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Board of Mgrs. of the Chocolate Factory Condominium v Chocolate Partners, LLC
2014 NY Slip Op 50754(U)
Decided on May 13, 2014
Supreme Court, Kings County
Demarest, J.
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Supreme Court, Kings County

The Board of Managers of the Chocolate Factory Condominium, on behalf of the Chocolate Factory Condominium and all unit owners of the Chocolate Factory Condominium, Plaintiff,

against

Chocolate Partners, LLC, Nick Lavrinoff and Lon Bernell, Defendants.

26667/2011

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Carolyn E. Demarest, J.

In this action by plaintiff the Board of Managers of the Chocolate Factory Condominium (the Board) on behalf of the Chocolate Factory Condominium (the Condominium) and all unit owners of the Condominium against defendants Chocolate Partners, LLC (the Sponsor), Nik Lavrinoff (sued herein as Nick Lavrinoff) (Lavrinoff), and Lon Bernell (Bernell), the Sponsor and Lavrinoff (collectively, defendants) move for an order, pursuant to CPLR 213, 3211 (a) (1), (5), and (7), dismissing the complaint, [*2]dated May 30, 2013, based upon the grounds that there are defenses founded upon documentary evidence, that certain claims are barred by the Statute of Limitations, and that the complaint fails to state a cause of action.

BACKGROUND

On March 13, 2001, the Sponsor purchased real property located at 689 Myrtle Avenue, in Brooklyn, New York, for the purpose of sponsoring the conversion of an industrial building at that location into residential condominium apartments. On May 1, 2002, the Sponsor filed a Condominium Offering Plan (the Offering Plan) with the Attorney General's Office of Real Estate Investment in accordance with General Business Law article 23-A. Construction was completed on or about March 16, 2004 and the units were sold between July 2003 and October 2004. Lavrinoff is a member and principal of the Sponsor, and Bernell was also a member and principal of the Sponsor, but he is now deceased.

Pursuant to Real Property Tax Law § 489 and the Administrative Code of the City of New York § J-51-2.5 (which was later reclassified as § 11-243), the City of New York (the City) offers

a program (the J-51 program) that is overseen and administered by the New York City Department of Housing Preservation and Development (HPD), which offers tax benefits to qualifying residential condominiums that have been converted from industrial use, upon proof of compliance with eligibility standards and subject to their developers' compliance with HPD's procedures for applying for such benefits. The J-51 program provides both a tax exemption, which effectively freezes a renovated building's assessed value for tax purposes, so that the owners do not have to pay property tax on the increase in value resulting from the rehabilitation work, and a tax abatement, which is a reduction in the amount of tax an owner must pay.

HPD has promulgated regulations (Rules of the City of New York [RCNY], at 28 RCNY, Chapter 5), also set forth in a "J-51 Guidebook" published by HPD, which set forth the time frames for applying for J-51 benefits, the application procedures to be followed, the application forms to be filled out and submitted, and the application documentation required in order to receive J-51 tax benefits. 28 RCNY § 5-03 (d)(1) requires construction of eligible projects to be completed within 36 months after the commencement of the construction, alteration, or improvement. 28 RCNY § 5-03 (d)(3), as applicable hereto, states that an "application for a Certificate of Eligibility and Reasonable Cost must be filed with [HPD] . . . not later than forty-eight months following the Commencement of Construction." 28 RCNY § 5-03 (d)(5) provides that "[a]n application for a Certificate of Eligibility and Reasonable Cost must contain all documentation required by § 5-05 of the Rules and be completed and filed with [HPD]. . . (B) [for projects completed before December 31, 2011], within twenty-four months of the initial filing date with [HPD]." Section 5-03 (d)(5) further provides: "If the application is not completed [as required by § 5-03 (d)(5)(B)], it shall be deemed withdrawn at the end of the tax quarter in which the application completion deadline . . . falls, and no tax [*3]benefits shall be authorized for the Conversion, Alterations, or Improvements made thereunder."

Pursuant to 28 RCNY § 5-03 (e), in order to be eligible for tax benefits, apart from timely completing the required documentation, the "building must be structurally sound and must comply with applicable laws including, but not limited to, the Building Code, the Multiple Dwelling Law, the Housing Maintenance Code and the Zoning Resolution."

As evidenced by a retainer letter dated April 17, 2001, the Sponsor, prior to filing the Offering Plan for the sale of units in the Condominium, retained New York Advisory Services, Inc. (NYAS), a firm specializing in the filing of real estate tax J-51 applications. The letter by Arnold H. Chernoff (Chernoff) of NYAS, addressed to Lavrinoff and the Sponsor, stated that the fee for its

handling of the J-51 application was $14,500, payable by a non-refundable retainer of $4,500 to be paid immediately with the balance to be paid at the time of issuance of the Certificate of Eligibility by HPD. It advised that upon receipt of the $4,500 check, it would furnish a list of documents needed in order to commence work on this matter.

Schedule A of the Offering Plan set forth the offering prices and description of the units of the Condominium. Footnote 6 to Schedule A of the Offering Plan (at page 11), entitled "Monthly Real Estate Tax," stated that "[t]he Sponsor has applied for a real estate tax exemption and abatement pursuant to Section J-51 of the Tax Law. However the Sponsor makes no representation that its application will be granted."

The Offering Plan (at page 58), under the title "Real Estate Taxes," further provided as follows:

> "The Sponsor has applied for a real estate tax exemption and abatement pursuant to Section J-51 of the Tax Law. The Sponsor must request a preliminary certificate of eligibility from HPD. Such opinion letter must be obtained before the plan is declared effective. Sponsor will keep all record[s] required by HPD and will make them available to HPD whenever requested to do so. HPD routinely conducts audits, the result of which can be either . . . the reduction or revocation of benefits if proper documentation is not provided. Upon closing Sponsor will make all tax benefit documents available to the Board of Managers for inspection and copying for the life of the benefits and it will file all applications and timely comply with all procedures required to properly process and maintain the tax benefits. The Sponsor will use its best efforts to obtain the [J-51] benefits, however, the Sponsor makes no representation that its application will be granted."

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The Sponsor, in the Offering Plan, annexed an April 17, 2002 letter from NYAS, which was prepared for inclusion in the Offering Plan. NYAS, in this letter, described the New York City J-51 Program. It explained that after the project was completed, HPD would review the J-51 application which would include copies of contracts for work and the checks used to pay for the work, and assuming HPD was satisfied with the veracity and adequacy of the submissions, HPD would issue a Certificate of Eligibility stating that the project was entitled to an anticipated certified value of approximately $620,000, based on the City's guidelines for each aspect of the job. NYAS stated that, assuming the City issued a Certificate of Eligibility for $620,000, the building would then be entitled to a total abatement of approximately $310,000 over a period of 6.7 years. NYAS annexed

to its letter a schedule which set forth what the taxes for each unit would be both with and without J-51 benefits. NYAS further stated that the estimate of the actual assessed value upon completion of the project was a good faith estimate, not to be construed as a guarantee of future assessment or tax rates.

Under paragraph 21 of "Special Risks" (at page iv), the Offering Plan additionally provided:

> "The Sponsor is applying for the J-51 Tax Abatement and Exemption. The Sponsor will use [its] best effort to obtain these tax benefits but does not guarantee that they will be obtained. The Sponsor makes no representation that its application will be granted. Purchasers are purchasing with no guarantee of obtaining tax benefits. The Sponsor does not anticipate obtaining the tax benefits before the first closing of a Unit."

The Sponsor sold its first unit of the Condominium in February 2003. As noted, construction on the Condominium's units was completed in or about March 16, 2004. The Condominium building (the Condominium Building) contains 45 residential units. According to the Fifth Amendment of the Offering Plan, the Sponsor had sold all units of the Condominium by February 4, 2005.

The Sponsor, through NYAS, submitted a J-51 application for the Condominium on June 15, 2005. This initial application, although incomplete, was timely under HPD regulations. However, beginning in July 2005, HPD sent the Sponsor, via its agent, NYAS, four notices, which each stated that its J-51 application was incomplete, requested documentation to complete the application, and warned that the application must be completed within two years of the filing date or it would be deemed withdrawn. Specifically, as alleged in plaintiff's Complaint (¶ 51-52), these notices, addressed to NYAS, dated July 25, 2005, November 15, 2005, May 26, 2006, and May 2, 2007, each contained the following language:

> "Dear Applicant:

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> We have completed a preliminary review of the application for J-51 Tax Exemption/Tax Abatement benefits for the above referenced property. The documentation listed below is needed to complete your application. Upon receipt of these documents this office will continue to process and review the application. Please note that pursuant to Section 5-03 (d) (5) of the J-51 Rules and Regulations, the application must be completed within two years of the filing date, or it will be deemed withdrawn. If you have any questions please call the above listed number. Have your application number available for prompt

assistance.

DOCUMENTS TO BE SUBMITTED BY APPLICANT

* Proof of Agreement or Disp. of Fund

* Affidavits/Breakdown of Cost & Quality

* Contracts."

Under "Comments" to each notice, the applicant was advised: "Please note: Bldg. Dept. Approval (TA-3) has been requested but not received" (Complaint ¶ 53). An additional notice, dated July 6, 2005, further advised that processing of the application was delayed due to the lack of DOB approval.

The Sponsor received a permanent certificate of occupancy on February 25, 2005. During or after the construction of the Condominium Building and sale of the units of the Condominium to unit owners, the unit owners and the Board, which consists of its duly elected members and is charged, pursuant to Article II, Section 2, of the Condominium's by-laws, with the administration of the affairs of the Condominium, allegedly discovered certain defects in the construction of the Condominium Building, and various disputes arose (collectively, the Dispute) between the Board and the Sponsor with respect to the physical condition of the Condominium Building and its construction. As a result, the New York State Attorney General's Office commenced an investigation in connection with the Dispute. After intensive negotiations, the Sponsor and the Board, as agent for the unit owners, entered into a Settlement Agreement dated December 15, 2005 (the Settlement Agreement), which was executed by Lavrinoff on behalf of the Sponsor and by the Board, as agent for the unit owners.

The Settlement Agreement recited that the Board and the Sponsor had selected Rand Engineering & Architecture (Rand) as an independent engineer to inspect the Condominium Building and determine what repairs were necessary and that Rand had issued its findings and determinations in a written report (the Rand Report). It further recited that the Sponsor entered into a construction contract with Superior Construction Corp., as the contractor, which was consented to by the Board, and that based upon this Settlement Agreement, the New York State Attorney General and the Sponsor were [*6]prepared to enter into a Stipulation of Discontinuance relating to the Dispute. It set forth that the parties agreed that Peter Varsalona of Rand would adjudicate disputes between them arising out of the work, would direct the contractor to perform its

obligations in connection with the work, and would certify progress of billed work and the corresponding release of escrow funds to the contractor.

Paragraph 9 of the Settlement Agreement, entitled "Releases," provided that the parties would exchange releases of all claims relating to the work and/or the Dispute and all matters covered by the Rand Report. It further provided, in pertinent part, as follows:

> "The release by the Board . . . as agent for the Unit Owners in favor of Sponsor, shall release Sponsor from all claims relating to the Work and/or the Dispute and all matters covered by the Rand Report, but shall exclude [*inter alia*] (e) any and all obligations of Sponsor with respect to Sponsor's continuing obligation to file and process the application for J-51 benefits for the condominium units in the Building . . . The release by Sponsor in favor of the Board . . . as agent for the Unit Owners, shall cover all claims relating to the Work and/or the Dispute and all matters covered by the Rand Report . . . Nothing contained herein shall abrogate any rights in favor of the Board under the Plan or at law."

Although a violation was issued by the New York City Department of Buildings (DOB) regarding the Condominium Building's elevator on May 16, 2006, according to the DOB's website, this violation was dismissed on March 24, 2006, and there were no other violations on record. After March 24, 2006, when the last DOB violation on the Condominium was removed, the Sponsor still had more than a year to complete its J-51 application. It is undisputed that the Sponsor failed to provide HPD with the additional J-51 application documentation specified in the four notices. As a result, by letter dated August 7, 2007, HPD informed the Sponsor that its application for J-51 tax benefits for the Condominium Building was deemed withdrawn because it was not completed within two years of its initial filing on June 15, 2005. Plaintiff alleges this letter enclosed "[a]n annotated copy of the reminder sent to [the Sponsor via NYAS] prior to the deadline . . . which identifie[d] the item[s] missing or incomplete at expiration" (Complaint ¶ 63).

The Board asserts that after the application was deemed withdrawn, NYAS's principal, Chernoff, e-mailed a member of the Board, admitting that HPD had notified the Sponsor that the J-51 application for the Condominium had been withdrawn, but stating that "[i]t was [NYAS's] understanding that the Application was complete and satisfactory and [that it was] unclear why same was withdrawn." According to the Board, the Sponsor failed to comply with the requirement in the Offering Plan to make available to it all records relating to the J-51 application. [*7]

In November 2011, the Board, on behalf of the Condominium and its unit owners, filed this action against the Sponsor and its principals, Lavrinoff and Bernell, alleging five causes of action: a

first cause of action for Breach of Contract, a second cause of action for Fraud, a third cause of action for Constructive Fraudulent Conveyances While Insolvent, a fourth cause of action for Constructive Fraudulent Conveyances Causing Unreasonably Small Capital, and a fifth cause of action for Intentional Fraudulent Conveyances. On September 12, 2013, defendants filed this motion to dismiss each of these five causes of action.

DISCUSSION

The Board's first cause of action for Breach of Contract alleges that the Offering Plan constituted a contract between the Sponsor and the Condominium's unit owners who purchased units of the Condominium from the Sponsor, and that the Offering Plan was also incorporated by reference into the purchase agreements between the Sponsor and each of the purchasers of Condominium units. It further alleges that pursuant to the Offering Plan, the Sponsor was obligated to timely comply with all J-51 procedures and to use its best efforts to obtain J-51 tax benefits for the Condominium Building, and that these "best efforts," included, at a minimum, completing the J-51 application within the time allowed by HPD regulations, i.e., within two years from the Sponsor's initial filing of the J-51 application (by June 15, 2007), and taking all possible steps to reinstate the J-51 application following HPD's August 7, 2007 letter which notified the Sponsor that the application had been "deemed withdrawn" for failure to timely complete the application. It further also alleged that pursuant to the Offering Plan, the Sponsor was obligated to maintain and make available to it all records relating to the J-51 application.

The Board's first cause of action asserts that the Sponsor breached its obligations to timely comply with all J-51 application procedures and to use its "best efforts" to obtain J-51 tax benefits for the Condominium Building by, among other things, failing to complete its J-51 application filing by June 15, 2005, failing to seek reinstatement of its J-51application after HPD's August 7, 2007 notification that the application had been "deemed withdrawn" because of the Sponsor's failure to timely complete the application, and failing to maintain and make available to it all records relating to the J-51 application. It further asserts that as a proximate result of the Sponsor's breaches, the Condominium's unit owners did not obtain J-51 tax benefits. It also alleges that Lavrinoff is personally liable for the Sponsor's contractual obligations since he signed the Sponsor's Certification in the Offering Plan, which was incorporated by reference into the purchase agreements between the Sponsor and each of the purchasers of the Condominium units, in his individual capacity, in addition to signing it as the president of the Sponsor.

Defendants, in seeking dismissal of the Board's first cause of action for Breach of Contract, point to the fact that the contractual provision in the Offering Plan upon which it is predicated requires that the Sponsor use its "best efforts" to obtain the J-51 benefits. They rely upon *Strauss Paper Co. v RSA Exec. Search* (260 AD2d 570, 571 [2d Dept [*8]1999]), in which the Appellate Division, Second Department, held that where "a clause in an agreement expressly provides that a party must use its best efforts', it is essential that the agreement also contain clear guidelines against which to measure such efforts in order for such clause to be enforced." Defendants argue that the Offering Plan does not contain any such guidelines against which to measure whether it used "best efforts" to obtain the J-51 tax benefits, and that this clause is, therefore, unenforceable.

Defendants' argument, however, must be rejected. Initially, it is noted that, as recently observed in *Cruz v FXDirectDealer, LLC* (720 F3d 115, 124 [2d Cir 2013]), the New York Court of Appeals has not endorsed the requirement that the contract must contain "clear guidelines" before a "best efforts" clause can be enforced (*see Van Valkenburgh, Nooger & Neville v Hayden Publ. Co.*, 30 NY2d 34, 46-47 [1972], *rearg denied* 30 NY2d 880 [1972], *cert denied* 409 US 875 [1972]). Rather, "[n]umerous courts, including the New York Court of Appeals and the Second Department, have applied an express best efforts' provision without articulated objective criteria" (*Ashokan Water Servs., Inc. v New Start, LLC*, 11 Misc 3d 686, 689 [Civil Ct, Kings County 2006], citing, *inter alia*, *Van Valkenburgh, Nooger & Neville*, 30 NY2d at 43-46; *Wood v Duff-Gordon*, 222 NY 88, 90-92 [1917], *rearg denied* 222 NY 643 [1918]; *Allen v Williamsburgh Sav. Bank*, 69 NY 314, 321-322 [1877]; *Town of Roxbury v Rodrigues*, 277 AD2d 866, 867 [3d Dept 2000], *lv denied* 96 NY2d 708 [2001]; *Foster Wheeler Broome County v County of Broome*, 275 AD2d 592, 593-594 [3d Dept 2000], *lv denied* 95 NY2d 769 [2000]; *Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 191 [1st Dept 1996]; *Pfizer Inc. v PCS Health Sys.*, 234 AD2d 18, 18-19 [1st Dept 1996]; *Kroboth v Brent*, 215 AD2d 813, 814 [3d Dept 1995]; *Foster v Citrus County Land Bur.*, 133 AD2d 665, 666 [2d Dept 1987]; *Forward Indus. v Rolm of NY Corp.*, 123 AD2d 374, 375 [2d Dept 1986]; *Scientific Mgt. Inst. v Mirrer*, 27 AD2d 845, 845-846 [2d Dept 1967]). Noting that the cited cases appeared to conflict with the holding in *Strauss Paper Co.* (260 AD2d at 571) and other cases regarding the requirement for "clear guidelines," Judge Battaglia observed that "the cases can be reconciled by recognizing that there is no a priori rule precluding enforcement of a best efforts' obligation even in the absence of articulated criteria, and that the obligation will be enforced where sufficient content may otherwise be read into it against which the promisor's performance may be measured" *(Ashokan Water Servs., Inc.,*11 Misc 3d at 690; accord *Maestro W. Chelsea SPE LLC v Pradera Realty Inc.*, 38 Misc 3d 522, 529 [Sup Ct, NY County 2012] (finding a "best efforts" clause enforceable when "external standards or circumstances impart

a reasonable degree of certainty to the meaning of the phrase best efforts")). This court concurs that "[t]he law . . . does not require that best efforts' criteria be defined by the contract . . . If external standards or circumstances impart a reasonable degree of certainty to the meaning of the phrase best efforts,' the clause can be enforced" (*id.*; *see also McDarren v Marvel Entertainment Group, Intl.*, 1995 WL 214482, *4, 1995 US Dist LEXIS 4649, *12-13 [SD NY, Apr. 7, 1995, No. 94-CV-0910 (LMM)], *rearg denied* [*9]1995 WL 331766 [SD NY Jun. 5, 1995, No. 94-CV-0910 (LMM)], citing *Proteus Books Ltd. v Cherry Lane Music Co., Inc.*, 873 F2d 502, 508 [2d Cir 1989]).

While defendants rely upon language in the recent case of *DirecTV Latin Am., LLC v RCTV Intl. Corp.*, 38 Misc 3d 1212[A] [Sup Ct, NY County 2013], *affd* 115 AD3d 539 [1st Dept 2014]) that "for a promise to exert best efforts to be enforceable, there must be clear guidelines against which such efforts can be evaluated", such reliance is misplaced as the issue there was not best efforts, *per se*, but whether an enforceable agreement had been reached. Indeed, in affirming the dismissal of counterclaims in that case, the Appellate Division, First Department, found that the memorandum at issue lacked the definiteness as to material terms required in order to be a legally enforceable contract.

"[U]nder New York law, a best efforts' clause imposes an obligation to act with good faith in light of one's own capabilities," and apply "such efforts as are reasonable in the light of that party's ability and the means at its disposal and of the other party's justifiable expectations" (*Ashokan Water Servs., Inc.*, 11 Misc 3d at 692 [internal quotation marks omitted]). " Best efforts' can only be defined contextually" (*id*; *see also Bloor v Falstaff Brewing Corp.*, 601 F2d 609, 613 n 7 [2d Cir 1979]; *McDonald's Corp. v Hinksman*, 1999 WL 441468, *12 [US Dist Ct, ED NY May 28, 1999, No. 92-CV-3187 (DGT)]). Thus, the court finds that "a best efforts provision may be enforced even in the absence of contractually articulated criteria" (*Glanzer & Co., LLC*, 2013 NY Slip Op 32713[U]; *see also US Airways Group, Inc. v British Airways PLC*, 989 F Supp 482, 491 [SD NY 1997]) where the contractual language and the circumstances permit an inference as to the applicable criteria for performance.

Here, the Offering Plan, in fact, contains clear guidelines since it expressly requires the Sponsor to "file all applications and timely comply with all procedures required to properly process and maintain the tax benefits." This is the guideline which determines whether the Sponsor had used its "best efforts" since all the Sponsor had to do was file the application and timely comply with all procedures to obtain the J-51 tax benefits. It is this very obligation to file the application and comply with these procedures which the Board contends that the Sponsor breached.

Furthermore, the procedures required to properly process the J-51 application and obtain the J-51 benefits are set forth in HPD's regulations (28 RCNY, Chapter 5) and in a J-51 Guidebook published by HPD, thereby providing external standards which impart a reasonable degree of certainty to the meaning of the phrase "best efforts." Thus, sufficient content may be read into the "best efforts" clause in the Offering Plan from the HPD regulations, against which the Sponsor's performance may be measured. While the Sponsor did not guarantee, and made no representation, that its application would be granted by HPD, the Offering Plan obligated the Sponsor to, at least, attempt in good faith to complete the application and comply with the procedures required by HPD to process the application, and the Sponsor does not dispute that the undertaking of such efforts were [*10]within its ability.

Defendants further argue, however, that even if there was no absence of guidelines, the Board has also not adequately alleged a breach of the "best efforts" provision. They assert that since the Sponsor hired NYAS, as a reputable agent, to file and manage the J-51 application and NYAS timely filed the application and the application was assigned a docket number, their obligation to use their "best efforts" to obtain the J-51 tax benefits was fully satisfied.

This argument is unavailing. While the Sponsor filed the initial application on time, filing such an initial, but incomplete, application, and obtaining a docket number does not constitute "all procedures required to properly process" the application for J-51 benefits. As discussed above, the Board alleges that in four notices, HPD informed the Sponsor that its filing was incomplete and eventually deemed the application withdrawn for failure to complete the filing process.

Although the Sponsor argues that it fulfilled its obligations by hiring NYAS, the Sponsor promised to use its own best efforts, and not to simply delegate its contractual obligation to NYAS and then ignore its own obligation. "A duty is not delegable . . . if the . . . the obligor has promised to act in good faith or use [its] best efforts" (*In re Town, LLC*, 2009 WL 2883047, *5 [Bankr SD NY Jul. 27, 2009, No. 09-11827 (SMB)]; *In re Schick*, 235 BR 318, 323 [Bankr SD NY 1999]). The mere act of hiring NYAS cannot be held to satisfy the Sponsor's obligation under the Offering Plan.

Thus, the court finds that the Board has sufficiently alleged a breach of the Sponsor's contractual obligation to use its "best efforts" to obtain the J-51 benefits by timely filing all applications and completing all procedures required by HPD. Dismissal of its first cause of action must, therefore, be denied.

The Board's second cause of action for Fraud points to its alleged discovery of substantial and serious defects in the construction of the Condominium Building which led to its entry of the Settlement Agreement with the Sponsor on December 15, 2005. The Board refers to its express exemption from its release of claims against the Sponsor and its principals under the Settlement Agreement of "any and all obligations of Sponsor with respect to Sponsor's continuing obligation to file and process the application for J-1 benefits for the condominium units in the Building." It alleges that by this inclusion in the exemption from the release of claims against the Sponsor and its principals, the Sponsor acknowledged that it had this continuing obligation and represented that it intended to pursue, implement, and honor its obligation to use its "best efforts" to obtain J-51 benefits for unit owners of the Condominium, including filing and processing the J-51 application and timely complying with all J-51 application procedures.

The Board asserts that these representations by the Sponsor were false because, at the time that they were made, the Sponsor did not intend to use its "best efforts" to obtain J-51 benefits, but, instead, "intended only to pursue and/or continue half-hearted and ineffectual steps, amounting to a Potemkin-like charade, to obtain J-51 benefits." It [*11]alleges that the Sponsor had hired NYAS merely to "make a show of pursuing J-51 benefits, and then proceeded to sit idly by while permitting NYAS to mishandle and/or abandon the J-51 application."

The Board alleges that "but for" the Sponsor's representations that it would use its "best efforts" to obtain J-51 benefits for the Condominium's unit owners, it would not have released its valuable claims against the Sponsor arising out of the alleged myriad construction defects at the Condominium Building, and that such representations constituted fraud. It claims that Lavrinoff is also liable to it for fraud due to his execution of the Settlement Agreement on behalf of the Sponsor. It asserts that by reason of this alleged fraud, it was wrongfully induced to give up valuable rights against defendants and was thereby damaged in an amount of not less than $1,750,000, and that it is also entitled to punitive damages against defendants of no less than $1,500,000.

As discussed above, the Settlement Agreement resolved certain construction disputes which were unrelated to the J-51 application. It did not contain any new representations with respect to the J-51 application, but only referred to the "continuing obligation" of the Sponsor with respect to such application, which, at that time, had not yet been deemed withdrawn. Indeed, the Settlement Agreement only mentioned the continuing obligation of the Sponsor to file and process the application for J-51 benefits for the units in the Condominium Building in the context of carving

out and excluding it, along with other specified claims, such as claims for breach of warranty, from the release of claims against the Sponsor being given by the Board in consideration for the Sponsor's agreement to address and remedy the alleged construction defects. Since this obligation was carved out from the release of claims, it could not have been relied upon as consideration for entering into the Settlement Agreement.

While the Board claims that it would not have released its claims against defendants arising out of the alleged construction defects if it had known that defendants were not intending to use their best efforts to obtain the J-51 benefits, the Board obtained the relief it was seeking related to the alleged construction defects and did not give up any of its rights as they related to the J-51 application. Thus, since the Board did not relinquish any rights with respect to the J-51 application, any claim related to the J-51 could not have been relied upon by it when entering into the Settlement Agreement and it could not have sustained any damages arising from any claimed fraud.

" The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages'" (*Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 710 [2d Dept 2011], quoting *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2d Dept 2010]). Pursuant to CPLR 3016 (b), "the circumstances constituting the wrong [must] be stated in detail."

"A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to [*12]honor or act on [its] statement" (*Lanzi v Brooks*, 54 AD2d 1057 1058 [3d Dept 1976], *affd* 43 NY2d 778 [1977]; *Karsanow v Kuehlewein*, 232 AD2d 458 [2d Dept 1996]). "[A]ny inference drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions" (*Lanzi*, 54 AD2d at 1058).

Since the Sponsor hired NYAS and NYAS filed the application on its behalf, there is no factual support for plaintiff's claim that, at the time the Sponsor made its original promissory representation that it would apply for J-51 benefits, it never intended to honor or act on such representation. Furthermore, since the statement in the Settlement Agreement merely acknowledged an existing obligation to file the J-51 application, and the Board has failed to allege facts to demonstrate that, at the time the representation was made, the Sponsor did not intend to honor or act on such obligation, it cannot state a cause of action for fraud (*see Chase Invs. v Kent*, 256 AD2d 298, 299 [2d Dept 1998]; *Karsanow*, 232 AD2d at 458). In any event, as alleged, the fraud claim is

duplicative of the breach of contract cause of action (*see Fromowitz v W. Park Assoc.*, 106 AD3d 950, 951 [2d Dept 2013]). Thus, dismissal of the Board's second cause of action is warranted (*see* CPLR 3211 [a] [7]).

The Board's third cause of action for Constructive Fraudulent Conveyances While Insolvent pursuant to Debtor and Creditor Law §§ 273 and 278, alleges that the Condominium and the unit owners are creditors of the Sponsor based upon the Sponsor's liability to them. It further alleges that the Sponsor is a single-purpose entity formed and existing solely in order to serve as the sponsor/developer of the Condominium, that the Sponsor has no business other than having sponsored, developed and sold the units of the Condominium, and that the Sponsor does not have and has never had any material assets other than the units of the Condominium that it sold pursuant to the Offering Plan and the proceeds of the sales of such units. It asserts that the Sponsor sold its first unit of the Condominium in or about February 2003 and all residential apartment units of the Condominium have now been sold. The complaint alleges that at the time that the Sponsor began closing on its sales of units of the Condominium, it was indebted to an institutional lender (the Lender) and was obligated under its loan agreements with the Lender to pay substantially all of the sales proceeds to the Lender, but that, at some point between February 2003 and the present time, the Sponsor closed on the sales of a sufficient number of units so as to repay the Lender in full, and that after it did so, it completed additional closings on the sales of units of the Condominium, but retained little, if any, of the sale proceeds from the sale of these units, and, instead, distributed these proceeds pro rata to Lavrinoff and Bernell in accordance with their equity interests in the Sponsor and/or the Condominium (the Equity Distributions), rendering Sponsor insolvent. Alleging that these Equity Distributions were transfers of the property of the Sponsor, made without fair consideration and rendering the Sponsor insolvent, the Board contends such Equity Distributions should be set aside, pursuant to Debtor and Creditor [*13]Law § 273 and § 278, and the funds be made available to the Board.

The Board's fourth cause of action for Constructive Fraudulent Conveyances Causing Unreasonably Small Capital likewise seeks to set aside the Equity Distributions and/or to recover from Lavrinoff and Bernell the amount of the Equity Distributions received by each of them, together with interest thereon, pursuant to Debtor and Creditor Law § 274 and § 278, alleging that the Sponsor made some or all of the Equity Distributions without fair consideration while it was engaged in or was about to be engaged in a business or transaction for which the property remaining in its hands after such distributions would leave it with an unreasonably small amount of capital.

The Board's fifth cause of action for Intentional Fraudulent Conveyances seeks to set aside and recover the Equity Distributions, pursuant to Debtor and Creditor Law § 276 and § 278, and demands punitive damages of no less than $1,500,000 against defendants. It alleges that the Sponsor made some or all of the Equity Distributions with actual intent to hinder, delay and defraud its creditors.

Debtor and Creditor Law § 273 provides:

> "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to [its] actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

Debtor and Creditor Law § 274 provides:

> "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in [its] hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to [its] actual intent."

Debtor and Creditor Law § 276 provides:

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Notably, Debtor and Creditor Law § 276 "addresses actual fraud, as opposed to constructive fraud, and [unlike Debtor and Creditor Law § 273 and § 274] does not require proof of unfair consideration or insolvency" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]; *see also Atsco Ltd. v Swanson*, 29 AD3d 465, 465 [1st [*14]Dept 2006]). Pursuant to Debtor and Creditor Law § 278, "[w]here a conveyance or obligation is fraudulent as to a creditor," such a creditor, may "[h]ave the conveyance set aside or obligation annulled to the extent necessary to satisfy [its] claim."

Defendants argue that these three causes of action alleging fraudulent conveyances are time-barred by the applicable Statute of Limitations. As to the third and fourth causes of action, such claims for constructive fraudulent conveyances are generally governed by the six-year Statute of Limitations period set out in CPLR 213 (1), which accrues at the time the fraud or conveyance occurs (*see Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 2013]; *Wall St. Assoc.*,

257 AD2d at 530), and, as to the fifth cause of action, such a claim for an actual fraudulent conveyance under Debtor and Creditor Law § 276 generally must be commenced within six years from the date of the alleged fraud, or within two years after the plaintiff discovered the fraud, or could with reasonable diligence have discovered it, whichever is longer (*see* CPLR 203 [g]; 213 [8]*; Miller v Polow*, 14 AD3d 368, 368-369 [1st Dept 2005]). This action was commenced by filing of a summons with notice on November 28, 2011. Therefore, applying the six year statute of limitations, the alleged fraud would have had to occur no earlier than November 28, 2005.

Lavrinoff has submitted his affirmation, wherein he attests that the last transfer from the Sponsor to him and Bernell, as its principals, in the amount of $635,000, occurred on February 15, 2005. He has annexed a bank statement, dated March 8, 2005, from the Sponsor's Citibank checking account, which shows a check drawn in this amount on that date. Lavrinoff further attests that all other debits from the Sponsor's bank account after that date were for transactions necessary to wind up the company, and that no distributions to members/principals from the Sponsor were made after February 2005. Defendants contend that the Statute of Limitations, therefore, expired before the Board filed the summons with notice in this action in November 2011, rendering the Board's fraudulent conveyance claims untimely.

The Board, in opposition, argues that discovery is necessary to determine if, in fact, the final transfer was in February 2005 as asserted by defendants. However, the Board acknowledged, in its complaint, that by February 4, 2005, all of the Condominium's units were sold, and the bank account statement annexed by Lavrinoff demonstrates that most of the remaining money in the Citibank checking account was transferred by the Sponsor to the principals at that time. The Settlement Agreement dated December 15, 2005, executed by plaintiff, acknowledges that "Sponsor deposited $300,000, *the net proceeds of sale of the last unit held by Sponsor*. . . in escrow" to cover the required repairs (emphasis added). This acknowledgment suggests plaintiff does not dispute that the Equity Distributions occurred before December 15, 2005, but would require that plaintiff be permitted to have discovery regarding any distributions made between November 28, 2005 and December 15, 2005, and the nature of payments made [*15]from Sponsor's funds after November 28, 2005.[FN1]

However, since the Board's claims involve a distribution from a limited liability company to its members, the three-year Statute of Limitations pursuant to Limited Liability Company Law § 508 (c) must be applied as to the fraudulent conveyance claims against Lavrinoff and Bernell. Section 508 (c) of the Limited Liability Company Law provides: "a member who receives a wrongful

distribution from a limited liability company . . . ha[s] no liability under th[at] article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution", and thus insulates the members of a limited liability company from liability under Limited Liability Company Law § 508 (a), even where the LLC is thereby left without sufficient funds to cover its liability to creditors. It has been held that "it was the intent of the New York Legislature that claims under the DCL and contractual claims for the recovery of distributions be preserved, but only as limited by § 508 (c)" (*In re Die Fliedermaus LLC*, 323 BR 101, 108 [Bankruptcy Ct SDNY 2005]). The three year Statute of Limitations contained in § 508 (c) applies both to claims by the limited liability company against its members and by third party creditors (*Id*. at 109; 1 Karon S. Walker, *NY Practice Series-Limited Liab. Co. & Partnerships: A Guide to Law and Practice* § 7:11; *see also Pepsi-Cola Bottling Co. v Hardy*, 2000 Del. Ch. Lexis 52 at *16 [2000] (applying an analogous provision in Delaware law)).

Pursuant to Limited Liability Company Law § 508 (c), in order for the Board's fraudulent conveyance claims to be timely against the member defendants, it would be necessary for the final conveyance to have occurred after November 28, 2008, over three years after the date of the final condominium unit sale by the Sponsor, as acknowledged by plaintiff. Lavrinoff, in a reply affirmation, annexes further bank statements from the Sponsor's Citibank checking account (which, he attests, was the only bank account utilized by the Sponsor) for the period November 11, 2008 through December 8, 2011, which show that the balance in the account on November 11, 2008 was $4,362.42 and never surpassed that amount, and that none of the debits in any of the bank statements for this time period were transfers to him or Bernell. Thus, the Board's fraudulent conveyance claims against the members are time-barred by the applicable Statute of Limitations and must be dismissed as to Lavrinoff and Bernell (*see* CPLR 3211 [a] [5]).

Moreover, with respect to the Board's third cause of action, even if such claim [*16]were not barred by the Statute of Limitations, in order to have standing to allege a fraudulent transfer under Debtor and Creditor Law § 273, a plaintiff must demonstrate that it was a "creditor" at the time of the conveyance (*see Shelly v Doe,* 249 AD2d 756 [3d Dept 1998]; *United National Funding v Volkmann*, 25 Misc 3d 1233[A] [NY County 2009] ("§ 273 requires that a claim be in existence at the time of the alleged fraudulent conveyance")). Since any action for breach of defendants' contractual obligations to plaintiff could not have accrued earlier than June 15, 2007, when the Sponsor defaulted in filing a complete and timely application, the Board could not have been a creditor of the Sponsor at the time of the final conveyance of funds prior to December 15, 2005. Thus, plaintiff's third cause of action must be dismissed in its entirety as to all defendants.

Conversely, Debtor and Creditor Law § 276 is applicable to both present and future creditors (*see Planned Consumer Marketing, Inc., v Coats & Clark*, 71 NY2d 442, 450 [1988]). However, the Board's fifth cause of action pursuant to Debtor and Creditor Law § 276 "requires proof that the transferor actually intended to hinder, delay, or defraud' any present or future creditors" (*Zanani v Meisels*, 78 AD3d 823, 825 [2d Dept 2010], quoting Debtor and Creditor Law § 276). Since "[d]irect evidence of [actual] fraudulent intent is often elusive . . . courts will consider badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004], *lv denied* 3 NY3d 612 [2004] [internal quotation marks omitted]; *see also Matter of Shelly v Doe*, 249 AD2d 756, 758 [3d Dept 1998]). "Badges of fraud" from which fraudulent intent may be inferred include: (1) a close relationship between the parties to the transaction, (2) secrecy and haste in making the transfer, (3) the inadequacy of consideration, (4) the transferor's knowledge of the creditor's claim, or a claim so likely to arise as to be certain, and the transferor's inability to pay it, and (5) the retention of control of property by the transferor after the conveyance (*see Dempster*, 4 AD3d at 498; *Board of Mgrs. of 14 Hope St. Condominium v Hope St. Partners, LLC*, 40 Misc 3d 1215[A], 2013 NY Slip Op 51201[U], *7 [Sup Ct, Kings County 2013] [internal quotation marks and citations omitted]).

Here, the Board's fifth cause of action fails to allege with the requisite specificity a cause of action upon which relief can be granted sounding in actual fraud. The complaint simply parrots and tracks the statutory language of Debtor and Creditor Law § 276, without referencing any of the aforementioned "badges of fraud." No evidence of fraudulent intent is identified (*see* CPLR 3016 [b]). Thus, the Board's fifth cause of action is insufficiently pleaded and fails to state a cause of action (*see* CPLR 3211 [a] [7]).

CONCLUSION

Accordingly, defendants' motion to dismiss the Board's complaint is denied as to its first cause of action and to its fourth cause of action pursuant to DLC § 274 only as to the Sponsor defendant, and is granted as to its second, third, fourth only as to defendants Lavrinoff and Bernell, and fifth causes of action. [*17]

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: Since the target of the fraudulent conveyance claims is the Equity Distributions to the Sponsor's members, which may not be recovered by either the Sponsor LLC or third party creditors more than three years after such distribution, it may be of no practical consequence to permit discovery regarding these causes of action against the Sponsor alone. However, upon this CPLR 3211 motion, and given the express language of Limited Liability Company Law § 508, it would be premature to dismiss all of these causes of action at this point.

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