Nochi Blue LLC v Board of Mgrs. of Franklin Place Condominium
2024 NY Slip Op 34066(U)
September 25, 2024
Supreme Court, New York County
Docket Number: Index No. 651571/2020
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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INDEX NO. 651571/2020

NOCHI BLUE LLC,

MOTION SEQ. NO. 001 002

Plaintiff,

- v -

BOARD OF MANAGERS OF FRANKLIN PLACE CONDOMINIUM,

DECISION + ORDER ON MOTION

Defendant.

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BOARD OF MANAGERS OF FRANKLIN PLACE CONDOMINIUM

Third-Party
Index No. 595986/2020

Plaintiff,

-against-

BROADWAY 371, LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 70, 71, 73, 75, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 116, 117, 122

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72, 74, 76, 78, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 118, 119, 120, 121

were read on this motion for SUMMARY JUDGMENT.

Moses & Singer LLP, New York, NY (Ruth Haber of counsel), for plaintiff Nochi Blue LLC.
Schwartz Sladkus Reich Greenberg Atlas LLP, New York, NY (Stephen H. Orel of counsel), for defendant/third-party plaintiff Board of Managers of Franklin Place Condominium.
Rubin, Fiorella, Friedman & Mercante LLP, New York, NY (Paul Kovner of counsel), for third-party defendant Broadway 371, LLC.

Gerald Lebovits, J.

This action arises out of the alleged failure by defendant/third-party plaintiff Board of Managers of Franklin Place Condominium (the Board) to repair certain construction defects in a

residential condominium unit owned by plaintiff Nochi Blue, LLC (Nochi) in a mixed-use building located at 5 Franklin Place in Manhattan (the Condominium).

In motion sequence 001, third-party defendant Broadway 371, LLC (Broadway or Sponsor), moves, pursuant to CPLR 3212, for partial summary judgment dismissing Nochi's claims for damages. In motion sequence 002, the Board moves, pursuant to CPLR 3212, for partial summary judgment dismissing Nochi's first, second and third causes of action or, in the alternative, for an order declaring that Nochi cannot recover any damages incurred by its only member, Max Leventhal (Leventhal). Motion sequences 001 and 002 are consolidated for disposition. The motions are granted in part and denied in part.

BACKGROUND

Leventhal, Nochi's sole manager and member, formed Nochi, a Delaware limited liability company, in August 2017, for the purpose of purchasing unit 9A (the Unit) in the Condominium (NY St Cts Elec Filing [NYSCEF] Doc No. 36, Kovner affirmation, exhibit A at 1; NYSCEF No. 47, Kovner affirmation, exhibit L, Leventhal tr at 30-31 and 63). Nochi purchased the Unit for $3.7 million from nonparty Franklin 9A LLC pursuant to a contract of sale dated September 15, 2017 (NYSCEF No. 37, Kovner affirmation, exhibit B at 1-2). The contract states that the "Seller is not a 'sponsor' or a nominee of a 'sponsor' under any plan of condominium organization affecting the Unit" (*id.* at 2). Broadway is the Condominium's sponsor (NYSCEF No. 38, Kovner affirmation, exhibit C at 1).

The Board manages and administers the Condominium's affairs in accordance with the Condominium's bylaws (the Bylaws), which set forth the Board's powers and duties (NYSCEF No. 42, Kovner affirmation, exhibit G, ¶ 6). The Board's duties include "[c]ontracting for the necessary services for the operation, care, upkeep and maintenance of the Common Elements," employing "personnel necessary for the maintenance and operation of the Common Elements," and "[m]aking of repairs, additions and improvements to or alterations of the Property and repairs to and restoration of the Property in accordance with the other provisions of these By-Laws, after damage or destruction by fire or other casualty, or as a result of condemnation or eminent domain proceedings"[1] (NYSCEF No. 84, Leventhal aff, exhibit D at 104-106 [Article II, Section 3(a), (d) and (n)]). The Board is responsible for "[a]ll maintenance, repairs and replacements to the General Common Elements as defined in the Declaration" (*id.* at 125 [Article VI, Section 10(b)]). Regarding the Condominium's "Limited Common Elements," the Bylaws recite:

> "Maintenance, repair and replacements in or to the Limited Common Elements as defined in the Declaration will be performed (i) by the Board of Managers as a Residential Common Expense, if such Limited Common Element is a Residential Limited Common Element for the exclusive use of all of the Residential Unit Owners and whether or not it involves structural or extraordinary maintenance,

[1] "Property," as that term is used in the Bylaws, means "the land, the Building and all other improvements thereon (including the Units and the Common Elements, whether General Common Elements or Limited Common Elements)" (NYSCEF No. 84 at 103).

> repairs or replacements . . . or (iv) by the Board of Managers at the sole cost and expense of the individual Unit Owner, whether a Residential Unit Owner (involving a Residential Unit Limited Common Element) or the Commercial Unit Owner, having exclusive use of such Limited Common Element if involving structural repairs or replacements" (*id.* at 125-126 [Article VI, Section 10(c)]).

The Bylaws also state that "[p]romptly upon obtaining knowledge thereof, each Unit Owner shall report in writing delivered by mail to the Board of Managers or to the Managing Agent any defect or need for repairs for which the Board of Managers is responsible pursuant to the terms hereof" (*id.* at 126 [Article VI, Section 10(d)]).

Schedule C in the Condominium's declaration (the Declaration) defines the term "Common Elements" to mean "[a]ll portions of the Property other than Units. Common Elements are comprised of General Common Elements and Limited Common Elements" (NYSCEF No. 84 at 71). "General Common Elements" include "(2) At the cellar, cellar mezzanine and first floor levels: . . . those portions of the exterior walls and any insulation or framing beyond the unexposed face of the dry wall at the exterior face of the Building, or where applicable, those portions of the exterior walls beyond the interior face of the exterior walls or the concealed block work or concealed structural members of those walls" (*id.* at 74). "Limited Common Elements" means:

> "Parts of the whole which are owned as Common Elements but the exclusive use of which is granted to a single Unit Owner or several Unit Owners and, unless otherwise specified, the maintenance and repair of which is the responsibility of the Unit Owners or Owners to which the exclusive use has been allocated. In this Plan, the following are Limited Common Elements which shall be for the exclusive use of either all of the Residential Unit Owners ('Residential Limited Common Elements') . . . or an individual Residential Unit Owner ('Residential Unit Limited Common Elements'):
>
> (1.) Residential Limited Common Elements:
>
> (la) At the second floor, including the second floor mezzanine, through and including the twentieth floor or Penthouse levels: all foundations, footings, columns, girders, floor slabs and concrete ceilings, beams, and supports, any interior bearing walls . . . ; also at those levels, those portions of the exterior walls and any insulation or framing beyond the unexposed face of the dry wall at the exterior face of the Building, or where applicable, those portions of the exterior walls beyond the interior face of the exterior walls or the concealed block work or concealed structural members of those walls . . ." (*id.* at 77-78).

The Condominium's offering plan (the Offering Plan) details Broadway's obligations regarding construction defects in the building. Paragraph 7 in the section titled "Rights and Obligations of Sponsor" partially provides:

> "The Sponsor will promptly correct any patent defects in the construction of the Building and the Units therein . . . due to substantially improper workmanship or materials substantially at variance with the architectural plans and specifications, provided Sponsor is notified of such defects in writing by the Unit Owner as to the Unit affected within sixty (60) days from the date of closing of title to such Unit or, with respect to Common Elements affecting the Unit, that Sponsor is notified by the Board of Managers within six (6) months from the First Unit Closing. If any defect in the Common Elements can only be detected after said period by occupancy of a particular Unit, Sponsor will correct said defect in the construction of the Common Elements . . . if notified by the Board of Managers within sixty (60) days from closing of title to or first leasing of that particular Unit. Sponsor will also correct any latent defects in the construction of the Building and the Units therein . . . provided it is notified of such defects in writing by the Unit Owner as to such Unit within one (1) year from the closing of title to such Unit or is notified by the Board of Managers with respect to Common Elements within one (1) year after the First Unit Closing" (NYSCEF No. 39, Kovner affirmation, exhibit D at 6).

Paragraph 7 further states that Broadway shall have discharged its obligations with respect to patent or latent defects if it is not notified within the time periods set forth above (*id.* at 7), and that "[e]xcept as expressly set forth herein, Sponsor has no obligation to correct or repair any other defect or conditions in the Units, Common Elements or the Building" (*id.* at 8).

Leventhal moved into the Unit in September 2018 (NYSCEF No. 47 at 49). At his deposition, Leventhal recounted feeling a "very, very strong wind, a cold wind coming through the light switch next to [his] bed" on the first night he spent in the Unit (*id.* at 63). He described the wind as "more than a draft" and stated there was "[w]ind air blowing through light sockets, light fixtures. A draft is something that's very subtle through a door. This is blowing air" (*id.* at 69). When Leventhal spoke to "Genti" from building management the next day, Genti told him that "it was a known issue in the building and that they were actively trying to repair the air infiltration" (*id.* at 100). Genti also told Leventhal that "they were actually having someone come on site in a relatively short period of time" (*id.* at 101). The cold was not limited to the main bedroom, as Leventhal described cold air infiltration at the exterior wall on the south side of the Unit and on the north side of the living room and cold floors in the bathroom off the main bedroom, all of which caused the floors in the Unit to "warp" (*id.* at 67-68, 107 and 173). The cold temperatures in the Unit did not improve in the winter months, even though "[t]he heat would run continuously" (*id.* at 62-63, 70 and 107). Leventhal testified that he learned the residents in unit 10A experienced extremely cold temperatures in their main bedroom, as well (*id.* at 113-114 and 165).

Beginning in spring 2019, Leventhal began experiencing excessive humidity in the Unit (*id.* at 70). The humid conditions, which continued through the summer, fall and winter, caused visible water condensation on the walls (*id.* at 71-73). Leventhal later purchased and installed equipment to record the air temperature and humidity in the main bedroom, main bathroom, and living room (*id.* at 76).

Leventhal spoke to several Board members, including Philip Ha (Ha), Colburn Packard (Packard) and Lee Levy, about the conditions in his Unit (*id.* at 117). Ha and Packard told Leventhal that they had both experienced similar issues and were looking into remedying them with the Sponsor (*id.* at 117-121 and 154). Leventhal believed the conditions were "a linchpin issue . . . that affected a substantial number of units and the overall value of the building" and raised them at the owners' annual meeting in November 2018 (*id.* at 153). At that meeting, Packard acknowledged the issues were "known" and had been raised with the Sponsor (*id.* at 153-154). Packard, though, explained that other issues involving a neighboring building and a fire lane took precedence, and once those issues were settled, the Board would work on resolving Leventhal's complaints (*id.* at 154). Leventhal also testified that the Board prioritized redecorating the lobby over his issues and other structural issues in the building (*id.* at 153-153 and 165).

Pursuant to Article VI, Section 10(d) of the Bylaws, Nochi's counsel served the Board with written notice dated September 27, 2019, stating that the Board was obligated to repair the General Common Elements, specifically the exterior walls and insulation affecting floors nine and above (NYSCEF No. 40, Kovner affirmation, exhibit E at 2).

On February 2, 2020, Leventhal vacated the Unit because of the cold temperatures and moved into his parents' apartment on East 78th Street (NYSCEF No. 47 at 86-87). He resided in his parents' apartment, where he paid no rent, until July 2020, when he moved into an apartment at 242 Elizabeth Street (*id.* at 25 and 88). Leventhal rented the penthouse apartment pursuant to a written lease dated July 1, 2020, from nonparty Elizabeth Street LLC for a one-year term beginning July 15, 2020 through July 14, 2021, for $132,000 in annual rent (NYSCEF No. 46, Kovner affirmation, exhibit K at 1). Leventhal has renewed the lease each year since, and at the time of his deposition, his monthly rent had increased to $15,500 (NYSCEF No. 47 at 25).

Leventhal retained nonparty Thornton Tomasetti (TT) to investigate the thermal discomfort in the Unit (NYSCEF No. 47 at 167-169; NYSCEF No. 86, Leventhal aff, exhibit F). According to the report issued February 10, 2020, TT visited the Unit on January 2, 9, and 20, 2020, to conduct infrared surveys of the walls, observe open wall and ceiling probes, and record the temperature and humidity levels in the Unit (*id.* at 6-7). TT concluded that the cold temperatures and excessive humidity levels in the Unit were caused by cracks, holes and open joints in the building's exterior wall, which allowed cold air and water vapor to infiltrate the Unit; improperly installed or missing insulation in the exterior wall assembly; and thermal bridges at the floor and ceiling concrete slabs, which resulted in cold floors near the exterior walls (*id.* at 2).

Nochi's counsel forwarded TT's report to the Board on February 11, 2020, and wrote:

> "TT has determined that the thermal discomfort, cold drafts and excessive summer humidity in the Unit are a result of many cracks, holes and open joints in the exterior wall of the Unit. Moreover, there are areas of missing insulation and improperly installed insulation. These conditions are further aggravated by other contributing factors, namely thermal bridges at the floor slab and lack of a continuous air barrier" (*id.* at 4).

Nochi's counsel also warned that Nochi would commence an action to enforce its rights if the Board failed to provide "an acceptable remediation plan and schedule" by a date certain (*id.*). TT later reported, in an addendum dated September 24, 2020, that it had conducted additional visual observations and taken temperature and humidity readings in the Unit on August 13, 2020 (NYSCEF No. 87, Leventhal aff, exhibit at 4). TT concluded that warm, humid air infiltrated the Unit through cracks and holes in the exterior concrete masonry unit wall (*id.* at 9).

When asked at his deposition to expound on Nochi's damages, Leventhal described the general stress he experienced from having to move out of the Unit and finding a new residence because "by [his] standards the apartment is uninhabitable" (*id.* at 106); Leventhal's moving costs, including parking garage fees, rent and utilities at the Elizabeth Street apartment (*id.* at 97-98, 172-173 and 181); the "degraded value of the apartment. . . . And the inability to put a tenant or otherwise sell the apartment" (*id.* at 112); costs to remediate the extreme cold and humidity conditions (*id.* at 172); attorneys' fees (*id.*); and costs to retain engineers and contractors (*id.* at 173).

Nochi commenced this action against the Board on March 9, 2020. The complaint pleads four causes of action: (1) breach of contract predicated on the Board's failure to remediate the Unit's defects as required in the Bylaws; (2) breach of fiduciary duty causing a decrease in the Unit's value; (3) negligence; and, (4) injunctive relief to compel the Board to remediate the deficient conditions identified in the TT report. Nochi alleges in its verified bill of particulars that it has suffered damages of not less than $1 million, "including damages in the form of diminution in the value of his Unit, loss of the use of his Unit, payment of carrying charges and assessments related to the Unit, costs of alternative housing and related costs, professional fees and attorneys' fees" (NYSCEF No. 91, Leventhal aff, exhibit K, ¶ 11).

The Board subsequently brought a third-party action against Broadway for contractual and common-law indemnification, contribution, apportionment of responsibility for damages, and a judgment declaring that Broadway is obligated to provide a full defense to the Board in this action (NYSCEF No. 7). Broadway interposed counterclaims against the Board for contribution, contractual and common-law indemnification, and breach of contract for failing to procure insurance in its answer to the third-party complaint (NYSCEF No. 10).[2]

Broadway and the Board now move separately for summary judgment.

[2] Broadway also brought two third-party actions for contractual and common-law indemnification and contribution against second third-party and third third-party defendants Robinson Restoration LLC, Smith Restoration, Inc., and MEC General Construction Corp., entities that performed exterior brick work or carpentry and interior insulation work at the Condominium (NYSCEF No. 19, second third-party complaint ¶¶ 12-17; NYSCEF No. 27, third third-party complaint ¶ 11). Robinson Restoration LLC, Smith Restoration, Inc., and MEC General Construction Corp. have not yet appeared in this action.

THE PARTIES' CONTENTIONS

Broadway contends that Nochi cannot recover the cost of remediating any defects because it did not receive timely notice of such defects. Second, Broadway alleges that Nochi failed to mitigate its damages. Next, Broadway maintains that Nochi's damages for an alleged decrease in the Unit's value is limited to the remediation of the defects. As to the remaining damages claims, Broadway asserts that Nochi cannot recover any damages that are personal to Leventhal.

The Board moves to dismiss the first three causes of action for breach of contract, breach of fiduciary duty, and negligence on two grounds: Nochi lacks standing to recover the damages Leventhal sustained, personally, and Nochi has offered no proof of its damages on those causes of action. Alternatively, the Board seeks a declaration that Nochi cannot recover any expenses incurred by Leventhal.

Nochi counters that neither Broadway nor the Board have challenged its damages consisting of the loss of use of the Unit; $138,088.96 in the carrying charges, assessments and utilities (collectively, the Common Charges) for the Unit; $152,035.62 in real estate taxes; and $7,234.22 in professional fees for numerous contractors, as detailed in its verified bill of particulars and in Leventhal's deposition errata sheet (NYSCEF No. 90, Leventhal aff, exhibit J; NYSCEF No. 91, Leventhal aff, exhibit K at 6). Nochi had previously exchanged documents substantiating these damages, including a printout detailing a payment history and checks drawn from Nochi's Citibank account for the Common Charges (NYSCEF No. 92, Leventhal aff, exhibit L); a printout from the New York City Department of Finance website detailing the property taxes paid on the Unit (NYSCEF No. 93, Leventhal aff, exhibit M); and invoices for Lea Environmental, LLC, MicroDAQ.Com, Ltd., and Zale Contracting Inc. (NYSCEF No. 94, Leventhal aff, exhibit N). Nochi maintains that its damages for the loss of use of the Unit should be measured by comparing the Unit's rental value against the rental values of other A-line units in the Condominium (NYSCEF No. 89, Leventhal aff, exhibit I). Nochi additionally contends that it may seek reimbursement of Leventhal's damages because such costs were a natural consequence of the Board's actions, and the court may ignore Nochi's separate form to avoid an inequitable result.

The Board, in response, withdraws its request for summary judgment dismissing the first three causes of action and limits its motion to dismiss those categories of damages for which Nochi cannot recover (NYSCEF No. 121, Board's reply mem of law at 1 and 8-9). It submits that Nochi has identified six categories of damages, three of which were not mentioned at Leventhal's deposition or in the pleadings. Nochi had previously claimed its damages consisted of: (1) the expenses incurred in hiring professional contractors; (2) the diminution in the Unit's value; and, (3) Leventhal's alternative living expenses. Nochi raised three new damages categories for the first time in Leventhal's deposition errata sheet.[3] These new categories consist

[3] Leventhal was deposed on November 4, 2022 (NYSCEF No. 47 at 1), and his errata sheet is dated August 31, 2023 (NYSCEF No. 90). It is unclear when the Board or Broadway exchanged the transcript with Nochi, but it does not appear that Nochi returned the signed transcript, with changes, within 60 days, as required by CPLR 3116 (a), until after Broadway and the Board had

of: (1) the Common Charges; (2) real estate taxes; and, (3) loss of use of the Unit. In any event, the Board contends that Nochi cannot legally recover these damages and repeats its earlier arguments on the remaining damages claims. Broadway adopts the Board's arguments in reply.

DISCUSSION

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to meet its prima facie burden, the motion must be denied without regard to the sufficiency of the opposing papers (*see Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

A. Notice of the Alleged Construction Defects

Broadway contends that it did not receive timely notice of any construction defects in the Unit; and that as a result, Nochi cannot recover any damages. The argument is unpersuasive. As outlined above, the Offering Plan specifies that Broadway shall correct patent and latent defects upon receipt of written notice, made within a certain period after the closing of title on the first unit in the Condominium, from the Board or a unit owner (NYSCEF No. 39 at 6). "[S]unset provisions [in an offering plan] whereby notice of defects had to be made by dates certain in order to invoke the promisor's obligations to cure" are generally enforceable (*see Board of Mgrs. of Alfred Condominium v Carol Mgt.*, 214 AD2d 380, 381 [1st Dept 1995], *lv dismissed* 87 NY2d 942 [1996]). However, whether Nochi timely notified Broadway of the alleged defects as required in the Offering Plan does not bear on whether Nochi can recover in this action, since Nochi has not asserted any direct claims against Broadway.

B. Nochi's Failure to Mitigate Its Damages

Broadway contends that Nochi cannot recoup the rent, utilities and other alternative living expenses Leventhal incurred related to the Elizabeth Street apartment because he failed to mitigate his damages. Broadway also asserts that Leventhal could have continued to reside rent-free in his parents' apartment until all repairs in the Unit were completed but chose not to do so.

Broadway's contention that Leventhal failed to sufficiently mitigate his damages is unconvincing. A "violation of [a condominium's] bylaws is akin to a breach of contract" (*Pomerance v McGrath*, 124 AD3d 481, 482 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015]). As such, "[t]he law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury" (*Holy Props. v Cole Prods.*, 87 NY2d 130, 133 [1995]). The burden rests with the defendant to demonstrate the plaintiff's lack of diligent effort in mitigating its damages (*see Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 74

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moved for summary judgment. While Nochi has not explained the delay, neither the Board nor Broadway have rejected the errata sheet as untimely, nor asked this court to do so (*see Parra v Cardenas*, 183 AD3d 462, 463 [1st Dept 2020]).

[1966]). Whether a plaintiff has satisfied its duty to mitigate its damages, and whether the plaintiff acted reasonably, ordinarily present questions of fact for the jury to determine (*see NAB Constr. Corp. v Consolidated Edison Co. of N.Y.*, 242 AD2d 480, 480 [1st Dept 1997], citing *Bernstein v Freudman*, 180 AD2d 420, 421 [1st Dept 1992]).

C. The Alleged Diminution in the Unit's Value

Broadway submits that Nochi cannot recover any monetary damages for the alleged diminution in the Unit's value because its remedy in this action is limited to the remediation of the construction defects. The case Broadway cites in support of this proposition, however, is factually distinguishable. In *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (50 AD3d 503, 503 [1st Dept 2008]), the plaintiff brought claims against a condominium sponsor and others for breach of contract and negligence related to alleged defects in its unit. The Court determined that the plaintiff's remedy for a breach of the purchase agreement, which had incorporated the terms in the condominium's offering plan, limited the plaintiff's remedy "to the right to require the sponsors to 'repair or replace any defective item of construction.' The latter provision necessarily excludes from recoverable damages any diminution in the value of the unit that may result from defective construction" (*id.* at 504). By contrast here, Nochi did not purchase the Unit from Broadway, and the contract of sale between Nochi and Franklin 9A LLC does not contain a provision incorporating the terms of the Offering Plan, unlike the purchase agreement described in *Kerusa*.

The Board argues that Nochi has failed to furnish any proof demonstrating that the value of the Unit has decreased. To bolster its contention, the Board points to the admission in Leventhal's affidavit that he has yet to retain an expert to assess that figure (NYSCEF No. 80, Leventhal aff, ¶ 32). Thus, the Board contends that this category of damages must be dismissed. The Board, however, merely points to gaps in Nochi's proof, which is insufficient to sustain its prima facie burden on summary judgment (*see Vasquez v Ridge Tool Pattern Co.*, 205 AD3d 657, 661 [1st Dept 2022]; *Bryan v 250 Church Assoc., LLC*, 60 AD3d 578, 578 [1st Dept 2009]).

Leventhal's testimony that Nochi has not incurred any expenses in connection with the warped floors (NYSCEF No. 47 at 174) at least suggests that a diminution in the Unit's value may be too speculative to permit recovery (*see e.g. Pu v Board of Mgrs. of Trafalgar House Condominium*, 2021 NY Slip Op 32577[U], *3 [Sup Ct, NY County 2021] [finding that, in the absence of any physical damage to the condominium unit, the plaintiff cannot recover "compensation for a speculative loss in a hypothetical future sale due to his unit's alleged, unsubstantiated diminution in value"]). But Broadway has failed to tender any proof that the construction defects have not caused any physical damage to the Unit nor has it offered any proof demonstrating that the Unit's value has remained the same.

D. The Damages Incurred by Leventhal

Broadway and the Board both contend that Nochi cannot recover the costs incurred by Leventhal in relocating from the Unit and any costs associated with the Elizabeth Street apartment, such as rent, utilities, moving costs, and parking garage fees, because those damages are personal to Leventhal. The Board submits that Leventhal leased the Elizabeth Street

apartment in his own name (NYSCEF No. 47 at 26; NYSCEF No. 60, Orel affirmation, exhibit I), and that he paid the security deposit and three month's rent from his personal accounts (NYSCEF No. 62, Orel affirmation, exhibit K). Parking garage invoices, moving company invoices, and Consolidated Edison and Spectrum bills for the Elizabeth Street apartment are all addressed to Leventhal, not Nochi (NYSCEF Nos. 59, 63-64, Orel affirmation, exhibits H and L-M); and Leventhal testified that he personally paid the parking garage invoices (NYSCEF No. 47 at 97). Leventhal also paid the $3,097.84 invoice to Zale Contracting Inc. from an account for the Max Leventhal Revocable Trust[4] (NYSCEF No. 65, Orel affirmation, exhibit N).

Nochi, in opposition, invokes the doctrine of piercing the corporate veil in reverse. Nochi asserts that the Board was aware Leventhal had formed Nochi to facilitate ownership of the Unit and has interacted with Leventhal and Nochi as if they were the same entity.

It is not disputed that Nochi, the Unit's owner of record, is a limited liability company, and that a limited liability company is a separate legal entity from its members[5] (*see Cortazar v Tomasino*, 211 AD3d 677, 679 [2d Dept 2022]; *Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 682 [2d Dept 2016]). Here, Nochi seeks to recoup the expenses incurred and paid for by Leventhal, individually, which would be impermissible absent veil-piercing (*see 270 N. Broadway Tenants Corp. v Round Oaks Props., LLC*, 116 AD3d 1035, 1037 [2d Dept 2014] [concluding that the defendant's status as a member of "a limited liability company . . . would not make him an aggrieved party with respect to the judgment against [the limited liability company]"]; *Katz v Katz*, 55 AD3d 680, 684 [2d Dept 2008] [reasoning that the plaintiff, the sole member of a limited liability company, could not recover rent and other damages in his individual capacity because the company owned the premises where the defendant resided]; *Rogers v Ciprian*, 26 AD3d 1, 6 [1st Dept 2005] [finding that the individual plaintiff lacked standing to recover the losses sustained by a corporation]). Thus, Broadway and the Board have demonstrated that absent veil-piercing Nochi cannot recover Leventhal's relocation costs, alternative living costs, parking garage fees and other costs incurred by Leventhal, personally.

Nevertheless, Nochi maintains that its corporate veil may be pierced in reverse. It is well established that "courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity" (*Matter of Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993] [internal quotation marks and citation omitted]). The doctrine allows a party "to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation" (*id.* at 141). However, "[w]hile the corporate veil may be pierced for the benefit of those suing a corporation, it will not be pierced in the reverse manner for the benefit of the corporation or its individual shareholders" (*Richbell Info. Servs. v Jupiter Partners*, 309

[4] Leventhal testified that Zale Contracting Inc. created the probes for TT's investigation (NYSCEF Doc No. 47 at 133).

[5] Although the Board acknowledges that Nochi is a Delaware limited liability company (NYSCEF Doc No. 68, the Board's mem of law at 5), Broadway and the Board both recite New York caselaw. Nochi, similarly, relies on a New York federal case in its opposition. Accordingly, the court shall rely on New York law.

AD2d 288, 306 [1st Dept 2003], citing *Uribe v Merchants Bank of N.Y.*, 239 AD2d 128, 128 [1997], *affd* 91 NY2d 336 [1998]; *Matter of Colin v Altman*, 39 AD2d 200, 202 [1st Dept 1972]). That is exactly the case here—Nochi is seeking to pierce its own corporate veil for the benefit of its only member, Leventhal. Accordingly, Nochi cannot recover those damages incurred personally by Leventhal.

Nochi contends that the rule against reverse-veil-piercing in these circumstances is not absolute and cites *Musico v Champion Credit Corp*. (764 F2d 102 [2d Cir 1985]) in support. This court disagrees with Nochi.

The Second Circuit in *Musico* reasoned that "there are New York cases involving corporations owned by estates in which the separate status of the corporation was disregarded for the benefit of the owner, or in which the question of whether this should be done was not closed as a matter of law" (*id.* at 108). The decision in *Musico*, however, "while entitled to great weight, is not binding on this court" (*New York R.T. Corp. v City of New York*, 275 NY 258, 265 [1937], *affd* 303 US 573 [1938]). In any event, the Second Circuit recognized that this equitable exception applies in the context of estate cases (*see Bingham v Zolt*, 66 F3d 553, 562 [2d Cir 1995]), and, as the Board has argued, the present action does not involve an estate case.

In *Corcoran v Frank B. Hall & Co*. (149 AD2d 165, 175 [1st Dept 1989]), the Appellate Division, First Department, agreed with the proposition in *Musico* that the rule against reverse veil piercing was not absolute. *Corcoran* involved an action brought by a court-appointed liquidator on behalf of an insolvent insurance company, its policyholders and creditors against the company's parent and sole shareholder, subsidiaries, and former directors, officers and auditors stemming from the company's insolvency (*id.* at 168-169). In determining that the liquidator had standing to maintain the action, the Court made the distinction "between an 'alter ego' action brought by a liquidator or receiver for a defunct corporation and that brought by an operating corporation" (*id.* at 174). Significantly, the Court reasoned:

> "When a functioning corporation sues on its own behalf, it is in essence suing for the benefit of its shareholders. Thus, a suit by a viable corporate entity seeking to pierce its own veil is the equivalent of a suit by a corporation for the benefit of its shareholders brought against its shareholders, an absurdity. This is the clear and compelling rationale why courts have failed to recognize such an action. Where, however, the corporate entity is in receivership or insolvent, the receiver's suit is *for the benefit of the company's creditors* and not its shareholders. In the alter ego case, therefore, it has been held that a trustee can bring an action piercing the corporate veil" (*id.* at 174-175) (emphasis in original).

Unlike the scenario in *Corcoran*, Nochi has not alleged that it is insolvent or that it is pursuing this action on behalf of its creditors. In sum, Nochi has not demonstrated that piercing Nochi's corporate veil to benefit Leventhal is an available remedy.

Moreover, even if piercing the corporate veil in reverse were available, Nochi's proof is deficient. Nochi urges the court to "look at the realities of the situation between the occupant of the Unit and the board of managers of the Condominium" (NYSCEF No. 79, Nochi's mem of law at 10), and submits that the Board was aware and treated Nochi and plaintiff as if they were the same. On this point, Nochi tenders its purchase application for the Unit containing Leventhal's personal financial information (NYSCEF No. 81, Leventhal aff, exhibit A), and a September 30, 2017 email between Board members referring to Leventhal, not Nochi, as the applicant purchasing the Unit (NYSCEF No. 82, Leventhal aff, exhibit B). Neither document, though, conclusively demonstrates that the Board regularly disregarded Nochi's and Leventhal's separate forms (*see e.g. Musico*, 764 F2d at 110 [reasoning that "defendants' own disregard of the separate status of the Musico, Sr. corporations from at least 1980, and because of their own acceptance during most of this litigation of the Musico, Sr. estate as the real party in interest in the lease and sale of the medallions" warranted disregarding the corporate form to avoid inequity]). Thus, Nochi's claims for damages related to the alternative living costs personally incurred by Leventhal, including rent, utilities, relocation or moving costs, and parking garage fees, are dismissed.

To the extent the Board seeks to dismiss Nochi's damages for costs related to the professional engineers or contractors hired to investigate the conditions in Unit, the Board has produced one document demonstrating that Leventhal, not Nochi, paid Zale Contracting, Inc., for its work (NYSCEF No. 65). Leventhal also testified that he paid MicroDAQ.Com, Ltd. for the equipment used to measure and record the air temperature and humidity levels in the Unit, as Nochi does not possess its own credit card (NYSCEF No. 47 at 95-97). As a result, Nochi's claims for damages related to Zale Contracting, Inc. and MicroDAQ.Com, Ltd. are dismissed.

The Board, however, has failed to establish that Nochi has not sustained any damages related to TT or Lea Environmental, LLC. Leventhal testified that either he or TT retained Lea Environmental, LLC, and that he hired TT (NYSCEF No. 47 at 94 and 167). This testimony though, does not by itself establish that Leventhal *personally* paid for TT's or Lea Environmental, LLC's services. Last, Leventhal identified Nochi's attorney fees as part of its damages. The Board has not furnished specific proof that Leventhal, rather than Nochi, paid Nochi's attorney fees.

E. The Damages Related to the Common Charges, Real Estate Taxes and Loss of Use of the Unit

As to the Common Charges, the Board has demonstrated that Nochi cannot recover in this category of damages. "'[A]n individual unit owner cannot withhold payment of common charges and assessments in derogation of the condominium's bylaws based on defective conditions in his or her unit or in the common areas, or a disagreement with actions lawfully taken by the Board of Managers'" (*Board of Mgrs. of Villas on the Lake Condominium v Policicchio*, 228 AD3d 610, 612 [2d Dept 2024], quoting *Matter of Abbady [Mailman]*, 216 AD2d 115, 115-116 [1st Dept 1995]; *Board of Mgrs. of the 200 W. 109 Condominium v Baker*, 244 AD2d 229, 229 [1st Dept 1997]; *Frisch v Bellmarc Mgt*., 190 AD2d 383, 389 [1st Dept 1993]). With respect to Nochi's demand for reimbursement of the real estate taxes it has paid, Nochi cites no caselaw to support the contention that such damages are recoverable, especially

since Nochi still holds title to the Unit. Accordingly, Nochi's claims for damages related to the Common Charges and real estate taxes paid on the Unit are dismissed.

Regarding the alleged loss of use of the Unit, it is unclear on what grounds the Board seeks dismissal of this category of damages. Therefore, this part of the motion is denied, given the Board's failure to advance any specific arguments that Nochi cannot recover such damages based on an alleged breach of contract.

Accordingly, it is

ORDERED that the motions for summary judgment brought by third-party defendant Broadway 371, LLC (motion sequence no. 001) and defendant/third-party plaintiff Board of Managers of Franklin Place Condominium (motion sequence no. 002) are granted to the extent of dismissing the damages claims brought by plaintiff Nochi Blue, LLC, in the following categories:

(i) common charges, assessments, utilities and real estate taxes paid for unit 9A at 5 Franklin Place, New York, New York from February 2, 2020;

(ii) alternative living expenses comprised of moving or relocation costs, rent, the security deposit, and all utilities paid for the apartment located at 242 Elizabeth Street, New York, New York from July 1, 2020, and parking garage expenses from February 2, 2020, incurred by plaintiff's sole member, Max Leventhal; and

(iii) payments made by Leventhal to Zale Contracting, Inc. and MicroDAQ.Com, Ltd.;

and it is further

ORDERED that the balance of each motion is otherwise denied.

9/25/2024
DATE

HON. GERALD LEBOVITS
J.S.C.

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