Board of Mgrs. of the 443 Greenwich St. Condominium v SGN 443 Greenwich St. Owner LLC

2024 NY Slip Op 31662(U)

May 10, 2024

Supreme Court, New York County

Docket Number: Index No. 656934/2021

Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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BOARD OF MANAGERS OF THE 443 GREENWICH STREET CONDOMINIUM,

Plaintiff,

- v -

SGN 443 GREENWICH STREET OWNER LLC, SGN 443 GREENWICH STREET FEE OWNER LLC, SGN 443 GREENWICH STREET ASSOCIATES LLC, JS GREENWICH LLC, NB 443 GREENWICH STREET LLC, NATHAN BERMAN, JACK BERMAN, MARC L. FRIED, CETRA/CRI ARCHITECTURE PLLC, CETRARUDDY ARCHITECTURE D.P.C., JOHN A. CETRA, GREENWICH 2D LLC, GREENWICH 4D LLC, GREENWICH 4H LLC, GREENWICH 3F LLC, GREENWICH 4E LLC, GREENWICH 2F LLC, GREENWICH PHD LLC, AVERY TRUST,

Defendants.

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INDEX NO. 656934/2021

MOTION DATE 09/21/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

SGN 443 GREENWICH STREET OWNER LLC, SGN 443 GREENWICH STREET FEE OWNER LLC, SGN 443 GREENWICH STREET ASSOCIATES LLC, JS GREENWICH LLC, NB 443 GREENWICH STREET LLC, NATHAN BERMAN, JACK BERMAN, MARC FRIED

Plaintiffs,

-against-

UNIQUE ROOFING OF NEW YORK, INC., HORSEPOWER ELECTRIC AND MAINTENANCE CORP., PRESERV BUILDING RESTORATION MANAGEMENT INCORPORATED, CADCO SALES CORP. D/B/A CHRISTIE OVERHEAD DOORS, LLC & DIAMOND DOOR, COSENTINI ASSOCIATES 2 LLC D/B/A TETRA TECH ENGINEERS, ARCHITECTS & LANDSCAPE ARCHITECTS, P.C., CTS GROUP ARCHITECTURE, PLANNING, P.A., DEMAR PLUMBING CORP., WATERMARK DESIGNS, LLC, DIRECT FLOORING, INC., DER SPECIALTY PRODUCTS, LLC D/B/A VIRTUWOOD FLOORING, HERITAGE MECHANICAL SERVICES, INC., KSW MECHANICAL SERVICES, INC., LIF INDUSTRIES INC. D/B/A LONG ISLAND FIREPROOF DOOR, INC., FM NY, INC., ROCKAWAY CONTRACTING CORP., SD STAIRS & RAILING CORP., SPRAY-RITE LLC D/B/A A-RITE FIRE PROTECTION SERVICES LLC, URBAN-SUBURBAN

Third-Party
Index No. 595834/2023

RECREATION, INC. D/B/A U.S. RECREATION, INC.

Defendants.
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PRESERV BUILDING RESTORATION MANAGEMENT INCORPORATED

Second Third-Party
Index No. 596006/2023

Plaintiff,

-against-

EMPIRE RESTORATION GROUP INC.

Defendant.
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 203, 204, 205, 206, 207, 208, 235
were read on this motion to DISMISS.

This dispute arises from development of the 443 Greenwich Street Condominium building and the conveyances of building units by Defendants SNG 443 Greenwich Street Owner LLC and SGN 443 Greenwich Street Fee Owner LLC (collectively "Sponsor") to allegedly related entities, Defendants Avery Trust, Greenwich 2D LLC, Greenwich 4D LLC, Greenwich 4H LLC, Greenwich 3F LLC, Greenwich 4E LLC, Greenwich 2F LLC, and Greenwich PHD LLC (collectively, the "Avery Defendants').

The Avery Defendants move to dismiss the Amended Complaint of Plaintiff Board of Managers of the 443 Greenwich Street Condominium ("Plaintiff") as alleged against them for failure to state a claim and as barred by the statute of limitations. For the reasons set forth below, the motion is denied.

BACKGROUND

I. Factual Background

According to the Amended Complaint, Sponsor purchased the Condominium Building on or about July 19, 2012, for approximately $150 million (NYSCEF 73 [First Amended Complaint ("FAC")] ¶ 31). Sponsor's plan was to renovate the former factory into a seven-story building with residential condominium units for sale (*id.* ¶¶1–9, 32–33). The Sponsor Defendants marketed the Building as meticulously renovated apartments of unparalleled luxury and sold the units for millions of dollars (*id.* ¶2).

According to Plaintiff, the unit owners later discovered that the Building was rife with defective conditions and code violations due to Sponsor Defendants' purportedly shoddy construction (*id.* ¶¶ 55–96). Plaintiff also allege that Sponsor failed to obtain a permanent certificate of occupancy ("PCO") by June 16, 2018, as required by the Offering Plan (*id.* ¶¶ 8, 106–116); failed to deliver final architectural plans, manufacturer's warranties, and maintenance manuals as required (*id.* ¶ 38); and put Sponsor's interests over the Building's interests (*id.* ¶¶ 98–105, 262–273). And, as relevant to the instant motion, Plaintiff allege that Sponsor fraudulently conveyed Sponsor's assets to various individuals and entities related to Sponsor, leaving the Sponsor with insufficient funds to obtain a PCO given the number of construction defects in the Building .

The Fraudulent Conveyances

At the time the Sponsor began closing on its sales of Units, the Sponsor was indebted to Deutsche Bank AG New York (the "Lender") and was obligated under its loan agreements with the Lender to pay a substantial amount of the sales proceeds to the Lender (*id.* ¶ 154). Sponsor's loan agreement granted Lender the right to be involved in certain aspects of Sponsor's

management of the Building. For example, Sponsor was required to sell units in the Building at or above prices approved by the Lender. On or about March 22, 2017 (the "Loan Repayment Date"), the Sponsor Defendants had closed on the sales of a sufficient number of Units to be able to pay the Lender in full (*id.* ¶ 155).

According to Plaintiff, shortly thereafter, Sponsor began selling and/or transferring several units to allegedly related parties at steep discounts. Specifically, between June 2017 and November 2018, Sponsor transferred units 2D, 4D, 2F, 3F, 4E, 4H, and PHD (the "Related Entity Units") to the Avery Defendants at prices significantly below the price listed in the Offering Plan and its amendments and the publicly listed price on StreetEasy.com (the "Unit Transfers") (*id.* ¶¶163–206):

Unit	**Offering Price per Offering Plan**	**StreetEasy.com price**	**Sale Price**	**Discount from Offering Plan/Street Easy Price**	**Buyer**	**Approx. Date of Sale**
2D	$13,200,000	$13,000,000	$8,440,917	35-36 %	Greenwich 2D LLC	June 2, 2017
4D	$13,650,000	$12,950,000	$8,361,731	35-39 %	Greenwich 4D LLC	July 20, 2017
4H	$13,900,000	$13,900,000	$7,275,233	49%	Greenwich 4H LLC	Aug. 10, 2017
3F	$11,500,000	$11,500,000	$6,803,802	41%	Greenwich 3F LLC[1]	April 23, 2018
4E	$13,400,000	$13,400,000	$5,486,267	59%	Greenwich 4E LLC	Oct. 4, 2018
2F	$9,150,000	$9,150,000	$3,789,855	59%	Greenwich 2F LLC	Oct. 4, 2018
PHD	$21,000,000	$20,500,000	$6,065,471	70-71%	Greenwich PHD LLC	Nov. 15, 2018

[1] The Avery Defendants submit that according to the documents filed with the NYC Department of Finance, the actual buyer of Unit 3F was 443G-3F Unit Owner LLC (NYSCEF 158 at 4).

According to Plaintiff, the Avery Defendants are related to Sponsor because Defendant Avery Trust, which is the sole member and owner of the remaining Avery Defendants (FAC ¶ 29), has an ownership interest in in Sponsor Defendant JS Greenwich LLC, which holds a majority interest in Sponsor Defendant SGN 443 Greenwich Street Associates LLC, which wholly owns Sponsor (*see* NYSCEF 205). The documents filed with the NYC Department of Finance describe the sale of units 2D, 4H, 3F, 4E, 2F, and PHD as a "Sale Between Related Companies or Partners in Business" (*see* page 11 of NYSCEF 148–155).

Plaintiff alleges that at the same time, Sponsor distributed all sale proceeds received from the sale of units in the building to Sponsor's Related Member Entities and Sponsor's Principals in accordance with their equity interests in Sponsor and/or the Building (the "Equity Distributions") (FAC ¶ 157).

According to Plaintiff, the Unit Transfers and Equity Distributions depleted all or substantially all of Sponsor's assets (FAC ¶¶ 209–216). Before the Lender was repaid, the Sponsor set aside $38 million in reserves to obtain a PCO (*id.* ¶ 210). Three months after the loan was repaid (approximately the same time the Sponsor started selling units to related parties), Sponsor reduced this amount to $3 million (*id.* ¶ 211). By December 2019, Sponsor only had $500,000 in reserves to obtain a PCO, which Plaintiff alleges is insufficient given the numerous defective conditions and code violations in the Building (*see id.* ¶¶ 48–53, 81, 210–213).

Furthermore, certain of the Avery Defendants subsequently sold or rented their purchased units to third parties (*id.* ¶¶ 203, 205). Specifically, Greenwich 2F LLC began renting out unit 2F (which it acquired for $3,789,855, *see* chart *supra*) in or about July 2018 for $37,500 per month (*id.* ¶ 204). In May 2022, Greenwich 2F LLC sold the unit to a third-party for

$10,700,000 (*id.* ¶ 205). Greenwich PHD LLC began renting out unit PHD in or about October 2018 for $60,000 a month (*id.* ¶ 202).[2]

II. Procedural Background

Plaintiff filed its initial complaint on December 10, 2021, alleging a series of claims against Sponsor Defendants and the Architect Defendants, including a constructive fraudulent conveyance claim against Sponsor's Related Member Entities and Sponsor's Principals based on the Equity Distributions (NYSCEF 2). The Sponsor Defendants moved to dismiss. On December 20, 2022, the Court dismissed Plaintiff's unjust enrichment and GBL §349 and 350 claims but denied the motion with respect to the breach of contract, breach of fiduciary duty, and constructive fraudulent conveyance claims (NYSCEF 46).

On July 20, 2023, the Court granted Plaintiff's motion to amend its Complaint to add actual and constructive fraudulent conveyance claims against the Avery Defendants based on the Unit Transfers (FAC ¶¶ 163–225) and to supplement allegations regarding the insolvency of the Sponsor as a result of the Unit Transfers and the Equity Distributions (NYSCEF 70, 73). The Avery Defendants now move to dismiss these claims.

DISCUSSION

A motion to dismiss under CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). CPLR 3211(a)(7) permits dismissal when the "pleading fails to state a cause of action."

[2] According to the Avery Defendants, Defendant Greenwich 2D LLC sold Unit 2D to 443 AJG LLC in March 2022, and Defendant Greenwich 2D subsequently dissolved in December 2022 (NYSCEF 203 at 4).

A motion under either provision requires the Court to "accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference . . . ." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[H]owever, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration'" (*Myers v Schneiderman*, 30 NY3d 1, 11 [2017] [citations omitted]).

I. Constructive Fraudulent Conveyance (Fourth and Fifth Causes of Action)

Plaintiff has adequately alleged a constructive fraudulent conveyance claim under former DCL §§ 273 and 274. To state a cause of action for constructive fraudulent conveyance under the statute, plaintiff must allege that: (1) plaintiff was a creditor of the transferor; (2) a transfer was made by the transferor without adequate consideration, thus (3) rendering the transferor insolvent (former DCL 273) or leaving the transferor with unreasonably small capital (former DCL 274) [3] (*Bd. of Managers Of Be@William Condominium v 90 William St. Dev. Group LLC*, 2019 NY Slip Op 30613[U], 10 [Sup Ct, NY County 2019], *affd in part, appeal dismissed in part*, 2020 NY Slip Op 06221 [1st Dept 2020], citing DCL [former] §§ 273-274; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 [2011]).

[3] As of April 4, 2020, the DCL was amended to repeal the Uniform Fraudulent Conveyance Act (UFCA) and replace it with the Uniform Voidable Transactions Act (UVTA), Article 10, §§ 270-281. The UFCA applies to transfers (or conveyances) of property prior to April 4, 2020, the UVTA applies to all transfers of property thereafter. The UVTA eliminates the category of "fraudulent conveyances" from the DCL and replaces them with "voidable transactions" and has amended the burden of proof from "clear and convincing evidence" to a "preponderance of the evidence." (DCL § 273). Because this motion relates to transfers that occurred before April 4, 2020, the UFCA applies to the transactions here (*Bd. of Managers of 11 Beach St. Condominium v HFZ 11 Beach St. LLC*, 2021 WL 4553684 [Sup Ct, NY County 2021]; *see also* § 129:5. Legislative history, 4F N.Y.Prac., Com. Litig. in New York State Courts § 129:5 [5th ed.])

"Since valid claims of violations of Debtor and Creditor Law §§ 273 and 274 do not require proof of actual intent to defraud, such claims are not required to be pleaded with the particularity required by CPLR 3016 (b)" (*Bd. of Managers of E. Riv. Tower Condominium v Empire Holdings Group, LLC*, 175 AD3d 1377, 1379 [2d Dept 2019]).

A. Whether Plaintiff was a Creditor

Plaintiff has adequately alleged that it is a creditor. A "creditor" is statutorily defined as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (*see* DCL (former) § 270). "Under this definition, one becomes a creditor when a cause of action against the debtor accrues" (*Roey Realty LLC v Jacobowitz*, 2022 NY Slip Op 34310[U], 13 [Sup Ct, Kings County 2022]; *see also Henry v Soto-Henry*, 89 AD3d 617, 618 [1st Dept 2011] [A plaintiff may be creditor "even though the claim may be unmatured and unliquidated at the time of the conveyance"]).

Here, taking Plaintiff's factual allegations as true, Plaintiff's breach of contract claim arose during construction of the Building and prior to the alleged fraudulent conveyances. "[A] breach of contract cause of action accrues at the time of the breach" (*Ely–Cruikshank Co., Inc. v. Bank of Montreal,* 81 NY2d 399, 402 [1993]). Plaintiff alleges that the Sponsor Defendants breached their obligation to renovate and construct the Building in accordance with the Offering Plan, and they failed to obtain a PCO by June 16, 2018 as required by the Offering Plan. Its allegations are sufficient to survive a motion to dismiss.

B. Whether the Transfers were Made Without Adequate Consideration

Plaintiff has sufficiently alleged that the transfers were made without fair consideration. It alleges that Sponsor transferred each of the Units at issue to the Avery Defendants at steep discounts between 35 and 70 percent below the prices listed in the amendments to the Offering

Plan and advertised to the public via Streeteasy.com. For example, unit PHD was listed at a price of $21,000,000 in an amendment to the Offering Plan signed on August 22, 2018, but this unit was sold to the Avery Defendants for $6,065,471 on November 15, 2018. The Avery Defendants argue that the prices listed in the Offering Plan and on Streeteasy.com were only "asking prices" and the Offering Plan gave Sponsor the right to sell the Units for a price other than "intended" based on "market conditions" (Offering Plan at 31, 32). That is, however, a factual dispute that cannot be resolved on a motion to dismiss. Taking the facts alleged as true, Plaintiff has adequately alleged that each Unit was transferred for less than fair consideration.

C. Whether Sponsor was Insolvent or Left with Unreasonably Small Capital

Finally, Plaintiff has adequately alleged that the transfers left Sponson insolvent or with unreasonably small capital.

As an initial matter, the Avery Defendants assert that because multiple conveyances took place over several years, the Court should not view the conveyances collectively when analyzing the question of insolvency and unreasonably small capital. In their view, Plaintiff would have to demonstrate that each conveyance independently rendered Sponsor insolvent or left Sponsor with unreasonably small capital. This, again, raises fact issues that cannot be determined at this stage. While the time between transfers may be relevant in making the final determination on the merits, the Court cannot conclude as a matter of law at the pleading stage that they cannot be viewed as part of a single overarching plan among related parties to leave the Sponsor insolvent or with unreasonably small capital. In a given case, a fact-finder might reasonably conclude that "[e]ach transfer does not constitute a separate cause of action . . .it is the whole series of transfers which is actionable where it results in the transferor's insolvency or where it is made with actual intent to defraud, since it may be only the aggregate of all which renders the transferor insolvent

or establishes actual intent to defraud, while one or more, taken alone, may not have this result" (*Gruenebaum v Lissauer*, 185 Misc 718, 728 [Sup Ct, NY County 1945], *affd.* 270 AD 836 [1st Dept 1946]).

In a claim under DCL § 273, "both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under section 273, and the burden of proving these elements is upon the party challenging the conveyance" (*Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003]). "Insolvency is present when the fair value of his salable assets is less than the amount required to pay existing debts as they become due" (*Ede v Ede*, 193 AD2d 940, 941 [3d Dept 1993]; DCL (former) § 271[1]). "However, when a transfer is made without fair consideration, a presumption of insolvency and fraudulent transfer arises, and the burden shifts to the transferee to rebut that presumption" (*Battlefield Freedom Wash, LLC v Song Yan Zhuo*, 148 AD3d 969, 971 [2d Dept 2017]; *Miner v Edwards*, 221 AD2d 934, 935 [4th Dept 1995]).

Plaintiff have alleged that Sponsor is a single purpose entity formed for the sole purpose of developing the Building, and the only assets Sponsor held were units of the Condominium and the proceeds from the sales of the units. After the Lender was repaid, Sponsor allegedly retained little, if any, of its assets and instead distributed sales proceeds to the other Sponsor Defendants via the Equity Distributions and transferred the Units at issues to the Avery Defendants.

The Avery Defendants argue that Plaintiff's allegation that Sponsor repaid the Lender indicates that Sponsor was solvent. But Plaintiff alleges that the challenged Unit Transfers and Equity Distributions took place after the loan was repaid. Furthermore, giving Plaintiff the benefit of all favorable inferences at the pleading stage, a fact-finder could determine – as Plaintiff argues – that the timing of the repayment of the loan relative to the Unit Transfers provides more reason to be suspicious of the Unit Transfers. Before the Lender was repaid,

Sponsor could only sell units at prices approved by the Lender. After repayment, Sponsor was free to sell the Units to the Avery Defendants at whatever price they chose, or so the allegation goes.

Furthermore, while Sponsor initially set aside $38 million in reserves to obtain a PCO before the Lender was repaid, Sponsor purportedly reduced this amount to only $500,000 by December 2019. Plaintiff adequately alleges that $500,000 is insufficient for Sponsor to cover its contractual obligation to obtain a PCO in light of the many code violations in the Building. Defendants' suggestion that Plaintiff must plead with specificity the amount of money required to obtain a PCO is unavailing. Plaintiff's allegations – including the extensive number of repairs that Defendants purportedly must make in order to obtain a PCO – are sufficient to put Defendants on notice of the allegations asserted against them.

Accordingly, the Avery Defendants' motion to dismiss the DCL §§ 273 and 274 claims is denied.

D. The Claim Against Greenwich 2D LLC is Timely

Finally, Defendant Greenwich 2D LLC has not established that Plaintiff's constructive fraudulent transfer claim against it is untimely. "On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). "New York law provides that a claim for constructive fraud is governed by the six-year limitation set out in CPLR 213 (1), and that such a claim arises at the time the fraud or conveyance occurs" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 530 [1st Dept 1999]).

Here, Plaintiff's constructive fraud claims under DCL §§ 273 and 274 were required to be commenced within six (6) years after the date of the alleged fraudulent transfer, which – assuming each transfer is considered a separate violation – occurred with respect to Unit 2D on June 2, 2017 (*see* FAC ¶ 168). Plaintiff filed a motion to amend its Complaint to add these claims on June 2, 2023 (within the six-year period) and it was granted on July 20, 2023. The filing of a motion to "amend [with] annexed proposed amended pleadings toll[s] the applicable statute of limitations" (*Abreu v Casey*, 157 AD3d 442, 442 [1st Dept 2018] [rejecting defendant's contention that plaintiff was required to serve him with the motion to amend before the motion was decided]). In any event, the running of the statute of limitations on this claim was tolled between March 20, 2020 and November 3, 2020 by order of the Governor (*New York City Tr. Auth. v Am. Tr. Ins. Co.*, 211 AD3d 643 [1st Dept 2022]). That would be more than sufficient to render the claims timely when actually filed on July 20, 2023. Accordingly, the motion to dismiss this branch of the claim as untimely is denied.

II. Actual Fraudulent Conveyance (Sixth Cause of Action)

Plaintiff has adequately alleged an actual fraudulent conveyance claim under former DCL § 276, which provides 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." (DCL (former) § 276).

Unlike sections 273 and 274, Section 276 "addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). "Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to

support his case, i.e., circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent'" (*Wall St. Assoc.*, 257 AD2d at 529 [citations omitted]). Such circumstances include: "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance" (*id.*). "Depending on the context, badges of fraud will vary in significance, though the presence of multiple indicia will increase the strength of the inference" (*MFS/Sun Life Tr.-High Yield Series v Van Dusen Airport Services Co.*, 910 F Supp 913, 935 [SDNY 1995]).

Here, the amended complaint sufficiently alleges fraud under the above standards. Plaintiff alleges that each of the Avery Defendants is a related entity of Sponsor as demonstrated by the Avery Defendants' own public filings and exhibits to the Motion, which described each Unit Transfer as a "Sale Between Related Companies or Partners in Business." (*see* NYSCEF 150 at 11; NYSCEF 152 at 11; NYSCEF 153 at 11; NYSCEF 154 at 11; NYSCEF 155 at 11). It also adequately alleges "inadequacy of consideration," as discussed above.

Further, Plaintiff adequately alleges "retention of control of the property by the transferor after the conveyance." As noted, publicly filed documents demonstrate that Sponsor transferred the Units at issue to related entities and the organizational chart recently produced by Sponsor Defendants indicates that Avery Trust (one of the Avery Defendants and the sole owner of the remaining Avery Defendants) is an investor in the project and has an indirect ownership interest in Sponsor (NYSCEF 205). While the Avery Defendants argue that the organizational chart does not prove that Sponsor retained control after the transfer, and that the transfers in fact were at arms-length, on a motion to dismiss the Court must take Plaintiff's allegations as true.

In sum, Plaintiff's allegations of actual fraud are sufficient to withstand the Avery Defendants' motion to dismiss (*Shisgal v Brown*, 21 AD3d 845, 847 [1st Dept 2005] [noting that actual intent under DCL § 276 is ordinarily a question of fact which cannot be resolved on a motion to dismiss]; *In re 45 John Lofts, LLC*, 599 BR 730, 744 [Bankr SDNY 2019] ["All these allegations fall within the badges of fraud . . . and are sufficient to survive a motion to dismiss."]). Therefore, Plaintiff has sufficiently stated a claim under DCL § 276.

Accordingly, it is

ORDERED that the Avery Defendants' Motion to Dismiss the Amended Complaint is **DENIED.**

This constitutes the Decision and Order of the Court.

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5/10/2024
DATE

JOEL M. COHEN, J.S.C.

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