

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Tanya R. Kennedy Justice

PART 63

Board of Managers of the Residential Section of The Plaza Condominium

INDEX NO. 654394/15

MOTION DATE

MOTION SEQ. NO. 002

Krista Franzese, et al.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is decided, in accordance with the attached decision, dated March 21, 2019.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: March 21, 2019

Hon. Tanya R. Kennedy, J.S.C. HON. TANYA R. KENNEDY

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

ESTD 1978 FINE JEWELRY, QIVIUK BOUTIQUE OF NEW YORK, INC. d/b/a QIVIUK, RADU PHYSICAL CULTURE OF NEW YORK, LLC d/b/a RADU PHYSICAL CULTURE, SEIZE SUR VINGT PLAZA LLC d/b/a SEIZE SUR VINGT, STEM BY DAVID TUTERA, INC. d/b/a STEM BY DAVID TUTERA, WARREN TRICOMI MADISON AVENUE LLC d/b/a THE PLAZA BEAUTY BY WARREN TRICOMI, VERTU USA, INC., d/b/a VERTU, HAMPSHIRE HOTELS MANAGEMENT LLC, HAMPSHIRE HOTELS & RESORTS LIMITED LIABILITY COMPANY, DREAM HOTEL GROUP

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 63

-----X  
BOARD OF MANAGERS OF THE RESIDENTIAL  
SECTION OF THE PLAZA CONDOMINIUM,

Plaintiff,

DECISION/ORDER

Index No.: 654394/15  
Motion Sequence 002

-against-

KRISTIN FRANZESE, As President of the Board of  
Managers of the Plaza Condominium, CPS 1 REALTY,  
LP, EL-AD PROPERTIES NY LLC, SAHARA  
DREAMS LLC, SAHARA US CORP., SAHARA  
PLAZA LLP d/b/a THE PLAZA HOTEL, SAHARA  
PLAZA LLC, KINGDOM HOLDING COMPANY, EL  
AD US HOLDINGS, INC., KINGDOM XXII (USA),  
LTD., BOARD OF MANAGERS OF THE PLAZA  
CONDOMINIUM, PLAZA ACCESSORY OWNER GP  
LLC, BOARD OF MANAGERS OF THE HOTEL  
SECTION OF THE PLAZA CONDOMINIUM, PLAZA  
ACCESSORY OWNER LP, PLAZA CLUB OWNER LP,  
PLAZA RESIDENTIAL OWNER LP, PLAZA  
RESIDENTIAL OWNER GP LLC, CPS 1 REALTY GP  
LLC, CPS EVENTS, ANNA HU LLC d/b/a ANNA HU,  
ASSOULINE PUBLISHING LLC d/b/a ASSOULINE,  
CAUDALIE SPAS, INC. d/b/a CAUDALIE  
VINOTHERAPIE SPA AT THE PLAZA, DEMEL NEW  
YORK, INC. d/b/a DEMEL BAKERY, IRADJ MOINI  
COUTURE LTD d/b/a IRADJ MOINI, KENNETH JAY  
LANE, INC. d/b/a KENNETH JAY LANE, ASSOULIN  
LTD d/b/a MAURICE FINE JEWELRY, QIVIUK  
BOUTIQUE OF NEW YORK, INC. d/b/a QIVIUK,  
RADU PHYSICAL CULTURE OF NEW YORK, LLC  
d/b/a RADU PHYSICAL CULTURE, SEIZE SUR  
VINGT PLAZA LLC d/b/a SEIZE SUR VINGT, STEM  
BY DAVID TUTERA, INC. d/b/a STEM BY DAVID  
TUTERA, WARREN TRICOMI MADISON AVENUE  
LLC d/b/a THE PLAZA BEAUTY BY WARREN  
TRICOMI, VERTU USA, INC., d/b/a VERTU,  
HAMPSHIRE HOTELS MANAGEMENT LLC,  
HAMPSHIRE HOTELS & RESORTS LIMITED  
LIABILITY COMPANY, DREAM HOTEL GROUP

LLC, FRHI HOTELS & RESORTS (US), INC., FRH (NY) LLC, FHR (NYC) LLC, SAHARA DREAMS CO. II, INC., SAHARA DREAMS LIMITED, SAHARA PLAZA, INC., SAHARA PLAZA II, INC., SAHARA HAMPSHIRE HOTEL MANAGEMENT LLC, SAHARA HAMPSHIRE HOSPITALITY MANAGEMENT LIMITED, SAHARA HAMPSHIRE HOTEL MANAGEMENT CO. II, INC., SAHARA HAMPSHIRE HOTEL MANAGEMENT CO., INC. and JOHN DOE NOS. 1-50, being unknown parties related to, associated with, or responsible for the named parties,

Defendants.

-----X  
**HON. TANYA R. KENNEDY, J.S.C.:**

This action involves multiple claims under different legal theories centered on a utility payment dispute in a mixed-use residential/commercial condominium building. Several of the defendants move to dismiss the amended complaint, pursuant to CPLR 3211(a)(1) and (7)<sup>1</sup>. For the following reasons, this motion is granted in part and denied in part.

### BACKGROUND

The plaintiff Board of Managers of the Residential Section of the Plaza Condominium (the residential board and/or plaintiff) represents the residential apartment unit owners in a mixed-use residential/commercial condominium building located at 768 Fifth Avenue in the County, City and State of New York, which operated for many years as the Plaza Hotel (the Plaza) (amended complaint, ¶¶ 2, 3, 57).

The Plaza currently consists of (1) a “residential section,” including 181 residential apartment units and certain other common elements; (2) a “hotel section,” including 130 transient hotel rooms, 152 hotel condominium apartments and certain common elements; (3) a

<sup>1</sup> Plaintiff’s first cause of action is not asserted against the named moving defendants.

commercial unit designated as an “accessory unit;” and (4) a commercial unit designated a “club unit” (*id.*, ¶ 58).

The amended complaint designates the group of defendants that filed the instant dismissal motion as the El-Ad entities (El-Ad defendants)<sup>2</sup> and alleges that:

“[t]he El-Ad [defendants] are shell entities completely controlled and dominated by the same principals with similar board members, commingled assets, and in some instances no or few assets, with no or few employees and no proper on-going business purpose other than to shield the [p]rincipals from liability and passthrough profits to the [p]rincipals” (*id.*, ¶17).

The El-Ad defendants are comprised of: (1) CPS 1 Realty LP (CPS 1); (2) El-Ad Properties NY LLC (El-Ad Properties); (3) Plaza Residential Owner LP (Plaza Owner LP); (4) Plaza Residential Owner GP LLC (Plaza Owner LLC); (5) Plaza Accessory Owner LP (Plaza Accessory LP); (6) Plaza Accessory Owner GP LLC (Plaza Accessory LLC); (7) Plaza Club Owner LP (Plaza Club); (8) El Ad US Holding, Inc (El Ad); and (9) CPS 1 Realty GP LLC (CPS 1 LLC) (*id.*, ¶¶ 7-16). Although CPS 1 and Plaza Owner LP are listed among the El-Ad defendants, these two entities are also referred to as the Sponsor defendants and collectively referred to as the Sponsor (*id.*, ¶11).

The amended complaint alleges that the El-Ad defendants, the Kingdom defendants, and/or their affiliates acquired ownership of the Plaza in 2004; that defendant, CPS 1, as original sponsor, filed a condominium offering plan (offering plan) in 2005 for sale of the residential units and their appurtenant common elements within the Residential Section of the Condominium; that CPS 1 assigned all of its rights as sponsor of the Residential Section of the

<sup>2</sup> The amended complaint designates the remaining defendants into groups identified as the Sahara defendants; the Kingdom defendants; the Commercial defendants; and the John Doe defendants (amended complaint, ¶¶ 18-56). None of these defendants are parties to this motion.

Plaza Condominium to its affiliate Plaza Owner LP in 2006; that the El-Ad defendants transferred their interest in the Plaza to the Sahara defendants in 2012; and that the El-Ad defendants “still retain ownership, control and dominion over certain portions or interests in the Plaza” (*id.*, ¶¶ 11, 58, 60, 63-64).

According to plaintiff, “the El-Ad defendants, the Sahara defendants and the Kingdom defendants have complete control and dominion over the Sponsor defendant [i.e. CPS 1]” (*id.*, ¶62). However, the amended complaint does not specifically identify the principals of the El-Ad defendants or said defendants’ prior or current ownership interests in the Plaza condominium, its hotel section, accessory unit or club unit.

The central allegation of the amended complaint is that the residential unit owners have subsidized certain monthly utility charges which the non-residential unit owners incurred and misallocated to the residential unit owners (*id.*, ¶ 1). According to plaintiff, such actions violate the terms of the offering plan; declaration and by-laws; and purchase agreements (*id.*, ¶¶ 65-91).

The amended complaint alleges, *inter alia*, that the Plaza’s residential condominium units were sub-metered for electrical service; that residential condominium unit owners were responsible for paying: (1) the cost of their units’ sub-metered electricity consumption and (2) the pro-rated cost of electricity consumption in the Plaza’s residential common areas (as a common expense); (3) that the Plaza’s commercial units were also sub-metered for electrical service; and (4) that the commercial condominium unit owners (and/or their tenants) were responsible for paying: (1) the cost of their units’ sub-metered electricity consumption and (2) the pro-rated cost of electricity consumption in the Plaza’s commercial common areas (also as a common expense) (amended complaint, ¶¶ 69, 71).

Among the papers submitted with this motion are copies of a “settlement agreement” (the settlement) and a “general release” (the release) that was executed on May 27, 2014 between the residential board, CPS 1 and Plaza Owner LP (collectively designated as “the Sponsor”) (notice of motion, exhibits C, D). The relevant portion of the settlement agreement provides:

“3. Electricity Consumption. Notwithstanding anything contained herein to the contrary, this Agreement does not affect any claim the [Residential] Board or the Residential Unit Owners may have (a) against the Owners of the Condo Hotel Units, Transient Hotel Unit, the Accessory Unit and the Club Unit (i.e., the ‘Non-Residential Units’) with regard to electrical usage in the Non-Residential Units that was paid by the Residential Unit Owners; and (b) against the Sponsor with regard to any fine, violation or similar penalty from a third-party that affects the Residential Units as a result of the failure of the Sponsor to obtain the consent of the New York State Public Service Commission for submetering the Residential Units, in the event Sponsor was required to obtain such consent. The Owners of the Non-Residential Units are not third-party beneficiaries of either this Agreement or the General Releases executed by the [Residential] Board” (*id.*, exhibit C).

The relevant portion of the release provides as follows:

“**Know [t]hat** the undersigned [residential board] . . . on behalf of itself and . . . the individual Residential Unit Owners, collectively referred to herein as the RELEASORS, in consideration of . . . [\$2,018,000.00] . . . received from [Plaza Owner LP and CPS 1], as RELEASEES, release and discharge the RELEASEES, and any and all of RELEASEES’ past or present, direct or indirect, owners, shareholders, successors, heirs, partners, principals, general partners, directors, officers, members, agents, attorneys, administrators, employees, consultants, architects, assigns, insurers . . . grantees, lenders, investors, subsidiaries, affiliates, parent companies (including, but not limited to Ed Ad US Holding, Inc. and El-Ad Group, Ltd.) and representatives (collectively, the RELEASEES’ REPRESENTATIVES) from any and all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, rights, violations, liens, defenses, obligations, costs, attorney’s fees, losses, liabilities, credit applications, fees, finance charges, interest, rentals, commissions, compensation, and demands whatsoever, in law, admiralty or equity, which against the RELEASEES, the RELEASORS . . . ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this RELEASE, whether known or unknown, including,

without limitation: any claims resulting from, in connection with, or arising out of the acts, omissions or negligence of the RELEASEES or the RELEASEES' REPRESENTATIVES . . . any claims arising out of or relating to the Offering Plan for the conversion of the Residential Section of the Plaza Condominium, and any Amendments thereto (the 'Offering Plan') . . . any claims arising out of, in connection with or relating to the design and/or construction of the Building, including claims for acts, omissions or negligence, and/or breach of implied or express warranties including, but not limited to . . . all general common elements; any claims arising out of or relating to representations and/or warranties made by the RELEASEES or the RELEASEES' REPRESENTATIVES, including claims that such representations were either negligently made and/or fraudulent; and any claims relating to or arising out of the RELEASEES' operation, control and/or management of the land, building and improvements at the Condominium, *excluding, however, any claim that the RELEASOR may have for (a) electricity consumed in the Non-Residential Units while they were owned by the RELEASEES and which electricity was paid by the RELEASORS or any claims by the Unit Owners regarding their Units; and (b) any monetary claim that the RELEASORS may have for the RELEASEES' failure to obtain the consent of the New York State Public Service Commission for the submetering of the Residential Units.*

It is the intention of the undersigned to hereby fully, finally and forever settle and release all the matters released between the RELEASORS and RELEASEES in the manner provided in the preceding paragraph. This RELEASE shall be effective and remain in effect as a fully and complete release notwithstanding the discovery or existence of any additional or different claims or facts.

It is expressly understood by the RELEASORS that this Release may be pleaded as a complete defense and bar to any action brought by RELEASORS against RELEASEES or RELEASEES' REPRESENTATIVES concerning the subject matter of this Release (except in case of breach of the Agreement) and, further, that each term hereof shall be given a prospective application such that it constitutes an affirmative covenant not to sue based upon any claim released herein" (*id.*, exhibit D) (emphasis added).

The amended complaint sets forth causes of action for: (1) a permanent injunction (against the Board of Managers of the Plaza Condominium; hereinafter, the Plaza board); (2) conspiracy to commit fraud (against the Sponsor defendants, Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (3) conversion (against the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (4) money had and



received (against the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (5) unjust enrichment (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, the Kingdom defendants, and the Commercial defendants); (6) an accounting (against the Sponsor defendants and the Plaza board); (7) breach of contract (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (8) negligent misrepresentation (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (9) violation of General Business Law (GBL) §§349 & 350 (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (10) breach of fiduciary duty (against the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (11) fraud (against all defendants); (12) fraudulent inducement (against all defendants); (13) breach of implied warranty (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (14) tortious interference with economic advantage (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (15) violation of Debtor and Creditor Law §273 (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (16) violation of Debtor and Creditor Law §274 (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (17) violation of Debtor and Creditor Law §§276 & 276-a (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (18) fraudulent concealment (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the

Kingdom defendants); (19) negligence (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); (20) violation of the Public Service Law (PSL) §§52 & 67 (against the Sponsor defendants, the Plaza board, the El-Ad defendants, the Sahara defendants, and the Kingdom defendants); and (21) tortious interference with contract (against the El-Ad defendants, the Sahara defendants, and the Kingdom defendants).

The named moving defendants move to dismiss the twenty causes of action (second through twenty-first) as asserted against them in the amended complaint, pursuant to CPLR 3211(a)(1) and (7), maintaining that the settlement agreement and release are a complete bar to all of plaintiff's claims.

#### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to establish that the documentary evidence conclusively refutes the party's claim (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]).

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211(a)(7), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016] citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). However, where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and favorable inferences are both rebutted (*see Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001], *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002); *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept

1994]).

The moving defendants first assert that the settlement agreement and release are a complete bar to all of plaintiff's claims. While the moving defendants note that the settlement and release reserved two discrete claims for plaintiff, they maintain that the none of the causes of action in the amended complaint involve these claims.

Specifically, the relevant portion of the settlement explicitly provides that "this Agreement does not affect any claim the [Residential] Board or the Residential Unit Owners may have (a) *against the Owners of the Condo Hotel Units, Transient Hotel Unit, the Accessory Unit and the Club Unit (i.e., the 'Non-Residential Units')* with regard to electrical usage in the Non-Residential Units that was paid by the Residential Unit Owners" (notice of motion, exhibit C (emphasis added)). Further, the relevant portion of the release excludes "any claim that the RELEASOR may have for (a) *electricity consumed in the Non-Residential Units while they were owned by the RELEASEES and which electricity was paid by the RELEASORS* or any claims by the Unit Owners regarding their Units" (*id.*, exhibit D) (emphasis added).

As previously noted, the release defines the 'RELEASOR' as the residential board and its members, and the 'RELEASEES' as CPS 1 and Plaza Owner LP (*id.*). Both the settlement and the release unequivocally establish that plaintiff retained: (1) the right to assert claims against CPS 1 and/or Plaza Owner LP for improperly billed electricity charges while such entities held title to the Plaza's non-residential condominium units as sponsors; and (2) the right to assert the same claims against any party that subsequently purchased and/or rented the Plaza's non-residential condominium units.

This Court's review of the amended complaint reveals that most of plaintiff's claims are barred by the unambiguous terms of the settlement and the release. Plaintiff maintains in its opposition papers that its claims in the amended complaint are derived from theories of design defect and/or fraud. Specifically, plaintiff argues that the amended complaint alleges defendants' wrongful conduct as follows:

"failing to ensure the proper design, construction, operation, maintenance, activation, installation and implementation of the electricity metering and sub-metering systems; [of] knowingly concealing the defect in the design, operation, maintenance, activation, installation, and implementation of the electricity metering and sub-metering systems; [of] failing to properly utilize such metering and sub-metering systems so as not to overcharge Plaintiff for electricity use; [of] grossly misallocating the Non-Residential Units' electricity use as an expense to Plaintiff and the owners of the Residential Units; and [of] causing Plaintiff and the owners of the Residential Units to effectively subsidize the non-residential units' electricity use" [and] [of] "illicitly made material amendments to the condominium offering plan's methodology to account for electricity charges" (plaintiff's mem of law, at 6).

However, these allegations do not afford plaintiff any defense to this motion. The terms of the release explicitly provide that, in return for a \$2,018,000.00 payment from CPS 1 and Plaza Owner LP, plaintiff (and its members) consented to waive its rights regarding:

*"any and all actions, causes of action . . . and demands whatsoever, in law, admiralty or equity, which against the RELEASEES, the RELEASORS . . . ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this RELEASE, whether known or unknown, including, without limitation: any claims resulting from, in connection with, or arising out of the acts, omissions or negligence of the RELEASEES . . . ; any claims arising out of or relating to the Offering Plan for the conversion of the Residential Section of the Plaza Condominium, and any Amendments thereto (the 'Offering Plan'); . . . any claims arising out of, in connection with or relating to the design and/or construction of the Building, including claims for acts, omissions or negligence, and/or breach of implied or express warranties including, but not limited to . . . the general common elements; . . . and any claims relating to or arising out the RELEASEES' operation, control and/or management of the land, building and improvements at the Condominium"* (notice of motion, exhibit D) (emphasis added).

This same interpretation applies to the terms of the settlement, which provides that:

“this Agreement does not affect any claim the [Residential] Board or the Residential Unit Owners may have (a) against the Owners of the . . . ‘Non-Residential Units’ with regard to electrical usage in the Non-Residential Units that was paid by the Residential Unit Owners; and (b) against the Sponsor with regard to any fine, violation or similar penalty . . . as a result of the failure of the Sponsor to obtain the consent of the New York State Public Service Commission for submetering the Residential Units” (*id.*, exhibit C).

Thus, the issue before the Court is to determine whether plaintiff’s causes of action are based on these two reserved claims.

Plaintiff’s second cause of action alleges conspiracy to commit fraud; specifically, in the form of a scheme to “conceal the true facts concerning the utility metering systems necessary and required under the Offering Plan. . .” and to “avoid, and excuse the Sponsor Defendants [i.e., CPS 1 and Plaza Owner LP] responsibility for compliance with [their] obligations under the Offering Plan” (amended complaint, ¶ 104).

However, the text of the release explicitly includes “any claims arising out of or related to the Offering Plan . . . and any amendments thereto,” as well as “any claims arising out of, in connection with or relating to the Offering Plan (notice of motion, exhibit D). Therefore, the Court finds that the second cause of action is barred by the release and is, therefore, dismissed.

Plaintiff’s third, fourth and fifth causes of action for conversion, money had and received, and unjust enrichment seek reimbursement for the payment of utility costs (*id.*, ¶¶115-134). This Court’s review of these causes of action establish that the reserved claim under the release for electricity consumption is applicable and, thus, not barred by the terms of the release.

However, the third, fourth and fifth causes of action are not stated with sufficient

specificity, as required under CPLR 3013. This statute provides that:

“[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

The amended complaint alleges that the El-Ad defendants (apart from defendants CPS 1 and Plaza Owner LP) continue to retain ownership over certain portions of the Plaza (amended complaint, ¶ 63). While the amended complaint alleges that CPS 1 and Plaza Owner LP benefitted from plaintiff's payment of certain electricity charges while they were the Plaza's sponsors, it fails to clearly allege which parties subsequently received such benefit, as well as the amount of such benefit received and the duration that said benefit was received. Therefore, these causes of action are dismissed.

While the Court dismisses the third, fourth and fifth causes of action, the Court grants plaintiff leave to serve a second amended complaint to replead these claims in accordance with CPLR 3013 since a court is permitted to exercise its discretion to permit a party to amend its pleadings (*see generally* CPLR 3025[b]).

Plaintiff's sixth cause of action seeks an accounting from CPS 1 and Plaza Owner LP because of their alleged breach of fiduciary duty as the Plaza's sponsors (amended complaint, ¶¶ 137-138). However, the release expressly includes “any claims arising out of the Offering Plan for the conversion of the Residential Section of the Plaza Condominium” and “any claims arising out of or relating to . . . the RELEASEES' operation, control and/or management of the land, building and improvements at the Condominium” (notice of motion, exhibit D). Inasmuch as CPS 1's and Plaza Owner LP's fiduciary duties as sponsors are related to their “operation,

control and/or management of the . . . building” while they served in such capacity, the Court finds that plaintiff’s sixth cause of action is barred by the release and is, thus, dismissed.

Plaintiff’s seventh cause of action alleges breach of contract; specifically, “numerous breaches of the Offering Plan, Condominium Documents and Purchase Agreements” (amended complaint, ¶ 143). However, the terms of the release include “any claims arising out of or relating to the Offering Plan . . . and any Amendments thereto” (notice of motion, exhibit D). Therefore, this cause of action is also dismissed because it is barred by the terms of the release.

Plaintiff’s eighth cause of action alleges negligent misrepresentation; specifically, that defendants concealed “the information that they had concerning the construction of the Building and its units (including concerning the improperly designed, constructed, operated, maintained, activated, installed and/or implemented metering and submetering systems)” (amended complaint, ¶¶ 157, 165). However, the terms of the release explicitly include “any claims arising out of or relating to representations and/or warranties made by the RELEASEES or the RELEASEES’ REPRESENTATIVES, *including claims that such representations were either negligently made and/or fraudulent*” (*id.*) (emphasis added). Accordingly, this cause of action is dismissed since it is barred by the terms of the release.

Plaintiff’s ninth cause of action alleges violations of General Business Law (GBL) §§349 & 350; specifically, in that defendants “each disseminated advertising and promotional information that was false in material ways, including without limitation by misrepresenting the quality of construction of the Building (including the common areas and units of the Condominium) and many of its principal features, including the metering and submetering system” (amended complaint, ¶ 174).

Similarly, this cause of action is dismissed because it is barred by the terms of the release which include “any claims arising out of, in connection with or relating to the design and/or construction of the Building, including claims for acts, omissions or negligence, and/or breach of implied or express warranties including, but not limited to . . . all general common elements, and “any claims arising out of or relating to representations and/or warranties made by the RELEASEES or the RELEASEES’ REPRESENTATIVES, including claims that such representations were either negligently made and/or fraudulent” (notice of motion, exhibit D).

Plaintiff’s tenth cause of action also alleges breach of fiduciary duty; specifically, that all of the moving defendants “refus[ed] to comply with the requirements and obligations set forth in the Offering Plan, Condominium Documents and Purchase Agreements,” and that they instead “acted at all times to further their own interests at the expense of the Plaintiff” (amended complaint, ¶ 183). This cause of action is barred by the terms of the release and is also dismissed for the same reasons regarding dismissal of the sixth cause of action.

Plaintiff’s eleventh cause of action alleges fraud; specifically that “[d]efendants were well aware that the metering systems necessary and required under the Offering Plan, Condominium Documents and Purchase Agreements. . . were not properly designed, constructed, operated, maintained, activated, installed and/or implemented in accordance with” those documents, and that they “knowingly, wrongfully, intentionally and fraudulently made, and continued to make, the written and oral misrepresentations of material facts concerning the metering and sub-metering systems of the Condominium . . . with the intent to deceive, mislead and influence the Plaintiff and residential unit owners” (amended complaint, ¶¶ 191-192).

However, this cause of action is also dismissed since it is barred by the terms of the



release, which include “any claims arising out of, in connection with or relating to the design and/or construction of the Building, including claims for acts, omissions or negligence, and/or breach of implied or express warranties including, but not limited to . . . all general common elements, and “any claims arising out of or relating to representations and/or warranties made by the RELEASEES or the RELEASEES’ REPRESENTATIVES, including claims that such representations were either negligently made and/or fraudulent” (notice of motion, exhibit D).

Plaintiff’s twelfth cause of action alleges fraudulent inducement and repeats the allegations of the preceding eleventh cause of action (amended complaint, ¶¶ 201-206). Therefore, the court finds that this cause of action is also barred by the release for the same reasons regarding dismissal of the eleventh cause of action.

Plaintiff’s thirteenth cause of action alleges breach of implied warranty in that defendants failed “to ensure that the residential units were completed in a skilled and workmanlike manner with the proper submetering and metering systems” (amended complaint, ¶ 211). This cause of action is also dismissed since it is barred by the terms of the release which apply to “any claims arising out of, in connection with or relating to the design and/or construction of the Building, including claims for. . . breach of implied or express warranties” (notice of motion, exhibit D).

Plaintiff’s fourteenth cause of action alleges that defendants’ “wrongful, unlawful, intentional and fraudulent actions designed to overcharge the residential unit owners for utility services consumed by the Non-Residential Section of the Condominium” constituted a tortious interference with economic advantage in that it “decrease[d] the value of the residential unit owners’ assets . . . [and] prohibited the Plaintiff and residential unit owners from completing the sales of their residential units” (amended complaint, ¶¶ 214-215). This cause of action is

clearly a claim “arising out of, in connection with or relating to the design and/or construction of the Building, including claims for acts,” (notice of motion, exhibit D), specifically, fraud, which is barred by the terms of the release, and is, therefore, dismissed.

Plaintiff’s fifteenth, sixteenth and seventeenth causes of action respectively allege violations of Debtor and Creditor Law (DCL) §§273, 274, 276, 276-a and 278 (amended complaint, ¶¶ 220-242). These causes of action demand the return of a portion of the proceeds that were realized from the sponsor’s sale of the Plaza’s residential condominium units on the theory that plaintiff is a creditor of the El-Ad defendants (*id.*, ¶¶ 231, 236, 241-242). However, the Court reiterates that the release applies to “any claims arising out of or relating to the Offering Plan for the conversion of the Residential Section of the Plaza Condominium, and any Amendments thereto” (notice of motion, exhibit D). Since the fifteenth, sixteenth and seventeenth causes of action arise from the sale of the Plaza’s residential units under the offering plan, these claims are barred by the release and are dismissed.

Plaintiff’s eighteenth cause of action alleges fraudulent concealment of “[defendants’] failure to fulfill [their] obligations under the Offering Plan and Purchase Agreements . . . by not properly designing, constructing, operating, maintaining, activating, installing and/or implementing the utility metering systems required under the Offering Plan, Condominium Documents and Purchase Agreements” (amended complaint, ¶ 244).

However, the release applies to “any claims arising out of or related to the Offering Plan . . . and any amendments thereto” and “any claims arising out of, in connection with or relating to the design and/or construction of the Building” (notice of motion, exhibit D). Since plaintiff’s eighteenth cause of action alleges that defendants fraudulently concealed information regarding

the building's construction in violation of the offering plan, the Court finds that this cause of action is barred by the release and is, therefore, dismissed.

Plaintiff's nineteenth cause of action alleges negligence (amended complaint, ¶¶ 252-261). However, the release explicitly states that it applies to "any claims resulting from, in connection with, or arising out of the acts, omissions or negligence of the RELEASEES or the RELEASEES' REPRESENTATIVES" (*id.*). As such, the terms of the release bars the nineteenth cause of action, which is dismissed.

Plaintiff's twentieth cause of action seeks damages, including treble damages and attorneys' fees, for defendants' alleged violations of PSL §§52 & 67, which govern the metering of utility services (amended complaint, ¶¶ 262-265). The settlement and the release both permit a reserved claim for any fines resulting from the "failure of the Sponsor to obtain the consent of the New York State Public Service Commission for submetering the Residential Units, in the event Sponsor was required to obtain such consent" (notice of motion, exhibits C, D).

The text of these documents and the allegations of the amended complaint indicate that 'the Sponsor' refers to defendants CPS 1 and Plaza Owner LP. There is no provision in the settlement or the release for plaintiff to assert a claim against any other parties regarding the imposition of a fine. Therefore, the Court grants so much of the moving defendants' motion as to dismiss the twentieth cause of action as against all moving defendants, except for CPS 1 and Plaza Owner LP.

However, the allegations in the twentieth cause of action presents a different issue for the Court's review and consideration. The Court notes that PSL §52 delineates a property owner's utility metering obligations, and that PSL §67 grants rule making authority to the New York

State Public Service Commission. However, neither of these statutes expressly provide for the imposition of any fine or penalty. Since the terms of the settlement and the release narrowly circumscribe plaintiff's reserved claim to the recovery of a certain type of fine, plaintiff's twentieth cause of action fails to sufficiently set forth the nature of such fine (*see generally* CPLR 3013). Accordingly, the Court grants the moving defendants' motion to dismiss this claim, but grants plaintiff leave to replead this cause of action with sufficient specificity as only against CPS 1 and Plaza Owner LP to assert the correct requested relief.

Finally, plaintiff's twenty-first cause of action alleges tortious interference with contract; specifically, that the El-Ad defendants so completely controlled the Sponsor defendants (i.e., CPS 1 and Plaza Owner LP) so as to "ensure that [they] failed and refused to properly design, construct, operate, maintain, activate, install and/or implement the utility metering systems necessary and required under the Offering Plan, Condominium Documents and Purchase Agreements" (amended complaint, ¶¶ 269).

However, as aforementioned, the release applies to "any claims arising out of or relating to the Offering Plan for the conversion of the Residential Section of the Plaza Condominium, and any Amendments thereto" (notice of motion, exhibit D). This cause of action is a claim which relates to the offering plan, which is barred by the release and is, thus, dismissed.

The moving defendants further argue that the alter-ego claims with respect to the El-Ad defendants should be dismissed since they are solely premised upon conclusory allegations. This Court previously noted in this decision that the amended complaint failed to allege the exact connection(s), if any, between the El-Ad defendants and the Sponsor defendants or to specify the prior or current interests of the El-Ad defendants in the Plaza's non-residential condominium

units.

In *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.* (66 AD3d 122 [2d Dept 2009]), the Appellate Division, Second Department, noted that

“ . . . the party seeking to pierce the corporate veil must . . . establish that the owners, through their domination, abused the privilege of doing business in the corporate form. Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.

Notably, even under the liberal ‘notice pleading’ requirements of CPLR 3013, a complaint still must allege, inter alia, the material elements of each cause of action asserted. Conduct constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation under the doctrine of piercing the corporate veil”

66 AD3d at 126-127 (internal citations and quotation marks omitted). Here, the amended complaint merely sets forth blanket alter-ego allegations against the El-Ad defendants, namely that:

“[t]he El-Ad defendants are shell entities completely controlled and dominated by the same principals with similar board members, commingled assets, and in some instances no or few assets, with no or few employees and no proper ongoing business purpose other than to shield the principals from liability and passthrough profits to the principals” (amended complaint, ¶17).

As such, the amended complaint is devoid of any particularized allegations that any specific El-Ad defendant performed any specific act “through their domination [which] abused the privilege of doing business in the corporate form” (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., supra* at 126-127). Therefore, the moving defendants correctly contend that the alter-ego claims fail to meet the notice pleading requirements of CPLR 3013 to establish such theory of liability.

This Court previously determined in this decision that the third, fourth and fifth causes of action were not barred by the terms of the release. Although the Court dismissed said claims, plaintiff was granted leave to serve a second amended complaint which repleads the third, fourth and fifth causes of action with sufficient specificity. Such specificity will also require plaintiff to sufficiently allege the interests of the El-Ad defendants in the Plaza's non-residential condominium units, as well the basis and extent of their purported liability to plaintiff for the payment of certain misallocated electricity charges.

Finally, defendants argue that the sponsor (i.e., CPS 1 and Plaza Owner LP) is entitled to recover the costs, disbursements and attorneys' fees incurred in defending and enforcing its rights under the settlement. Under New York law, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; see also *Sykes v RFD Third Ave. 1 Assoc., LLC*, 39 AD3d 279 [1st Dept 2007]). While the settlement authorizes the recovery of attorneys' fees, defendants have not prevailed on the merits since plaintiff is permitted to file a second amended complaint to replead certain causes of action (see *Gedula 26 LLC v Lightstone Acquisitions 111 LLC*, 150 AD3d 583, 584 [1st Dept 2017] [determination of the prevailing party for an award of attorneys' fees was premature due to ongoing litigation]).

### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211(a)(1) and (7), of defendants CPS 1 Realty LP, CPS 1 Realty GP LLC, Plaza Residential Owner LP, Plaza Residential Owner GP

LLC, El-Ad Properties NY LLC, El-Ad US Holdings, Inc., Plaza Accessory Owner LP, Plaza Accessory Owner GP LLC and Plaza Club Owner LP is granted to the extent that the second and sixth through nineteenth causes of action in the amended complaint are dismissed with prejudice as against the moving defendants, and the twenty-first cause of action is also dismissed with prejudice as against all moving defendants, except for CPS 1 Realty LP and Plaza Residential Owner LP; and it is further

ORDERED that plaintiff is granted leave to serve and file a second amended complaint to replead the third, fourth and fifth causes of action as against all of the named moving defendants herein, and to replead the twenty-first cause of action with specificity as only against defendants CPS 1 Realty LP and Plaza Residential Owner LP, within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file a second amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation by counsel for the moving defendants attesting to such noncompliance, is directed to enter judgment dismissing the action as against them, with prejudice, and with costs and disbursements to said defendants as taxed by the Clerk.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
March 21, 2019

ENTER:

*Hon. Tanya R. Kennedy*  
Hon. Tanya R. Kennedy, J.S.C.

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**TANYA R. KENNEDY**