Board of Mgrs. of 252 Condominium v World-Wide Holdings Corp.
2024 NY Slip Op 32511(U)
July 14, 2024
Supreme Court, New York County
Docket Number: Index No. 652387/2022
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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THE BOARD OF MANAGERS OF 252 CONDOMINIUM, ON BEHALF OF THE UNIT OWNERS,

Plaintiff,

- v -

WORLD-WIDE HOLDINGS CORP., SNOWPLOW LH 2 LLC, JAMES STANTON, DAVID LOWENFELD, ADAM R. ROSE, NEAL COHEN, and SNOWPLOW LH LLC,

Defendants.

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INDEX NO. 652387/2022

MOTION DATE --

MOTION SEQ. NO. 003 004 006

DECISION + ORDER ON MOTION

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SNOWPLOW LH 2 LLC and SNOWPLOW LH LLC

Plaintiffs,

-against-

LEND LEASE (US) CONSTRUCTION LMB INC., SLCE ARCHITECTS, LLP, SKIDMORE, OWINGS & MERRILL LLP, DESIMONE CONSULTING ENGINEERS PLLC, WSP USA BUILDINGS INC. F/K/A WSP FLACK KURTZ, INC. STRUCTURAL ENGINEERS, and GMS, LLP F/K/A GILSANZ MURRAY STEFICEK LLP

Defendants.

Third-Party
Index No. 595920/2022

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LEND LEASE (US) CONSTRUCTION LMB INC.

Plaintiff,

-against-

ASM MECHANICAL SYSTEMS, BENSON INDUSTRIES, LLC, EPIC MECHANICAL CONTRACTORS, LLC, FD SPRINKLERS, INC., ISLAND ACOUSTICS, LLC, JANTILE INC., L&L PAINTING CO., INC., L.I.F. INDUSTRIES, INC., LYNBROOK GLASS & ARCHITECTURAL METALS CORP., MARTIN ASSOCIATES, INC., MENT BROS IRON WORKS CO., INC., NAVILLUS TILE, INC., PARKVIEW PLUMBING AND HEATING CORP., SJ ELECTRIC, INC., WOLKOW BRAKER ROOFING CORP., WOODWORKS CONSTRUCTION COMPANY INC., and JOHN DOES

Defendants.

Second Third-Party
Index No. 595359/2024

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 87, 89, 132, 149, 151, 154, 155, 156, 157, 158, 304

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 75, 76, 88, 90, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 150, 152, 153, 159, 305

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 321, 322, 323, 324, 325, 326, 331, 332, 335, 336, 337, 338, 339, 340, 341, 342, 343

were read on this motion to/for AMEND CAPTION/PLEADINGS.

This action arises from alleged construction defects in a building located at 252 East 57th Street, New York, NY 10022 (Building).

In motion sequence number 003, defendants Snowplow LH 2 LLC (Snowplow LH 2) and Snowplow LH LLC (Snowplow LH; together, Sponsor Defendants) move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint.

In motion sequence number 004, defendants World-Wide Holdings Corp. (WWH), James Stanton, David Lowenfeld, Adam R. Rose, and Neal Cohen (collectively, Non-Sponsor Defendants) move pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint.

In motion sequence number 006, plaintiff The Board of Managers of 252 Condominium (Board) moves pursuant to CPLR 3025 (b) for leave to file a second amended complaint.

Background

The following facts are drawn from the amended complaint unless otherwise noted and are assumed to be true for purposes of the two motions to dismiss. (*See CBS, Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 499 [1990].)

The Building's construction commenced in 2013. (NYSCEF 35, Amended Complaint [AC] ¶ 37.) The residential unit sales started in March 2017, with the last unit being sold in early 2020. (NYSCEF 35, AC ¶¶ 37, 57.) The Building consists of 95 residential units that were offered for sale in the Offering Plan and rental and retail units that were not offered for sale in the Offering Plan. (*Id.* ¶ 37; NYSCEF 67, Offering Plan[1] at 2[2].) The Offering Plan was filed on August 20, 2014 and was followed by 25 amendments. (*Id.* ¶ 37.) The form Option Agreement, pursuant to which residential units were purchased, incorporates the Offering Plan and the amendments. (*See id.* ¶¶ 24, 59; NYSCEF 67, Offering Plan at 313 [Option Agreement ¶ 1].) The Offering Plan identifies Snowplow LH 2 as the sponsor. (NYSCEF 35, AC ¶ 34; NYSCEF 67, Offering Plan at 2.) Snowplow LH is an affiliate of Snowplow LH 2 and the entities' members are identical. (NYSCEF 35, AC ¶ 11; NYSCEF 67, Offering Plan at 32, 754.) Additionally, Snowplow LH is the declarant on the declaration of the 252 Condominium. (NYSCEF 35, AC ¶ 11; NYSCEF 36, Exhibits to AC at 152 [Declaration].)

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[1] The Board attaches to its amended complaint excerpts from the Offering Plan and selected amendments thereto. (*See* NYSCEF 36, Exs to Amended Complaint.) The court will consider the Offering Plan in its entirety (NYSCEF 67, Offering Plan and Amendments). (*See Alliance Network, LLC v Sidley Austin LLP*, 43 Misc 3d 848, 852 n 1 [Sup Ct, NY County 2014] ["On a motion to dismiss, the court may consider documents referenced in a complaint, even if the pleading fails to attach them" (citation omitted)].)

[2] NYSCEF pagination.

In 2014, the Non-Sponsor Defendants allegedly formed the Sponsor Defendants "as the entity through which they would develop and build the Condominium and sell Units." (NYSCEF 35, AC ¶ 26.) WWH "is a corporate parent, owner, affiliate, and/or … alter-ego of [the Sponsor Defendants], and developed and constructed the Condominium under the appellation, the 'World-Wide Group'." (*Id*. ¶ 12.) WWH's executives were Stanton (President), Lowenfeld (Chief Operating Officer and Executive Vice President), and Cohen (Director of Construction). (*Id*. ¶¶ 13-14, 18.) Rose is a former principal of Rose Associates, Inc. (Rose Associates) and both are long-time business partners of the Non-Sponsor Defendants. (*Id*. ¶ 16.) Stanton, Lowenfeld, and Rose are the Sponsor Defendants' principals. (*Id*. ¶¶ 13, 15, 17.)

The Board was previously comprised of Rose and nonparties Julia Hodgson and Jodi Gerstman of WWH. (*Id*. ¶¶ 17, 19-20; NYSCEF 67, Offering Plan at 775 [Twelfth Amendment].) Rose Associates was appointed as the Building's initial managing agent. (NYSCEF 35, AC ¶ 28.) In 2018, Rose and Hodgson left the Board and Rose Associates was replaced as a managing agent. (*Id*. ¶ 28.) In late 2019, the Board was expanded to five members, four of whom were designated by owners of residential and retail units and one of whom was designated by the Non-Sponsor Defendants. (*Id*. ¶ 56.) Thereafter, the Board began to "gradually learn of the [Building's] major defects and substandard construction." (*Id*. ¶ 29.) This action followed.

Procedural History

The Board brings this action pursuant to Real Property Law § 339-dd[3] on behalf of the residential unit owners. (*Id*. ¶ 9.) The initial complaint was filed on July 8, 2022. (NYSCEF 1, Complaint.) In the amended complaint filed on consent on November 9, 2022, the Board alleges two claims against all defendants: breach of the Option Agreement and fraud and fraudulent inducement. (NYSCEF 34, Stipulation; NYSCEF 35, AC ¶¶ 136-180.)

Discussion

Motion Sequence No. 003 – Sponsor Defendants' Motion to Dismiss

On a CPLR 3211 (a) (7) motion to dismiss, 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 within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

Monetary Damages

In the breach of contract claim, the Board seeks monetary damages and, in the alternative, specific performance of the obligation to repair construction defects in the Building. (NYSCEF 35, AC ¶¶ 159-160.) The Board likewise seeks monetary damages

[3] Real Property Law § 339-dd states: "Actions may be brought or proceedings instituted by the board of managers in its discretion, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one unit."

in the fraud and fraudulent inducement claim. (*Id.* ¶ 180.) The Sponsor Defendants argue that the Board's claim for monetary damages is barred as a matter of law under the Offering Plan, which states in a section entitled "RIGHTS AND OBLIGATIONS OF SPONSOR":

> "NOTHING CONTAINED IN THIS SECTION WILL BE CONSTRUED SO AS TO RENDER SPONSOR LIABLE FOR MONEY DAMAGES NOR SHALL PURCHASER HAVE ANY SUIT, CLAIM, CAUSE OF ACTION, OR DEMAND (WHETHER BASED ON NEGLIGENCE, BREACH OF CONTRACT, BREACH OF WARRANTY, OR OTHERWISE), IT BEING INTENDED THAT SPONSOR'S SOLE OBLIGATION UNDER THE PLAN WILL BE TO REPAIR OR REPLACE ANY DEFECTIVE ITEM OF CONSTRUCTION UPON, AND SUBJECT TO, THE TERMS AND CONDITIONS SET FORTH ABOVE.... ASIDE FROM ANY SPONSOR WARRANTIES AND UNDERTAKINGS WITH RESPECT TO THE CONSTRUCTION AND COMPLETION OF THE BUILDING CONTAINED IN THIS SECTION, NO OTHER WARRANTIES OR UNDERTAKINGS SHALL BE IMPLIED. HOWEVER, NO SUCH DISCLAIMER OR LIMITATION OF LIABILITY ON SPONSOR'S PART SHALL APPLY TO SPONSOR'S OBLIGATIONS UNDER ALL APPLICABLE STATUTES, LAWS AND REGULATIONS." (NYSCEF 67, Offering Plan at 150 ¶ [t] [emphasis added].)

Language in the Offering Plan such as this ordinarily precludes claims for monetary damages. (*See e.g. Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012] [holding that these "provisions restricting recovery are generally enforceable," except "as a matter of public policy, a party will not be permitted to escape liability for damages arising from grossly negligent conduct or intentional wrongdoing" (citations omitted)]; *Foschi v Sag Dev. Partners, LLC*, 2022 NY Slip Op 33898[U], *4 [Sup Ct, NY County 2022] [causes of action seeking monetary damages precluded under similar offering plan provision].)

Likewise, the limitation on money damages applies to the breaches alleged here. Although the Offering Plan states that "NO SUCH DISCLAIMER OR LIMITATION OF LIABILITY ON SPONSOR'S PART SHALL APPLY TO SPONSOR'S OBLIGATIONS

UNDER ALL APPLICABLE STATUTES, LAWS AND REGULATIONS" (NYSCEF 67, Offering Plan at 150 ¶ [t]), the Board fails to identify any statutes, laws, or regulations that entitle the residential unit owners to recover monetary damages.

Rather, the Board alleges that "[d]efendants refused to adequately remedy the defects" in the Building (NYSCEF 35, AC ¶ 144) and that the Board "expended millions of dollars on the repairs." (*Id.* ¶ 157.) These allegations are sufficient to raise an inference that the Sponsor Defendants failed to repair the alleged construction defects. Thus, to the extent the Board seeks monetary damages needed to compensate it for the reasonable cost of repairs in the breach of contract claim, the claim for monetary damages is sustained. (*See Ridinger v W. Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017] ["the contractual limitation on damages cannot be said to apply as a matter of law, where, as here, the allegation is that there were unreasonable delays in making repairs" (citation omitted)]; *430 W. 23rd St. Tenants Corp. v 23rd Assoc.*, 155 AD2d 237, 238 [1st Dept 1989] ["a failure by the sponsor to effect repairs, after having a reasonable opportunity to do so, should entitle the purchasers to compensation for the reasonable cost of making the repairs or replacements themselves, and nothing more. Such compensation would give the purchasers more than a 'fair quantum of remedy', and likely accords with what the parties intended in the event of a failure by the sponsor to perform" (citation omitted)].) However, to the extent the Board in the breach of contract claim seek monetary damages other than those needed to compensate it for the reasonable cost of repairs, such monetary damages are barred by the Offering Plan.

As to the fraud and fraudulent inducement claim, in which the Board alleges that defendants deliberately included false information in the Offering Plan and

amendments, the Offering Plan's limitation on monetary damages is unenforceable. (*Berenger v 261 W. LLC*, 93 AD3d at 181 [finding an exception that "as a matter of public policy, a party will not be permitted to escape liability for damages arising from grossly negligent conduct or intentional wrongdoing" (citations omitted); *see also Kalisch-Jarcho, Inc. v New York*, 58 NY2d 377, 385 [1983] ["an exculpatory clause [by which party agreed to make no claims for delay damages] is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith" (citation and footnotes omitted)]; *Audthan LLC v Nick & Duke, LLC*, 211 AD3d 419, 421 [1st Dept 2022] [although § 33.09 of the contract "states that the tenant's remedy is limited to injunctive relief, the third amended complaint adequately alleges bad faith conduct that, if established, could overcome § 33.09's limitation on damages" (citation omitted)], *mod in part on other grounds* — NY3d —, 2024 NY Slip Op 02223 [2024].)

The Martin Act (General Business Law Art. 23-A)

The Sponsor Defendants argue that the fraud and fraudulent inducement claim is barred by the Martin Act. "The Martin Act is a disclosure statute designed to protect the public from fraud in the sale of real estate securities and the Attorney General enforces its provisions and implementing regulations." (*Berenger*, 93 AD3d at 184 [citations omitted].)

> "[A] private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the

> Martin Act is not enough to extinguish common-law remedies." (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011].)

"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*, 93 AD3d at 184 [citation omitted].)

Here, the fraud and fraudulent inducement claim is barred to the extent it is predicated on the following alleged disclosures that are mandated by the Martin Act's implementing regulations:

(i) statements in the Offering Plan that the Building "is not in need of any major repairs and is free of material defects" and that "Defendants were not aware of material defects and need for major repairs" (NYSCEF 35, AC ¶ 162; *see id.* ¶ 165; NYSCEF 67, Offering Plan at 200 [Sponsor's Statement of Building Condition]; 13 NYCRR § 20.3 [ag] [1][4]);

(ii) statement in the Offering Plan and that the Building was "built in compliance with all applicable laws, plans and specifications" (NYSCEF 35, AC ¶ 162; *see* NYSCEF 67, Offering Plan at 144 [Rights and Obligations of Sponsor]; 13 NYCRR § 20.3 [t] [10][5]);

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[4] "Plans subject to this Part must comply with the format and minimum disclosure requirements set forth herein in addition to the requirements of provisions of Article 23-A of the General Business Law and Article 9B of the Real Property Law or the laws regulating condominiums in the state where the property is located.... (ag) Sponsor's statement of building condition. Include the following provisions: (1) Sponsor must adopt the description of property and building condition set forth in Part II of the plan, and represent that sponsor has no knowledge of any material defects or need for major repairs to the property except as set forth in the description of property and building condition." (13 NYCRR § 20.3 [ag] [1] [emphasis added].)

[5] "Rights and obligations of the sponsor. Describe the rights and obligations of sponsor under the plan and applicable law with respect to the offering including, but not limited to, the following elements ... (10) State the sponsor's obligation to build and complete

(iii) statements in the Offering Plan that the Building "conforms to all applicable regulations" in the Building Code of the City of New York (NYCBC) and is "'classified as Class I-B (Non-combustible)' and adequately fireproofed in accordance with" NYCBC (NYSCEF 35, AC ¶¶ 93 [a]-[b]; *see* NYSCEF 67, Offering Plan at 207, 227 [Description of Property]; 13 NYCRR § 20.3 [e] [3][6]);

(iv) statements in the Offering Plan's Certification of Sponsor and Principals (NYSCEF 35, AC ¶ 163; *see* NYSCEF 67, Offering Plan at 535-36; 13 NYCRR § 20.4 [b][7]);

(v) statements in the amendments to the Offering Plan that "[e]xcept as set forth in this Amendment, there have been no material changes of facts or circumstances affecting the Property or the offering" (*see e.g.* NYSCEF 67, Offering Plan at 558, 585, 599 [first, second, and third amendments][8]; *see* NYSCEF 35, AC ¶¶ 52, 109, 163; 13 NYCRR § 20.5 [a] [2][9]); and

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the condominium in accordance with the building plans and specifications identified in the plan and sponsor's right to substitute equipment or materials and make modifications of layout or design." (13 NYCRR § 20.3 [t] [10].)

[6] "Description of property and improvements. This section should … (3) State whether the property will be improved and the units constructed in accordance with all applicable zoning and building laws, requirements and specify the laws and regulations that apply." (13 NYCRR § 20.3 [e] [3].)

[7] "Certification by sponsor. Include in Part II of the plan and in the exhibits a certification subscribed and sworn to by the sponsor and sponsor's principals in their capacity as principals, in the following form …." (13 NYCRR § 20.4 [b].)

[8] The court has reviewed the first through twenty-first and twenty-third through twenty-fifth amendments. (NYSCEF 67, Offering Plan at 557-1088.) The twenty-second amendment is omitted from the Sponsor Defendants' exhibit.

[9] "An amendment must include a representation that all material changes of facts or circumstances affecting the property or the offering are included unless the changes were described in prior amendment(s) submitted to but not yet filed with the Department of Law." (13 NYCRR § 20.5 [a] [2].)

(vi) statement in the eighth amendment to the Offering Plan that "[t]here are no material changes to the projected budget for the first year of condominium operation which have not been disclosed in the Plan, as amended." (NYSCEF 67, Offering Plan at 668 ¶ 5 [Affidavit in Support of Declaring the Plan Effective]; *see* NYSCEF 35, AC ¶¶ 112, 165; 13 NYCRR § 20.5 [e] [5] [iii].[10])

Although the Board asserts that these statements are affirmative misrepresentations, this portion of the fraud and fraudulent inducement claim is in fact predicated on the alleged omission of information about the Building's defects from the disclosure statements mandated by the Martin Act. Indeed, it is the Board's contention that the omission of information from Offering Plan and its amendments makes these mandated representations false. (*See Kerusa Co. LLC v W10Z/515 Real Estate LP*, 12 NY3d 236, 246 [2009] [allegation that defendants "actively concealed fraud by repeatedly representing in plan amendments that there were no material changes of facts or circumstances" pleads no "concealment unrelated to alleged omissions from Martin Act disclosures"]; *Bd. of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542, 544 [1st Dept 2013] [defendant "may not be held individually liable for any of plaintiff's claims premised solely on alleged violations of the offering plan and certification .... The statements made by defendants in the certification and the plan were mandated by the Martin Act" (citations omitted)];

[10] "The amendment shall include, as an exhibit, an affidavit from sponsor that shall set forth the following information ... (iii) a representation that there are no material changes to the budget for the first year's operation which have not been disclosed in a duly filed amendment to the offering plan." (13 NYCRR § 20.5 [e] [5] [iii].)

Alexander Condominium v E. 49th St. Dev. II, LLC, 60 Misc 3d 1232[A], 2018 NY Slip Op 51288[U], *6 [Sup Ct, NY County 2018] [dismissing fraudulent inducement claim based on omissions in offering plan].)

The remainder of the fraud and fraudulent inducement claim is not barred by the Martin Act as it is predicated on alleged affirmative misrepresentations (i) in budgets regarding projected repair costs and (ii) about the waterproofing, air conditioning system, and compliance with local industry standards. (NYSCEF 35, AC ¶¶ 93 [c]-[d], 162 [a], 165-167; *see Bd. of Mgrs. of the S. Star v WSA Equities, LLC*, 140 AD3d 405, 405 [1st Dept 2016] ["To the extent the fraud claim is based on omissions in the offering plan … it is barred by the Martin Act …. However, to the extent it is based on defendants' affirmative misrepresentations … it is not so barred" (citations omitted)]; *Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 607 [1st Dept 2011] [claims were not preempted because "plaintiffs allege not that defendant omitted to disclose information required under the Martin Act but that it affirmatively misrepresented, as part of the offering plan, a material fact about the condominium" (citation omitted)].)

The Sponsor Defendants' reliance on *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284, 1287 (2nd Dept 2009), *appeal dismissed* 15 NY3d 742 (2010), which held that claims "based upon the alleged unrealistic budget projections included in the offering plan" are barred by the Martin Act, is unavailing. *Hamlet* "did not … preclude causes of action based on affirmative misrepresentations on the ground that they are preempted by the Martin Act, as *Hamlet* involved budget projections for new businesses, which are predictions or opinions, not statements of fact." (*Caboara v Babylon Cove Dev., LLC*, 82 AD3d 1141, 1142-43 [2d Dept 2011]

[citations omitted].) Here, the contention is that the budgets were knowingly false. (*See E. 32nd St. Assoc. v Jones Lang Wootton USA*, 191 AD2d 68, 71 [1st Dept 1993] ["financial projections made with the knowledge that they were false and unreasonable may be the basis for an allegation of common-law fraud" (citation omitted)].) The Sponsor Defendants' argument that the budgets in fact contain no misrepresentations was raised for the first time in their reply brief and thus will not be considered. (*See Fetahu v New Jersey Tr. Corp.*, 197 AD3d 1065, 1066 [1st Dept 2021].)

Justifiable Reliance

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (*Eurycleia Partners, L.P. v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [citations omitted].) The Sponsor Defendants argue that the Board cannot establish justifiable reliance because of the disclaimers in the Option Agreement and the Offering Plan. Specifically, the Option Agreement's disclaimer states:

> "Purchaser acknowledges that Purchaser has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Sponsor, Selling Agent or otherwise, including, but not limited to, any relating to the description or physical condition of the Property, the Building or the Unit, or the size or the dimensions of the Unit or the rooms therein contained or any other physical characteristics thereof, the services to be provided to Unit Owners, the estimated Common Charges allocable to the Unit, the right to any income tax deduction for any PILOT or mortgage interest paid by Purchaser, the right to any income tax credit with respect to the purchase of the Unit, or any other data, except as herein or in the Plan specifically represented. Purchaser has relied solely on Purchaser's own judgment and investigation in deciding to enter into this Agreement and purchase the Unit. No person has been authorized to make any representations on behalf of Sponsor except as herein or in the Plan specifically set forth. No oral representations or statements shall be considered a part of this Agreement. Sponsor makes no representation or warranty as to the work, materials, appliances, equipment or fixtures in the Unit, the Common Elements or any other part of the Property other than as set

> forth herein or in the Plan. Except as otherwise set forth in the Plan, Purchaser agrees (a) to purchase the Unit, without offset or any claim against, or liability of, Sponsor, whether or not any layout or dimension of the Unit or any part thereof, or of the Common Elements, as shown on the Floor Plans is accurate or correct, and (b) that Purchaser shall not be relieved of any Purchaser's obligations hereunder by reason of any immaterial or insubstantial inaccuracy or error. The provisions of this Section shall survive the Closing of Title to the Unit or the earlier termination of this Agreement." (NYSCEF 67, Offering Plan at 322 [Option Agreement ¶ 20] [emphasis added].)

By its own terms, the Option Agreement does not disclaim reliance on matters stated in the Offering Plan and amendments. Thus, the Sponsor Defendants' reliance on the disclaimer in the Option Agreement is unavailing.

The Sponsor Defendants next refer to the following portion of the Offering Plan:

> "Sponsor makes no other warranties, express or implied, in connection with this offering of the Units and all such warranties are excluded, except as provided in the limited warranty ('Limited Warranty') set forth in the section of the Plan entitled 'Rights and Obligations of Sponsor.' Sponsor will correct, repair, or replace any and all defects relating to construction of the Building, Common Elements or the Units or in the installation or operation of any appliances, fixtures, or equipment therein, or will cause the same to be corrected, repaired, or replaced, subject to the limitations set forth in such section. See the Section of the Plan entitled 'Rights and Obligations of Sponsor' for further details." (NYSCEF 67, Offering Plan at 20-21 ¶ 19 [a].)

The Sponsor Defendants further refer to the Offering Plan's Limited Warranty provisions which outline Snowplow LH 2's limited repair obligations. (*See id.* at 147-150 ¶¶ [r]-[u].) The cited portions of the Offering Plan, however, contain no language disclaiming residential unit owners' reliance on representations made in the Offering Plan or the amendments. Accordingly, the Sponsor Defendants fail to show as a matter of law that the reliance element is lacking. (*See Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014] ["only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon representations or omissions

as to the specific matter, is a plaintiff precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter"(citations omitted)].)

Duplication

Finally, the Sponsor Defendants argue that the fraud and fraudulent inducement claim is duplicative of the breach of contract claim, and thus, shall be dismissed.

> "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 .... By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract .... For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim .... Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty." (*First Bank of the Ams. v Motor Car Funding, Inc.*, 257 AD2d 287, 291-92 [1st Dept 1999] [citations omitted].)

Here, although the two claims include overlapping allegations of misrepresentations in the Offering Plan, the fraud and fraudulent inducement claim is not duplicative as it alleges misrepresentations of then present facts, rather than "a misrepresentation of future intent to perform" defendants' obligations under the Option Agreement. (*Id.*; *see The Bd. of Managers of the Walton Condominium v 264 H2O Borrower, LLC*, 2018 WL 587128, *3 [Sup Ct, NY County 2018] ["the allegations relating to fraud relate to assertions about present facts- the current state of the building at the time of contract- and, therefore, are not duplicative of the breach of contract claim], *affd sub nom. Bd. of Managers of Walton Condominium v 264 H2O Borrower, LLC*, 180 AD3d 622 [1st Dept 2020]; *Bd. of Mgrs. of the S. Star v WSA Equities, LLC*, 2014 NY Slip Op 32750[U], *6 [Sup Ct, NY County 2014] [fraud claim is not duplicative where

"the complaint alleges – separate and apart from defendants' alleged failure to perform under the Purchase Agreement – that defendants made material factual misstatements in the Offering Plan about the condition of the Building with the intent to deceive by their misrepresentations, and that the individual unit owners justifiably relied on such misrepresentations to their detriment in purchasing the units"], *mod in part on other grounds* 140 AD3d 405 [1st Dept 2016].)

Additionally, the damages sought in the two causes of action are not identical. In the breach of contract claim, the Board seeks monetary damages in excess of $20 million to inter alia compensate the Board for the cost of repairs, and/or, in the alternative, specific performance of the obligation to effectuate repairs. (*See* NYSCEF 35, AC ¶¶ 157, 159-160.)[11] In the fraud and fraudulent inducement claim, however, the Board seeks monetary damages "in an amount to be determined at trial," including "the difference in value between what Unit Owners paid for their Units versus their true value based on the true condition of the Condominium." (*Id*. ¶ 180.)

Motion Sequence No. 004 – Non-Sponsor Defendants' Motion to Dismiss

Alter Ego Liability

It is undisputed that the Non-Sponsor Defendants were not parties to the Offering Plan or the Option Agreement. The Non-Sponsor Defendants argue that the amended

[11] As discussed *supra*, the Board's claim for monetary damages under the breach of contract theory is limited to the reasonable cost of repairs.

complaint's allegations are insufficient to plead an alter ego liability for the Sponsor Defendants' conduct.

"It is a general principle that only the parties to a contract are bound by its terms .... A non-signatory may be bound by a contract under certain limited circumstances, including as ... an alter ego of a signatory." (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 121-22 [1st Dept 2020] [citations omitted]; *see also GE Energy Power Conversion Fr. SAS, Corp. v Outokumpu Stainless USA, LLC*, 590 US 432, 140 S Ct 1637, 1643-44 [2020] ["'traditional principles of state law' that ... authorize the enforcement of a contract by a nonsignatory ... [include] 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel'" (citations omitted)].)

"In order to state a claim for alter-ego liability plaintiff is generally required to allege complete domination of the corporation ... in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014] [internal quotation marks and citation omitted].) Plaintiff's burden is heavy and "mere conclusory alter ego allegations are insufficient to survive a motion to dismiss." (*226 Fifth Ave. LLC v SBF Intl., Inc.*, 2012 NY Slip Op 33491[U], *11-12 [Sup Ct, NY County 2012] [citations omitted].) Plaintiff must "allege particularized facts to warrant piercing the corporate veil" on an alter ego theory. (*Andejo Corp. v S. St. Seaport LP*, 40 AD3d 407, 407 [1st Dept 2007].) The question of control is highly fact-dependent and in determining that question,

> "courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers,

> directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity …." (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013], citing *TNS Holdings v MKL Sec. Corp.*, 243 AD2d 297, 300 [1st Dept 1997], *revd on other grounds* 92 NY2D 891 [1998].)

"No one factor is controlling, and all need not be present to support a finding of alter ego status." (*Trustees of the NY City Dist. Council of Carpenters Pension Fund v Centurion Cos., Inc.*, 2016 NY Slip Op 31265[U], *4 [Sup Ct, NY County 2016] [internal quotation marks and citations omitted].)

Here, the factual allegations are insufficient to plead that the Non-Sponsor Defendants were the Sponsor Defendants' alter ego. For example, the Board alleges, among other things, that the Sponsor Defendants are shell entities with no resources or operations which the Non-Sponsor Defendants formed "as the entity through which they would develop and build the Condominium and sell Units." (NYSCEF 35, AC ¶ 26.) The Board includes some allegations of overlapping management and control, such as that "WWH is a corporate parent, owner, affiliate, and/or… alter-ego of Sponsor" (*id*. ¶ 12), that Stanton and Lowenfeld were WWH's executives and the Sponsor Defendants' principals (*id*. ¶¶ 13-14), and that "Non-Sponsor Defendants controlled both [the Sponsor Defendants] and the Condominium through all phases of its development and construction, including the sale of Units." (*Id*. ¶ 28 [citation omitted].) The Board also alleges that Non-Sponsor Defendants "identified themselves or were identified as the builders and sellers of the Condominium" (*id*. ¶ 33 [citation omitted]) and that the Sponsor Defendants maintain offices at WWH's address and directs that

communications to be sent care of WWH. (*Id.* ¶¶ 13, 34 ["Offering Plan directed that communications to Sponsor be addressed "c/o World Wide Holdings"].)

However, the amended complaint is devoid of any allegations that the NON-Sponsor Defendants' "domination [over the Sponsor Defendants] was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Baby Phat Holding Co., LLC*, 123 AD3d at 407.) The Board "does not allege any fraud or malfeasance to support [its] attempt to reach [the Non-Sponsor Defendants]" to hold them liable for the Board's claims against the Sponsor Defendants. (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016]; *see Bd. of Mgrs. of a Bldg. Condominium v 13th & 14th St. Realty, LLC*, 2014 NY Slip Op 32509[U], *8 [Sup Ct, NY County 2014] [evidence shows that entities and individuals "shared office space and email addresses, and received mail, entered into agreements, and paid bills associated with the construction and management of the condominium, none of which demonstrates an abuse of their corporate form in the construction and management of the condominium or how the abuse was used to defraud or commit a wrong against plaintiffs" (citation omitted)].) Accordingly, the Non-Sponsor Defendants' alter ego theory is insufficiently alleged.

The Board's alternative argument that WWH is liable for fraudulent acts of its agents, including Stanton, Lowenfeld, Cohen, and Rose, fails too. Although the fraud and fraudulent inducement claim may proceed as against Stanton, Lowenfeld, and Rose because they were the Sponsor Defendants' principals who personally participated in the alleged fraud (*see infra*), the Board proffers no authority for the proposition that WWH is liable because Stanton, Lowenfeld, and Rose were

simultaneously WWH's agents. Thus, the fraud and fraudulent inducement claim is dismissed as against WWH.

Assumption by WWH

Aside from alter ago, the Board argues that WWH assumed the Sponsor Defendants' repair obligations under the Option Agreement. "[N]onsignatories may be held liable for breach of contract, without being 'alter egos,' if their actions show that they are in privity of contract or that they assumed obligations under the contract." (*MBIA Ins. Corp. v Royal Bank of Can.*, 706 F Supp 2d 380, 397 [SD NY 2009].)

Here, the allegations of the amended complaint raise an inference that WWH assumed the Sponsor Defendants' repair obligations under the Option Agreement. For example, it is alleged that Gerstman and Cohen, holding themselves out as WWH's executives, met with the Board and its representatives to discuss repairs and routinely referred "to the Non-Sponsor Defendants as the parties responsible for fulfilling Sponsor's duties under the Offering Plan." (NYSCEF 35, AC ¶¶ 119-120.) They further represented that "all necessary repairs would be completed by Defendant WWH and/or the Non-Sponsor Defendants." (*See id*. ¶ 126.) Cohen allegedly represented to contractors that the repair invoices were the responsibility of WWH and acknowledged paying for repair invoices. (*See id*. ¶ 122.) When delays in effectuating repairs occurred, Gerstman and Cohen allegedly "told the Condominium Board that they should go ahead with the repairs, and that WWH and/or the Non-Sponsor Defendants would reimburse them for the cost." (*Id*. ¶ 130.) Thus, the breach of contract claim may proceed against WWH. (*See e.g. Impulse Mktg. Group, Inc. v Natl. Small Bus. Alliance, Inc.*, 2007 US Dist LEXIS 42725, *19-20 [SD NY June 11, 2007, No. 05-CV-7776

(KMK)] [allegations that non-party "'micro-managed' performance under the Contract, acknowledged that it was the actual party in interest, and paid for Plaintiff's services" were sufficient to demonstrate that non-party assumed contract].)

Stanton, Lowenfeld, Rose, and Cohen's Personal Liability

The Non-Sponsor Defendants argue that, as against Stanton, Lowenfeld, and Rose, both claims are barred by the Martin Act because the only wrongdoing alleged on their part is the signing of the certification included in the Offering Plan. As to Cohen, the Non-Sponsor Defendants argue that the amended complaint is devoid of allegations supporting imposition of personal liability. The Board contends that the fraud and fraudulent inducement claim against Stanton, Lowenfeld, Rose, and Cohen should be sustained because these defendants personally participated in fraud.

"In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally." (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 55 [2001] [citation omitted]; *see also Peguero v 601 Realty Corp.*, 58 AD3d 556, 558 [1st Dept 2009] ["a corporate officer who participates in the commission of a tort may be held individually liable, *regardless of whether the officer acted on behalf of the corporation in the course of official duties* and regardless of whether the corporate veil is pierced" (internal quotation marks and citations omitted)]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 47 [1st Dept 2012] [although participation in a breach of contract will typically not give

rise to individual director liability, the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability"].)

Here, as to Stanton, Lowenfeld, and Rose, the Board alleges that they are the Sponsor Defendants' principals. (NYSCEF 35, AC ¶¶ 13, 15, 17.) It further alleges that Stanton and Lowenfeld "led the development and construction of the Condominium, as well as the sale of the Units" (*id*. ¶ 15) and that the Non-Party Defendants "oversaw and controlled all aspects of the Condominium's development, construction and marketing." (*Id*. ¶ 30.) Further, the Offering Plan states that Stanton, Lowenfeld, and Rose "who were advertised as experts in the field of condominium construction and operations … would be 'actively involved' in all phases of the Condominium construction and sales." (*Id*. ¶ 34; NYSCEF 67, Offering Plan at 32, 194.) In addition, the Board alleges that Stanton, Lowenfeld, and Rose signed the certification in their individual capacities as the Snowplow LH 2's principals. (NYSCEF 35, AC ¶¶ 13-14, 17, 35; NYSCEF 67, Offering Plan at 535-37.) These allegations are sufficient to raise an inference that Stanton, Lowenfeld, and Rose "knowingly and intentionally advance[ed] the alleged misrepresentation in the offering plan," and thus, can be held personally liable for fraud and fraudulent inducement. (*Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.*, 190 AD2d 636, 637 [1st Dept 1993]; *see also Bd. of Mgrs. of the Walton Condominium v 264 H2O Borrower, LLC*, 180 AD3d 622, 622 [1st Dept 2020] ["defendants, who are principals of the sponsor, and who signed the certification in the offering plan, could be held liable" (citations omitted)]; *Bd. of Mgrs. of 87-89 Leonard St. Condominium v Leonard St. Owner, LLC*, 2022 NY Slip Op 33275[U], *6 [Sup Ct, NY County 2022] [allegations that individual defendants directed activities of sponsor, were

"personally involved in using the Offering Plan to market and negotiate unit sales," and executed certification are sufficient to plead personal liability for fraud]; *cf*. *Alexander Condominium*, 2018 NY Slip Op 51288[U], *17 [no allegations permitting inference that individual defendants "were aware of and participated in any misrepresentations"].) Accordingly, to the extent the fraud and fraudulent inducement claim is not precluded by the Martin Act, it is sustained as against Stanton, Lowenfeld, and Rose.

The Non-Sponsor Defendants argue that the Offering Plan's disclaimer limits Stanton, Lowenfeld, and Rose's liability as it states:

> "[c]onsistent with a recent First Department decision, the principals of Sponsor expressly disclaim the existence of any private right of action for contract claims by individual unit owners (or a board on their behalf) in connection with or arising solely from their execution of the Certification of Sponsor and Principals, absent liability under another statute or under an alter-ego or other veil-piercing theory. See Board of Managers of 184 Thompson Street Condominium v. 184 Thompson Street Owner LLC et. al., 106 AD. 3rd 542 (1st Dept. May 16, 2013)." (NYSCEF 67, Offering Plan at 28 ¶ 35.)

The court disagrees. As the basis for Stanton, Lowenfeld, and Rose's personal liability does not arise "solely from their execution of the Certification of Sponsor and Principals" (*id*.), the fraud and fraudulent inducement claim is not disclaimed.

As to Cohen, the Board does not allege that he was the Sponsor Defendants' officer or director. Instead, the Board alleges that he was WWH's Director of Construction and oversaw construction and/or remediation of defects in the Building. (*See e.g.* NYSCEF 35, AC ¶¶ 5, 18, 176.) Such allegations are insufficient to raise an inference that Cohen personally "participated in or had knowledge of the fraud."

(*Polonetsky*, 97 NY2d at 55 [2001] [citation omitted].) The fraud and fraudulent inducement claim is dismissed as against Cohen.

As to the breach of contract claim, the Board's argument that Stanton, Lowenfeld, Rose, and Cohen can be held personally liable for the breach of the Option Agreement based on the alter ego theory fails. As discussed, the alter ego liability is insufficiently alleged. The Board does not argue that that Stanton, Lowenfeld, Rose, or Cohen can be personally liable under the Option Agreement based on any other theory, such as assumption. Thus, the breach of contract claim is dismissed as against Stanton, Lowenfeld, Rose, and Cohen.

Motion Sequence No. 006 – The Board's Motion to Amend

In its proposed second amended complaint, the Board seeks to add Rose Associates, and Benson Industries, Inc. (Benson),[12] and Tecnoglass Inc. (Tecnoglass) as defendants. The Board alleges that Benson and Tecnoglass performed services in connection with the Building's construction. (*See* NYSCEF 326, Second Amended Complaint [SAC] ¶¶ 27-28.) The Board also alleges that Rose Associates was not only the Building's initial managing agent pursuant to a management agreement, but also a co-developer of the Building and an indirect beneficial owner of the Sponsor Defendants. (*Id.* ¶¶ 32, 36, 237.)

In the second amended complaint, the Board alleges the existing claims for (i) breach of contract against the Sponsor and Non-Sponsor Defendants and Rose Associates (*id.* ¶¶ 171-194) and (ii) fraud and fraudulent inducement against the same

[12] Benson is a third-party defendant in the second third party action (index. no. 595359/2024). (*See* NYSCEF 347, Second Third-Party Complaint.)

parties (*id*. ¶¶ 195-214) and adds new claims for (iii) aiding and abetting fraud against the Non-Sponsor Defendants and Rose Associates (*id*. ¶¶ 215-220), (iv) breach of indemnity against the Sponsor and Non-Sponsor Defendants and Rose Associates (*id*. ¶¶ 221-228), (v) breach of contract warranty against Benson and Tecnoglass (*id*. ¶¶ 229-235), and (vi) breach of the management agreement against Rose Associates. (*Id*. ¶¶ 236-241.) The Sponsor and Non-Sponsor Defendants oppose the motion to amend.

"[L]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit … and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." (*Davis v S. Nassau Communities Hosp*., 26 NY3d 563, 580 [2015] [internal quotation marks and citations omitted]; *see also* CPLR 3025 [b].) "[L]eave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025." (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], *3-4 [Sup Ct, NY County 2021].) "When the non-moving party opposes amendment on the ground of futility, the moving party should be prepared in its reply brief to defend the proposed pleading as if it were opposing a motion to dismiss." (*Id*. at 4.)

"[P]rejudice occurs when the party opposing amendment has been hindered in the preparation of [its] case or prevented from taking some measure in support of [its] position." (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654-55 [1st Dept 2009] [internal quotation marks and citation omitted].) "[M]ere lateness … is

not a barrier to amendment. Lateness must be coupled with significant prejudice to [a non-moving party]." (*Seda v New York City Housing Authority*, 181 AD2d 469, 470 [1st Dept 1992] [citation omitted], *lv denied* 80 NY2d 759 [1992].)

> "The kind of prejudice required to defeat an amendment … must … be a showing of prejudice traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add." (*Jacobson v Croman*, 107 AD3d 644, 645 [1st Dept 2013] [internal quotation marks and citations omitted].)

Prejudice and Delay

The Sponsor and Non-Sponsor Defendants argue that they will be prejudiced by the amendment, but they fail to demonstrate prejudice: how the amendment will hinder their case or pursuit of their position. For instance, there is no indication that the Sponsor and Non-Sponsor Defendants no longer have access to any relevant documents or witnesses. Discovery in this case is ongoing. (*See* NYSCEF 474, May 23, 2024 Order at 2-3.) The need for any "additional discovery does not constitute prejudice sufficient to justify denial of an amendment." (*Jacobson*, 68 AD3d at 645 [citation omitted].)

Although Rose Associated was mentioned in the July 8, 2022 complaint and the November 9, 2022 amended complaint, the Board explains that it "awaited discovery to ensure it had a good faith basis for its claims. And when that discovery made clear that such basis existed, [the Board] responsibly asserted its claims against Rose Associates." (NYSCEF 343, Reply MOL at 14, n 6.) The Board also explains that it recently learned about window defects and having made unsuccessful warranty demands on Benson and Tecnoglass on June 5, 2023 and January 22, 2024 and

attempts to negotiate, it now seeks to add the breach of warranty claim. (*See* NYSCEF 340, June 5, 2023 Demand; NYSCEF 341, Jan. 22, 2024 Supplemental Demand.)

As to the indemnification claim arising from the Fire Department of New York's (FDNY) December 27, 2022 summons, the Board alleges that it was able to resolve the violations, but that on October 31, 2023, the Sponsor Defendants refused to reimburse the Board for the incurred costs. (NYSCEF 326, SAC ¶¶ 225-227.) The Board filed this motion to amend on January 24, 2024. (NYSCEF 321, Notice of Motion [mot. seq. no. 006].) Under these circumstances, the alleged delay in adding the breach of warranty and indemnification claims is excusable. (*See Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2d Dept 2015] ["In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered" (internal quotation marks and citations omitted).)

Merits

1. **Breach of Contract & Fraud and Fraudulent Inducement**

The Sponsor and Non-Sponsor Defendants argue that the claims for breach of contract and fraud and fraudulent inducement fail for the reasons articulated in their motions to dismiss and that the amendment does not cure the deficiencies in these claims.

To the extent these claims are deficient, the Board's minor amendments to these claims do not cure the deficiencies. Thus, the breach of contract claim shall proceed against the Sponsor Defendants and WWH, except that its claim for certain monetary damages is dismissed. (*See supra* at 6-7, 24.) The fraud and fraudulent inducement

claim shall proceed against the Sponsor Defendants, Stanton, Lowenfeld, and Rose to the extent this claim is not precluded by the Martin Act. (*See supra* at 8-13, 20-24.) Both of these claims also shall proceed as against Rose Associates.[13]

2. Aiding and Abetting Fraud

The claim for aiding and abetting fraud is precluded, in part, to the extent the fraud and fraudulent inducement claim is precluded by the Martin Act. (*See Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010] ["A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance"]; *see also Crestview SPV, LLC v Crestview Fin., LLC*, 217 AD3d 473, 474 [1st Dept 2023] ["Absent an underlying breach of fiduciary duty, the aiding and abetting claim fails" (citation omitted)].)

Defendants argue that the aiding and abetting claim fails to meet the heightened pleading standard of CPLR 3016 (b) as to the Non-Sponsor Defendants. The court agrees. The aiding and abetting claim merely alleges that "Rose Associates may therefore be held liable for aiding and abetting fraud. The same is true for the other Non-Sponsor Defendants for the reasons set forth above." (NYSCEF 326, SAC ¶ 219.) Such vague group allegation as to the Non-Sponsor Defendants, as well as other group allegations (*see e.g. id*. ¶¶ 117, 121-124, 186), are insufficient to plead the aiding and abetting fraud claim. (*See* CPLR 3016 [b] ["Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail"]; *see e.g.*

[13] The court allows these two claims to proceed with the minor amendments sought as defendants do not challenge such minor amendments specifically.

Aetna Cas. & Sur. Co v Merchants Mut. Ins. Co., 444 NYS2d 79, 80 [1st Dept 1981] [dismissing complaint where claims were "pleaded against all defendants collectively without any specification"].) Further, it is unclear to the court how Stanton, Lowenfeld, and Rose can aid and abet in their own fraud.

3. Breach of Indemnity

The breach of indemnity claim is predicated on the Offering Plan's clause which requires "Sponsor 'to defend any suits or proceedings arising out of Sponsor's obligations set forth in the Plan and … to indemnify the Condominium Board and Unit Owners against any such action or proceeding.'" (NYSCEF 326, SAC ¶ 222, quoting NYSCEF 67, Offering Plan at 151.) The breach of indemnity claim is palpably insufficient as against the Non-Sponsor Defendants who are not parties to the Option Agreement which incorporates the Offering Plan's indemnification clause. (*See Highland Crusader Offshore Partners, L.P.*, 184 AD3d at 121-22 ["It is a general principle that only the parties to a contract are bound by its terms …. A non-signatory may be bound by a contract under certain limited circumstances, including as … an alter ego of a signatory"].) To the extent the Board relies on the alter ego liability to allege this claim against the Non-Sponsor Defendants, alter ego liability is again insufficiently alleged.

The Sponsor Defendants' arguments regarding the breach of indemnity claim are unavailing. The Board alleges that under the Offering Plan, the Sponsor Defendants had an obligation to "construct the building 'in accordance with all applicable Laws and the Plans and Specifications,' including the [New York City Building Code] and mandatory fire safety regulations." (NYSCEF 326, SAC ¶ 223, quoting NYSCEF 67,

Offering Plan at 151.) The Board also alleges that Sponsor Defendants refused to reimburse it for the incurred costs of $154,238.12 arising from FDNY's summons that identified three violations of "'New York City Administrative Code and/or the rules of the City of New York'" relating to the HVAC chiller units. (*Id*. ¶ 224; *see id*. ¶¶ 226-227.) Even though the particular problems cited in FDNY's summons are not specified, the allegations are "sufficiently particular to give the court and parties notice of the transactions … intended to be proved and the material elements of each cause of action." (CPLR 3013.)

The Sponsor Defendants cite no authority for the proposition that because the Board allegedly rejected the Sponsor Defendants' assistance with the FDNY summons, it forego its right to seek contractual indemnification. Thus, the motion to amend is granted as to this claim insofar as it is alleged against the Sponsor Defendants.

4. Remaining Claims

As no argument is offered with respect to the motion to amend to add claims for breach of warranty against Benson and Tecnoglass and breach of the management agreement against Rose Associates, the motion is granted as to these claims.

The court has considered the parties remaining arguments relating to motions sequence 003, 004, and 006 and finds that they do not affect the outcome.

Accordingly, it is

ORDERED that the Sponsor Defendants' motion to dismiss (seq. no. 003) is granted, in part, to the extent that (i) the breach of contract claim is dismissed to the extent that The Board of Managers of 252 Condominium's claim for monetary damages other than those needed to compensate it for the reasonable cost of repairs is

dismissed, and (ii) the fraud and fraudulent inducement claim is dismissed to the extent it is predicated on the alleged misrepresentations in items i through vi (*see supra* at 9-11) and the balance of the motion is denied; and it is further

ORDERED that the Non-Sponsor Defendants' motion to dismiss (seq. no. 004) is granted, in part, to the extent that (i) the breach of contract claim is dismissed as against defendants James Stanton, David Lowenfeld, and Adam R. Rose, (ii) the fraud and fraudulent inducement claim is dismissed as against defendant World-Wide Holdings Corp., and (iii) the action is dismissed as against defendant Neal Cohen in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant and the balance of the motion is denied; and it further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that The Board of Managers of 252 Condominium's motion for leave to amend the complaint (seq. no. 006) is granted, in part, as follows: leave is granted to

(i) add Rose Associates, Inc., Benson Industries, Inc., and Tecnoglass Inc. as defendants; and

(ii) add the following claims: the aiding and abetting fraud claim against Rose Associates, Inc. to the extent this claim is not predicated on the alleged misrepresentations in items i through vi (*see supra* at 9-11), the breach of indemnity claim against Snowplow LH 2 LLC and Snowplow LH LLC, the breach of contract warranty claim against Benson Industries, Inc. and Tecnoglass Inc, and the breach of contract claim against Rose Associates, Inc; and it is further

ORDERED that the balance of The Board of Managers of 252 Condominium's motion for leave to amend the complaint is denied; and it is further

ORDERED that the second amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof. However, to avoid confusion, The Board of Managers of 252 Condominium is directed to refile and clearly label in NYSCEF the second amended complaint within 10 days of the date of this decision for the limited purposes of complying with this decision since the motion to amend was not granted in its entirety and the motion to dismiss was granted in part; and it is further

ORDERED that plaintiff The Board of Managers of 252 Condominium shall serve Technoglass Inc. Benson Industries, Inc., and Rose Associates, Inc. by July 22, 2024; and it is further

ORDERED that Technoglass Inc., Benson Industries, Inc., and Rose Associates, Inc. shall serve an answer to the second amended complaint or otherwise respond thereto within 20 days of service of this order with notice of entry; and it is further

ORDERED that the defendants that have appeared in this action shall serve an answer to the second amended complaint or otherwise respond thereto within 20 days from the date of this decision; and it is further

ORDERED that the caption in the main action (index no. 652387/2022) be amended as follows

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THE BOARD OF MANAGERS OF 252 CONDOMINIUM,
ON BEHALF OF THE UNIT OWNERS,

Plaintiff,

- v -

WORLD-WIDE HOLDINGS CORP., SNOWPLOW LH 2 LLC, JAMES STANTON, DAVID LOWENFELD, ADAM R. ROSE, SNOWPLOW LH LLC, ROSE ASSOCIATES, INC., BENSON INDUSTRIES, INC., TECNOGLASS INC.

Defendants.

----------X

and it is further;

ORDERED that and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

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7/14/2024
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**