SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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JENNY KWAN, DOUBLE J BRYANT PARK 25 LLC,DOUBLE J BRYANT PARK 27, LLC,

Plaintiff,

- v -

BRYANT PARK FUNDING, 100, LLC,20 WEST 40 BRYANT PARK OWNER, LLC,HFZ BRYANT PARK OWNER LLC,OFFICE OF NEW YORK CITY REGISTER

Defendant.

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INDEX NO. 159075/2024

MOTION DATE 03/20/2025, 03/20/2025

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 88, 90, 92, 94

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 91, 93, 95, 96, 97, 98

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions to dismiss are granted in part and denied in part.[1]

Background

This action arises from a dispute over the ownership of two units within a condominium development project located at 16 West 40th Street, New York, NY 10018. On September 29, 2015, and October 18, 2016, Plaintiff Jenny Kwan acquired two options to purchase Apartments 25A and 27A from HFZ Capital Group, LLC, the owner of the condominium sponsor HFZ Bryant Park Owner, LLC ("HFZ Sponsor"). HFZ Sponsor is an affiliate of defendant 20 West 40 Bryant Park Owner, LLC ("Owner", collectively with HFZ Bryant Park Owner LLC the "HFZ

[1] The Court would like to thank Marlowe Glass for his assistance in this matter.

Defendants"), the owner of the condominium building. Pursuant to these agreements, Kwan obtained the right to apply her cumulative $7,047,275 advance as credits towards the purchase price of both units, and HFZ Capital agreed to compel HFZ Sponsor to sell the units to Kwan. On December 18, 2017, Kwan exercised both of her options via written notice and designated Plaintiff corporations, Double J Bryant Park 25 ("DJ 25"), and Double J Bryant Park 27 ("DJ 27", collectively with Jenny Kwan the "Plaintiffs") as the purchasers. In March of 2018, the Corporate Plaintiffs each entered into a separate purchase and sale agreement with HFZ Bryant Park Owner LLC for the two apartments (the "2018 Agreements).

But Plaintiffs allege that following Kwan's written notice in 2017, Bryant Park Funding, LLC ("BPF 100"), induced HFZ Sponsor to "persistently [refuse] to close" on the units. BPF 100 is a company that has been involved in the condominium project from its inception. In November 2014, for instance, BPF 100 was granted a $52.5 million security interest in the project, pursuant to a Junior Mezzanine Loan Pledge and Security Agreement. As such, Plaintiffs contend that BPF 100 was well aware of the 2018 Agreements and their later efforts to close on the units. On August 26, 2021, Plaintiffs continued these efforts by issuing two time-is-of-the-essence letters, commanding HFZ Sponsor to appear at a closing on September 30, 2021, and to transfer title to both units. Plaintiff alleges that HFZ Sponsor, at the behest of BPF 100, did not comply with these demands.

In an attempt to cure these demands, on May 3, 2022, Plaintiff corporations DJ 25 and DJ 27 entered into an amendment to the 2018 Agreement with HFZ Sponsor, specifying certain preconditions for the closing of Units 25A and 27A ("2022 Amendment"). The 2022 Amendment required, among other things, (1) the satisfaction of all debt instruments and

mortgages related to the Condominium and/or the Units, and (2) consent by BPF 100 before any new closing could occur.

On June 28, 2022, 20 West 40 Bryant Park Owner subsequently granted a mortgage to BPF 100 for $22.8 million on a variety of unsold units, including 25A and 27A (the "BPF Mortgage"). Importantly, Plaintiffs allege that this mortgage, in conjunction with the 2022 Amendment, allowed BPF 100 to veto the transfer of titles to Plaintiffs. Plaintiffs allege that BPF 100 was "fully aware" of Plaintiffs' contracts to acquire the units and, as such, claim that the BPF 100 mortgage was a "fraudulent transaction intended to usurp plaintiffs' contractual rights."

On March 24, 2023, Plaintiffs brought suit against HFZ Capital Group, HFZ Sponsor, and the principals of both entities, seeking a money judgment based on their breach of contract and failure to close on Units 25A and 27A ("Kwan 1"). While that suit remains pending, Plaintiffs subsequently bring this action seeking to nullify the BPF 100 mortgage and reassert their contractual rights to both Units 25A and 27A. BPF 100 and the HFZ Defendants (collectively, the "Defendants") separately move to dismiss the amended complaint, with the HFZ Defendants adopting the memorandum of law by BPF 100.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340, 341 [2d Dept. 2003]. Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 [2017].

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez,* 84 N.Y.2d 83, 88 [1994].

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 [1977].

Discussion

The Defendants move to dismiss the amended complaint on the following grounds: 1) the claims are time-barred; 2) the claims are precluded by the underlying agreements; Kwan lacks standing to bring any claims in this action as she was not a party to the underlying agreements; 3) Plaintiffs' claims that the BPF Mortgage is null as a sham mortgage is refuted by documentary evidence and 4) Plaintiffs' claim that the BPF Mortgage is a fraudulent transfer fails as a matter of law. Plaintiffs oppose. For the following reasons, the motions to dismiss are granted to the extent of the claims brought on behalf of plaintiff Jenny Kwan and the first, second, and fourth causes of action. The motions to dismiss are denied to the extent of the third cause of action, and this action is consolidated with Kwan 1.

Plaintiffs' Claims Are Not Time-Barred

Defendants argue that because Plaintiffs made down payments in 2015 and 2016, and executed the 2018 Agreements in 2018, all claims here are past the six-year statute of limitations.

This argument fails because as a matter of fundamental contract law, a claim accrues at the time of the breach, not the creation of the agreement. *See, e.g., Chelsea Piers L.P. v. Hudson Riv. Park Trust*, 106 A.D.3d 410, 412 [1st Dept. 2013]. It would be nonsensical to find that all claims based on a property interest created by an agreement can only be brought within six years of the creation of that document, instead of the event creating an adverse interest or breach of the agreement. Plaintiffs could hardly bring an action against the BPF Mortgage years before said mortgage was created. Defendants cite to no case law standing for the proposition that a claim to enforce a vendee's lien against an adverse interest accrues only when the vendee's lien is created, and not when the adverse interest arises. Therefore, Defendants have not met their burden in establishing that Plaintiffs' claims are barred by the statute of limitations.

Plaintiff Kwan Lacks Standing

Defendants argue that plaintiff Kwan lacks standing to bring the present claims because she was not a party to the 2018 Agreements. Plaintiffs argue that because Kwan personally funded the down payments, she has direct economic harm and therefore standing to join in the claims based on the 2018 Agreements. As a matter of black-letter law, a member of a business entity does not have standing to sue for injuries to the entity, even in cases where "a shareholder incurs personal liability in an effort to maintain the solvency of the corporation." *Serino v. Lipper*, 123 A.D.3d 34, 39 [1st Dept. 2014]; *see also HH Holdings, Inc. v. PaineWebber, Inc.*, 180 A.D.2d 419, 419 [1st Dept. 1992]. Plaintiffs cite to *GSCP* for the proposition that Kwan can maintain this action because of her direct economic injury, but omit that there, unlike here, the plaintiffs in question were parties to the agreements at issue. *GSCP VI EdgeMarc Holdings, L.L.C. v. ETC Northeast Pipeline, LLC*, 192 A.D.3d 454, 455 [1st Dept. 2021]. Therefore,

plaintiff Kwan lacks standing to bring this proceeding, and claims asserted on her behalf here must be dismissed.

Defendants Are Not Forestalled from Relying on Express Provisions in the 2018 Agreements Due to An Alleged Material Breach

Defendants urge dismissal of Plaintiffs' claims challenging the BPF Mortgage on the grounds that by the terms of the 2018 Agreements and the Condo Plan (which permits the owner to mortgage any unsold units), Plaintiffs agreed to subordinate their claims to any subsequent mortgage lien. Defendants argue that regardless of whether Plaintiffs have a claim under the agreements against the sponsor/owner, the BPF Mortgage is not invalidated or subordinate to a purchaser's claim. Plaintiffs argue that the Defendants cannot assert defenses derived from the agreements in this matter, as a material breach of those agreements precludes contractual defenses. They claim that neither parties to the agreement nor third-party beneficiaries can obtain a dismissal at the pleading stage based on contractual defenses, citing to non-binding federal cases.

The 2018 Agreements contained a subordination provision reading that the agreement was "subject and subordinate to the lien of any mortgage […] heretofore or hereafter made." That same provision also reads that "[n]o encumbrance shall arise against the Property as a result of this Agreement, or any monies deposited hereunder." Plaintiffs argue that because they allege a breach of the 2018 Agreements by the owner/sponsor, the subordination provision no longer applies. Generally speaking, a material breach of an agreement gives the aggrieved party two options: "affirm the [agreement/s] and continue with them or terminate the agreements and seek redress for a total breach." *Parlux Fragrances, LLC v. S. Carter Enters., LLC*, 204 A.D.3d 72, 90 [1st Dept. 2022]. Plaintiffs here do not plead a claim for breach of the 2018 Agreements.

Furthermore, the impact of an alleged material breach is to allow the non-breaching party to treat the contract as having ended and to excuse future performance under the contract by the aggrieved party. *See, e.g., Gomez v. MLB Enters., Corp.*, 2018 U.S. Dist. LEXIS 96145, *35 [S.D.N.Y. June 05, 2018]. Plaintiffs here are not seeking to treat the 2018 Agreements as having ended and to be redressed for their damages as result of a breach, but instead seek to enforce that part of the 2018 Agreements that gives them certain rights in the units in question but not the parts of the 2018 Agreements that specifically and expressly states that they do not have a lien in the units and that any interest is subordinate to a future mortgage. This selective enforcement is not encompassed in the material breach doctrine.

As a final note, it is not alleged that the subordination provisions in the 2018 Agreements were obtained via fraud, but rather that the subsequent mortgage itself was fraudulent. Plaintiffs cite to an Order from this court in Kwan 1, holding that because it was alleged that a limitation of remedy provision was obtained fraudulently, the defendants there were forestalled from relying on that provision in a motion to dismiss. But the motion here is distinguishable from that set of facts. That a subsequent mortgage was or was not obtained fraudulently would not invalidate the express subordination provisions in the 2018 Agreements, absent any allegation that the subordination provisions were themselves obtained fraudulently. The first cause of action in the amended complaint seeks to void the BPF Mortgage on the grounds that Plaintiffs have a vendee's lien in the units created by the 2018 Agreements and the payments made. The fourth cause of action similarly is based on the proposition that Plaintiffs have an equitable lien in the units. Because these causes of action are directly and expressly contradicted by the terms of the 2018 Agreements, dismissal under CPLR § 3211(a)(1) would be proper.

The BPF Mortgage Is Not a Sham Due to the Listed Owner Entity

Plaintiffs allege in the amended complaint that the BPF Mortgage is a sham because the entity identified as the mortgagor (Owner) is not the entity identified as the owner in the condominium offering documents and the 2018 Agreements (HFZ Sponsor). Defendants have moved to dismiss this claim on the grounds that the Condo Plan submitted to the Attorney General and associated documents identify Owner as the owner of the property title. The HFZ Sponsor transferred title to the condominium to the Owner in 2013, according to the Deed provided. In the 2015 Condominium Offering Plan, there was a Declaration listing Owner as the entity submitting the land and building to the be considered as the Bryant Park South Condominium. Defendants have submitted conclusive documentary evidence that Owner had the title to the units. Therefore, the fact that the BPF Mortgage lists Owner as the owner of the units that were mortgaged does not give Plaintiffs a basis to invalidate the mortgage. Because the second cause of action seeks a judgment declaring the BPF Mortgage as a sham based on this theory, dismissal of this claim as contradicted by documentary evidence would be proper.

It Is Adequately Alleged That the BPF Mortgage Was a Voidable Transfer

Plaintiffs allege in their amended complaint that the BPF Mortgage was a fraudulent transfer under the Debtor Creditor Law ("DCL") § 274. This provision permits transfers to be voided in cases where a creditor's claim "arose before the transfer was made or the obligation was incurred" if certain other conditions are met. Defendants move to dismiss the third cause of action on several grounds. First, they argue that Plaintiffs are not creditors. Debtor Creditor Law § 270(d) and (c), a creditor is defined as a person that has a right to payment. Plaintiffs contend that their existing claims in Kwan 1 for money damages against Owner constitute a right to payment that makes them a creditor of Owner under the DCL. While Defendants argue that Plaintiffs cannot be creditors because Owner was not a party to the 2018 Agreements, those

claims in Kwan 1 survived a motion to dismiss under the alter ego theory. Plaintiffs allege in the amended complaint that the HFZ Sponsor and Owner impermissibly failed to close on the units before the BPF Mortgage was made. Taking these facts alleged as true and according Plaintiffs every favorable inference, their claim for money damages against Owner would have arisen before the BPF Mortgage was made, satisfying this part of DCL § 274.

Another requirement for claims pled under DCL § 274(a) is that the debtor be insolvent at the time of the transfer and that the debtor did not receive a "reasonably equivalent value in exchange for the transfer." Defendants argue that neither of these elements have been adequately pled. Plaintiffs allege in the amended complaint that based on outstanding debt owed, "HFZ Sponsor is insolvent" and that Owner is "likewise insolvent to the extent it is HFZ Sponsor's successor-in-interest." They also allege that the mortgagor did not receive reasonably equivalent value for the mortgage because it was "intended as additional consideration for funding that BPF 100 provided in 2014." They point to the admission by BPF 100 in a related case that the mortgage with an outstanding balance of over $81 million was made in exchange for nearly $23 million in additional financing and argue that this imbalance makes the transaction not one for a reasonably equivalent value. Viewed through the lens of the motion to dismiss standard, Plaintiffs have thus far adequately alleged a claim under DCL § 274.

DCL § 274 also permits a transfer to be voided if it was made "to an insider for an antecedent debt." Plaintiffs allege that BPF 100 was an insider to the condominium project, and that the BPF Mortgage was made in order to collateralize their previously unsecured mezzanine loan. Defendants argue that BPF 100 was not an insider but a third-party lender. DCL § 270 defines an insider as a "person that operates the debtor's business under a[n] … agreement." Plaintiffs have alleged that BPF 100, acting through its principal, exercised control over HFZ

Sponsor and was the cause of the refusal to close on the two units in question. These allegations are sufficient to survive a motion to dismiss. The parties have requested that any remaining claims be consolidated with Kwan 1. Accordingly, it is hereby

ADJUDGED that the motions to dismiss are granted in part; and it is further

ORDERED that all claims brought on behalf of plaintiff Jenny Kwan are hereby dismissed for lack of standing; and it is further

ORDERED that the first, second, and fourth causes of action in the amended complaint are dismissed in their entirety; and it is further

ORDERED that the above-captioned action is consolidated in this Court with Index No. 651518/2023, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 651518/2023 and the caption in the consolidated action shall bear the following caption:

JENNY KWAN, DOUBLE J BRYANT PARK 25 LLC AND DOUBLE J BRYANT PARK 27, LLC
Plaintiffs,

-against-

HFZ CAPITAL GROUP, LLC, HFZ BRYANT PARK OWNER LLC, 20 WEST 40 BRYANT PARK OWNER LLC, ZIEL FELDMAN, NIR MEIR, and BRYANT PARK FUNDING, 100, LLC.
Defendants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

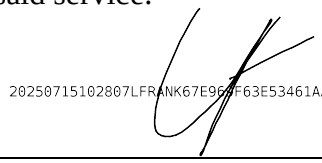
ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.



7/15/2025
DATE

LYLE E. FRANK, 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