Board of Mgrs. of 87-89 Leonard St. Condominium v Leonard St. Owner, LLC
2022 NY Slip Op 33275(U)
September 29, 2022
Supreme Court, New York County
Docket Number: Index No. 151532/2019
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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BOARD OF MANAGERS OF 87-89 LEONARD STREET CONDOMINIUM, SUING ON BEHALF OF ITS UNIT OWNERS,

Plaintiff,

- v -

LEONARD STREET OWNER, LLC, MARC RAVNER, BENJAMIN SHAOUL, GRASSOMENZIUSO ARCHITECTS

Defendant.

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INDEX NO. 151532/2019

MOTION DATE 09/13/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41
were read on this motion to/for DISMISSAL.

In this action for breach of contract, fraud in inducement, breach of fiduciary duty, and fraudulent conveyance, defendants Leonard Street Owner, LLC, Marc Ravner, and Benjamin Shaoul move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing plaintiff Board of Managers of 87-89 Leonard Street Condominium's second cause of action for fraud in inducement, fourth cause of action for breach of fiduciary duty, fifth to seventh causes of action for fraudulent conveyances, and claim for attorney's fees. Plaintiff opposes the motion.

Background

The condominium's board of managers, on behalf of the condominium and the unit owners (plaintiff), brings this action alleging construction defects in a luxury condominium building located at 87-89 Leonard Street, New York, New York (the Building). The defendants are Leonard Street Owner, LLC (Sponsor) – the sponsor and developer of the Building; Marc Ravner and Benjamin Shaoul (individual defendants – principals of the Sponsor (together with Sponsor, the moving defendants), and Grasso-Menziuso Architects, P.C. (Grasso) – the architect for the Building, who has yet to appear in this action.

According to the Complaint, the Building is a "150-year-old landmarked cast-iron building" in Manhattan and was first acquired by non-party Go Cat Go, LLC in 2004 to be renovated and converted into a "meticulously restored" seven-unit condominium (NYSCEF # 15 – Complaint, ¶¶ 1, 12). In 2011, Go Cat Go, LLC

formed a company that had "substantially and/or nearly completed" the renovation work. In 2014, Sponsor acquired the Building from that company with the intention of completing the project (*id.*, ¶¶ 13-18). After acquiring the Building on June 2, 2014, Sponsor filed the Offering Plan on June 23, 2014 (*id.*, ¶ 19), which contained a Sponsor's Certification signed by Sponsor and both individual defendants, and an Architect's Certification signed by Grasso (*id.*, ¶¶ 8-9, 28-29). Using the Offering Plan as a promotional tool, the moving defendants began a marketing campaign for the sale of the seven units in or around January 2015 (*id.*, ¶¶ 32-33).

Plaintiff alleges that the Building suffered from a multitude of material defects, exhibited poor workmanship, shoddy construction practices, and was not at all representative of what the Sponsor depicted in the Offering Plan (*id.*, ¶ 35). The Complaint lists the exterior and interior defects in the Building. For example, there are numerous cracks, voids, openings, and missing bricks while the Offering Plan described the Building's exterior as having "no visible cracks, bowing, horizontal or vertical displacement or other structural issues" and that "[a]ny noted areas of visual cracking [had] been repaired" (*id.*, ¶¶ 51-52); the Building's windows lack proper waterproofing and flashing while the Offering Plan represented that Sponsor "remediated damaged wood and installed weather-proofing at the in-situ windows" (*id.*, ¶¶ 54-55); the fire escape had an incorrect pitch and was in a deteriorated and unsafe state while the Offering Plan stated otherwise (*id.*, ¶ 56); the main roof and terraces were improperly installed and was defective, and the warranty provided in the Offering Plan was never delivered, causing water infiltrating inside the Building (*id.*, ¶¶ 60-64); the cellar and subcellar were wet and damaged while the Offering Plan described that "there is no evidence of dampness in the cellar or sub-cellar" (*id.*, ¶¶ 69-71); and there was a crack in the Building's foundation on the wall that caused water infiltration into a unit's storage, although the Offering Plan described that the Building's "existing foundation [was] in fair condition" (*id.*, ¶¶ 73-76). Plaintiff also alleges in detail that, as opposed to what the Offering Plan depicted, there were defects in the mechanical equipment, the plumbing equipment and the electrical system (*id.*, ¶¶ 89-106). Further, plaintiff alleges that the Building violated applicable building codes and industry standards in various ways (*id.*, ¶¶ 59, 62, 65, 67, 99, 103, 105).

In addition, plaintiff alleges that because the movant defendants assigned project managers to frequently visit the construction site, communicate with, and monitor the project's contractors, subcontractors, and materialmen, the moving defendants were "fully aware" of the construction defects and nonconformities. Yet the moving defendants concealed these defects and nonconformities from "unsuspecting purchasers of the Units" (*id.*, ¶ 37). Despite their knowledge of the construction defects, Sponsor filed the Offering Plan "when the Project was nearly complete, and/or during the completion of the Building's construction and well before the closing on the sale of a Unit" (*id.*, ¶¶ 37-38, 121), and used the Offering Plan "[t]o lure prospective purchasers into paying millions of dollars for the Units"

(*id.*, ¶ 119). After the renovation was complete and before any sales were consummated, the moving defendants continued to market the units without correcting the false descriptions in the Offering Plan despite amending the Plan at least fourteen times (*id.*, ¶¶ 38, 123-125). Moreover, according to the Complaint, the moving defendants concealed the defects and nonconformities, to wit, by coating over the exterior's deficiencies rather than addressing them (*id*, ¶¶ 122, 147, 150).

From the first closing on the sale of a unit to October 12, 2018, Sponsor controlled the board of managers and the three seats on the board, which were filled with Sponsor affiliates including both individual defendants (*id.*, ¶¶ 43, 49). During this period, the individual defendants allegedly refused to address these defects and code violations, which they knew, despite the unit owners complaints and repair demands (*id.*, ¶¶ 46-48, 145-151). In addition, after paying off a loan with the sale proceeds, Sponsor distributed the remaining sale proceeds to individual defendants and other Sponsor affiliates, retaining little, if any, of the proceeds for the Building (*id.*, ¶¶ 162-166). Plaintiff asserts that the distributions "were made without fair consideration" and "were not made at the set or agreed upon intervals for distribution," which rendered the Sponsor insolvent (*id.*, ¶¶ 168, 171).

On February 12, 2019, plaintiff commenced this action by filing a summons with notice naming Sponsor as the sole defendant (NYSCEF # 1). On October 23, 2020, plaintiff filed an amended summons with notice adding individual defendants and Grasso as parties (NYSCEF # 4). The Complaint, filed on July 22, 2021, asserts seven causes of action, including (1) breach of contract against the Sponsor; (2) fraud in inducement against Sponsor and the individual defendants; (3) fraud in inducement against Grasso; (4) breach of fiduciary duty against the individual defendants; (5) constructive fraudulent conveyance while insolvent under Debtor and Creditor Law (DCL) §§ 273 and 278; (6) constructive fraudulent conveyance causing unreasonably small capital under DCL §§ 274 and 278; and (7) intentional fraudulent conveyance under DCL §§ 276 and 278 (NYSCEF # 15). Instead of answering the complaint, Sponsor and the individual defendants move to dismiss all the claims against them except the first cause of action for breach of contract.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff ... can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). Additionally, "to withstand dismissal, a plaintiff may submit opposing affidavits which can be considered to

amplify the pleadings" (*M& E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 (1st Dept 2020], *lv dismissed* 38 NY2d 1086 [2021]). Additionally, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003]). However, dismissal based on documentary evidence under CPLR 3211(a)(1) may result "only where 'it has been shown that a material fact as claimed by the pleader ... is not a fact at all and ... no significant dispute exists regarding it'" (*Acquista v N.Y. Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001] [internal citation and quotation omitted]).

Fraud in Inducement Claim

The moving defendants seek dismissal of the fraud in inducement claim, arguing that (1) plaintiff fails to allege predicate facts in sufficient detail, (2) the fraud claim duplicates plaintiff's breach of contract claim, and (3) the fraud claim cannot be sustained against individual defendants based on the Sponsor's Certification. The moving defendants also contend that the documentary evidence conclusively establishes a defense to this claim under CPLR 3211(a)(1).

To adequately allege a fraud-based claim, the complaint must state the circumstances with sufficient detail under CPLR 3016(b)'s heightened pleading standard (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). At the same time, the Court of Appeals has cautioned that CPLR 3016(b) "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*id.*, at 559; *Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). Thus, "CPLR 3016(b) is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct" (*Eurycleia*, 12 NY3d at 559, citing *Pludeman*, 10 NY3d at 492).

Here, plaintiff alleges that Sponsor knowingly made affirmative, material misrepresentations in the Offering Plan intending to solicit buyers, who relying on the statements, purchased the units and suffered damages. In particular, the Complaint identifies the specific defective conditions in the Building and, in comparison, the respective provisions of the Offering Plan which affirmatively stated that no such condition exists or that any such defects had been repaired (NYSCEF #15, ¶¶ 51-110). Plaintiff further alleges that although Sponsor amended the Offering Plan at least fourteen times, it did not correct the false statements in the Offering Plan but kept circulating those amendments to solicit sales (*id.*, ¶ 38).

With regard to fraudulent intent, plaintiff claim that its allegation – that the moving defendants regularly monitored the construction and assigned managers to communicate with the contractors, subcontractors, and materialmen, and therefore

were aware of the defects and nonconformities – raises a reasonable inference of their knowledge of the alleged falsity of the statements in the Offering Plan (*id.*, ¶ 37), thus (*Bd. of Mgrs. of the 369 Harman St. Condominium v 369 Harman LLC*, 2018 WL 3972359, *2 [Sup Ct, NY County, Aug. 20, 2018] [finding the fact that the sponsor constructed the building raises an inference of its knowledge of the alleged falsity]). Further, the allegations of Sponsor coating over the Building's exterior to conceal deficiencies also "permit a reasonable inference" of its fraudulent intent (*Eurycleia*, 12 NY3d at 559; *see also Kerusa Co. LLC v W10Z/515 Real Estate L.P.*, 12 NY3d 236, 246 [2009] [suggesting that allegations of active concealment such as painting over drywall would support a fraud action]; *Bd. of Mgrs. of 231 Norman Ave. Condominium v 231 Norman Ave. Prop. Dev., LLC*, 36 Misc 3d 1232[A] [Sup Ct, Kings County 2012] [allegations of the sponsor painting over the units to conceal defects, together with other affirmative misrepresentation, are sufficient to support plaintiff's fraud claim]).

The moving defendants also argue that plaintiff fails to plead reasonable reliance since the unit owners expressly disclaimed reliance in the Offering Plan and purchase agreements. Under New York law, however, "a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless ... the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge" (*Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 143 [1st Dept 2014]). Here, the disclaimers do not preclude reliance because the alleged defects concern covered-up exterior defects and interior defects in the mechanical equipment, plumbing equipment, and electrical system, which are sufficient to raise the question as to whether these defective conditions are peculiarly within the Sponsor's knowledge and could not be discovered by unit owners through ordinary inspection (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 139 [1st Dept 2014] [buyer's reliance is not disclaimed since the seller allegedly had access to nonpublic information, noting that it is inappropriate to determine at the pleading stage whether the seller had any special knowledge that the buyer could not have ascertained by exercising reasonable diligence]).

The moving defendants' next argument that the fraud claim duplicates the breach of contract claim is unavailing. It is well-established that "[a] fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]). Meanwhile, a fraud claim may be maintained if the legal duty "spring[s] from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Community Counseling & Mediation Servs. v Chera*, 78 AD3d 554, 554 [1st Dept 2010]; *Bd. of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 684 [2d Dept 2016]). Unlike a misrepresentation of

future intent to perform, a misrepresentation of then-present facts is collateral to the contract, even though it may have induced the plaintiff to enter the contract, and therefore involves a separate breach of duty (*see Wyle Inc. v ITT Corp.*, 130 AD3d 438, 440-442 [1st Dept 2015]).

In this action, plaintiff alleges that Sponsor prepared and filed the Offering Plan "when the Project was nearly complete" (NYSCEF # 15, ¶ 121) and circulated the amended versions of the Offering Plan without correcting the false statements "after the renovation of the Building was complete but before any sales were consummated" (*id.*, ¶ 123). As such, the alleged false statements mostly concern then-present facts rather than mere future event, and were made prior to, and as an inducement for unit owners to enter into the purchase agreements (*see 369 Harman St.*, 2018 WL 3972359, *4 [Sup. Ct., NY County 2018] [finding the fraudulent inducement claim not duplicative since plaintiff alleges that "most, if not all unit owners purchased their units after the Building's construction was completed, and that Defendants utilized the affirmative misrepresentations contained in the Offering Plan to sell the units"]*; cf Bd. of Mgrs. of 147 Waverly Place Condominium v KMG Waverly, LLC*, 129 AD3d 549, 550 [1st Dept 2015] [finding that the statements cannot support a fraud action because they were "predictions of future events" made when "the renovation was in its early stages"]).

Moreover, plaintiff alleges that Sponsor was aware of the defects from monitoring the construction work, but ignored them and even concealed some defects from prospective buyers by coating over the exteriors of the deficiencies, thus raising a reasonable inference of fraud (*see Kerusa*, 12 NY3d at 246; *231 Norman Ave.*, 36 Misc 3d 1232[A]). These allegations, which, for purposes of this motion, must be accepted as true, are separate and distinct from that underlying the breach of contract claim and are sufficient to support a fraud in inducement claim (*Bd. of Mgrs. of the S. Star v WSA Equities, LLC*, 2014 NY Slip Op 32750[U], *5-6 [Sup Ct, NY County 2014], *affd as mod* 140 AD3d 405 [1st Dept 2016]).

The Complaint also sufficiently pleads a fraud claim against the individual defendants. "A corporate officer who participates in the commission of a tort may be held individually liable ... regardless of whether the corporate veil is pierced" (*WSA Equities*, 140 AD3d at 405). Here, plaintiff alleges that the individual defendants, as principals of the Sponsor, "directly participated in the fraud by personally directing the activities of the Sponsor" and personally involved in using the Offering Plan to market and negotiate unit sales (NYSCEF 15, ¶¶ 32-38, 128). In addition, the individual defendants executed the certification in their individual capacities, separate from their representative capacities on behalf of the Sponsor (NYSEF # 22 at 393-394). By doing so, they "knowingly and intentionally advanc[ed] the alleged misrepresentation in the offering plan" and can be held personally liable (*Residential Bd. of Mgrs. of Zeckendof Towers v Union Sq.-14th St. Assocs.*, 190 AD2d 636, 637 [1st Dept 1993]; *see also Birnbaum v Yonkers Contracting Co., Inc.*,

272 AD2d 355, 357 [2d Dept 2000]; *Zanani v Savad*, 228 AD2d 584, 584 [2d Dept 1996]; *266 W. 115th St. Condominium v 266 W. 115th St., LLC*, 2014 WL 6791412, *6 [Sup Ct, NY County, Dec. 2, 2014]).[1]

And, the moving defendants' documentary evidence does not conclusively establish a defense to this claim under CPLR 3211(a)(1) because the documentary evidence submitted, including the Offering Plan and the purchase agreements, do not flatly contradict the allegations, and the disclaimers in those documents do not preclude unit owners' reliance as discussed above (*Morgenthow*, 305 AD2d at 78 [stating that to prevail a CPLR 3211(a)(1) motion to dismiss, the legal conclusions and factual allegations in the complaint must be "flatly contradicted by documentary evidence" such that "they are not presumed to be true or accorded every favorable inference"]). Accordingly, the moving defendants' motion to dismiss the fraud in inducement claim against them is denied.

Breach of Fiduciary Duty Claim

The moving defendants next seek to dismiss the breach of fiduciary duty claim against the individual defendants,[2] arguing that this claim is pleaded with inadequate specificity, duplicative of the breach of contract claim, and barred by the statute of limitations.

Members of a condominium board owe a fiduciary duty to unit owners in their management of the common property (*Bowery 263 Condominium Inc. v D.N.P. 336 Covenant Ave. LLC*, 169 AD3d 541, 542 [1st Dept 2019]). Moreover, courts have noted that the initial sponsor-appointed board, like the first board in this action, is subject to "a great potential for conflicts of interest" since "it is vested with great power over the property interests of unit owners" while at the same time "receives its authority from the profit-motivated sponsor" (*Bd. of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 325 [2d Dept 1993]).

The individual defendants allegedly controlled the board from January 29, 2016, shortly before the first unit was sold, through October 12, 2018 (NYSCEF # 15, ¶ 43). Plaintiff alleges that when the unit owners moved in and discovered the

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[1] The moving defendants' reliance on *Bd. of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542, 544 (1st Dept 2013) is misplaced. In dismissing the fraud claim against individual members of the sponsor, the First Department did not address whether the execution the certification by these members in their separate capacities would provide a basis for their liability; rather, the decision focused on plaintiff's allegation of omissions in the offering plan and certification for which there is no private cause of action (*id.*, citing *Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]).

[2] The fourth cause of action for breach of fiduciary duty is asserted against "Sponsor Board Members," who were the two individual defendants and another sponsor affiliate (NYSCEF # 15, ¶ 43). Since the Complaint does not identify or name as defendant the third sponsor affiliate, this cause of action is deemed to concern only the two individual defendants.

defects in the Building, they complained to the board and demanded that the defects be addressed (*id.*, ¶¶ 45-46). However, the individual defendants, who were board members then, denied the defects' existence and refused to address them (*id.*, ¶¶ 47-48, 150). Plaintiff also alleges that the individual defendants underfunded the condominium's operating budget, pocketing the sale proceeds that should have been reserved to pay for repairs and maintenance of the Building (*id.*, ¶¶ 151-152). These allegations raise a reasonable inference that the individual defendants used their control over the board to further Sponsor's and their interests at the expense and to the detriment of the unit owners, which fit within a cognizable legal theory (*Bowery 236*, 169 AD3d at 542 [sponsor-affiliated board members failed to address the defects upon notice and concealed known defects]; *Bd. of Mgrs. of Astoria Homes Condominium v Los Vamos, LLC*, 2019 WL 2898447, * 7 [Sup Ct, NY County, May 8, 2019] [board members concealed the building's deficiencies]. In addition, this claim does not duplicate the breach of contract claim because it is predicated on different facts and asserted against different defendants.

However, plaintiff cannot pursue this claim for conduct that occurred prior to October 23, 2017, three years before filing the amended summons with notice against the individual defendants on October 23, 2020. For a breach of fiduciary duty claim, "the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). As this claim seeks only monetary damages, the three-year limitations period of CPLR 214(4) applies (*id.*). Plaintiff's argument that this breach of fiduciary duty claim is based on fraud and therefore a six-year limitations period applies has no merit. Unlike the second cause of action, this claim is not premised on the unit owners' reliance upon any misrepresentations the individual defendants made; rather, it is based on the individual defendants' alleged conflicts of interest and their misconducts in refusing to address the defects and mismanaging the condominium's funds (NYSCEF # 15, ¶¶ 147-153).

The court is not persuaded by plaintiff's argument that the statute of limitations is tolled under the continuous wrong doctrine, since the individual defendants ended their control of the board on October 12, 2018 (*Bd. of Mgrs. of 111 Hudson St. Condominium v 111 Hudson St., LLC*, 2015 WL 4627738, *6 [Sup Ct, NY County, July 28, 2015] [finding the claim time-barred since the sponsor-affiliated board members handed over control more than three years before commencing the action]). Therefore, the motion to dismiss the breach of fiduciary duty claim is granted only to the extent of dismissing the aspect of the claim for conduct occurred before October 23, 2017.

Debtor and Creditor Law Claims

As to the two constructive fraudulent conveyance claims under DCL §§ 273 and 274, contrary to the moving defendants' contention, no confidential or fiduciary

relationship is required (*Bd. of Mgrs. of BeWilliam Condominium v 90 William St. Dev. Group LLC*, 187 AD3d 680, 681-682 [1st Dept 2020]). Also, since constructive fraudulent conveyance claims under DCL §§ 273 and 274 do not require proof of actual intent to defraud, they are not subject to the particularity requirement of CPLR 3016(b) (*Lore*, 169 AD3d at 618; *see also Bd. of Mgrs. of E. River Tower Condominium v Empire Holdings Group, LLC*, 175 AD3d 1377, 1379 [2d Dept 2019]). The allegation here is that after repaying the loan to its financing lender, the Sponsor sold additional units and rather than retaining the sale proceeds, distributed those proceeds to the individual defendants and other undisclosed affiliates. Further, the distributions were made without fair consideration, rendering the Sponsor insolvent and leaving it with an unreasonable small amount of capital. Under the liberal pleading standard, plaintiff sufficiently pleads the two claims under DCL §§ 273 and 274 (*E. River Tower*, 175 AD3d at 1379; *369 Harman St.*, 2018 WL 3972359, * 5).

Unlike constructive fraud, a claim for intentional fraudulent conveyance under § DCL 276 must be pleaded with the particularity required under CPLR 3016(b) (*Ray v Ray*, 108 AD3d 449, 451 [1st Dept 2013]). In that direct evidence of actual fraudulent intent is often elusive, plaintiff is allowed to rely on "badges of fraud," which are "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent" (*id.* at 451).

Here, plaintiff's references of "badges of fraud" – that "the Distribution were made not in the usual course of business" and "without fair consideration" – (NYSCEF # 15, ¶ 179) are conclusory and fall short of the requisite specificity (*see 369 Harman St.*, 2018 WL 3972359, * 5-6 [concerning similar allegations]; *see also Alexander*, 60 Misc 3d 1232[A] ["Plaintiff then alleges, in conclusory fashion and with no supporting facts, that these transactions were 'made without fair consideration,' which merely tracks the language of the statute"]; *cf Bd. of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 883 [1st Dept 2016] [plaintiff sufficiently alleges badges of fraud such as that the transferee company is owned and controlled by a related defendant, and that defendant conveyed four commercial units at $0 following plaintiff's commencement of the action]). More needs to be alleged to support a cause of actual intent to defraud (*Ray*, 108 AD3d at 451-452). Thus, plaintiff's seventh cause of action is insufficiently pleaded, and must be dismissed.

Claim for Attorney's Fees

Finally, the moving defendants seek to dismiss plaintiff's claim for attorney's fees correctly arguing that no attorney's fees are warranted under Debtor and Creditor Law § 276-a since the complaint fails to sufficiently allege an actual intent to defraud in connection with Sponsor's conveyance. As to plaintiff's request for attorney's fees in the ad damnum clause of the Complaint, the fees are merely

incident of litigation and are not recoverable absent a specific contractual provision or statutory authority (*Campbell v Citibank, N.A.*, 302 AD2d 150, 154 [1st Dept 2003]). In any event, plaintiff does not address this issue in its opposition or at oral argument, thereby waiving its opposition and abandoning its claim for attorney's fees (*Saidin v Negron*, 136 AD3d 458 [1st Dept 2016] [finding that plaintiff abandoned his claim by failing to oppose the part of defendant's motion to dismiss]).

Conclusion

In view of the above, it is

ORDERED that the moving defendants' (Leonard Street Owner, LLC, Marc Ravner, and Benjamin Shaoul) motion to dismiss plaintiff's second cause of action for fraud in inducement is denied; it is further

ORDERED that the moving defendants' motion to dismiss the fourth cause of action for breach of fiduciary duty against Marc Ravner and Benjamin Shaoul is granted only to the extent of dismissing the aspect of the claim for conduct occurred before October 23, 2017; it is further

ORDERED that the moving defendants' motion to dismiss the fifth and sixth causes of action for constructive fraudulent conveyance is denied; it is further

ORDERED that the moving defendants' motion to dismiss the seventh cause of action for intentional fraudulent conveyance is granted; it is further

ORDERED that the moving defendants' motion to dismiss plaintiff's claim for attorney's fees is granted; it is further

ORDERED that the moving defendants are to serve an answer to the Complaint within 20 days of the entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on November 10, 2022 at 2:30 p.m. via Microsoft Teams with the link to be provided by the court.

9/29/2022
DATE

MARGARET A. CHAN, J.S.C.

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