SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

----------X

DAVID KIM,

Plaintiff,

- v -

HFZ 11 BEACH STREET LLC, H F Z CAPITAL GROUP, LLC, ZIEL FELDMAN, ADAM FELDMAN, NIR MEIR, 11 BEACH STREET RC LLC, UNIT 3B 11 BEACH LLC, and HOLLAND & KNIGHT, LLP

Defendants.

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INDEX NO. 657153/2020

MOTION DATE 07/15/2021, 07/15/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 62, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 121, 123, 124, 125, 126, 127, 153

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 128, 129, 130, 131, 132, 133, 134, 145, 146, 147, 148, 152, 154

were read on this motion to/for DISMISSAL.

The motions are decided in accordance with the attached Decision and Order.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

10/11/2021
DATE

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
SEQ 002		**GRANTED**		**DENIED**	X	**GRANTED IN PART**	**OTHER**
SEQ 003		**GRANTED**		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

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I. INTRODUCTION

In this action seeking equitable relief and money damages under theories of, *inter alia*, breach of contract, constructive trust, voidable transfer, tortious interference with a contract, and aiding and abetting fraud, the defendants 11 Beach Street RC, LLC, and Unit 3B 11 Beach, LLC, move pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7) to dismiss the amended complaint as against them and for an award of attorneys' fees and costs (SEQ 002). The defendant Holland & Knight, LLP, separately moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the amended complaint as against it (SEQ 003). The plaintiff opposes the motions. The motions are granted in part.

II. BACKGROUND

The following allegations are drawn from the plaintiff's amended complaint, unless otherwise noted, and are assumed to be true solely for purposes of this motion. See Grassi & Co. v Honka, 180 AD3d 564 (1st Dept. 2020).

A. The Parties

Defendant H F Z Capital Group, LLC ("HFZ Capital") is a New York real estate development and investment company whose principals include defendants Ziel Feldman ("Ziel"), Adam Feldman ("Adam"), and Nir Meir ("Meir").

Defendant HFZ 11 Beach Street, LLC (the "Sponsor," and together with HFZ Capital, Ziel, Adam, and Meir, the "HFZ Defendants") is a Delaware company whose sole member is 11 Beach Investor, LLC. 11 Beach Investor, LLC, has two members. The first member is nonparty 11 Beach Street (HFZ), LLC, which owns 50.8% of the company. 11 Beach Street (HFZ), LLC, is controlled by Ziel and Adam. Ziel and Meir are managing members of the Sponsor, and Adam is a principal or control person of the Sponsor. The second member of 11 Beach Investor, LLC, is nonparty Joy Construction, LLC ("Joy Construction"), which owns 49.2% of the company.

Defendant 11 Beach Street RC, LLC ("Joy"), is a New York affiliate company of Joy Construction and a purported "indirect principal" of the Sponsor. Defendant Unit 3B 11 Beach, LLC ("Beach," and together with Joy, the "Joy Defendants"), is a New York affiliate company of Joy Construction.

Defendant Holland & Knight, LLP ("Holland & Knight"), is a New York law firm that represented the Sponsor in a transaction between the Sponsor and the plaintiff.

The plaintiff is a resident of Connecticut who loaned money to the HFZ Defendants between 2012 and 2015.

B. The Plaintiff's Investments and Purchase Agreement for Unit 3B

In or about 2012, the HFZ Defendants marketed investments to the public that could be converted to condominium purchases in one of HFZ's ongoing projects. In response to the HFZ Defendants' investment solicitation, beginning in 2012, the plaintiff loaned over $2.7 million to HFZ Capital.

In or about January 2016, HFZ Capital and the plaintiff entered into an agreement consolidating HFZ's total indebtedness to the plaintiff in the sum of $2,738,760 (the "January 2016 Agreement"). The January 2016 Agreement provided that HFZ Capital would cause the Sponsor to enter into a contract with the plaintiff for the purchase of Unit 3B ("Unit 3B") in one of HFZ Capital's projects, a building being redeveloped and converted from a commercial to a residential structure at 11 Beach Street in New York City (the "Condominium"). The January 2016 Agreement further provided that at closing, HFZ Capital would cause the Sponsor to credit the plaintiff with all amounts he had loaned to HFZ Capital towards the purchase price, and that the balance the plaintiff would have to pay to close would be $644,690. The January 2016 Agreement was followed by a side letter agreement (the "September 2016 Side Letter"), which confirmed that HFZ Capital or an affiliate thereof would cause the first and second payment installments towards the plaintiff's purchase of Unit 3B, as described below, to be tendered to the Sponsor and credited to the plaintiff, along with the balance that remained owing on the plaintiff's loans, at closing in reduction of the purchase price. The September 2016 Side Letter further stated that HFZ Capital would cause the Sponsor to deliver to the plaintiff written confirmation of the Sponsor's receipt of the first and second installments promptly upon receipt.

Pursuant to the September 2016 Side Letter, the Sponsor, as Seller, and the plaintiff, as Purchaser, entered into a purchase agreement for Unit 3B on September 19, 2016 (the "Purchase Agreement," and together with the January 2016 Agreement and the September 2016 Side Letter, the "Purchase Documents"). The Purchase Agreement was prepared by Holland & Knight. It initially provided that the plaintiff would have the option to purchase Unit 3B. As modified by paragraph two of the Rider to the Purchase Agreement, Article 4 of the Purchase Agreement set the purchase price for Unit 3B at $4,794,000, of which $239,700 was due upon signing and an additional $239,700 was due 150 days after execution of the Purchase Agreement (the "Downpayment"). The balance, $4,314,600, was due at closing.

Pursuant to Article 12 of the Purchase Agreement, the Downpayment was to be held in escrow by Holland & Knight, as designated escrow agent. Section 12.6 provides that "[w]ithin five business days after the fully executed [Purchase] Agreement has been tendered to [Holland & Knight] along with the [Downpayment], [Holland & Knight] shall sign the Agreement and place the [Downpayment] into the Master Escrow Account." Section 12.6 further provides that within ten business days after receipt of the first Downpayment, Holland & Knight was to notify the parties, including the plaintiff, that the funds had been deposited into escrow and provide the account number and interest rate. This obligation is reiterated in Section 12.7. The remaining provisions of Article 12 of the Purchase Agreement require Holland & Knight to, *inter alia*, hold the Downpayment in escrow pending closing, a subsequent writing signed by both the Sponsor and the plaintiff, or a final court order, and directly maintain and control the escrow account. Section 12.8 states that the "[Downpayment] … shall continue to be the [plaintiff's] money … per [General Business Law] § 352-h." Section 12.13 states, "A fiduciary relationship shall exist between [Holland & Knight] and [the plaintiff], and [Holland & Knight] acknowledges its

fiduciary and statutory obligations pursuant to [General Business Law] §§ 352(e)(2-b) and 352(h)." A Holland & Knight partner signed the Purchase Agreement on the firm's behalf, expressly agreeing that the firm accepted and agreed to the provisions of Article 12.

The Purchase Agreement provides that the Sponsor's obligation to close the sale of Unit 3B was subject to completion of all conditions of sale as set forth in the Offering Plan for the Condominium. The September 2016 Agreement also provided that the Sponsor's obligation to close would become effective 90 days after the Sponsor's indebtedness on the Condominium's building was eliminated. In this regard, a UCC-3 termination form for the bank loan was filed on or about October 29, 2020.

In September 2016, the plaintiff exercised his option to purchase Unit 3B as provided by the Purchase Agreement. Pursuant to the September 2016 Side Letter, the Downpayment totaling $479,400, was to be made to the Sponsor by HFZ Capital. Section 4.1(a) of the Purchase Agreement, as modified by the Rider, stated that "receipt of the [the first installment of the Downpayment] is hereby acknowledged." Shortly after the Purchase Agreement was signed, an attorney at Holland & Knight, orally confirmed to the plaintiff that the required Downpayment had been made. However, no notice that the funds were deposited into escrow with an escrow account number and interest rate was sent to the plaintiff in accordance with Article 12.

The plaintiff visited the Condominium from time to time as construction progressed. His name was on a list of purchasers and he was granted access to the building once construction permitted. From time to time, the plaintiff requested modifications to Unit 3B, which the Sponsor's representatives agreed to. The HFZ Defendants issued "sales tracker" reports

reflecting that Unit 3B was under contract. Holland & Knight mailed copies of amendments to the Offering Plan for the Condominium to the plaintiff.

Beginning in September 2016, the plaintiff communicated with Meir concerning when the sale of Unit 3B to the plaintiff would close. These communications became more frequent in 2018. In the first half of 2020, the plaintiff and the HFZ Defendants' project manager communicated frequently about punch-list items and unit modifications, examples of which are cited in the amended complaint. Also beginning in late 2019 or early 2020, Meir represented that work on Unit 3B was near completion and that closing was imminent. A Holland & Knight attorney likewise communicated to the plaintiff's counsel the firm's understanding that closing was imminent. An email a Holland & Knight attorney sent on September 21, 2020, for example, indicates that the "sponsor anticipates the closing to be either September 28 or 29th."

C. The Transfer of Unit 3B to Beach

By 2019, unbeknownst to the plaintiff, the HFZ Defendants were insolvent and becoming subject to dozens of litigations for financial improprieties. According to the plaintiff, during this period, the HFZ Defendants began engaging in sham sales and other fraudulent transactions to deceive creditors and hide assets. The HFZ Defendants also allegedly commingled assets and would use the assets of one HFZ entity to satisfy the obligations of other HFZ entities. According to the plaintiff, the Sponsor, like the other HFZ Defendants, remains insolvent and unable to pay its obligations as they become due.

On November 16, 2020, Meir sent an email to the plaintiff containing a draft termination agreement (the "Termination Agreement") prepared by Holland & Knight. Pursuant to the Termination Agreement, the Purchase Agreement for the plaintiff to purchase Unit 3B would have been cancelled. In response to the plaintiff's questioning why he had received the

Termination Agreement, Meir orally represented to the plaintiff that it had become necessary to transfer Unit 3B to a "nominee," which would then convey Unit 3B to the plaintiff, in order to shield Unit 3B from creditors. The plaintiff responded that this arrangement was not acceptable and that Unit 3B must be conveyed directly to him. The plaintiff did not sign the Termination Agreement.

Meir did not disclose to the plaintiff at that time that, on August 6, 2020, a litigation had been filed in which Joy, a 49.2% indirect owner of the Sponsor, contended that the HFZ Defendants had breached the Sponsor's operating agreement and sought payment for its equity (the "Joy Litigation"). In November 2020, Joy and the HFZ Defendants settled the litigation by the HFZ Defendants' agreeing to convey Unit 3B to Joy as the return of its equity. Holland & Knight prepared the settlement papers and facilitated the conveyance of Unit 3B to Joy. The Joy Litigation has been sealed by court order.

According to public records, Unit 3B was conveyed to Beach on November 20, 2020. A notice of discontinuance was filed in the Joy litigation on the same date. The Deed for the conveyance of Unit 3B was recorded with the City Register on November 25, 2020. It was signed by Ziel on behalf of the Sponsor and Eli Weiss of Joy Construction on behalf of Beach, the grantee. The plaintiff avers that the Joy Defendants would have been aware of the plaintiff's contract to purchase Unit 3B when they agreed to accept conveyance of the same based on their regular receipt of documents listing the sales status of each unit in the Condominium, among other things. The plaintiff did not learn about the conveyance of Unit 3B to Beach until December 2020.

In early December 2020, Meir continued to advise the plaintiff that Unit 3B was being held by an affiliate of the Sponsor as "nominee" and that it would be conveyed to the plaintiff.

On December 15, 2020, the plaintiff's counsel emailed a Holland & Knight attorney asking her to arrange a phone call to discuss the plaintiff's purchase contract and the recently discovered conveyance of Unit 3B to Beach. The attorney confirmed receipt but did not otherwise respond.

On December 21, 2020, the plaintiff commenced this action as against the Sponsor and Beach, stating a claim for breach of contract and seeking specific performance and preliminary and permanent injunctive relief. The plaintiff filed a notice of pendency on the same date.

The plaintiff's counsel followed up with Holland & Knight in early January 2021. On January 15, 2021, a Holland & Knight attorney responded to the plaintiff's counsel and advised, for the first time, that the HFZ Defendants did not make any of the Downpayment required pursuant to the Purchase Documents. Meanwhile, Meir continued to advise the plaintiff on four separate occasions through January 13, 2021, that the Joy Defendants were aware of the Purchase Agreement, that the Downpayment had been deposited, and that Unit 3B would be conveyed to him at closing, where the plaintiff would be required to pay only the $644,690 sum specified in the January 2016 Agreement. On January 14, 2021, Adam and another HFZ Capital employee told the plaintiff that HFZ Capital had never funded the Downpayment and that the Purchase Agreement was therefore inoperative. Adam also told the plaintiff that HFZ Capital was insolvent and had liabilities in excess of $1,000,000,000. On January 18, 2021, Meir again told the plaintiff that at all relevant times, the Purchase Documents were in full force and effect, that Holland & Knight knew that, and that Unit 3B should be conveyed to the plaintiff.

In January 2021, Beach listed Unit 3B for sale. On January 19, 2021, the plaintiff filed an amended complaint, stating sixteen claims and adding HFZ Capital, Ziel, Adam, Meir, Joy, and Holland & Knight as defendants.

III. LEGAL STANDARDS

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) (quoting Fontanetta v John Doe 1, supra).

B. CPLR 3211(a)(3)

CPLR 3211(a)(3) provides for dismissal for lack of capacity or standing. See David D. Siegel and Patrick M. Connors, N.Y. Practice § 136 at 349 (6th ed.]). A plaintiff lacks standing if he does not have a sufficiently cognizable stake in the outcome of the litigation "so as to cast[] the dispute in a form traditionally capable of judicial resolution." Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 155 (1994) (internal quotation marks omitted).

C. CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable

inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Gugqenheimer v Ginzburg, 43 NY2d 268 (1977).

IV. DISCUSSION

A. The Joy Defendants' Motion to Dismiss

The amended complaint asserts claims against the Joy Defendants sounding in (1) specific performance as against Beach (second cause of action); (2) constructive trust as against Beach (third cause of action); (3) voidable transfer as against both Joy Defendants (fourth and fifth causes of action); (4) tortious interference with the Purchase Documents as against both Joy Defendants (thirteenth cause of action); and (5) aiding and abetting fraud as against both Joy Defendants (sixteenth cause of action). The Joy Defendants move to dismiss each claim as asserted against them. For the following reasons, the third and sixteenth causes of action are dismissed as against the Joy Defendants, and the remaining causes of action survive.

i. Specific Performance

The second cause of action seeks specific performance of the Purchase Agreement and is asserted as against Beach only.

"A purchaser seeking specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform the contract," (Realty Equities, Inc. v

Walbaum, Inc., 18 AD3d 531, 532 [2nd Dept. 2005]), and that the defendant was able to convey the property, (Piga v Rubin, 300 AD2d 68 [1st Dept. 2002]). While a party seeking specific performance is typically required to further plead that there is no adequate remedy at law, "the equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique." EMF General Contracting Corp. v Bisbee, 6 AD3d 45, 52 (1st Dept. 2004).

An issue with respect to the defendant's ability to convey the subject property arises when such defendant subsequently transfers title to the property to a third party. "A *bona fide* purchaser of real property—one who purchases land 'in good faith and for a valuable consideration' (Real Property Law § 291)—takes the property free and clear of any prior conveyance, encumbrance or servitude of which the purchaser did not have actual or constructive notice at the time of the purchase." Akasa Holdings, LLC v 214 Lafayette House, LLC, 117 AD3d 103, 104 (1st Dept. 2019). Thus, where a defendant seller, after contracting with a plaintiff purchaser for a sale of real property, enters into a contract of sale with a good faith third party purchaser for value, specific performance is generally unavailable to disturb the conveyance of the property to such third party. See 2386 Creston Ave. Realty, LLC v M-P-M Management Corp., 58 AD3d 158 (1st Dept. 2008); TCJS Corp. v Koff, 74 AD3d 1188 (2nd Dept. 2010); El Bruto Realty Corp. v Fevola, 175 AD2d 857 (1991); Berger v Polizzotto, 148 AD2d 651 (2nd Dept. 1989).

However, the plaintiff purchaser may be entitled to specific performance if the third party is made a defendant in the action and is alleged to lack the status of a *bona fide* purchaser. See Irwin v Regal 22 Corp., 175 AD3d 671 (2nd Dept. 2019); Nagavi v Newcomb, 305 AD2d 904 (2nd Dept. 2003); Morrocoy Marina, Inc. v Altengarten, 120 AD2d 500 (2nd Dept. 1986); Maurer

v Albany Sand & Supply Co., 40 AD2d 883 (3rd Dept. 1972); see also 2386 Creston Ave. Realty, LLC v M-P-M Management Corp., supra (distinguishing facts from cases where specific performance was available because, among other things, defendant was not a good faith purchaser); Vesey Associates, Inc. v Levine, 31 AD2d 611 (1st Dept. 1968) (permitting addition of defendants claiming interest in property in action seeking specific performance of option to purchase the property). "[T]he status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such." 2386 Creston Ave. Realty, LLC v M-P-M Management Corp., supra at 163 (quotation marks omitted); see Akasa Holdings, LLC v 214 Lafayette House, LLC, supra; Irwin v Regal 22 Corp., supra; Morrocoy Marina, Inc. v Altengarten, supra.

Beach moves to dismiss the second cause of action as against it on the ground that there exists no contract between it and the plaintiff for conveyance of Unit 3B. However, even in the absence of contractual privity, the plaintiff may maintain a claim for specific performance against Beach because the plaintiff adequately alleges that Beach was not a good faith purchaser for value. Specifically, the plaintiff avers that Beach had actual knowledge that Unit 3B was under contract to be purchased by the plaintiff because the Joy Defendants were in regular receipt of documents listing the sales status of each unit in the Condominium. According to the amended complaint, Unit 3B was listed as "under contract" at all relevant times. More significantly, Joy Construction, Beach's parent entity, was a member of and owned 49.2% of the Sponsor, the very party with which the plaintiff directly contracted to purchase Unit 3B. This is sufficient to plausibly allege that Beach had "notice or knowledge of a prior interest or equity in" Unit 3B.

The Joy Defendants' reply papers, which, the court notes, contain certain arguments and exhibits that were not raised in their initial moving papers, do not alter the court's conclusion. The Joy Defendants contend there existed a "scheme between [the] [p]laintiff and [d]efendant [HFZ Capital] to use [Unit 3B] as security" for the loans the plaintiff made to HFZ Capital and that the plaintiff failed to perform under the Purchase Documents. This suggests that there may be an unclean hands defense available to them or questions of fact as to the plaintiff's allegations. Neither issue is before the court at this phase in the proceedings. This is particularly so on a pre-answer motion pursuant to CPLR 3211, where the court is required to give the plaintiff the benefit of every possible favorable inference.

Similarly, to the extent the Joy Defendants attempt to introduce documents from early 2020 labeling Unit 3B as "unsold," their arguments are more properly addressed to a motion pursuant to CPLR 3212. Even then, the documents presented would, at best, create a triable issue of fact and would not independently support dismissal of the second cause of action.

Finally, the Joy Defendants' assertion that the plaintiff does not plead the absence of an adequate remedy at law where, as here, the underlying contract is for the purchase of a unique parcel of real property, the customization of which the plaintiff was substantially involved in, is in contravention of established law. See, e.g., EMF General Contracting Corp. v Bisbee, supra; Alba v Kaufmann, 27 AD3d 816 (3rd Dept. 2006).

For the foregoing reasons, the second cause of action survives.

ii. Constructive Trust

The third cause of action seeks the imposition of a constructive trust with respect to Beach's possession of Unit 3B. It is asserted as against Beach only.

"[A] constructive trust may be imposed when property has been acquired in such

circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." Sharp v Kosmalski, 40 NY2d 119, 121 (1976) (internal quotation marks, brackets and citations omitted). "In general, to impose a constructive trust, four factors must be established: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." Rowe v Kingston, 94 AD3d 852, 853 (2nd Dept. 2012) (citing Sharp v Kosmalski, supra at 121); see Palazzo v Palazzo, 121 AD2d 261 (1st Dept. 1986). However, "the power of equity to employ a constructive trust to reach a just result is not strictly limited by the [foregoing] conditions." Palazzo v Palazzo, supra at 264 (citing Simonds v Simonds, 45 NY2d 233 [1978]); see Robinson v Day, 103 AD3d 584 (1st Dept. 2013); Rowe v Kingston, supra.

Here, the plaintiff has not pleaded that he had a confidential relationship of trust and confidence with Beach. Nor has the plaintiff alleged that Beach made any promise to him, or that the transfer of Unit 3B took place in reliance on such a promise to him. Rather, the amended complaint avers that it was Meir, who was not a representative of Beach, that told the plaintiff Unit 3B was being transferred to a "nominee" affiliated with the Sponsor to shield the property from creditors. Meir further promised that such nominee would transfer Unit 3B to the plaintiff. While the plaintiff alleges that Beach was aware that the Sponsor had previously contracted with the plaintiff for the sale of Unit 3B, the plaintiff provides no basis for imputing Meir's representations regarding what would be done with the property after transfer to Beach. Furthermore, while there is no rigid formula governing the availability of a constructive trust, the plaintiff presents no authority for the proposition that a constructive trust is available as against a transferee who did not have any relationship with or make any express or implied promises to the plaintiff. See Evans v Rosen, supra at 459 ("In the absence of a confidential or fiduciary relationship, plaintiffs ha[d] no cause of action for imposition of a constructive trust" against

defendants who the plaintiffs claimed purchased properties from defendant real estate broker accused of misappropriation.).

Accordingly, the third cause of action for the imposition of a constructive trust as against Beach is dismissed.

iii. Voidable Transfer

The fourth and fifth causes of action of the amended complaint seek to set aside, or recover damages for, the transfer of Unit 3B on the grounds that the transfer violated provisions of the recently amended New York Debtor and Creditor Law ("DCL"). Specifically, the fourth cause of action avers that the transfer violated DCL § 273(a)(1) ("Section 273(1)") and the fifth cause of action avers that the transfer violated DCL § 273(a)(2) ("Section 273(2)") and DCL § 274(a) and (b) ("Section 274"). Both causes of action are pleaded as against both Joy Defendants, as well as HFZ Capital and the Sponsor.

As of April 4, 2020, months before the transfer of Unit 3B, Section 273(a)(1) was amended to provide, in relevant part, that "[a] transfer or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay or defraud any creditor of the debtor. . . ." The Joy Defendants erroneously cite to a prior, outdated version of the DCL and do not address this or any arguably analogous provision in their moving papers. Instead, the Joy Defendants focus their attention on an inapplicable provision addressing conveyances made while litigation is pending against the debtor. Notwithstanding that the plaintiff pointed out their mistake in his opposition, the Joy Defendants also fail to make any argument addressed to Section 273(a)(1) in their reply. Thus, no basis is presented for dismissal of the fourth cause of action.

The version of Section 273(a)(2) effective on the date of the transfer of Unit 3B provides that

> A transfer or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> …
>
> (2) without receiving a reasonable equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Intent, within the meaning of the DCL, may be determined with consideration to enumerated factors including whether "the transfer or obligation was to an insider," "the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred," and "the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred."

Section 274(a) further provides that a transfer or obligation incurred by a debtor is voidable as to a present creditor "if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." Section 274(b) provides that a transfer or obligation incurred by a debtor is voidable as to a present creditor "if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent."

The fifth cause of action states that the Sponsor's transfer of Unit 3B is voidable because the Sponsor, alleged to be a debtor to the plaintiff, did not receive any consideration or reasonably equivalent value for such transfer and the Sponsor was insolvent at the time of the transfer. Further, the amended complaint avers that since Joy Construction was a member of the Sponsor, its subsidiary, Beach, was an insider for purposes of the transaction.

The Joy Defendants challenge the sufficiency of the plaintiff's pleading on two grounds. First, they claim that the plaintiff is required to state its claim with sufficient particularly pursuant to CPLR 3016(b). CPLR 3016(b) sets forth heightened particularity requirements for pleading causes of action based on fraud. Since Sections 273(a)(2), 274(a), and 274(b) are based on constructive fraud, however, CPLR 3016(b) is inapplicable. See Ridinger v West Chelsea Dev. Partners LLC, 150 AD3d 559 (1st Dept. 2017).

Second, the Joy Defendants attack the plaintiff's assertion that the Sponsor was insolvent at the time of the transaction. The Joy Defendants submit a document entitled "Amendment No. 24 to the Offering Plan" as purported proof that the Sponsor was, in fact, solvent, during the relevant time period. The document states that the Sponsor owned five units in the Condominium as of the date of filing. However, the document was filed by the Sponsor, does not contain any other information about the Sponsor's financial condition, and cannot be taken as "essentially undeniable," as is required where a party seeks dismissal pursuant to CPLR 3211(a)(1). See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, supra at 193. It was also filed on December 31, 2019, approximately one year prior to the transfer of Unit 3B to Beach. It cannot be said to demonstrate the solvency of the Sponsor at that future time.

Accordingly, the fifth cause of action survives.

iv. Tortious Interference

The thirteenth cause of action seeks damages for alleged tortious interference with the Purchase Documents. It is asserted as against both Joy Defendants, as well as HFZ Capital, Ziel, Adam, and Meir.

It is well settled that "[a] claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." Foster v Churchill, 87 NY2d 744, 749–50 (1996) (citation omitted); Macy's Inc. v Martha Stewart Living Omnimedia, Inc., 127 AD3d 48 (1st Dept. 2015); see also 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B., 293 AD2d 314, 315 (1st Dept. 2002); Mayo, Lynch & Assocs., Inc. v Fine, 148 AD2d 424 (2nd Dept. 1989).

The Joy Defendants aver that the amended complaint fails to state a cause of action sounding in tortious interference with the Purchase Documents because it "fails to allege that [d]efendant [Beach] intentionally procured a breach of any contract between [the] [p]laintiff and [d]efendant Sponsor" and because "even if there was a contract between [the] [p]laintiff and [d]efendant Sponsor, the [p]laintiff did not provide any deposit or downpayment…to purchase the Condominium Unit." As to the former claim, the Joy Defendants overlook the amended complaint's express allegations that Beach purchased Unit 3B notwithstanding the Joy Defendants' awareness that the Sponsor had already agreed to convey Unit 3B to the plaintiff pursuant to the Purchase Documents. The plaintiff's contention that the Joy Defendants knew about the Sponsor's obligations to the plaintiff under the Purchase Documents in November 2020 is supported by his allegations that the Joy Defendants regularly received documents listing the sales status of Unit 3B as "under contract," and, as subsidiaries of a member of the Sponsor,

knew about the contractual obligations of the Sponsor. That the Joy Defendants proceeded to negotiate a settlement with the Sponsor that included the transfer of Unit 3B to Beach, thereby defeating the plaintiff's rights under the Purchase Documents, is sufficient to plead intentional procurement of breach at this stage.

The Joy Defendants' allegation that the plaintiff had no rights under the Purchase Documents because the plaintiff did not actually provide the Downpayment highlights a factual dispute inappropriate for resolution on a pre-answer motion. The amended complaint contains ample factual allegations that the Sponsor received the Downpayment. These include the Purchase Agreement's express acknowledgement that the first installment of the Downpayment had been received, Holland & Knight's oral representations that all required payments had been made, and the contracting parties' years-long course of treating the plaintiff as the purchaser of Unit 3B and even discussing the dates for closing as late as September 2020. Moreover, to the extent the plaintiff cannot state with certainty whether the Downpayment was made, that is because such facts are within the control of HFZ Capital and the Sponsor. In that regard, the plaintiff demonstrates that further discovery is warranted before his claim can be adjudicated. See CPLR 3211(d). Dismissal is inappropriate under such circumstances. See id.

v. Aiding and Abetting Fraud

The sixteenth cause of action states a claim sounding in aiding and abetting fraud as against all defendants.

"A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance." Oster v Kirschner, 77 AD3d 51, 55 (1st Dept. 2010). "In turn, the elements of an underlying fraud are 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the

purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" William Doyle Galleries, Inc. v Stettner, 167 AD3d 501, 503 (1st Dept. 2018) (quoting Genger v Genger, 152 AD3d 444, 445 [1st Dept. 2017] [internal quotation marks omitted]). However, "[i]n the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim." Wyle Inc. v ITT Corp., 130 AD3d 438, 439 (1st Dept. 2015). "A fraud-based claim is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." MMCT, LLC v JTR Coll. Point, LLC, 122 AD3d 497, 499 (1st Dept. 2014).

The fourteenth cause of action, which is stated against the HFZ Defendants, alleges that those defendants made knowingly false representations of fact to the plaintiff with regard to the Sponsor's and their intent to perform under the Purchase Documents. Specifically, (1) those defendants repeatedly stated and confirmed to the plaintiff that the Downpayment had been funded, that the Purchase Documents were in full force and effect, and that Unit 3B was under contract for conveyance to the plaintiff; (2) during 2020, Meir, on behalf of the Sponsor, HFZ Capital, Ziel, and Adam, repeatedly told the plaintiff that the sale of Unit 3B would close shortly; (3) the Sponsor and Meir advised the plaintiff that attention was being given to requested physical modifications and "punch-list" items affecting Unit 3B; (4) in November 2020, the Sponsor and Meir advised the plaintiff that he needed to sign a Termination Agreement in order to allow Unit 3B to be sold to the plaintiff through a nominee; and (5) in late 2020, representatives of the Sponsor told the plaintiff that Unit 3B had been transferred to Beach as "nominee" and that Beach would transfer the property to the plaintiff at closing. Only on

January 14, 2021, after the Sponsor had transferred Unit 3B to Beach, was the plaintiff told that HFZ Capital did not fund the Downpayment and that the Purchase Documents executed years before were allegedly deemed inoperative.

To the extent that many of the HFZ Defendants' false statements constitute false promises to perform future acts contemplated by the Purchase Documents, they are redundant of the plaintiff's sixth and seventh causes of action sounding in breach of contract as against the Sponsor and HFZ Capital, respectively, and are not actionable as fraud. See Cronos Group Ltd. v XComplP, LLC, 156 AD3d 54, 67 (1st Dept. 2017) ("[A]n insincere promise to perform a contractual obligation is not actionable as fraud."). There are two sets of statements, however, that are not necessarily duplicative of the plaintiff's breach of contract claim. The first are Meir and the Sponsor's representations that the plaintiff needed to execute a Termination Agreement so that Unit 3B could be conveyed through a "nominee" entity to the plaintiff. These statements constitute representations collateral to the Purchase Documents. Nonetheless, the plaintiff did not execute the Termination Agreement and therefore cannot claim that he relied upon such representations to his detriment. Thus, no fraud claim arises from the HFZ Defendants' alleged false statements regarding the Termination Agreement.

The second set of representations that warrant further scrutiny are the statements of various HFZ Defendants that the Sponsor had received the necessary Downpayment. Section 4.1(a) of the Purchase Agreement, as modified by paragraph 2 of the Rider, includes a potential misrepresentation of present fact inasmuch as it states that receipt of the first installment of the Downpayment was acknowledged. The plaintiff admits he cannot be sure at this stage whether this statement or the HFZ Defendants' January 2021 statement is true. Nonetheless, to the extent that the latter is determined to be accurate, the former necessarily constitutes a false statement of

present fact collateral to the Purchase Agreement and therefore involves a separate breach of duty. See VXI Lux Holdco, S.A.R.L. v SIC Holdings, LLC, 194 AD3d 628 (1st Dept. 2021); MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287 (1st Dept. 2011); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999). The HFZ Defendants' continued representations that the Downpayment had been satisfied over the course of several years likewise would amount to misrepresentations that a condition precedent to the Sponsor's performance under the Purchase Agreement had been satisfied and would not be duplicative of the plaintiff's breach of contract claim. The court notes, again, that the plaintiff's pleading of alternative theories based on the truth or falsity of statements about the Sponsor's receipt of the Downpayment is permissible at this juncture because the facts necessary to clarify this issue are within the control of the defendants. See CPLR 3211(d).

The plaintiff has adequately alleged that he relied on Section 4.1(a), among other things, in entering into the Purchase Agreement and preparing to purchase Unit 3B. Moreover, to the extent Section 4.1(a) and the HFZ Defendants' analogous representations as to satisfaction of the Downpayment were false, he suffered injury when he spent years incurring costs related to his expected consummation of the transaction only to be advised in December 2020 that the Purchase Agreement was never in effect. Of course, the fact that the plaintiff did not directly pay money to the Sponsor might mitigate any recovery he is entitled to for the Sponsor's alleged fraud. However, based on the plaintiff's allegations that he devoted resources to monitoring and providing input into the construction of the subject property, retained counsel in connection with the Purchase Agreement and its performance, and declined to pursue other rights he may have had as a creditor of HFZ Capital, he sufficiently pleads damages at this phase.

As discussed in greater detail below, the plaintiff also states a fraud claim against Holland & Knight in the fifteenth cause of action. Specifically, the plaintiff asserts that Holland & Knight, in its capacity as attorney to the Sponsor and escrow agent under the Purchase Agreement, falsely represented to the plaintiff that the Downpayment had been received. The plaintiff pleads reasonable reliance on and damages arising from such conduct.

Having concluded that the plaintiff adequately states an underlying fraud claim, the court turns to the questions of the Joy Defendants' scienter and degree of assistance, if any, in the fraudulent conduct. At the pre-discovery stage, "actual knowledge need only be pleaded generally," as "a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind." Oster v Kirschner, supra at 55; see William Doyle Galleries, Inc. v Stettner, 167 AD3d 501 (1st Dept. 2018). The plaintiff's allegation that the Joy Defendants were "aware that a fraud was being perpetrated against Plaintiff," and the inference of actual knowledge that may be drawn from Joy's membership in the Sponsor and receipt of documents listing Unit 3B as "under contract," are sufficient in this regard.

"Substantial assistance" to fraudulent conduct is shown when a defendant "affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling [the underlying fraud] to occur." Kaufman v Cohen, 307 AD2d 113, 126 (1st Dept. 2003). The amended complaint alleges that the Joy Defendants' acquisition of Unit 3B permitted the HFZ Defendants to consummate their fraud against the plaintiff insofar as it defeated the plaintiff's right to the property under the Purchase Documents. However, as discussed, the only actionable underlying fraud arises from the Sponsor's and Holland & Knight's purported false statements that the Downpayment had been duly received. To the extent that the transfer of Unit 3B to Beach

harmed the plaintiff, such harm would have arisen from the breach of the Purchase Agreement itself, rather than the furtherance of the false representations identified above.

In other words, should the plaintiff prevail on his fraud-based theory of liability, his damages arise from the actions he took in reliance on the defendants' false assurances that a condition precedent to performance of the Purchase Agreement had been satisfied. They do not arise from the Purchase Agreement itself. The ultimate transfer of Unit 3B to Beach defeated the plaintiff's *contractual* rights, if he had any. Conversely, if the plaintiff was deceived into assuming he had contractual rights when he did not, his damages are the costs he incurred in proffering or preparing to proffer performance under the purported contract.

Thus, in isolation, the Joy Defendants' purchase of Unit 3B did not substantially assist any underlying fraud identified in the amended complaint. The sixteenth cause of action is dismissed as against the Joy Defendants.

B. Holland & Knight's Motion to Dismiss

The amended complaint asserts claims against Holland & Knight sounding in (1) breach of contract (ninth cause of action); (2) breach of fiduciary duty (tenth cause of action); (3) violation of the General Business Law (eleventh cause of action); (4) tortious interference with the Purchase Documents (twelfth cause of action); (5) fraud (fifteenth cause of action); and (6) aiding and abetting fraud (sixteenth cause of action).

i. Breach of Contract

The ninth cause of action of the amended complaint, brought against Holland & Knight only, asserts that Holland & Knight breached its duties as escrow agent under Article 12 of the Purchase Agreement. The plaintiff premises his allegation on three theories, pleaded in the

alternative of one another. First, the plaintiff posits that Holland & Knight is maintaining the Downpayment in escrow but refuses to keep the plaintiff apprised as to the status of the escrow pursuant to Section 12.5 of the Purchase Agreement. Second, the plaintiff contends that Holland & Knight converted the Downpayment or allowed it to be converted, in violation of the provisions in Article 12 governing the treatment of escrowed funds. Third, the plaintiff avers that Holland & Knight "never received the Downpayment to begin with but failed to apprise the Plaintiff of such fact." Again, the plaintiff admits that he lacks access to the records that would confirm whether a Downpayment was actually made.

Initially, Holland & Knight correctly argues that the third scenario proposed by the amended complaint does not state a claim for breach of the escrow agreement. As is the case in an ordinary breach of contract claim, in order to impose liability for breach of an escrow agreement, "[t]he plaintiff must show the escrow agent breached its duty under the escrow agreement." Takayama v Schaefer, 240 AD2d 21, 26 (2nd Dept. 1998); see Cont'l Ins. Co. v 115-123 W 29th St. Owners Corp., 275 AD2d 604, 605 (1st Dept. 2000) ("It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms"). Article 12 of the Purchase Agreement, which Holland & Knight expressly agreed to be bound by, requires Holland & Knight to, *inter alia*, provide notice to the parties within 10 business days of receipt of the Downpayment that the funds were deposited into escrow. However, the plaintiff identifies no provision affirmatively obligating Holland & Knight to notify the plaintiff in the event the Downpayment was *not* received. Thus, Holland & Knight cannot be held liable for failing to apprise the plaintiff that it did not receive a Downpayment.

As to the two remaining alternative theories posited by the plaintiff, Holland & Knight argues that they, too, must fail because it offers what it contends is "unambiguous documentary evidence" that no part of the plaintiff's Downpayment was ever paid into escrow at Holland & Knight. The evidence consists of a heavily redacted spreadsheet Holland & Knight attorney Kelly Maharaj describes in an affirmation as an "Escrow Report" applicable to the Condominium. Numerous unit numbers purportedly describing apartments in the building are listed in the Escrow Report; Unit 3B is absent. Maharaj avers that the spreadsheet shows "no sub-escrow account was ever opened for [the plaintiff's] purchase of Apartment 3B." According to Maharaj, this is because no escrow deposit was ever received by Holland & Knight in connection with the plaintiff's effort to purchase Unit 3B.

Contrary to Holland & Knight's contention, the Maharaj affirmation and Escrow Report are both improper submissions on a motion pursuant to CPLR 3211(a)(1). As the court has explained above, a document qualifies for evidentiary consideration under CPLR 3211(a)(1) only if it satisfies the following criteria: "(1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable.'" VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, supra at 193 (quoting Fontanetta v John Doe 1, supra at 86). Conversely, papers such as affidavits that "do no more than assert the inaccuracy of [a plaintiff's] allegations" may not be considered. Tsimerman v Janoff, 40 AD3d 242, 242 (1st Dept. 2007). Here, the Maharaj affirmation is plainly inadmissible. Further, the Escrow Report, which consists of a spreadsheet wholly devoid of pertinent information with respect to Unit 3B, prepared internally by Holland & Knight, and relevant only within the context of Maharaj's testimony regarding Holland & Knight's practices, is not unambiguous or of undisputed authenticity. Nor can the contents of the spreadsheet be described as essentially undeniable.

Most significantly, the Maharaj affirmation and Escrow Report do not amount to irrefutable proof that no escrow deposit was ever received by Holland & Knight. According to the amended complaint, Holland & Knight attorneys at least twice indicated that the firm had received the Downpayment prior to contending for the first time, years later, that no part of the Downpayment had been made. First, a Holland & Knight attorney signed the Purchase Agreement. Pursuant to Section 12.6, such execution of the Purchase Agreement was to be made "[w]ithin five business days after the fully executed [Purchase] Agreement has been tendered to [Holland & Knight] *along with the [Downpayment]*" (emphasis added). Section 12.6 further indicated that Holland & Knight was to place the Downpayment into a Master Escrow Account at the time of signing. Second, the plaintiff contends that Stephanie Rainaud, a Holland & Knight attorney, orally confirmed that all required payments had been made. The amended complaint also alleges that Holland & Knight attorneys, including Maharaj, continued to behave towards the plaintiff in a manner consistent with their prior representations that the Downpayment had been received and the Purchase Agreement was effective. For instance, the plaintiff quotes from a September 2020 email he received from Maharaj in which she discusses dates for closing and states that the firm is confirming the amount due from the plaintiff at closing based on the amount deposited with the Sponsor. Only in January 2021, after Holland & Knight assisted in the transfer of Unit 3B to another party, did a Holland & Knight attorney reveal that the amount deposited was purportedly zero.

Holland & Knight does not explain why it affirmatively indicated to the plaintiff that the Downpayment had been received if, as it now avers, such a statement was false. Nor are "the factual allegations [of the amended complaint] … definitively contradicted by" Maharaj's statement or the Escrow Report spreadsheet. VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC,

supra at 193; see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 (2002) (a motion pursuant to CPLR 3211(a)(1) may only be granted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"). Finally, while the plaintiff lacks direct knowledge of what was done with any escrowed funds, he has pleaded sufficient facts, viewed in the light most favorable to the plaintiff, to support an inference at the pleading stage that Holland & Knight's treatment of any such funds was in violation of Article 12.

For the foregoing reasons, the ninth cause of action survives to the extent it is based on (1) Holland & Knight's alleged maintenance of the Downpayment in escrow without apprising the plaintiff as to the status of the escrow pursuant to the Purchase Agreement or (2) Holland & Knight's alleged conversion or assistance in the conversion of the Downpayment.

ii. Breach of Fiduciary Duty

The tenth cause of action of the amended complaint, brought against Holland & Knight only, asserts that Holland & Knight breached its fiduciary duty to the plaintiff based on the same three theories set forth under the ninth cause of action.

"An escrow agent owes the parties to the transaction a fiduciary duty … and therefore the agent, as a fiduciary, has 'a strict obligation to protect the rights of [the] parties' for whom he or she acts as escrowee." Greenapple v Capital One, N.A., 92 AD3d 548, 549 (1st Dept. 2012) (internal citations omitted) (citing Grinblat v Taubenblat, 107 AD2d 735, 736 [2nd Dept. 1985]); see Bardach v Chain Bakers, 265 AD 24 (1st Dept. 1942) (escrowee owes "the highest kind of loyalty" to his fiduciary). Further, "an escrow agent has a duty not to deliver the monies in escrow except upon strict compliance with the conditions imposed by the controlling agreement." Greenapple v Capital One, N.A., supra at 549 (citation omitted). Section 12.13 of

the Purchase Agreement confirms that a "fiduciary relationship shall exist between [Holland & Knight] and [the plaintiff]."

Holland & Knight contends that it cannot be held liable for breach of fiduciary duty because the Downpayment was never delivered to it. As discussed above, however, the documents now proffered by Holland & Knight do not conclusively establish that it never received any deposit in connection with the Purchase Agreement, particularly in the face of the allegations of the amended complaint, which are assumed to be true for the purposes of this motion. Thus, the plaintiff sufficiently states a claim sounding in breach of fiduciary duty based on his allegations that Holland & Knight has improperly held the Downpayment in escrow without apprising the plaintiff and converted or assisted in the conversion of the funds maintained therein.

However, to the extent the tenth cause of action is premised on the plaintiff's assertion that Holland & Knight had an affirmative duty to advise the plaintiff that no funds were deposited in escrow, no cause of action lies. "An essential element of an escrow is the delivery of the subject of the escrow to the designated escrow agent." Muscara v Lamberti, 133 AD2d 362, 363 (2nd Dept. 1987) (citations omitted). Accordingly, assuming Holland & Knight did not receive any deposit, no fiduciary duty could have been triggered. See id. ("Absent delivery of the subject of the escrow, however, no escrow is created…and the fiduciary duty of the designated escrow agent does not come into existence."); Rosenberg v Rosenberg, 180 AD2d 607 (1st Dept. 1992).

iii. Violation of the General Business Law

The eleventh cause of action seeks to hold Holland & Knight liable for alleged violations of the General Business Law ("GBL"). Specifically, the plaintiff claims that Holland & Knight

violated GBL §§ 352(e)(2-b) and 352(h), both provisions of the Martin Act, which mandate that payments made by purchasers to the sponsor of a real estate development be maintained in a separate escrow account, and not co-mingled with the funds of the sponsor, until the transaction is consummated. If the transaction is terminated prior to consummation by delivery of the completed unit of real property, the funds must be returned to the purchaser.

Holland & Knight correctly state that there is no private right of action under the Martin Act. "Indeed, '[t]he Attorney General bears sole responsibility for implementing and enforcing the Martin Act.'" Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, 12 NY3d 236, 244 (2009) (internal citations omitted). The plaintiff, a private litigant, contends that he should nonetheless be permitted to state claims under the Martin Act because Article 12 of the Purchase Agreement referenced provisions of the Act. The plaintiff provides no authority for the proposition that a contract can create a private right of action under a statute that, by its terms, is exclusively enforceable by the Attorney General. Moreover, to the extent the plaintiff references explicit contractual provisions requiring Holland & Knight to maintain and distribute escrowed funds in a specified manner, his claims under the ninth and tenth causes of action provide sufficient remedy.

For the foregoing reasons, the eleventh cause of action is dismissed.

iv. Tortious Interference

The twelfth cause of action, stated as against Holland & Knight only, states that Holland & Knight interfered with the Purchase Agreement because it "facilitated the transfer of Unit 3B to [Beach], thereby impeding [the] Sponsor's ability to close on [the] [p]laintiff's purchase of Unit 3B." The plaintiff contends that Holland & Knight, as the Sponsor's counsel in connection with the Purchase Agreement and as escrow agent, was aware of the Sponsor's contractual

obligation to sell Unit 3B to the plaintiff when, again as the Sponsor's counsel, it assisted the Sponsor in selling the Unit to a third party. The plaintiff's tortious interference claim assumes that the Purchase Agreement was in full force and effect at the time of Unit 3B's transfer.

Generally, no tortious interference claim can be alleged against a party to the allegedly interfered-with agreement. See Devash LLC v German Am. Capital Corp., 104 AD3d 71 (1st Dept. 2013); Buller v Giorno, 28 AD3d 258 (1st Dept. 2006). The same rule applies to the agent of a party to a contract where the agent is acting within the scope of its duties on behalf of the principal. See OneBeacon Am. Ins. Co. v Colgate Palmolive Co., 123 AD3d 222, 228-29 (1st Dept. 2014). An agent of a party to a contract may be held liable in tort, however, where "it is alleged that [such agent] was not acting in good faith and committed wholly independent torts directed at plaintiff for personal pecuniary gain." Bank of N.Y. v Berisford Intl., 190 AD2d 622, 622 (1st Dept. 1993); see Burger v Brookhaven Med. Arts Bldg., 131 AD2d 622, 623 (2nd Dept. 1987) (to hold agent of corporation liable for inducing breach of contract, evidence must show he committed independent torts or predatory acts at the direction of another party).

The foregoing principles apply to circumstances where the relationship between principal and agent is that of a client and its attorney. Thus, no claim for tortious interference with a contract lies as against a party's attorney where there is no indication that the attorney acted outside the scope of his or her authority as the party's agent. See Little Rest Twelve, Inc. v Zajic, 137 AD3d 540 (1st Dept. 2016); Kartiganer Assocs., PC v Town of New Windsor, 108 AD2d 898 (2nd Dept. 1985).

Here, Holland & Knight was involved in the sale of Unit 3B to Beach in its capacity as the Sponsor's attorney. Holland & Knight was not under any obligation to refuse to prepare documents for its client, even if such documents were ultimately used by the Sponsor to breach

the Purchase Agreement. Moreover, even assuming Holland & Knight held money in escrow in connection with the Purchase Agreement at the time of Unit 3B's transfer, the Sponsor remained the sole holder of title to Unit 3B. While Holland & Knight may have had fiduciary duties to the plaintiff as escrow agent, that still would not permit it to interfere with the Sponsor's title or otherwise force the Sponsor to adhere to the Purchase Agreement. Contrary to the plaintiff's arguments, there are no factual assertions in the amended complaint that support an inference that, in the context of the sale, Holland & Knight acted outside of the scope of its representation of the Sponsor for its personal pecuniary gain so as to support the unusual claim of tortious interference against an agent of a contracting party.

For the foregoing reasons, the twelfth cause of action is dismissed.

v. Fraud

The fifteenth cause of action, asserted as against Holland & Knight only, states that Holland & Knight, in its capacity as counsel for the Sponsor and escrow agent under the Purchase Agreement, falsely represented to the plaintiff that the Downpayment had been funded, that the Purchase Agreement was in full force and effect, that the sale of Unit 3B to the plaintiff would close imminently. The plaintiff further cites Holland & Knight's preparation of the Termination Agreement as a basis for his fraud claim. Lastly, the plaintiff avers that Holland & Knight failed to correct misstatements or disclose information known to the firm so that its statements, taken as a whole, would not be considered false and misleading.

The plaintiff's fraud claim fails to the extent it is premised on Holland & Knight's emails to the plaintiff's counsel purporting to schedule a closing date for Unit 3B in September 2020. Statements of future intent to perform under a contract made on behalf of a contracting party are not collateral to the contract. See Cronos Group Ltd. v XComplP, LLC, supra at 67. Holland &

Knight's purported general representations that the Purchase Agreement was "in full force and effect" likewise duplicate the plaintiff's breach of contract claim against the Sponsor. Moreover, they constitute nonactionable legal conclusions that cannot form the basis of a fraud claim brought against an attorney by a non-client. See Aglira v Julien & Schlesinger, P.C., 214 AD2d 178, 185 (1st Dept. 1995) ("[N]either a party nor his attorney may justifiably rely on the legal opinion or conclusions of his or her adversary's counsel…"); Dousmanis v Joe Hornstein, Inc., 181 AD2d 592, 593 (1st Dept. 1992) (party "could not have justifiably relied on the legal opinion or conclusion of its adversary's counsel that the action had been timely commenced").

The plaintiff's allegations with regard to Holland & Knight's preparation of the Termination Agreement likewise fail to support a claim sounding in fraud. The plaintiff identifies no misstatement made by Holland & Knight, rather than Meir, to the effect that the plaintiff needed to sign the Termination Agreement in order to avoid the creditors of HFZ Capital or that Unit 3B would ultimately be conveyed to the plaintiff by a third party. Where no misstatement can be identified, a fraud claim brought by a nonclient against an attorney fails. See Gansett One, LLC v Husch Blackwell, LLP, 168 AD3d 579 (1st Dept. 2019); Yuko Ito v Suzuki, 57 AD3d 205 (1st Dept. 2008). Further, as the court has explained, the plaintiff did not sign the Termination Agreement and therefore cannot claim detrimental reliance on any statement in connection therewith.

Nor can the plaintiff claim fraud based only on Holland & Knight's alleged failure to disclose that no Downpayment had been received. Absent a claim that a law firm owes a separate duty to a nonclient, a law firm lacks any "ethical obligation to disclose what knowledge it might have had concerning its client's alleged impending fraud." National Westminster Bank USA v Weksel, 124 AD2d 144, 148 (1st Dept. 1987); see Gansett One, LLC v Husch Blackwell,

LLP, supra at 579. While Holland & Knight would have a fiduciary duty to the plaintiff as escrow agent if it did, in fact, receive the Downpayment, the plaintiff's fraud claim assumes that no such payment was ever received. To the extent no escrow was ever created, Holland & Knight did not have a duty to disclose material information to the plaintiff and no fraud claim lies for its alleged silence or omission.

However, the plaintiff's fraud claim survives to the extent it is premised on the affirmative statements of Holland & Knight attorneys that the Downpayment had been funded. The plaintiff claims that Holland & Knight represented that the Downpayment was satisfied on multiple occasions, in including when they signed the Purchase Agreement as escrow agent upon receipt of the Downpayment and when a Holland & Knight attorney orally confirmed to the plaintiff that all required payments had been made. Such statements differ from nonactionable opinion or advice insofar as they constitute representations of fact upon which it was reasonable for the plaintiff to rely. See Pszeniczny v Horn, 193 AD3d 1091, 1093 (2nd Dept. 2021) (seller attorney's alleged misrepresentation to buyer that nonparty had signed guaranty, which thereby induced buyer to sign stipulation, stated claim for fraud against attorney); Fidelity Nat. Title Ins. Co. v Smith Buss & Jacobs, LLP, 126 AD3d 530, 531 (1st Dept. 2016) (seller attorney's purported misrepresentations to purchasers regarding legal effect of documents attorney drafted on condominium units formed adequate basis for fraud claim). This is particularly so in light of the provisions of Article 12 of the Purchase Agreement, which created an express obligation on Holland & Knight's part to notify the plaintiff upon receipt of the Downpayment into escrow.

Contrary to Holland & Knight's contentions, the plaintiff also adequately pleads that he was damaged by the firm's false representations. While the plaintiff made no payments to the Sponsor pursuant to the Purchase Agreement, the plaintiff avers that he incurred financial

obligations under the Purchase Documents, expended time and effort in planning construction and modifications to Unit 3B and preparing to purchase the unit, and declined to pursue other avenues to enforce rights he may have had against HFZ Defendants for several years.

For the foregoing reasons, the plaintiff plausibly states a fraud claim against Holland & Knight to the extent described herein.

vi. Aiding and Abetting Fraud

The sixteenth cause of action alleges, *inter alia*, that Holland & Knight aided and abetted the fraud of the HFZ Defendants, identified in the fourteenth cause of action and described in greater detail above, by repeating and reinforcing the HFZ Defendants' misrepresentations and failing to correct them or provide clarifying information. As the court has explained, the fourteenth cause of action states a fraud claim only to the extent it alleges the HFZ Defendants affirmatively represented to the plaintiff that the Downpayment had been funded.

The plaintiff adequately pleads that Holland & Knight knew about HFZ's false statements inasmuch as it represented the Sponsor in the subject transaction and prepared the Rider to the Purchase Agreement containing an acknowledgment of receipt of the Downpayment. Holland & Knight was also designated as escrow agent pursuant to the Purchase Agreement and therefore would have direct knowledge as to whether any payment had actually been made by HFZ Capital.

The plaintiff further alleges that Holland & Knight substantially assisted the HFZ Defendants' commission of the fraud. Holland & Knight "drafted the very purchase agreement[]" that "it is alleged, contained [a] misrepresentation[]" as to the Sponsor's receipt of the first installment of the Downpayment. Gansett One, LLC v Husch Blackwell, LLP, supra at 580. Holland & Knight further confirmed the misrepresentation by signing the Purchase

Agreement, which it was only to do upon receipt of the Downpayment, and by telling the plaintiff that all required payments under the Purchase Agreement had been made. Holland & Knight's alleged activities go beyond merely fulfilling its duty as counsel to the Sponsor or failing to disclose material information, (see Lumen at White Plains, LLC v Stern, 135 AD3d 600 [1st Dept. 2016]), and, if proven, may rise to the level of substantial assistance, (see Gansett One, LLC v Husch Blackwell, LLP, supra; Fidelity Nat. Title Ins. Co. v Smith Buss & Jacobs, LLP, supra).

Finally, as explained above, the plaintiff adequately claims damages arising from Holland & Knight's substantial assistance to the HFZ Defendants' fraud.

Accordingly, the sixteenth cause of action survives to the extent described herein.

V. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendants 11 Beach Street RC, LLC, and Unit 3B 11 Beach, LLC, pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7) to dismiss the amended complaint as against them and for an award of attorneys' fees and costs (SEQ 002), is granted to the extent that the third cause of action is dismissed and the sixteenth cause of action is dismissed as against 11 Beach Street RC, LLC, and Unit 3B 11 Beach, LLC, only, and the motion is otherwise denied; and it is further

ORDERED that the motion of the defendant Holland & Knight, LLP, pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the amended complaint as against it (SEQ 003), is granted to the extent that the eleventh and twelfth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the defendants 11 Beach Street RC, LLC, Unit 3B 11 Beach, LLC, and Holland & Knight, LLP, shall file answers to the amended complaint within 30 days of service of this Decision and Order with Notice of Entry; and it is further

ORDERED that the parties shall appear for a preliminary conference via Microsoft Teams on January 20, 2022, at 12:30 p.m.

This constitutes the Decision and Order of the court.

DATED: October 11, 2021

NANCY M. BANNON, J.S.C.
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