospective buyers for it (*id.*, ¶ 219). These allegations are sufficient for purposes of satisfying CPLR 3016 (b) (*see MBIA Ins. Corp. v Countywide Home Loans, Inc.*, 87 AD3d 287, 295 [1st Dept 2011] [denying a motion to dismiss where the complaint sufficiently identified the misrepresentations and how they were made to the plaintiff]).

Similarly, the fraud cross claim is not redundant of the breach of contract cross claim. A fraud claim is duplicative of a breach of contract claim where the fraud involves an “insincere promise of future performance under the contract” (*see Archstone Dev. LLC v Renval Constr. LLC*, 156 AD3d 432, 432 [1st Dept 2017]). Where the purported fraud concerns a then-present fact or a present fact that is collateral to the contract, the fraud claim stands independently from a contract claim (*see American Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 [1st Dept 2016]; *TIAA Global Invs., LLC*, 127 AD3d at 87). As is relevant here, “[a] warranty is not a promise of performance, but a statement of present fact” (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 292 [1st Dept 1999]). A fraud claim arising out of a breach of a contractual warranty may coexist alongside a breach of contract claim (*see Wyle Inc. v ITT Corp.*, 130 AD3d 438, 440 [1st Dept 2005]). In this instance, the Buyer Defendants allege that the Seller Defendants misrepresented key and material facts from the rent roll about the rent regulated statuses of the apartments, despite the warranty in the PSA that the rent roll was accurate. This is sufficient (*see MBIA Ins. Corp.*, 87 AD3d at 294 [stating that “[i]t is of no consequence that some of the allegedly false representations are also contained in the agreements as warranties and form a basis of the breach of contract claim”]).

As to the element of reliance, “[r]eliance must be found to be justifiable under all the circumstances before a complaint can be found to state a cause of action in fraud” (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 57 [1st Dept 2013] [internal quotation marks and citation omitted]). In *Danann Realty Corp. v Harris* (5 NY2d 317 [1959]), the Court of Appeals repeated the general rule that:

““if the facts represented are not matters peculiarly within the party’s knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations””

(*id.* at 322, quoting *Schumaker v Mather*, 133 NY 590, 596 [1892]). Ordinarily, the issue of justifiable reliance is a question of fact (see *Braddock v Braddock*, 60 AD3d 84, 88 [1st Dept 2009], *appeal withdrawn* 12 NY3d 780 [2009]).

The Seller Defendants maintain that there can be no detrimental reliance since the Buyer Defendants, who are “sophisticated, well-represented parties entering into a \$45 million deal,” performed their own due diligence investigation (NYSCEF Doc 171, Seller Defendants’ mem of law at 17). The Seller Defendants further contend that the necessary information to ascertain the true rent regulated statuses, including tax information for the Building, was available either publicly, or had been furnished to the Buyer Defendants in accordance with Section 3.2 (i) of the PSA. However, ““the fact that one party is sophisticated does not end the fact-intensive question of what constitutes reasonable reliance, because [courts] consider the entire context of the transaction”” (*High Value Trading, LLC v Shaoul*, 168 AD3d 641, 642 [1st Dept 2019], *lv denied* 33 NY3d 910 [2019] [citation omitted]). Where sophisticated investors are involved, they “must show they used due diligence and took affirmative steps to protect themselves from misrepresentations by employing what means of verification were available at the time”

(*VisionChina Media Inc.*, 109 AD3d at 57). A fraud claim will not be dismissed where the investor “has taken reasonable steps to protect itself against deception” (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).

Here, the Buyer Defendants allege that they took several steps to protect themselves from the alleged deception. First, the PSA contains an express warranty from Realty that the rent roll was accurate, and a provision requiring Realty to update this warranty as of the closing. The Buyer Defendants allege that the Seller Defendants failed to correct the rent regulated designations in the rent roll prior to the closing. Second, whether the Buyer Defendants could have discovered that the representations were false depends, in part, upon the accuracy of the information available to them. For example, the Buyer Defendants sought to review the rent registration records maintained by DHCR using an authorization Novoa furnished to their attorneys (NYSCEF Doc No. 175, ¶ 17). The accuracy of DHCR’s records partially depends upon the registration statements furnished to it by the Seller Defendants. The Buyer Defendants, though, allege that even after the Seller Defendants received the DHCR notice in January 2016, they did not re-register the exempt apartments as rent stabilized. In addition, “landlords [must] keep and preserve sufficient records to determine the legal rent at all times ... [so that] a successor landlord would always be able to ascertain whether the previous owners had been guilty of overcharges and protect itself accordingly” (*see Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 549 [1997]). Although the Seller Defendants maintain that this information had been furnished to the Buyer Defendants, it is unclear, at this juncture, whether those records would have disclosed any potential rent overcharge claims or whether the apartments were improperly deregulated. While the better practice may have been for West to protect itself from possible overcharge claims by inserting a protective indemnification provision into the PSA (*see Matter of*

500 West End Ave. Owners. v New York State Div. of Hous. & Community Renewal, 185 Misc 2d 179, 184 [Sup Ct, NY County 2000]), the issue of whether the Buyer Defendants' reasonably relied on the alleged misrepresentations on the rent roll cannot be resolved on this motion.

In addition, the Seller Defendants' argument that the "as is" language in Section 8.2 constitutes a waiver of the Buyer Defendants' right to assert a fraud claim is unpersuasive, since "fraud is a recognized exception to the merger doctrine" (*West 90th Owners Corp.*, 137 AD2d at 459]). Moreover, a general merger clause and disclaimer clause will not preclude the introduction of parol evidence on a claim for fraud in the inducement unless the parties expressly disclaimed reliance on the specific representation at issue (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]). Nothing in Section 8.2 references a specific disclaimer with regards to rent regulation (*see e.g. Rosenblum v Glogoff*, 96 AD3d 514, 514 [1st Dept 2012] [granting the defendants' motion for summary judgment where the purchase agreement contained a specific disclaimer about the alleged misrepresentation]).

As to Mann's liability, an agent acting for a corporate seller may "be responsible for any false representation he made on behalf of the corporation even though he may not have profited" (*Taylor v Cowit*, 20 AD2d 699, 699 [1st Dept 1964]). The complaint sufficiently alleges specific conduct attributable to both Realty and Mann.

Lastly, the Seller Defendants have not demonstrated that the Buyer Defendants unduly delayed asserting the cross claim. Accordingly, dismissal of the second cross claim is denied.

C. The Third Cross Claim for Indemnification and Contribution

The third cross claim seeks indemnity and contribution for any rent overcharges and treble damages that accrued prior to April 20, 2016, the date West took title to the Building (NYSCEF Doc No. 160, ¶ 255).

The Seller Defendants argue that indemnity and contribution are duplicative of the breach of contract cross claim, are contractually barred under the PSA, and are barred by the Rent Stabilization Code. In addition, contribution is unavailable under CPLR 1401.

In response, the Buyer Defendants maintain that they are entitled to indemnification due to the Seller Defendants' wrongdoing for which they may be held vicariously liable. The Buyer Defendants refute the Seller Defendants' assertion that the language in Section 8.2 placing any post-closing liabilities upon West constitutes a waiver of the indemnification claim, which is grounded on violations of the RSL. The Buyer Defendants also contend that this court has previously ruled that, under the principle of *ejusdem generis*, the term "violations of any applicable laws" in Section 8.2 refers to the laws regarding the physical and environmental integrity of the Building (NYSCEF Doc No. 187, Hal N. Beerman affirmation, exhibit E [November 2017 Order] at 5), and constitutes law of the case. As such, they submit they are not foreclosed from asserting an indemnification cross claim.

Addressing contribution first, CPLR 1401 provides that contribution is available where two or more persons "are subject to liability for damages for the same personal injury, injury to property or wrongful death." The statute has "its genesis in tort law and the complications surrounding the apportionment of liability among joint tort-feasors" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 27 [1987]). Thus, the statute applies where "some form of tort liability" exists (*id.* at 28; *Lippes v Atlantic Bank of N.Y.*, 69 AD2d 127, 141 [1st Dept 1979] [discussing General Construction Law § 25-b and stating that "any tortious act (other than personal injury) resulting in damage ... constitutes an 'injury to property' within the contemplation of CPLR 1401"]]). Moreover, it is the measure of damages

sought in the underlying complaint that controls (*see Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]).

As applied here, plaintiffs' claims do not involve personal injury or wrongful death, nor are the damages sought by them considered an injury to property within the meaning of CPLR 1401. The recovery plaintiffs seek is purely economic and does not constitute an injury for contribution purposes. The Buyer Defendants fail to address this argument in opposition. Since contribution is unavailable, the part of the third cross claim seeking contribution is dismissed.

Turning to indemnification, common-law indemnification "permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). Since common-law indemnification is based upon "vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247 [1st Dept 2013] [internal quotation marks and citation omitted]; *accord Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006], *lv dismissed* 7 NY3d 864 [2006]).

As an initial matter, the indemnification cross claim is not identical to the contract cross claim. An indemnification claim is duplicative of a breach of contract claim where both arise out of the same facts and seek the same damages (*see Demurjian v Demurgian*, 190 AD3d 410, 411 [1st Dept 2021]). Rent Stabilization Code [9 NYCRR] § 2526.1 (f) (2) (i), states, in pertinent part, that "[f]or overcharge complaints filed or overcharges collected on or after April 1, 1984, a current owner shall be responsible for all overcharge penalties, including penalties based upon overcharges collected by any prior owner" except under circumstances not applicable here. Such carryover

liability is permissible (*see Matter of Gaines*, 90 NY2d at 549). Here, the Buyer Defendants seek indemnity for overcharges and treble damages that accrued during Realty's ownership of the Building (NYSCEF Doc No. 160, ¶ 255). Such damages are distinguishable from the damages sought on the contract cross claim, which relate to Realty's breach of the PSA.

That said, the Seller Defendants have demonstrated that Mann is not a proper party from whom the Buyer Defendants may seek indemnity. As discussed *supra*, the premise underlying indemnification is vicarious liability without fault, and the Rent Stabilization Code plainly imposes liability upon a current owner for a prior owner's rent overcharges. Mann, though, is not the Building's prior owner. The Buyer Defendants do not address whether Mann, as the Building's former managing agent, may be liable under Rent Stabilization Code (9 NYCRR) § 2526.1 (f) (2). Consequently, the part of this cross claim seeking indemnification is dismissed as against Mann.

As to Realty, Realty has not demonstrated that indemnification is unavailable. First, nothing in the Rent Stabilization Code prohibits a current owner from seeking indemnity from a predecessor owner for prior rent overcharges. Second, the cases cited in support are inapposite. Realty cites to *Fullan v 142 E. 27th St. Assoc.* (1 NY3d 211 [2003], *rearg denied* 1 NY3d 623 [2004]) for the proposition that a current owner assumes total liability for a predecessor owner's overcharges (*id.* at 216). While the statement is correct, the action concerned a current owner's liability for a fair market rent appeal award under Rent Stabilization Code (9 NYCRR) § 2522.3 (*id.* at 214-215). In *Matter of East 163rd St. LLC v New York State Div. of Hous. & Community Renewal* (4 Misc 3d 169 [Sup Ct, Bronx County 2004]), the current owner sought to avoid carryover liability for treble damages on a rent overcharge award from DHCR (*id.* at 170). It does not appear that Realty is seeking to evade liability to plaintiffs on the overcharge claims.

Likewise, Realty's reliance on *Helfand v Sessler* (8 Misc 3d 96 [App Term, 1st Dept 2005], *lv denied* 2006 NY App Div LEXIS 1792 [1st Dept 2006]), though factually similar, is unavailing. In *Helfand*, the plaintiff, the current owner of a residential building, sought indemnification from the defendant, the building's former owner, for satisfying a rent overcharge award in favor of a building tenant (*id.* at 97). The Court granted the defendant summary judgment dismissing the complaint because the "plaintiff was obligated, as ultimate purchaser of the building premises, to conduct her own investigation and evaluation of every aspect of the premises and transaction, which inquiry, had it been properly made, would have disclosed the then pending 1985 rent overcharge claim which forms the basis of this lawsuit" (*id.* at 98). The Court determined that the plaintiff had the opportunity to investigate the building's rent history but failed to do so before purchasing the building (*id.*). *Helfand*, though, involved a motion for summary judgment, as opposed to a motion to dismiss, as is the case here. No determination has been made as of yet with regards to West's own negligence, if any, in this action. Furthermore, Realty ignores the court's prior determination on a CPLR 3211 (a) (5) motion in *Helfand* which found that the plaintiff could pursue indemnity from the defendant (*see Helfand v Sessler*, 194 Misc 2d 38, 41 [Civ Ct, NY County 2002]). Thus, the Rent Stabilization Code does not foreclose the Buyer Defendants from pursuing indemnity as against Realty.

Nor does Section 8.2 of the PSA bar the Buyer Defendants from seeking indemnification. Preliminarily, the Buyer Defendants' argument that the law of the case doctrine forecloses Realty from raising waiver or release as a defense is unconvincing. Under the law of the case doctrine, "when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975], *mot to amend remittitur denied*, 37 NY2d 818 [1975])

[internal quotation marks and citations omitted]). The parties must have had a full and fair opportunity to litigate the issue (*see Wells Fargo Bank Minn., N.A. v Perez*, 70 AD3d 817, 817 [2d Dept 2010], *lv denied* 14 NY3d 710 [2010], *cert denied sub nom. Perez v Wells Fargo Minn., N.A.*, 562 US 1063 [2010]). Where a prior statement is not “essential to the determination of the [prior motion],” then the statement itself constitutes obiter dictum, and the law of the case doctrine is inapplicable (*Palmatier v Mr. Heater Corp.*, 163 AD3d 1228, 1230 [3d Dept 2018], quoting *Karol v Polsinello*, 127 AD3d 1401, 1402-1403 [3d Dept 2015]).

The court’s discussion of the principle of *ejusdem generis* in the November 2017 Order was not essential to the resolution of the Seller Defendants’ motion for indemnification against the Buyer Defendants, and was “mere dicta” (*Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332, 333 [2d Dept 2005], *lv denied* 5 NY3d 702 [2005]; *cf. Glynwill Invs. v Shearson Lehman Hutton*, 216 AD2d 78, 79 [1st Dept 1995] [concluding that the trial court’s prior determination on the limited effect of a release after applying the doctrine of *ejusdem generis* was law of the case]). Importantly, the court prefaced the discussion with the statement that it “need not apply this concept to reach the conclusion that this waiver does not oblige [West] to defend and indemnify [the Seller Defendants, as the waiver plainly refers to claims that [West] has, rather than claims that third-parties ... might have against Realty” (NYSCEF Doc No. 187 at 5).

Nevertheless, Realty has not demonstrated that West waived or released its right to assert a common-law indemnification. “A waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it Such a waiver must be clear, unmistakable and without ambiguity” (*Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [2006] [internal citation omitted]). In the context of a release, courts have applied the principle of *ejusdem generis* where a release

containing specific recitals to the claims being released is followed by a generic omnibus clause (see *Camperlino v Bargabos*, 96 AD3d 1582, 1583-1584 [4th Dept 2012]; *Green v Lake Placid 1980 Olympic Games*, 147 AD2d 860, 862 [3d Dept 1989]; see also 19A NY Jur Compromise, Accord, and Release § 105). “Under the rule of ejusdem generis, the meaning of a word in a series of words is determined ‘by the company it keeps’” (*Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 57 [1st Dept 2015], *aff’d* 28 NY3d 675 [2017], quoting *People v Illardo*, 48 NY2d 408, 416 [1979]). The waiver and release language in Section 8.2 states that after the closing, West assumes the risk on “adverse matters, including but not limited to, construction defects and adverse physical and environmental conditions” (NYSCEF Doc No. 173 at 23-24 [emphasis removed]). West also agreed to waive and release Realty and its agents:

“from and against any and all claims ... of any and every kind or character, known or unknown, which purchaser might have asserted or alleged against seller ... at any time by reason of or arising out of any latent or patent construction defects or physical conditions, environmental conditions, violations of any applicable laws and any and all other facts, omissions, events, circumstances or matters regarding the property”

(*id.* at 24 [emphasis removed]). Significantly, the omnibus language appears after the language regarding the physical and environmental integrity of the Building. Thus, West did not waive or release claim for indemnification related to alleged violations of the RSL. Accordingly, the part of the motion seeking to dismiss the indemnification cross claim as against Realty is denied.

D. The Fourth Cross Claim for Rescission

The Seller Defendants argue that this cross claim for rescission of the PSA should be dismissed on the grounds that the Buyer Defendants (1) failed to allege the lack of an adequate legal remedy; (2) their unreasonable delay in asserting the right to rescission constitutes a waiver, and (3) the claim is waived under the waiver language in Section 8.2. The Buyer Defendants

submit that whether an adequate remedy at law exists is a question of fact. Additionally, they submit that the status quo may be restored since they have taken no action to modify the Building in any way, and that they did not unreasonably delay asserting this cross claim.

Rescission is an equitable remedy that “is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored” (*Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972] [citation omitted]). To prevail on a claim for rescission, the plaintiff must plead “fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof” (*Babylon Assoc. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984]). Rescission is not available if a party against whom it is sought “has changed his position and cannot be returned to the *status quo ante*” (*Sokolow, Dunaud, Mercadier & Carreras*, 299 AD2d at 71).

As discussed above, Mann is not a party to the contract. Thus, rescission is unavailable as a remedy against Mann (*see AQ Asset Mgt., LLC v Levine*, 119 AD3d 457, 462 [1st Dept 2014]). Thus, the fourth cross claim is dismissed as against Mann.

As against Realty, the Buyer Defendants fail to plead a cross claim for rescission. West largely complains that it overpaid for the Building, and had it known of the rent overcharges, it would have paid less. Where monetary damages will suffice, then the plaintiff has an adequate remedy at law (*see Romanoff v Romanoff*, 148 AD3d 614, 616 [1st Dept 2017] [stating that “[t]he remedy of rescission is unavailable because money damages are available and will make plaintiff whole”]; *Yetnikoff v Mascardo*, 63 AD3d 473, 475 [1st Dept 2009], *lv denied* 13 NY3d 712 [2009] [same]). West’s assertion that it lacks an adequate legal remedy is conclusory, and it fails to explain why monetary damages are insufficient (*see Empire Outlet Bldrs. LLC v Construction*

Resources Corp. of N.Y., 170 AD3d 582, 583 [1st Dept 2019]). Thus, the fourth cross claim against Realty is dismissed. The court need not address whether the Buyer Defendants unreasonably delayed pleading a cross claim for rescission.

E. Attorneys' Fees

Section 10.14 of the PSA reads, "Attorneys' Fees. If either party commences legal proceedings for any relief against the other party arising out of this Agreement or any documents, agreements, exhibits or certificates contemplated hereby, the losing party shall pay the prevailing party's reasonable attorney's fees upon final judgment thereof" (NYSCEF Doc No. 173 at 29-30). A determination on whether the Seller Defendants are entitled to their attorneys' fees is premature, since a final judgment in their favor has not been entered.

CONCLUSION

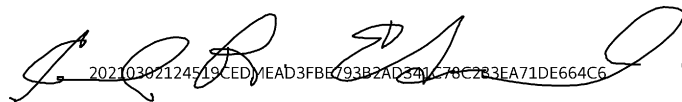
Accordingly, it is

ORDERED that the motion of defendants 207 Realty Associates L.L.C. and Mann Realty Associates to dismiss the second amended cross claims of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC (motion sequence no. 005) is granted to the extent of dismissing the first, third and fourth cross claims as against defendant Mann Realty Associates, and dismissing the first and fourth cross claims and that part of the third cross claim for contribution as against defendant 207 Realty Associates L.L.C., and the balance of the motion is otherwise denied; and it is further

ORDERED that the first, third and fourth cross claims as against defendant Mann Realty Associates and the first and fourth cross claims and that part of the third cross claim for contribution as against defendant 207 Realty Associates L.L.C. are dismissed; and it is further

ORDERED that counsel for defendants 207 Realty Associates L.L.C. and Mann Realty Associates shall serve a copy of this order along with notice of entry on all parties within 20 days; and it is further

ORDERED that within 20 days after service of this order with notice of entry, defendants 207 Realty Associates L.L.C. and Mann Realty Associates shall serve and file an answer to the second amended answer of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC.



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<u>3/2/2021</u> DATE					<u>CAROL R. EDMED, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE