

Healy v Carriage House LLC
2021 NY Slip Op 30883(U)
March 22, 2021
Supreme Court, New York County
Docket Number: 150133/2014
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: I.A.S. PART 55

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 JOHN A. HEALY and VALERIA CALAFIORE HEALY,

DECISION AND ORDER

Plaintiffs,

Index No. 150133/2014

- against -

CARRIAGE HOUSE LLC, JOHN K. LAMA, NY URBAN
 REAL ESTATE SERVICES INC., CHRISTOPHER LAMA,
 NY URBAN REAL ESTATE INVESTMENTS INC.,

Defendants.

-----X
Hon. James E. d'Auguste

Defendants New York Urban Real Estate Services, Inc. (NY Urban), John K. Lama (John), Christopher Lama (Christopher) and NY Urban Real Estate Investments, Inc. (NY Investments) (collectively, defendants) move, pursuant to CPLR 3211 (a) (1), (5), (7) and (10), to dismiss the amended complaint of plaintiffs John A. Healy (Healy) and Valeria Calafiore Healy (Calafiore Healy) (together, plaintiffs). Plaintiffs oppose the motion.

BACKGROUND

This action arises out of plaintiffs' purchase in 2011 of unit no. 8 in a condominium located at 211-213 East 2nd Street, New York, New York (the Condominium). The condominium is comprised of two adjacent lots and buildings, with units 1 through 6 located at 211 East 2nd Street and units 7 through 9/Garage located at 213 East 2nd Street (NY St Cts Elec Filing [NYSCEF] Doc No. 135, Martin Shaw [Shaw] affirmation, exhibit G at 4). The offering plan (the Offering Plan) filed by defendant Carriage House LLC (Carriage House) was accepted on February 27, 2006 (NYSCEF Doc No. 134, Shaw affirmation, exhibit F [amended complaint], ¶ 9). A fifth amendment to the Offering Plan dated October 8, 2010 (the Amendment) added NY Urban as a co-sponsor for units 7, 8 and 9/Garage, which were unsold as of that date (NYSCEF Doc No. 135

at 1). The Amendment identified John and Christopher (together, the Lamas) as the sole principals and equal shareholders in NY Urban (*id.*) and principals and one-third shareholders in NY Investments Inc., the holder of a first mortgage secured by the three unsold units (*id.*).

On January 5, 2011, plaintiffs, as “purchasers,” executed a purchase agreement (the Purchase Agreement) with Carriage House and NY Urban, together as “seller” or “sponsor,” to purchase unit no. 8 for \$2.3 million (NYSCEF Doc No. 130, Shaw affirmation, exhibit B at 1). Plaintiffs’ obligation to close on the unit was conditioned, in part, upon the seller’s completion of certain work (*id.* at 2). The pertinent provision in the Purchase Agreement reads, in part:

“Seller shall substantially complete the work set forth in attached Exhibit ‘A’, which is made a part hereof (collectively, ‘**Seller’s Work**’). Seller will use best efforts to complete Seller’s Work prior to Closing. Prior to closing Seller will notify Purchaser of the substantial completion of the work and Purchaser shall promptly thereafter inspect the Unit with Seller. In the event additional work (the ‘**Punchlist Work**’) is required to either complete Seller’s Work or which is discovered and agreed to by the parties during Purchaser’s Closing inspection then the parties shall create a punchlist and sign a punchlist agreement, and the parties shall proceed to closing, the parties agreeing that the completion of such Punchlist Work is not a condition to closing. Except as otherwise set forth in Exhibit A (see item #3 -- brick repointing), Seller will complete the Punchlist Work to Purchaser’s reasonable satisfaction as promptly as reasonably practicable, and in any event, within forty five (45) days after closing. The Seller’s obligations for Seller’s Work and Punchlist Work shall survive the closing of title”

(*id.*). A section entitled “Acceptance of Condition of Unit; Risk of Loss” also reads, in part:

“(iii) Purchaser represents to Seller that he has examined the Unit and agrees that his execution of this Purchase Agreement shall constitute acceptance of the Unit and the Building ... in their present conditions on the date of this Purchase Agreement, subject to Seller’s obligation to complete Punchlist Work in accordance with Paragraph 3 of this Agreement and further subject to any other obligations of Seller under the terms of the Plan to complete the Unit”

(*id.* at 9). Exhibit A to the Purchase Agreement identified 26 separate items for the seller to complete, including the “[r]epair [of] all leaks associated with the Solarium, Dining Room/Kitchen Window, Master Bedroom Window, and 3rd Bedroom window”; “repair water damage noted to the ceiling and walls directly below the northwest corner of the roof (fire ladder exit)” by the terrace roof; and installing “functional” air conditioning condensers (*id.* at 20). A closing on the unit occurred on February 28, 2011 (NYSCEF Doc No. 134, ¶ 12). Plaintiffs allege that several items in Exhibit A had not been completed by that date, and that the parties agreed these items would be completed as “Punchlist Work” (*id.*, ¶ 24).

PROCEDURAL HISTORY

Plaintiffs commenced this action on January 7, 2014 by filing a summons with notice naming Carriage House and John as defendants (NYSCEF Doc No. 1). In a supplemental summons, plaintiffs added NY Urban as a defendant (NYSCEF Doc No. 11). According to the complaint, plaintiffs alleged that Carriage House, NY Urban and John failed to complete the items in Exhibit A of the Purchase Agreement and the Punchlist Work within 45 days of the closing (NYSCEF Doc No. 129, Shaw affirmation, exhibit A [complaint], ¶ 22). Plaintiffs complained that their unit was not constructed in accordance with the architectural plans and specifications set forth in the Offering Plan or in accordance with local laws, codes and regulations (*id.*, ¶ 33). They alleged that the “temporary fixes” Carriage House, NY Urban and John performed have not remedied the recurring water leaks in the unit (*id.*, ¶¶ 24-25). Additionally, plaintiffs alleged that the air conditioning condensers were inadequate to cool the unit (*id.*, ¶¶ 28-30). Plaintiffs further alleged that Carriage House, NY Urban and John concealed both the extent of the defects in their unit and the financial condition of the Condominium due to potential exposure for the cost of repairs to the Condominium’s common elements and to two other residential units (*id.*, ¶¶ 12-14

and 26). The complaint pled causes of action for breach of the Offering Plan and Purchase Agreement, breach of express warranty, breach of limited warranty, negligence, violations of General Business Law §§ 349 and 350, and piercing the corporate veil.

After interposing answers, NY Urban and John moved for summary judgment. The court (Kern, J.) granted the motion to the extent of dismissing the cause of action for negligence (NYSCEF Doc No. 133, Shaw affirmation, exhibit E [March 2017 Order] at 12-13). Importantly, the court concluded that the negligence claim was duplicative of the cause of action for breach of the Offering Plan (*id.* at 11).

Plaintiffs subsequently obtained leave to amend the complaint to add Christopher and NY Investments as parties and to add two new claims (NYSCEF Doc No. 151, Calafiore Healy declaration, exhibit 3 at 1). The amended complaint asserts nine causes of action: (1) breach of the Offering Plan against Carriage House, NY Urban and the Lamas; (2) breach of the Purchase Agreement against Carriage House, NY Urban and the Lamas; (3) breach of express warranty against Carriage House and NY Urban; (4) breach of limited warranty against Carriage House and NY Urban; (5) negligence against Carriage House, NY Urban and the Lamas; (6) violations of General Business Law §§ 349 and 350 against Carriage House and NY Urban; (7) alter ego/veil piercing liability against the Lamas; (8) fraud against Carriage House, NY Urban and the Lamas; and, (9) fraudulent conveyance against NY Urban, NY Investments and the Lamas. Plaintiffs filed a supplemental summons and amended complaint on September 20, 2017 (NYSCEF Doc Nos. 111-112). Carriage House has not answered or otherwise appeared in this action.

In lieu of serving an answer, defendants move to dismiss the complaint against Christopher and NY Investments on the grounds that the claims against them are time-barred or fail to state a cause of action. Defendants also move to dismiss (1) the fifth cause of action for negligence

against NY Urban and John as duplicative and for failing to state a cause of action; (2) all claims related to water leaks; and, (3) the entire complaint for plaintiffs' failure to name the Board of Managers of Carriage House Condominium (the Board) as a necessary party.

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]).

At the outset, the court rejects plaintiffs' contention that the motion should be denied for opposing counsel's failure to comply with Uniform Rules for Trial Courts (22 NYCRR) § 202.8 (c), which states, in pertinent part, that "[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." "Affirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a

brief (i.e., a memorandum of law)” (*Tripp & Co., Inc. v Bank of N.Y. (Del), Inc.*, 28 Misc 3d 1211[A], 2010 NY Slip Op 51274[U], *6 [Sup Ct, NY County 2010]). However, the court may waive strict adherence to this rule (*see Lagattuta-Spataro v Sciarrino*, — AD3d —, 2021 NY Slip Op 00738, *1 [4th Dept 2021], citing CPLR 2001]). As there is no prejudice to plaintiffs, the court will overlook this deficiency¹ (*id.*; *Serov v Kernzer Intl. Resorts, Inc.*, 52 Misc 3d 1214[A], 2016 NY Slip Op 51150[U], *2 [Sup Ct, NY County 2016]).

Nor is there merit to the contention that defendants ought to have proffered an affidavit from a witness with personal knowledge instead of an attorney’s affirmation. An attorney’s affirmation may be used for the submission of evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In this instance, not only does counsel’s affirmation largely recite the facts as alleged in the amended complaint, but he submits the amended complaint, the Purchase Agreement and the Amendment in support. Furthermore, on a motion brought under CPLR 3211 (a) (1), “[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 contract constitutes documentary evidence for purposes of CPLR 3211 (a) (1) where it utterly refutes a plaintiff’s allegations (*see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). Plaintiffs have not challenged the authenticity of the Purchase Agreement or Amendment.

A. Dismissal on Statute of Limitations Grounds

Defendants posit that the first, second, third, fourth, fifth, sixth and eighth causes of action against Christopher and the eighth cause of action against John and NY Urban are time-barred

¹ The court takes this opportunity to remind plaintiffs’ counsel to recite CPLR 2106 (a), not 28 USC § 1746 (2), in their “declaration” (NYSCEF Doc No. 148, Calafiore Healy declaration at 2).

since they began to accrue on January 5, 2011, when plaintiffs entered into the Purchase Agreement, or February 28, 2011, when plaintiffs closed on the unit. Plaintiffs oppose and invoke the relation back doctrine.

A party moving under CPLR 3211 (a) (5) to dismiss a claim as time-barred “bears the initial burden of establishing, prima facie, that the time in which to sue has expired” (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017], quoting *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). To meet this burden, it is incumbent upon the movant to demonstrate when the claim accrued (*see Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]). The non-moving party, in response, must show “whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period ... [and] must aver evidentiary facts establishing that the action was timely or ... raise an issue of fact as to whether the action was timely” (*MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019] [internal quotation marks and citations omitted]).

The six-year statute of limitations in CPLR 213 (2) governs the first (breach of the Offering Plan), second (breach of the Purchase Agreement), third (breach of express warranty) and fourth (breach of limited warranty) causes of action (*see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770 [2012] [stating that a breach of contract is subject to a six-year limitations period running from the date of the breach]; *Strenk v Rausch Equip. Corp.*, 58 AD2d 986, 986 [4th Dept 1977] [stating that a six-year limitations period governs breach of warranty claims]). The fifth (negligence) and sixth (General Business Law §§ 349 and 350) causes of action are governed by the three-year limitations period set forth in CPLR 214 (*see Il Cambio, Inc. v U.S. Fid. & Guar. Co.*, 82 AD3d 650, 651 [1st Dept 2011] [finding that negligence claims are subject to a three-year statute of limitations]; *Lucker v Bayside Cemetery*, 114 AD3d 162, 175 [1st Dept

2013], *lv denied* 24 NY3d 901 [2014] [stating that CPLR 214 (2) controls claims alleging violations of General Business Law §§ 349 and 350]). As for the eighth cause of action, a fraud claim must be brought within six years from the commission of the fraud or two years from the date the fraud could have been discovered with reasonable diligence (*see Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 181 [1st Dept 1998], *lv dismissed in part, denied in part* [92 NY2d 1000 [1998], citing CPLR 213 [8]).

Defendants have shown that plaintiffs did not add Christopher as a party or interpose a fraud claim against NY Urban and John until September 2017, after the statute of limitations applicable to the first through fourth, sixth and eighth causes of action had lapsed. As to the fifth cause of action for negligence, the statute of limitations began to run from January 2012, when defendants last undertook repairs on the unit (NYSCEF Doc No. 134, ¶ 27), and not January 5, 2011 or February 28, 2011, as defendants contend. In any event, the negligence claim is untimely.

In response, plaintiffs submit that the relation back doctrine applies. Under the relation back doctrine, which is codified in CPLR 203 (f), a plaintiff may correct a pleading error by adding a new claim or party after the statute of limitations has expired upon a showing that:

“(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is ‘united in interest’ with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well”

(*Buran v Coupal*, 87 NY2d 173, 178 [1995], quoting *Brock v Bua*, 83 AD2d 61, 69 [2d Dept 1981]). It is the plaintiff’s burden to establish the doctrine’s applicability (*see Anderson v Montefiore Med. Ctr.*, 41 AD3d 105, 107 [1st Dept 2007]). As applied here, plaintiffs have demonstrated that the relation back doctrine has salvaged their claims.

First, the claims against Christopher arise out of the same transactions as those described in the original complaint. Thus, plaintiffs have satisfied the first prong.

Regarding the second prong, “[t]he ‘classic test’ for determining unity of interest is ‘that if the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other,’ then they are united in interest” (*Brunero v City of N.Y. Dept. of Parks & Recreation*, 121 AD3d 624, 625 [1st Dept 2014] [internal citation omitted]). In this action, plaintiffs seek to pierce NY Urban’s veil to hold Christopher personally liable for NY Urban’s actions. The ninth cause of action for fraudulent conveyance is also grounded, in part, on claims that the Lamas dissolved NY Urban during the course of this litigation, and that NY Urban’s assets were transferred to NY Investments or the Lamas as a result (NYSCEF Doc No. 134, ¶ 130). Because the Lamas and NY Urban share the same defenses (*see Donovan v All-Weld Prods. Corp.*, 34 AD3d 257, 257 [1st Dept 2006]), plaintiffs have met their burden on the second prong of the relation back doctrine.

As to the third prong, “the ‘linchpin’ of the relation back doctrine [is] notice to the defendant within the applicable limitations period” (*Cintron v Lynn*, 306 AD2d 118, 120 [1st Dept 2003] [internal quotation marks and citation omitted]). Christopher is one of NY Urban’s principals, and thus, “his knowledge of the pendency of this action, as well as the conduct or occurrence complained of, is imputed to the corporation he controls” (*Yaniv v Taub*, 256 AD2d 273, 275 [1st Dept 1998]). Plaintiffs, therefore, have satisfied the third prong.

Since the relation back doctrine saves plaintiff’s claims against Christopher, the branch of the motion to dismiss the first, second, third, fourth, fifth, sixth and eighth causes of action against him as time-barred is denied.

The relation back doctrine also saves the eighth cause of action for fraud against NY Urban and John. The relevant part of CPLR 203 (f) states that “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” Here, the original complaint alleged that defendants’ conduct with respect to the temporary nature of the repairs they undertook “was designed to conceal ... the true extent of the very serious defects that affected the apartment” (NYSCEF Doc No. 129, ¶¶ 26-27 and 51-55). These allegations are sufficient for purposes of satisfying CPLR 203 (f). Therefore, the part of the motion to dismiss the eighth cause of action against NY Urban and John as time-barred is denied.

B. Dismissal of the Fifth Cause of Action against Defendants

Defendants argue that this claim, which arises out of their alleged negligence in performing repairs, is time-barred. They maintain that the negligence claim was previously dismissed as duplicative of the contract claims. Defendants also maintain that the complaint fails to plead the existence of a duty of care owed to plaintiffs. In opposition, plaintiffs submit that the negligence claim is not duplicative since they have amended the complaint to allege that defendants breached a duty of care with regard to the repairs undertaken on their unit.

To prevail on a cause of action for negligence, the plaintiff must plead the existence of a duty, the defendant’s breach, and damages proximately caused by the breach (*see Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016]). The amended complaint alleges that defendants had a duty to complete the repairs with due care; that defendants breached this duty by negligently performing the repairs; and, that plaintiffs have incurred substantial damages due to defendants’ negligence (NYSCEF Doc No. 134, ¶¶ 92-98).

Although these allegations recite the basic elements of a negligence claim, the amended complaint fails to plead a duty of care independent from the Purchase Agreement (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [reasoning that “a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated”]). NY Urban’s obligation to complete the repair work arises out the Purchase Agreement, and “claims based on negligent or grossly negligent performance of a contract are not cognizable” (*Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010] [internal quotation marks and citation omitted]). Plaintiffs fail to cure this deficiency in opposition. Accordingly, the part of the motion seeking to dismiss the fifth cause of action is granted, and the fifth cause of action is dismissed against defendants. The court need not address whether the negligence claim is timely.

C. Dismissal of the Seventh Cause of Action against Christopher

The seventh cause of action pleads a claim for alter ego or veil piercing liability against the Lamas. Defendants submit that Christopher, a non-sponsor, cannot be held individually liable for alleged violations of the Offering Plan and the certification signed by him in connection with the Amendment. Defendants next contend that Christopher is not personally liable because the claims against him are time-barred. In the absence of any timely claims against him, the veil piercing claim fails as an independent cause of action.

Plaintiffs, in opposition, argue that the merits of their veil piercing claim was previously decided in their favor in the March 2017 Order (NYSCEF Doc No. 133 at 6). They maintain that NY Urban’s corporate veil may be pierced because discovery has shown that NY Urban failed to follow corporate formalities, that its corporate funds were commingled with the funds of Christopher, John and other entities the two control, and that NY Urban has paid for the personal legal expenses incurred by its two principals (NYSCEF Doc No. 147 at 16-17).

Preliminarily, plaintiffs misconstrue the discussion on veil piercing in the March 2017 Order. In denying summary judgment, the court concluded that NY Urban and John had “failed to make a *prima facie* showing that the court should not pierce the corporate veil” (NYSCEF Doc No. 133 at 6). The determination did not resolve the viability of a veil piercing claim.

“There is no private right of action where the fraud and misrepresentation relies entirely on alleged omissions in filings required by the Martin Act. (*Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012], citing *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 247 [2009]). In addition, a condominium sponsor’s principal generally is not individually liable for a sponsor’s breach of an offering plan (*see Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542, 544 [1st Dept 2013]). Examination of the amended complaint reveals that the first, third, fourth and eighth causes of action relate to alleged breaches of or misrepresentations in the Offering Plan. Thus, defendants correctly state that Christopher cannot be held liable simply because he signed the certification to the Amendment (*see Board of Mgrs. of the 125 N. 10th Condominium v 125North10, LLC*, 150 AD3d 1065, 1066 [2d Dept 2017], *lv dismissed* 30 NY3d 959 [2017], *rearg denied* 30 NY3d 1086 [2018]; *Board of Mgrs. of 184 Thompson St. Condominium*, 106 AD3d at 544).

The second cause of action, though, seeks redress for a breach of the Purchase Agreement. The sixth cause of action pleads a claim for deceptive advertising practices. The ninth cause of action pleads a claim for fraudulent conveyance. These three causes of action are wholly unrelated to any alleged breaches of the Offering Plan, and, therefore, they “are not precluded by the Martin Act, as they do not ‘rel[y] entirely on alleged omissions from filings required by the Martin Act and the Attorney General’s implementing regulations’” (*Board of Mgrs. of Marke Gardens Condominium v 240/242 Franklin Ave., LLC*, 71 AD3d 935, 936 [2d 2010] [internal citation

omitted)). Moreover, counter to defendants' position, it does not appear that a sponsor's principal can never be held liable for a violation of an offering plan. In *Board of Mgrs. of 184 Thompson St. Condominium*, cited by defendants, the Court declined to hold the sponsor's principal liable for violations of an offering plan where the plaintiff did not "assert that the Non-Sponsors are liable under an alter-ego or other veil-piercing theory" (106 AD3d at 544; *see also Board of Mgrs. of the 125 N. 10th Condominium*, 150 AD3d at 1066 [granting summary judgment to the sponsor's principals where the plaintiff failed to raise a triable issue of fact based on a veil piercing or alter ego theory]). As is relevant here, plaintiffs as a seventh cause of action seek to pierce NY Urban's corporate veil and hold Christopher and John personally liable.

Nevertheless, "New York does not recognize a separate cause of action to pierce the corporate veil" (*Chiomenti Studio Legale, L.L.C. v Prodos Capital Mgt. LLC*, 140 AD3d 635, 636 [1st Dept 2016] [internal quotation marks and citation omitted]). Rather, veil piercing is a theory of liability based on "an assertion of facts and circumstances which will persuade the court to impose the corporate obligation upon its owners" (*Matter of Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). While the claims against Christopher are not untimely, as discussed *supra*, the cause of action pleading a separate claim for alter ego or veil piercing liability must be dismissed (*see Chiomenti Studio Legale, L.L.C.*, 140 AD3d at 636; *Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015] [dismissing a cause of action for alter ego liability]). Accordingly, the part of the motion to dismiss the seventh cause of action against Christopher is granted, and the seventh cause of action is dismissed against him. That said, plaintiffs are not barred from seeking to impose personal liability upon Christopher on the other claims asserted against him. Significantly, defendants have not challenged whether the factual allegations are sufficient to support recovery under an alter ego or veil piercing theory.

D. Dismissal of the Ninth Cause of Action against Defendants

Plaintiffs predicate the ninth cause of action for fraudulent conveyance on a veil piercing theory, and allege that the Lamas improperly transferred assets from NY Urban to themselves or to NY Investments. Defendants urge the court to dismiss this claim against Christopher because the underlying claims against him are time-barred. They also argue that the ninth cause of action should be dismissed against the Lamas and NY Investments because plaintiffs are not judgment creditors of NY Urban. In opposition, plaintiffs submit that Debtor and Creditor Law § 276 permits a present or future creditor to assert a claim for fraudulent conveyance.

Debtor and Creditor Law § 276 states that “[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”² The statute does “not require the debtor to know of the creditor’s claim at the time of the transfer, as it expressly applied to ‘present and future creditors’” (*Board of Mgrs. of BeWilliam Condominium v 90 William St. Dev. Group LLC*, 187 AD3d 680, 682 [1st Dept 2020]). Applying these precepts, the fact that plaintiffs are not presently judgment creditors is no bar to their assertion of a fraudulent conveyance claim. Thus, defendants’ contention that plaintiffs cannot pursue the claim because they are not judgment creditors is unpersuasive. The argument that the fraudulent conveyance claim against Christopher fails because the other claims against him are time-barred is equally unconvincing. As explained earlier, the other causes of action pled against Christopher are timely. Consequently, the part of the motion to dismiss the ninth cause of action against defendants is denied.

² The court observes that the language in Debtor and Creditor Law § 276 changed on April 4, 2020 (*see* L 2019, ch 580, § 2), well after defendants filed the notice of motion. For purposes of the present motion, the court discusses plaintiffs’ claims under the former Debtor and Creditor Law § 276.

E. Dismissal of All Claims Related to Water Leaks

Defendants argue that any claims related to water leaks in plaintiffs' unit should be dismissed because they bear no liability under the Offering Plan. They submit that paragraph four in the Amendment limits NY Urban's liability to plaintiffs' unit, and does not extend to areas outside of that unit. More particularly, defendants assert that the roof, roof deck and Condominium façade constitute common or limited common elements. Because the leaks originate from outside of the unit, any claims relating to leaks must be dismissed.

Defendants buttress this argument with excerpts from Healy's deposition, where he appears to admit that the leaks originate from an external source. Defendants also rely on allegations in the Board's complaint against plaintiffs in an action captioned *Board of Mgrs. of Carriage House Condominium v Healy*, Sup Ct, NY County, index No. 150491/2019 (the Board Action), in which the Board describes the roof deck on top of and appurtenant to plaintiffs' unit as a limited common element over which plaintiffs enjoy exclusive use (NYSCEF Doc No. 137, Shaw affirmation, exhibit I, ¶¶ 1, 13-16 and 41). The Board brought the action, in part, for a judgment declaring that it has the right to access the roof deck to perform an inspection and repair work (*id.*, ¶¶ 52-64).

Plaintiffs respond that the March 2017 Order reads, in pertinent part, that [t]he moving defendants have failed to identify any causes of action in the complaint that are not based on defendants' obligations with regard to unit 8, plaintiffs' unit" (NYSCEF Doc No. 133 at 8). They contend that this determination forecloses any argument that claims related to water leaks cannot be asserted against defendants.

Here, defendants' reliance on paragraph four in the Amendment is misplaced. Paragraph four ("Rights and Obligations of Sponsor") reads, in part, as follows:

"Liability Limitation of Co-Sponsor NY Urban Services. The liability of Co-Sponsor NY Urban Services for obligations that the

Co-Sponsor Carriage House or anyone else committed itself to perform prior to the date Co-Sponsor NY Urban Services became a Co-Sponsor of the Plan, shall be limited to all obligations for Units 7, 8 and 9/Garage only, provided, however, that upon the date Co-Sponsor NY Urban Services became a Co-Sponsor of the Plan, the foregoing liability of Co-Sponsor NY Urban Services shall be joint and several with Co-Sponsor Carriage House”

(NYSCEF Doc No. 135 at 4 [internal quotation marks omitted]). While this provision appears to limit NY Urban’s liability to the three unsold units, only, defendants ignore the express provision in the Purchase Agreement requiring NY Urban and Carriage House to ensure that “the roof over the Unit shall be free of leaks” at the time of the closing (NYSCEF Doc No. 134, ¶ 4; NYSCEF Doc No. 130 at 7). Defendants also ignore item nos. 1 and 2 in Exhibit A of the Purchase Agreement requiring NY Urban and Carriage House to “[r]epair all leaks associated with” certain areas of the Unit and to “repair water damage” beneath the terrace roof (NYSCEF Doc No. 130 at 20). Critically, the second cause of action pleads a claim for breach of the Purchase Agreement’s provisions requiring defendants to repair these conditions (NYSCEF Doc No. 134, ¶¶ 74-75). Thus, paragraph 4 in the Amendment does not eliminate defendants’ liability, if any, in this action.

Healy’s testimony also does not support the argument that defendants bear no liability. First, Healy’s testimony that the Condominium was responsible for remedying leaks in an external wall concerns another unit in the adjacent building (NYSCEF Doc No. 136, Shaw affirmation, exhibit H [Healy tr] at 64). Other passages from Healy’s transcript show that he testified, “[t]he leaks come from outside. Repairing the leaks inevitably involves repairing the exterior of the building” (*id.* at 68), and that “when it rains and the water gets in the building, by definition, it is coming from the outside” (*id.* at 198-199). The testimony, though, does not cancel out plaintiffs’ claims that defendants failed to meet their contractual obligations under the Purchase Agreement.

The allegations in the complaint in the Board's action are similarly unhelpful. The Board alleged that plaintiffs had informed it of water infiltration in their unit due to defects with the roof deck's design or construction, and that plaintiffs had demanded "the Condominium reimburse them for all costs incurred in connection with the leaks and water infiltration" (NYSCEF Doc No. 137, ¶¶ 34, 36 and 38). The Board, though, had also alleged that it "does not believe that the Condominium is responsible for any repair or replacement of the Roof Deck or adjacent exterior walls, as well as any damages allegedly incurred by the Healys" (id., ¶ 37). Moreover, plaintiffs' allegations in this action largely concern defendants' failure to meet their contractual obligations in the Offering Plan and Purchase Agreement. Consequently, the branch of the motion seeking to dismiss all claims related to water leaks is denied.

F. Dismissal for Failing to Name a Necessary Party

Defendants argue that the complaint must be dismissed because the Board is a necessary party that has not been named in this action (NYSCEF Doc No. 128, Shaw affirmation, ¶ 66). They submit that plaintiffs' pursuit of this suit effectively eliminates the Board's responsibility to maintain the common or limited common elements in the Condominium in violation of Article 9-B of the Real Property Law and General Business Law § 352. Defendants further argue that Board is indispensable because any resolution of this action may result in a determination as to which entity is responsible to remedy the leaks originating from outside of plaintiffs' unit.

Plaintiffs respond that defendants fail to support their contention that the Board or any other party should be liable for fixing the problems with their unit. If defendants believe the Board is liable, plaintiffs assert that defendants may move for joinder or file a third-party complaint.

A necessary party "fall[s] into two distinct categories: persons 'who ought to be parties if complete relief is to be accorded between the persons who are parties to the action,' or 'who might

be inequitably affected by a judgment in the action” (*Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002], quoting CPLR 1001 [a]).” Significantly, “[j]oinder rules serve an important policy interest in guaranteeing that absent parties at risk of prejudice will not be ‘embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard’” (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 458 [2005] [internal citation omitted]; *Matter of 27th St. Block Assn.*, 302 AD2d at 160 [stating that compulsory joinder concerns due process]). Under CPLR 3211 (a) (10), the court may dismiss an action on the ground that it “should not proceed in the absence of a person who should be a party” (*see also* CPLR 1003 [stating that “[n]onjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section”]).

Applying these precepts, defendants have not articulated a reason to conclude that complete relief cannot be awarded in the Board’s absence. The Board is not a party to the Purchase Agreement, and, thus, it is not liable to plaintiffs for an alleged breach of that agreement. Likewise, the claims for deceptive advertising, fraud and fraudulent conveyance are unrelated to the Board’s obligations to the Condominium.

Nor have defendants demonstrated that a judgment in this action will inequitably affect the Board. While the Board is responsible for repairing damage to the Condominium building (*see* Real Property Law § 339-cc [1]), plaintiffs have not pled a claim for injunctive or equitable relief demanding that NY Urban complete the necessary repairs, if any, of the roof deck or other areas where water has infiltrated their unit. Instead, plaintiffs request monetary damages stemming from defendants’ breaches of the Offering Plan and the Purchase Agreement, with the latter containing

an express provision requiring NY Urban to repair leaks in several specific areas. The Board's failure, if any, to remediate the leaks does not invalidate plaintiffs' demand for damages related to NY Urban's failure to meet its contractual obligations. To the extent defendants seek contribution from the Board for its alleged failure to repair damage to the Condominium's common or limited common elements, that issue does not render the Board a necessary party to this action.

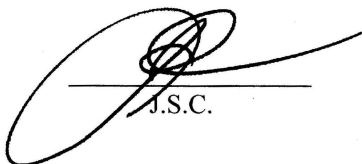
Accordingly, it is

ORDERED that the motion of defendants New York Urban Real Estate Services, Inc., John K. Lama, Christopher Lama and NY Urban Real Estate Investments, Inc. for dismissal of the complaint against them (motion sequence no. 005) is granted the extent of dismissing the fifth cause of action against said defendants, and the fifth cause of action is dismissed against these defendants, and the balance of the motion is otherwise denied; and it is further

ORDERED that defendants New York Urban Real Estate Services, Inc., John K. Lama, Christopher Lama and NY Urban Real Estate Investments, Inc. shall serve an answer to the amended complaint within 20 days after service of this order with notice of entry.

Dated: March 22, 2021

ENTER:



J.S.C.