SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **31M**

Justice

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INDEX NO. 653939/2024

MOTION DATE 10/10/2024, 10/15/2024, 11/13/2024, 11/27/2024

MOTION SEQ. NO. 001 002 003 004

DANIEL MICHAEL ADAMS, JAMIE KIM, LESTER KIM, HERIBERTO SIFUENTES-REYES, NICOLE KINKAID, LOPA BANERJEE, LISA MARIE BALUBAYAN, CARLOS ALBERTO PAGAN, EZRA HERBERT BERSHATSKY, JANUS RISING LLC,VICTOR LUIS HERNANDEZ, KEVIN JAHNG, MINSUN HWANG, ADAM BIERNAT, SHAREEZA BHOLA, ANDREW FLEMING, ALI FLEMING, ANDREW HAWTHORNE, GINA COLONETTE, BRANDON DANG, JOEL BARCIAUSKAS, WEI-SHAN VANESSA TUNG, UTHMAAN MOULTA-ALI, MARISSA LUBIN, TRULS TEIGEN, SARAH ELRAFEI, MOHAMED ELRAFEI, 300 WEST 122ND STREET 6L LLC,JAOCB KASHANIAN, LISA SINGH KASHANIAN, BAHA AL-ATTIA, JOSEPH CIRELLO, GABRIELLE SEGAL, ZEV SEGAL, VICTORIA SEGAL, ILIA SEGAL, JENNIFER SPROSS, NEHA PATEL, CATHERINE MUGERIA, EFRAIN GUERRERO, JAMES JONES, CHAVON TIFFANI SUTTON, JACK MILLER, IRA MILLER, NYANIKI QUARMYNE, MIRIAM LAUGESEN, ELISSA COFIELD, JEAN P. TANG, GLENN TANG, CALEB KING, THE DONNA FISH 2012 REVOCABLE TRUST, MARIA LUIZA GAGOS, ADRIENNE PHILLIPS, MYUNG OAK KIM, SAM DAVID JAFFE, ALLISON TOM-YUNGER, GREGORY M. ALLEN, HANSEUNG CHOI, GAUTAM GOWRISANKARAN, HAE YEON JEONG, PETER BOLO, LAILA ALMEIDA, ALINE MARIA LOPES GASPAR DA COSTA, RICARDO GONCALVES DA COSTA, YUMIKO MATSUMURA, ATSUTAKA CHIKARAISHI, JENELLE TIMMINS-PERSLEY, CHRISTOPHER PERSLEY, JULIEN CHUARD, TINA TSENG, LOUIS AMATO, JEFFREY ZAHN, GISELLE SIMONS, LINDA B. LEUNG, ANDREW STOLE, STEFAN SZANTO, ELIZAVETA CHISTYAKOVA, TIFFANY ROTHWELL, ROBERT CANNING, DEVAL A. SHAH-CANNING, JOEL KAMMET, JOAN WALTON, JANELLE RODRIGUEZ REVOCABLE TRUST, TONY MTANGO KISSACK, ROCHELLE LAURETTA MALCOLM, LAILA SIMONA RODRIGUEZ, ANGEL OCTAVIO CASTILLO MALPICA, ATLEE JEAN CASTILLO MURPHY, LORENZO FERGUSON, MARYGRACE CHAN,

Plaintiff,

- v -

BESPOKE HARLEM WEST, LLC,RACHEL MEDALIE, BHW MEZZ LLC,HAPPY LIVING DEVELOPMENT LLC,PEARL CHEN, MENACHIM BALKANY, RSR HOLDINGS LLC,REUVEN MEDALIE, BRENT M. PORTER,

DECISION + ORDER ON MOTION

ARCHITECT, PLLC,BRENT M. PORTER, MARANS, NEWMAN, TSOLIS AND NAZINITSKY LLC,PRAMODRAY SHAH, JOHN DOES NOS. 1 THROUGH 10, JANE DOES NOS. 1 THROUGH 10, THE 300 WEST 122ND STREET CONDOMINIUM, THE BOARD OF MANAGERS OF THE 300 WEST 122ND STREET CONDOMINIUM,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 43, 61, 65, 68, 69, 70, 71, 72, 73, 74, 85, 86, 87, 88, 97

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 63, 66, 77, 78, 79, 80, 81, 82, 84, 98

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 62, 67, 89, 99

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 64, 83, 90, 91, 92, 93, 94, 95, 96, 100

were read on this motion to/for DISMISS.

This action is brought by over 50 unit-owners in the condominium building located at 300 West 122nd Street in Manhattan ("the Condo") to recover damages for alleged defects throughout the Condo's common areas and individual units as the result of the "shoddy workmanship and construction practices" of the Condo's developer and sponsor, and for the sponsor and board's alleged mis-management of the Condo, in direct breach of the Offering Plan and applicable laws.

The complaint asserts eight causes of action sounding in breach of contract, breach of fiduciary duty, and fraud, against the Sponsor, members of the Sponsor, Condo Board members, Architect, Engineer, the attorney escrow agent, as well as Jane/John Does, alleged to be the recipients of fraudulent transfers. Certain of the defendants have moved to dismiss the complaint as alleged against them. The motions are consolidated and decided herein as follows:

The motion by defendants Bespoke Harlem West LLC ("the Sponsor"), BHW Mezz LLC ("BHW," a member of the Sponsor), Happy Living Development LLC ("Happy Living," a member of the Sponsor), Rachel Medalie ("Ms. Medalie," a member of the Sponsor and Board of Directors of the Condo ["the Board"]), Pearl Chen ("Ms. Chen," a member of the Sponsor and the Board), and Menachim Balkany ("Mr. Balkany," a member of the Board), for an order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), and 3016(b), dismissing the third, fourth, and eighth causes of action (motion seq. 001), is granted in part.

The motion by defendant Marans, Newman, Tsolis & Nazinitsky LLC ("the Law Firm"), for an order, pursuant to §§ 3211(a)(1) and (a)(7), dismissing the sixth cause of action (motion seq. 002), is granted.

The motion by defendants RSR Holdings LLC ("RSR"), Reuven Medalie ("Mr. Medalie"), for an order, pursuant to §§ 3211(a)(1), dismissing the eighth cause of action (motion seq. 003), is denied.

The motion by defendants Brent M. Porter, Architect, PLLC, and Brent M. Porter (collectively, "the Architect"), for an order CPLR §§ 3211(a)(1) and (a)(7), dismissing the fifth cause of action (motion seq. 004), is granted.

Background

The Condo is a new 13-floor building with 170 residential units, 2 commercial units, 1 community facility unit, 68 licensed storage spaces, 4 licensed rooftop cabanas, and 57 licensed parking spaces (NYSCEF Doc. No. 1; Complaint ¶ 36). Plaintiffs, each individual residential unit owners, allege that defendants promised a well-functioning building of the highest quality and offering various amenities but instead delivered a building of shoddy quality with numerous issues and failed to obtain a permanent Certificate of Occupancy ("PCO"). The Complaint details, with specificity, the alleged defects throughout the common areas and in the individual units. In the main, plaintiffs allege that defendants breached the Offering Plan and engaged in fraud, misrepresenting the quality of the Condo that would be delivered as well as the financial security of the Sponsor, "pilfered" the Sponsor's assets leaving the unit owners "in the lurch" for expenses that the Sponsor must pay, and that the Sponsor Defendants fraudulently transferred two residential units to their affiliates (*id.* ¶¶ 2 – 12, 27, 28).

Plaintiffs also contend that, although the Condo Board is impowered to bring an action on their behalf, the individual unit owners must bring this action because the Board has been complicit in the acts/omissions for which relief is sought (*id.* ¶¶ 45, 46). As noted above, defendants are the Sponsor, BHW, Happy Living, Ms. Medalie and Ms. Chen (collectively, "the Sponsor Defendants"); the Board (comprised of Ms. Medalie, Ms. Chen, and Mr. Balkany); the Law Firm; RSR and Mr. Medalie, the owners of Units 6K and 14J; and the Architect (*id.* ¶¶ 13 – 26, 29 – 35). Defendant Pramodray Shah, P.E., the Engineer, has not moved against the Complaint.

The Complaint

The Complaint consists of 50 pages, 231 separate paragraphs, and, as noted, asserts eight causes of action. In pertinent part, the Complaint alleges that the total value of the Sponsor's offering for the residential and non-residential units was $212,616,400 (*id.* ¶ 36), and that all but two residential units have been sold or improperly transferred to the Sponsor's affiliate, RSR (*id.* ¶ 37). It further alleges that the Sponsor used the Offering Plan as a promotional tool, started marketing the units in March 2021 (just after the Offering Plan was filed), with the first sale in January 2022 (*id.* ¶ 38).

According to the Complaint, the Offering Plan, filed in February 2021, listed Mr. Balkany as a principal of the Sponsor and main point of contact for the Unit Owners (*id.* ¶¶ 17 - 18). The Complaint alleges that the Second Amendment to the Offering Plan, dated February 28, 2024, noted that Mr. Balkany entered personal bankruptcy on May 13, 2022 (*id.*), and that, although the Offering Plan represents that the Sponsor's principals were current on their financial obligations, an entity of the Sponsor in which Mr. Balkany has an interest filed for bankruptcy two months after the filing of the Offering Plan (*id.* ¶¶ 115 – 130).

The Complaint further alleges that the Sponsor represented, in the Offering Plan and other materials that the Condo is "of a premier luxury caliber and constructed with the highest quality of

materials and workmanship in accordance with all applicable" laws; that these representations were false and known by the Sponsor Defendants and Architect to be false prior to and during the construction of the Condo; and that the Sponsor nevertheless "continued to disseminate the Offering Plan" to sell as many units as possible under false pretenses (*id.* ¶¶ 36 - 42).

As to the defective conditions throughout the Condo, the Complaint alleges a "laundry list of deficiencies" including: systemic lack of firestopping; a constantly leaky roof, which is not built up to code and "missing the 20-year premier 'no dollar limit' warranty" in the Offering Plan; improperly installed heat pump units on roof; lack consistent hot water throughout the building; excessive humidity in many units and in the cellar; deteriorating building to building joints; poorly constructed/installed elevators causing panic; "wide-spread code violations and safety related problems" (*id.* ¶ 3, 6, 7). The Complaint alleges that the amenities promised in the Offering Plan are not operational more than 2 ½ years after the first unit closing, including the sauna and parking garage (*id.* ¶ 4). As to the individual units, the Complaint alleges defects including leaks from HVAC equipment; improperly installed and poorly designed windows and patio doors (drafty and leaky, permitting water infiltration and causing unreasonably high heat and cooling costs); deficiently installed hardwood floors (warped, sagged, separated); and ventilation issues in kitchen & bathroom (odor and sound transmission between units) (*id.* ¶ 5).

It is further alleged that the Sponsor and its principals set up a governance structure that ensured the Sponsor would control the Condo and that its appointed Board members failed to address defects in the Condo (*id.* ¶ 8); exploited the Condo during the Sponsor control period to "serve their own financial interests" by, *inter alia*, mismanaging the Condo, failing to perform regular maintenance, not pursuing the Sponsor for construction defects, and using Condo funds to fix defects that are the responsibility of the Sponsor to fix (*id.* ¶ 43); and the Sponsor has failed to obtain a PCO (*id.* ¶ 44). The Complaint alleges that Sponsor and the Board delayed collecting common charges, improperly raided buyers' capital contributions, and engaged in self-dealing to the tune of millions of dollars with the Condo left to pay these costs (*id.* ¶¶ 8 - 11); and improperly transferred two units to themselves, via their ownership in an LLC, for a mere $10 (*id.* 27, 28, 212 – 231).

The Complaint generally alleges that the Sponsor, the Architect, the Engineer, and the Law Firm representing the Sponsor, all schemed together to falsely certify that the Condo complied with the Offering Plan and met building code standards and laws, and that the escrow to obtain the PCO need only be $5,000 (*id.* ¶¶ 9, 41 – 43, 110 – 114, 141, 147 – 162, 165 – 186).

The first cause of action, for breach of contract, is asserted solely against the Sponsor, seeks $4.4 million in damages, and consists of the lion's share of factual allegations as to the defective conditions of the Condo, all in violation of the Offering Plan and applicable laws (*id.* ¶¶ 47 – 90). In summary, this cause of action provides further detail of the defects generally identified in the introductory paragraphs of the Complaint (*id.* ¶¶ 3 – 8) and is broken down into two subparts, as follows:

> "I. Problematic Conditions Regarding Construction of the Building," first noting the provisions of the Offering Plan that require the Sponsor to construct and deliver the Condo in accordance with the express terms of the Offering Plan, all applicable laws, and the Condo Plans and Specifications (*id.* ¶¶ 50 – 59), followed by the precise "Conditions and Features" that deviate materially from the governing

documents and laws (*id.* ¶¶ 60 – 82, some of which contain 4 to 9 subparagraphs); and

"II. Sponsor's other Offering Plan Breaches," identified as failure to deliver warranties pertaining to the common elements, including the roof, and manufacturer warranties for the individual units (*id.* ¶¶ 83 – 86), and failure to deliver "As Built" Plans to the Board (*id.* ¶¶ 87 – 90).

The second cause of action, for a permanent injunction, is also asserted solely against the Sponsor, seeks an order compelling the Sponsor to maintain the Temporary Certificate of Occupancy; to procure a PCO for the Condo, which it promised in the Offering Plan to do within two years of the first unit closing; and, alternatively, $500,000 in damages. This cause of action alleges that the Sponsor permitted the TCO to lapse on several occasions; failed to deposit sufficient funds in escrow to satisfy the outstanding items required to obtain a PCO; and that the unit owners will suffer irreparable damage in if a PCO is not issued (*id.* ¶¶ 91 – 107).

The third cause of action, for fraud in the inducement, is asserted against the Sponsor Defendants – i.e., the Sponsor, BHW, Happy Living, Ms. Medalie and Ms. Chen – seeks $3 million in damages and alleges, in the main, that they: misrepresented the condition of the Condo as to its compliance with the Offering Plan and applicable laws; and misrepresented the bankruptcy status of Mr. Balkany, one the Sponsor's principals, and the financial condition of a Sponsor entity, in the Offering Plan (*id.* ¶¶ 108 – 130).

The fourth cause of action, for breach of fiduciary duty, is asserted against the Board – i.e., Ms. Medalie, Ms. Chen, and Mr. Balkany – seeks $3 million in damages and alleges, in the main, that the Sponsor structured the Board to have total control over it; that the Board had knowledge of defects and code violations yet purposefully failed to act to correct the defects and violations, and had "intimate knowledge" of the finances of the Board, utilized Condo funds to make repairs instead of Sponsor funds during the Sponsor Control Period, "intentionally refused" to force the Sponsor to honor its contractual obligations, failed to budget for necessary repairs and maintenance, and assisted the Sponsor in fraudulently transferring two units to its affiliates for no consideration (*id.* ¶¶ 131 – 145).

The fifth cause of action, for fraud in the inducement, is asserted solely against the Architect, seeks $1million in damages and alleges, in pertinent part, that the Architect falsely certified that the Condo had no code violations, was being constructed in compliance with the Offering Plan and related Plans and Specifications, and that such certifications were "made for the benefit of all persons to whom this offer is made" (*id.* ¶¶ 146 – 163).

The sixth cause of action, for breach of fiduciary duty, is asserted solely against the Law Firm, seeks $495,000 in damages and alleges that: governing law and the Offering Plan required the Law Firm to hold in escrow "all contract deposits from purchasers. . . if the PCO is not obtained by the date of the first unit closing"; based upon letters from the Engineer and Isaac & Stern Architects, it initially held $500,000 in escrow, which was reduced to $138,806.61 in October 2022, and then $5,000 in December 2023. This cause of action further alleges that such sums are insufficient to cover the costs required to obtain the PCO and that the Law Firm acted in concert with the Sponsor

and the Engineer to falsely claim that only $5,000 was required for this purpose and permit the Sponsor to "improperly pilfer" $495,000 from the special escrow account (*id.* ¶¶ 163 – 187).

The seventh cause of action, for aiding and abetting breach of fiduciary duty, is asserted solely against the Engineer, seeks $495,000 in damages and alleges, in pertinent part, that the Engineer provided a letter to the Law Firm which represented a cost to obtain the PCO which was woefully inaccurate and inadequate and worked in concert with the Sponsor and the Law Firm to falsely claim that only $5,000 was needed to obtain the PCO (*id.* ¶¶ 188 – 198).

Finally, the eighth cause of action, for voidable transactions, is asserted against the Sponsor, BHW, Ms. Medalie, Ms. Chen, Mr. Balkany, RSR, Mr. Medalie, and the Doe Defendants. It seeks to set aside equity distributions made to the members of the Sponsor and its affiliates from the proceeds of sale of the units, amounting to over $138 million as of March 2022, alleged to be made "without fair consideration and prioritized Sponsor's members over its creditors," including but not limited to the $59 million owed to its private lender. It also seeks to set aside the Sponsor's transfer of Unit 6K and 14J to its principals without sufficient consideration ($10) (*id.* ¶¶ 199 – 231).

Discussion

The Sponsor has not moved to dismiss the first cause of action, for breach of contract, and the second cause of action, for a permanent injunction, which are asserted solely against it. Nor has the Engineer moved to dismiss the seventh cause of action, for aiding and abetting fiduciary duty, which is asserted solely against it.

On a motion to dismiss under for documentary evidence, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v Martinez,* 84 NY2d 83 [1994]). Under CPLR § 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id*.; citing *Heaney v Purdy*, 29 NY2d 157 [1971]).

On a motion to dismiss under § 3211(a)(7), the complaint is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference *(see e.g. M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1 [1st Dept 2020]; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if, from the four corners of the pleadings, "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation omitted]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Viewing the Complaint through the foregoing lenses results in the dismissal of certain causes of action, with others remaining viable.

The Sponsor Defendants' Motion to Dismiss (Motion Seq. 001)

Third Cause of Action as Against the
Sponsor Defendants: Fraud in the Inducement

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and no constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987] [internal citations omitted]). "A failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract" (*Tesoro Petroleum Corp. v Holborn Oil Co*., 108 AD2d 607 [1st Dept 1985] [internal citations omitted]; *see also Bd. of Managers of Chelsea 19 Condo. v Chelsea 19 Assocs.*, 73 AD3d 581 [1st Dept 2010] [in condo unit owners action against sponsor and architect for defective units "[a]ll of the fraud and related tort claims arise from the same provisions said to have been breached and seek the same damages, and thus merely duplicate the insufficient contract claims"]).

That part of Plaintiffs' fraud cause of action against the Sponsor Defendants which is based upon the alleged defective conditions of the Condo – i.e., leaky roof, defective water distribution systems, lack of firestopping defective windows, missing amenities, and the like (*id.* ¶¶ 110 – 114), do not state a duty separate from, and in addition to, the contract, and, thus, are dismissed as duplicative of the breach of contract cause of action (*Bd. of Managers of Chelsea 19 Condo.*, 73 AD3d 581; *see also Alexander Condo., by its Bd. of Managers v E. 49th St. Dev, II, LLC*, 60 Misc3d 1232[A] [Sup. Ct. New York County 2018] ["To assert a fraudulent inducement claim, the plaintiff must allege a misrepresentation of presently existing fact, which is extraneous to the parties' contract and involves a duty that is separate from, and in addition to, the one imposed by the contract, and not merely that the defendant misrepresented its intent to perform. Moreover, where a fraudulent inducement claim is duplicative of a breach of contract claim, it must be dismissed."] [internal citations omitted]). Similarly, Plaintiffs' fraud claim fails to the extent that it is based on the Sponsor's promissory statements related to future acts (*Tesoro Petroleum Corp.*, 108 AD2d at 607).

To the extent that Plaintiffs' fraudulent misrepresentations and omissions claim is based upon the Certification in the Offering Plan as to alleged defective conditions of the Condo, it is pre-empted by the Martin Act. It is well-settled that no private cause of action for fraud arises from the mandatory antifraud provisions of offering plans required by the Martin Act (*CPC Intl. v McKesson Corp*., 70 NY2d 268 [1987]; *Board of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542 [1st Dept 2013]; *Board of Mgrs. of the Lore Condominium v Gateway IV LLC*, 169 AD3d 617, 618 [1st Dept 2019]).

However, a private cause of action for fraud does arise from affirmative misrepresentations of material facts in an offering plan beyond the requisite certification (*Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607 [1st Dept 2011]). Here, Plaintiffs alleged affirmative misrepresentations about the financial status of the Sponsor's principals (a material fact) – *inter alia*, that the principals were current on their financial obligations at a time when they were not (*id.* ¶¶ 115 – 130), sufficient to maintain the fraud claim (*see generally Bd. of Managers of S. Star v WSA Equities, LLC*, 140 AD3d 405 [1st Dept 2016]). These allegations are also sufficiently pleaded to "permit a reasonable inference of the alleged conduct" (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]), in that the Complaint alleges the Sponsor did not file any amendments to the Offering Plan between February 2021 and February 2024, during which time Mr. Balkany and one of the Sponsor entities were not in fact current on their financial obligations and had

filed for bankruptcy, a fact of which the Sponsor Defendants knew, yet continued to promote sales of the units based upon the Offering Plan containing representations to the contrary, upon which they intended purchasers to rely (*id.* ¶¶ 115 – 130).

Consequently, the third cause of action, for fraud in the inducement, is dismissed only to the extent that it is based upon the alleged defective conditions of the Condo and remains as to the allegations that the Sponsor affirmatively misrepresented the financial condition of its principals.

Fourth Cause of Action as Against the
Sponsor Defendants: Breach of Fiduciary Duties

The facts supporting a breach of fiduciary duty claim must be pled with particularity, unless details are in the control of defendant (CPLR 3016[b]; *Herrmann v CohnReznick LLP*, 155 AD3d 419 [1st Dept 2017]; *Pludeman*, 10 NY3d at 491-492). The Complaint alleges, in conclusory fashion, that Ms. Medalie, Ms. Chen, and Mr. Balkany purposefully failed to correct defects and violations throughout the Condo and, upon information and belief, utilized Condo funds of at least $80,000 and/or $115,000 in the aggregate to cover expenses for which the Sponsor is responsible. These allegations are insufficiently particular "to inform defendants with respect to the incidents complained of" as required (*id.*).

In addition, that part of the breach of fiduciary cause of action which is based upon the Board's failure to address and cure construction defects (Complaint ¶¶ 141, 144), is duplicative of the breach of contract cause of action (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000] ["A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand."]).

Consequently, the fourth cause of action, for breach of fiduciary duty, as against the Sponsor Defendants, is dismissed without prejudice to replead.

Eighth Cause of Action as Against the Sponsor Defendants:
Fraudulent Conveyance of Equity Distributions and Transfer of Units

The key allegations underpinning Plaintiffs' claims that the Sponsor Defendants fraudulently conveyed "Equity Distributions" to its principals and affiliates are made upon information and belief (Complaint ¶¶ 206 – 210) and, thus, are insufficient to support a common law fraudulent conveyance claim or one brought under the Debtor and Creditor Law (*Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]). This is particularly true where, as here, the alleged conveyances were "Equity Distributions" made by the Sponsor, an LLC, to its principals (members of the LLC), which do not require "fair consideration" as the principals "simply were entitled to the equity distributions by virtue of their membership" in the Sponsor (*Toren Condominium v Myrtle Owner LLC*, 2014 WL 10680364 at *6 [Sup. Ct. New York County 2014]). Thus, contrary to Plaintiffs' claim, *Brennan v 3250 Rawlins Ave. Partners, LLC*, 171 AD3d 603 [1st Dept 2019], is inapposite and does not control as the conveyances therein were alleged to have been made by the LLC to individual members "for their own use" and not as equity distributions. Moreover, the fraudulent conveyance cause of action is based upon information and belief and lacks the requisite specificity required by CPLR 3016(b) (*Alexander Condo., by its Bd. of Managers*, 60 Misc3d 1232[A] *9 [fraudulent conveyance claims dismissed for failure to plead, with sufficient particularity, facts "tend[ing] to show that the challenged conveyance was made without fair consideration."]).

Consequently, the eighth cause of action, to void certain fraudulent transactions, is dismissed only to the extent that it is based upon alleged Equity Distributions to the Sponsor's principals.

Notably, the Sponsor Defendants do not address that part of the eighth cause of action as seeks to void, as fraudulent, their participation in the transfer of two units to RSR and Mr. Medalie. As discussed immediately below, although those units have been transferred back to the Sponsor, the eighth cause of action states a valid fraudulent conveyance claim against the Sponsor Defendants, RSR, and Mr. Medalie, as to these alleged fraudulent transfers.

The Dismissal Motion by RSR and Mr. Medalie (Motion Seq. 003)

Eighth Cause of Action as Against RSR and Mr. Medalie:
Fraudulent Transfer of Units

The deeds reconveying Units 6K and 14J to the Sponsor constitute documentary evidence sufficiently demonstrating that the ultimate relief sought on the eighth cause of action – to set aside, as fraudulent, the initial transfers of those Units to RSR and Mr. Medalie – is moot (*see generally Colombo v Caiati*, 131 AD2d 532, 533 [2d Dept 1987] [reconveyance of real property rendered action to set aside conveyance as fraudulent moot]).

However, the deeds do not utterly refute the fraudulent conveyance claims (*Johnson v 275 Clermont, LLC*, 235 AD3d 731, 732 [2d Dept 2025] [deeds "did not utterly refute the factual allegations in the complaint"]). Indeed, the Complaint sufficiently alleges that the Sponsor's transfers of Units 6K and 14J to RSR were fraudulent under DCL § 273(b), in that it alleges that the Sponsor "was engaged or about to engage in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction" (Complaint ¶ 224); that the transfers were made "without fair consideration" and "without reasonably equivalent value" (*id*. ¶¶ 225, 226); and were "made to an insider and allowed the Sponsor principals to retain control of those units even after the fraudulent transfers" (*id*. ¶ 227). The claim by RSR and Mr. Medalie that the transfers were made to satisfy a debt owed by the Sponsor is conclusory, unsupported by any competent proof, and insufficient to warrant dismissal (*Celentano v Boo Realty, LLC*, 160 AD3d 576, 578 [1st Dept 2018] ["documentary evidence submitted by defendants in support of their motion to dismiss neither 'utterly refutes plaintiff's factual allegations,' nor 'conclusively establishes a defense to the asserted claims as a matter of law'."]). Thus, viewing the Complaint in the light most favorable to Plaintiffs, and giving it the benefit of every favorable inference, Plaintiffs state a claim for fraudulent transfer of the Units and may be entitled to recover their attorney's fees incurred on this cause action under DCL § 276.

Consequently, the eighth cause of action, to the extent that it is based upon the alleged fraudulent transfer of the two Units from the Sponsor to RSR and Mr. Medalie, states a cause of action against the Sponsor Defendants, RSR and Mr. Medalie.

The Dismissal Motion by the Architect (Motion Seq. 004)

Fifth Cause of Action as Against
the Architect: Fraud in the Inducement

The Complaint alleges, in pertinent part, that the Architect falsely certified in the Offering Plan and Amended Offering Plan that the Condo had no code violations, was being constructed in compliance with the

Offering Plan and related Plans and Specifications, and that such certifications were "made for the benefit of all persons to whom this offer is made" (*id.* ¶¶ 146 – 163). The Complaint does not allege any contract between Plaintiffs, on the one hand, and the Architect, on the other, because there is none. Absent privity, Plaintiffs have no breach of contract claim against the Architect (*Sutton Apartments Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646, 648 [1st Dept 2013]; *Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009] [breach of contract claims dismissed "since plaintiff was not in privity" with dismissed defendants; architectural drawings attached to purchase agreement does not create contract with architect]).

Unable to assert breach of contract, Plaintiffs allege, instead, a fraud claim. However, the Complaint fails to state such claim as it does not allege privity or the "functional equivalent of privity" (*Sutton Apartments Corp*, 107 AD3d at 648 ["tort claims against the architect fail for lack of contractual privity, or the functional equivalency of privity"]; *Melnick v Parlato*, 296 AD2d 443 [2d Dept 2002] [claim for architectural negligence fails where plaintiffs do not establish "the functional equivalent of privity of contract"]; *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424 [1989] ["The long-standing rule is that recovery may be had for pecuniary loss arising from negligent representations where there is actual privity of contract between the parties or a relationship so close as to approach that of privity."]). Architects owe a duty of care to the owner of the building who engaged them, not to subsequent owners "absent a special relationship or a covenant providing for such liability" (*In re September 11 Property Damage*, 468 FSupp.2d 508, 531 [SDNY 2006]). The Complaint does not allege a special relationship between Plaintiffs and the Architect, or the existence of a covenant or promise made by the Architect to assume liability to Plaintiffs.

Indeed, the Complaint fails to allege that Plaintiffs were specifically known to the Architect to be third-party beneficiaries of the contract between the Architect and non-party Isaac & Stern, pursuant to which the Architect issued its certifications (*Ossining Union Free School Dist.*, 73 NY2d at 424 [fraudulent inducement claim must allege defendants' "(1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance"). As courts are careful and circumspect in imposing liability in the absence of privity (*id.* at 424-425 [duty of care to third-parties defined "narrowly" and does not permit recovery "by any 'foreseeable' plaintiff who relied on the negligently prepared report"]), it is not enough to allege that Plaintiffs are in the class of potential purchasers to whom the Architect's certifications were addressed – i.e., that the certifications were "made for the benefit of all persons to whom this offer is made" (*see Bri-Den Const. Co. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355 [1st Dept 2008] ["any asserted reliance must be by a known party and not a class of potential parties, such as future bidders. Even were we to find that a class composed of prequalified bidders was sufficiently known for purposes of *Ossining*, the prequalified bidders were simply not 'known' at the time of the complained-of conduct."]).

Consequently, the fifth cause of action, for fraud in the inducement, asserted against the Architect is dismissed.

The Dismissal Motion of the Law Firm (Motion Seq. 002)

Sixth Cause of Action as Against
the Law Firm: Breach of Fiduciary Duty

The Complaint alleges, and it is indeed undisputed, that the Law Firm served as escrow agent and held escrow funds for the Sponsor to obtain the PCO, in accordance with GBL § 352-e(2-b) and 13 §

NYCRR 20.3(t)(13). Thus, the Complaint adequately alleges the existence of a fiduciary duty owed by the Law Firm to the Plaintiffs, who, as Condo unit owners, have a beneficial interest in the escrow funds which are meant to obtain a PCO for the Condo (*see Baquerizo v Monasterio*, 90 AD3d 587 [2d Dept 2011] ["An escrow agent 'not only has a contractual duty to follow the escrow agreement, but additionally becomes a trustee of anyone with a beneficial interest in the trust'."]).

However, the Complaint fails to allege a breach of the Law Firm's fiduciary duty to Plaintiffs. The Law Firm was entitled to rely upon the Engineer's December 12, 2023 letter concluding that the sum of $5,000 is reasonable to complete the work required to obtain a PCO, and, thus, to disburse all but $5,000 from the escrow to the Sponsor. The governing regulation permits release of such escrow funds where

> . . . the sponsor's engineer, architect or other qualified expert certifies that a lesser amount will be reasonably necessary to complete the work needed to obtain a permanent certificate of occupancy, in which case the sum exceeding the amount so certified by the sponsor's engineer, architect or other qualified expert may be released from any special escrow account. Alternatively, sponsor must deposit with an escrow agent an unconditional, irrevocable letter of credit, post a surety bond in the amount so certified, or provide other collateral acceptable to the Department of Law.
> (13 § NYCRR 20.3[t][13][i])

In support of its dismissal motion, the Law Firm submitted the certifications of the Engineer, as well as those of Isaac & Stern, which precisely follow the form recommended by the New York State Department of Law and the guidance provided therewith. In this regard, the Law Firm's documentary proof utterly refuted the claims in the Complaint that it violated its fiduciary duty and conclusively established a defense as a matter of law (*Farage v Associated Ins. Mgmt. Corp.*, 43 NY3d 152, 158 [2024] [affirming dismissal of complaint under 3211(a)(1)]).

Plaintiffs' breach of fiduciary duty claim against the Law Firm also fails in that the Complaint does not allege that the Sponsor is unable to obtain the PCO. To the contrary, oral argument, it was revealed that the Sponsor continues to work to complete the punch-list of items necessary to obtain the PCO and that the Plaintiffs are not out of pocket (thus, no ascertainable damages).

Consequently, the sixth cause of action, for breach of fiduciary duty, asserted solely against the Law Firm, is dismissed.

Accordingly, it is hereby

ORDERED that the instant motions (sequences 1 through 4) are granted in part, as set forth above; and it is further

ORDERED that the third cause of action, for fraud in the inducement as against the Sponsor Defendants, is dismissed only to the extent that it is based upon the alleged defective conditions of the Condo and remains viable as to the allegations that the Sponsor affirmatively misrepresented the financial condition of its principals; and it is further

ORDERED that the fourth cause of action, for breach of fiduciary duty as against the Sponsor Defendants, is dismissed without prejudice to replead; and it is further

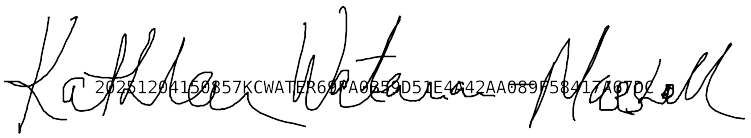
ORDERED that the fifth cause of action, for fraud in the inducement as against the Architect, is dismissed; and it is further

ORDERED that the sixth cause of action, for breach of fiduciary duty as against the Law Firm, is dismissed; and it is further

ORDERED that the eighth cause of action, to void fraudulent transactions, is dismissed only to the extent that it is based upon alleged Equity Distributions to the Sponsor's principals and remains viable to the extent that it is based upon the alleged fraudulent transfer of two Units from the Sponsor to RSR and Mr. Medalie; and it is further

ORDERED that defendants Bespoke Harlem West LLC, BHW Mezz LLC, Happy Living Development LLC, Rachel Medalie, Pearl Chen, Menachim Balkany, RSR Holdings LLC, and Reuven Medalie, shall serve an **Answer** to the Complaint, consistent with this Decision addressing the remaining causes of action, **within twenty (20) days of the date of this Decision and Order**; and it is further

ORDERED that this matter is scheduled for a **Preliminary Conference on March 25, 2026 at 10:00 a.m.** in Part 31, 111 Centre Street, Room 623, New York, New York. Counsel are reminded of the Part Rules, specifically those governing conferences and conference orders.



12/4/2025
DATE

KATHLEEN WATERMAN-MARSHALL, 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**