| **Board of Mgrs. of 11 Beach St. Condominium v HFZ 11 Beach St. LLC** |
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| 2023 NY Slip Op 33419(U) |
| September 30, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 653467/2021 |
| Judge: Andrea Masley |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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BOARD OF MANAGERS OF 11 BEACH STREET CONDOMINIUM,

Plaintiff,

- v -

HFZ 11 BEACH STREET LLC, HFZ 11 BEACH STREET 2 LLC, ZIEL FELDMAN, NIR MEIR, JOHN SHANNON, BKSK ARCHITECTS LLP, NV THA OWNER LLC, NV/JOY BEACH THB LLC, UNIT 3B 11 BEACH LLC, TRIBECA BEACH 7B LLC, HFZ REAL ESTATE DEVELOPMENT ASSOCIATES, LLC, HOLLAND & KNIGHT LLP, JOHN DOE NOS. 1 THROUGH 10, and JANE DOE NOS. 1 THROUGH 10,

Defendants.

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**INDEX NO.** 653467/2021

**MOTION DATE** ____________

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 94, 109, 161, 162, 163, 168, 178, 180

were read on this motion to/for DISMISSAL .

The following e-filed documents, listed by NYSCEF document number (Motion 003) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 137, 169, 170, 171, 172, 173, 174, 175, 176, 181, 182, 183, 184, 191, 192

were read on this motion to/for DISMISSAL .

Upon the foregoing documents, it is

In motion sequence number 002, defendants NV/JOY Beach THB LLC (NV THB) and Unit 3B 11 Beach LLC (3B LLC) move, pursuant to CPLR 3211(a)(1), (3) and (7) to dismiss the eighth cause of action in amended complaint (voidable transfers) and for sanctions of attorneys' fees, costs, and disbursements. In motion sequence number

003, defendant Tribeca Beach 7B LLC (7B LLC) also moves, pursuant to 3211(a)(1), (3), and (7), to dismiss the eighth cause of action in the amended complaint.[1]

**Background**

The following facts are alleged in the amended complaint, unless otherwise noted, and for the purposes of these motions are accepted as true. (*Davis v Boeheim*, 24 NY3d 262, 268 [2014].) The court will only detail facts relevant to these motions.

This action arises out of the alleged defective construction of a residential condominium apartment building located at 11 Beach Street, New York, New York (Condo). The Board brings this action against HFZ 11 Beach Street LLC and HFZ 11 Beach Street 2 LLC (together, Sponsor), Sponsors' principal Ziel Feldman, Sponsor-appointed board members Nir Meir and John Shannon (together with Feldman, Sponsor Board Members), NV THA Owner LLC (NV THA), former owner of Unit TH-A, NV THB, former owner of Unit TH-B, 3B LLC, owner of Unit 3B[2], 7B LLC, owner of Unit 7B, and HFZ Real Estate Development Associates, LLC.[3]

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[1] Plaintiff Board of Managers of 11 Beach Street Condominium (Board) filed an amended complaint on November 10, 2021, after these motions were filed. (NYSCEF Doc. No. [NYSCEF] 203, Amended Complaint.) However, the allegations contained in the amended complaint against the movants are the same as allegations contained in the original complaint. (NYSCEF 264, tr at 30:16-25, 58:3-17.)

[2] On October 5, 2021, the court granted the Board's motion seeking a preliminary injunction or alternatively an attachment "to the extent that the Board shall have an attachment for $1.1 million should Unit 3B be sold." (NYSCEF 177, Decision and Order at 13 [mot. seq. no. 001].) On February 17 and 23, 2022, counsel for 3B LLC informed the court of 3B LLC's intent to sell Unit 3B and post a surety bond in the amount of $1.1 million. (NYSCEF 257 and 258, Letters to Court.) On March 1, 2022, the Board and 3B LLC executed a stipulation whereby it was agreed that 3B LLC would post a surety bond in lieu of an attachment in order to clear the way for the sale of Unit 3B. (NYSCEF 261, So Ordered Stipulation.)

[3] This action was discontinued as to defendants Holland & Knight LLP (NYSCEF 267), C3D Architecture PLLC (NYSCEF 338), and BKSK Architects LLP (NYSCEF 350).

The Board alleges that, pursuant to certain loan agreements between Sponsor and nonparty lenders, Sponsor agreed to satisfy their debts with the proceeds from sales of the units in the Condo. (NYSCEF 203, Amended Complaint ¶ 215.) By January 2019, Sponsor repaid these lenders in full. (*Id.* ¶ 216.) However, as Sponsor completed additional closings, instead of retaining sales proceeds, they made distributions to their members or affiliates without fair consideration and prioritizing Sponsor's members over creditors. (*Id.* ¶¶ 218-219.) In addition to these alleged improper distributions, Sponsor also fraudulently transferred ownership in Units TH-A, TH-B, and 3B on November 20, 2020 to NV THA, NV THB, and 3B LLC, respectively; all entities owned by equity partners in the Condo project. (*Id.* ¶¶ 220, 224, 228.) The Board alleges that the sales prices included in the deeds are false and were only included because the Real Property Transfer Report (RPTR) requires inclusion of a sales price. (*Id.*) The Board further alleges that these Units were flipped and sold for a profit, which was distributed to these entities' members.[4] (*Id.* ¶¶ 223, 227, 232.)

The Board also alleges that, by deed dated December 7, 2020, and recorded on December 9, 2020, Sponsor, at Meir's direction, transferred Unit 7B to 7B LLC, a "strawman." (*Id.* ¶ 233.) 7B LLC is an entity allegedly owned by Dhruv Piplani, Meir's close friend and/or business associate. (*Id.* ¶ 234.) Meir allegedly used 7B LLC to take title to Unit 7B for no consideration and then mortgaged Unit 7B to provide himself with liquidity. (*Id.*) In December 2020, Meir attempted to occupy Unit 7B but was denied

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[4] At the time of the filing of the amended complaint, Unit 3B had not been sold. This status appears to have since changed. (*See* n 2, *supra*.)

access. (*Id.* ¶ 239.) Like the other Units at issue, the sales price listed in the RPTR is allegedly false. (*Id.* ¶ 239.)

The Board alleges that "Sponsor was insolvent at the time that some or all the Equity Distributions and the Property Transfers were made, or in making the Equity Distributions and/or the Property Transfers was rendered insolvent" and that the transfers were done with the intent to hinder, delay, and defraud Sponsor's creditors, including the Board. (*Id.* ¶¶ 245, 250.) Thus, it asserts that these transfers are voidable transfers of property under New York Debtor and Creditor Law (DCL).

Motion Seq. No. 002

*Standing*

"On a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing. To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing." (*Golden Jubilee Realty v Castro*, 196 AD3d 680, 682 [2d Dept 2021] [internal quotation marks and citations omitted].)

Here, NV THB and 3B LLC assert that the Board lacks standing because it did not hold a vote to commence this action as required by New York Real Property Law § 339-d. They support this argument based on the fact that the complaint does not contain allegations that such a vote was held.[5] In response, the Board submits an email chain sent after a board meeting, recording the Board's votes to commence this lawsuit.

[5] The amended complaint does not contain any such allegations either.

(NYSCEF 162, May 2021 Emails.) The Board's counsel notes that one Board member recused himself from the vote. (*See* NYSCEF 161, Paioff aff ¶ 4, n 2.) Thus, at the very least, the Board raises a question of fact as to its standing.

*DCL/Uniform Voidable Transactions Act*

On December 6, 2019, then-Governor Andrew Cuomo signed a bill repealing Article 10 of the DCL, replacing it with the Uniform Voidable Transactions Act (UVTA). (2019 NY Ch 580, 2019 NY AB 5622; NY Dr & Cr Law, Art 10 [2023].) The UVTA took effect on April 4, 2020 and applies to transfers made or obligations incurred on or after that date. (2019 NY Ch 580, § 7.) It does not apply to transfers made or obligations incurred prior to April 4, 2020, nor to a right of action that has accrued before that effective date. (*Id.*)

NV THB and 3B LLC argue that the UVTA does not apply here because the Board's claims accrued prior to April 4, 2020. They assert that the Board could have commenced an action against Sponsor and Feldman when the first unit closed in 2016, and therefore, the Board's right of action accrued in 2016. However, despite making this argument, in their moving papers, NV THB and 3B LLC cite only to the UVTA. Nevertheless, based on the remaining arguments made by these defendants, the same result would yield under the former DCL and the UVTA.

*Judgment Creditor*

NV THB and 3B LLC assert that the Board cannot bring this claim because it does not have a judgment. The former DCL did contain a provision which provided a remedy where a transfer was made during litigation in which a judgment was entered against the transferor and that judgment was not satisfied. (*See* DCL § 273-a [repealed] ["Every conveyance made without fair consideration when the person making

it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."].) "To prevail on such a fraudulent conveyance claim, the movant must establish three elements: (1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final judgment has been rendered against the transferor that remains unsatisfied." (*Fischer v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006] [citation omitted].)

Even if the Board's claim was brought pursuant to the former DCL, the Board does not have a claim under this very specific provision as the transfers did not occur during pending litigation. (*Singind Life Sciences (HK) Ltd. v Versailles Indus. LLC*, 2021 NY Slip Op 30584[U], *5 [Sup Ct, NY County 2021] [dismissing plaintiffs' claims brought pursuant to DCL § 273-a because they failed to allege that any transfer occurred after commencement of litigation].) Here, the Board filed this action in May 2021 and the transfers occurred in 2020.

*Insolvency*

NV THB and 3B LLC argue that the Board's claim for fraudulent conveyance also fails because the Sponsor was not insolvent when it transferred Units TH-A, TH-B, and 3B on November 20, 2020. NV THB and 3B LLC assert that the Sponsor still owned Unit 7B as of November 20, 2020, which was worth approximately $5,264,353. In the amended complaint, the Board alleges that "pursuant to the new DCL § 273, the Condominium (including the Unit Owners) is entitled to set aside the Property Transfers

as voidable transactions… .” (NYSCEF 203, Amended Complaint ¶ 252.) The Board further alleges that “[u]pon information and belief, Sponsor was insolvent at the time that some or all the Equity Distributions and the Property Transfers were made, or in making the Equity Distributions and/or the Property Transfers was rendered insolvent.” (*Id.* ¶ 245.)

DCL § 273 (a) provides,

> “A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due.”

This provision applies to both transfers made with actual intent or that lack fair consideration. DCL § 273 (b) sets forth eleven non-exhaustive factors that courts may consider when determining actual intent, including whether “the transfer or obligation was to an insider,” “the debtor retained possession or control of the property transferred after the transfer,” “the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred,” “the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred” and “the transfer occurred shortly before or shortly after a substantial debt was incurred.”

"Insolvency is a prerequisite[ ] to a finding of constructive fraud under [former] section 273." (*Cheek v Brooks*, 188 AD3d 785, 786 [2d Dept 2020] [internal quotation marks and citations omitted].) The transferor's financial ability to repay creditors is still an element under the UVTA. (DCL § 273 [a] [2] [i] and [ii]; James Gadsden and Alan Kolod, 2020 Supp Prac Commentary, McKinney's Cons Laws of NY, Debtor and Creditor Law § 271 [online version] ["Insolvency of a debtor is one of the required elements for one form of claim to avoid constructively voidable transactions."].)

Under the former DCL, "[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." (*Matter of Northwest 5th & 45th Realty Corp. v Mitchell, Maxwell & Jackson*, 164 AD3d 1158, 1158 [1st Dept 2018], citing DCL § 271 [repealed].) Under the UVTA, "(a) A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets. (b) A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence." (DCL § 271.)

Here, the Board's "conclusory allegation of insolvency does not suffice to support its claim" of a constructive voidable transfer. (*Eagle Eye Collection Corp. v Shariff*, 190 AD3d 600, 602 [1st Dept 2021] [citation omitted]; *see also Matter of Northwest 5th & 45th Realty Corp. v Mitchell, Maxwell & Jackson*, 164 AD3d 1158, 1158 [1st Dept 2018] [finding that "the petition made no allegations about the fair salable value of

[defendant's] assets"].) Further, the documentary evidence shows that the Sponsor still had the asset of Unit 7B when the transfer of Units TH-A, TH-B, and 3B occurred.

The Board also alleges that "Sponsor ... engaged in the Property Transfers with actual intent to hinder, delay, and defraud creditors of Sponsor, including the Condominium and the Unit Owners." (NYSCEF 203, Amended Complaint ¶ 250.) Insolvency is not a prerequisite in finding actual fraud. Rather, it is one of the badges of fraud sufficient to establish an inference that a transferor acted with actual intent to defraud. (DCL § 273 [b] [9].)

In their moving affirmation[6], NV THB and 3B LLC fail to address the Board's claim for actual fraud under DCL § 273 (a) (1). On reply, they, for the first time, assert that the Board fails to allege sufficient badges of fraud to infer an actual intent to defraud. However, "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] [citations omitted]; *see also Wal-Mart Stores, Inc. v United States Fid. & Guar. Co.,* 11 AD3d 300, 301 [1st Dept 2004] [holding that "motion court properly declined to reach defendants' argument regarding the application of CPLR 202 on the ground that it was improperly raised for the first time in reply."].) NV

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[6] Counsel for NV THB and 3B LLC is reminded that "an affirmation may be filed, under penalties of perjury, not in place of a brief but in place of an affidavit, by an attorney admitted to practice in New York. 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 NY (Del), Inc.*, 2010 NY Slip Op 51274[U], *6 [Sup Ct, NY County 2010] [citation omitted], citing 22 NYCRR § 202.8 [c] [Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law].)

THB and 3B LLC were well aware of the Board's claim for actual fraud when they moved to dismiss and failed to address it until their reply. (*See* NYSCEF 1, Summons and Complaint ¶ 242; NYSCEF 203, Amended Complaint ¶ 250.) Thus, the court declines to consider their argument, and the Board's claim under DCL § 273 (a) (1) survives this motion to dismiss.

Further, NV THB and 3B LLC seek sanctions in the form of attorneys' fees, costs and disbursements. However, they provide no grounds for sanctions and do not address sanctions in their papers. This request is denied.

Motion Seq. No. 003

7B LLC moves to dismiss the Board's claim for voidable transfers on the grounds that the Board (1) fails to allege fair consideration, (2) fails to plead Sponsor's insolvency, and (3) lacks standing because it is not a creditor. While 7B LLC relies on the former DCL, it provides no reason as to why the former DCL applies to a transfer that occurred in December 2020 (UVTA applies to transfers after April 4, 2020). Thus, without explanation, the court applies the UVTA as that is what the Board brings its claim under.

*Fair Consideration*

A transfer is voidable if the debtor made the transfer "without receiving a reasonably equivalent value in exchange for the transfer or obligation." (DCL § 273 [a] [2].) The former DCL required both (1) fair equivalency of the consideration and (2) good faith by both parties. (DCL § 272 [repealed].) However, for the purposes of the new DCL § 273 (a) (2), "a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or

disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." (DCL § 272 [b].) Good faith is no longer a requirement.

The Board alleges, "upon information and belief," that there was "no consideration" given for the transfer of Unit 7B and that a mortgage was taken out on Unit 7B two months after the transfer in order to provide Meir with some liquidity. (NYSCEF 203, Amended Complaint ¶ 234.) This conclusory allegation based upon information and belief is insufficient. (*L&M 353 Franklyn Ave. LLC v Steinman*, 202 AD3d 440, 440 [1st Dept 2022] [holding that allegations made upon information and belief are insufficient to support a claim for fraudulent conveyance[7]].) For this reason, the Board's claim for constructive voidable transfer is dismissed with leave to replead within 20 days of the date of this decision and order. Although the court need not address insolvency, the First Department also held in *L&M 353 Franklyn Ave. LLC* that allegations based upon information and belief are insufficient to support claims that the transfers rendered the debtor insolvent. (*Id.*)

*Actual Fraud*

As reasonably equivalent value and insolvency are not requirements for actual fraud, only 7B LLC's argument regarding standing applies to the Board's claim pursuant to DCL § 273 (a) (1). Specifically, 7B LLC asserts that, because the Board was not a creditor at the time of the challenged transfers, it lacks standing. This argument fails. Section 273 (a) provides, in relevant part, that "[a] transfer made or obligation incurred by a debtor is voidable as to a creditor, *whether the creditor's claim arose before or after*

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[7] The court acknowledges that the First Department was addressing a fraudulent conveyance claim under the former DCL; however, this pleading standard did not change with the enactment of the UVTA.

*the transfer was made or the obligation was incurred… .*" Thus, the Board need not be a creditor at the time the transfer occurred.

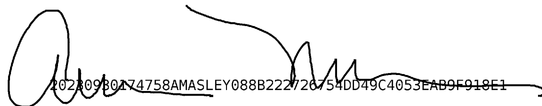
Accordingly, it is

ORDERED that defendants NV/JOY Beach THB LLC and Unit 3B 11 Beach LLC's motion to dismiss the eighth cause of action in amended complaint (voidable transfers) and for sanctions is granted, in part, in so far as plaintiff's claim pursuant to DCL § 273 (a) (2) is dismissed; and it is further

ORDERED that defendant Tribeca Beach 7B LLC's motion to dismiss the eighth cause of action in the amended complaint is granted, in part, in so far as plaintiff's claim pursuant to DCL § 273 (a) (2) is dismissed with leave to replead; and it is further

ORDERED that plaintiff is granted leave to serve and file a second amended complaint so as to replead the eighth cause of action (claim under DCL § 273 [a] [2]) within 20 days of the date of this decision and order; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied.




| 9/30/2023 | | | | | |
|---|---|---|---|---|---|
| **DATE** | | | **ANDREA MASLEY, 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** | |