SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

CHELSEA PIERS, L.P.

-v-

HUDSON RIVER PARK TRUST

INDEX NO. 653143/11

MOTION DATE

MOTION SEQ. NO. 002

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 by defendant for reargument is GRANTED; Defendant's motion to dismiss the complaint is GRANTED for the attached Decision and Order.

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

Dated: July 26, 2012

J.S.C.

MELVIN L. SCHWEITZER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

CHELSEA PIERS, L.P.,	:	
	:	
Plaintiff,	:	Index No. 653143/11
	:	
-against-	:	DECISION AND ORDER
	:	
HUDSON RIVER PARK TRUST,	:	Sequence No. 002
	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This is a dispute between plaintiff Chelsea Piers, L.P. (Chelsea Piers), as the tenant under a lease for Piers 59, 60, and 61 (the Piers), and defendant Hudson River Park Trust (HRPT), as the landlord of the Piers. The issue in this case is whether and to what extent HRPT is liable to Chelsea Piers for maintenance of the Piers.

HRPT here moves for reargument pursuant to CPLR 2221(d) on the grounds that matters of fact and law were overlooked or misapprehended by the court in its decision denying HRPT's motion to dismiss Chelsea Piers' complaint pursuant to CPLR 3211(a) (1), (5), and (7).

Background

Chelsea Piers is a New York, for-profit business that leases the Piers.

HRPT is a public benefit corporation established by the Hudson River Park Act (Act) signed into law in September 1998 to control the planning, design, construction, operation and maintenance of a park on the west side of Manhattan, along the Hudson River waterfront.

In June 1994, Chelsea Piers and New York State (the State) entered into a twenty-year lease (Lease) for the Piers. HRPT is the successor in interest to the State, as lessor under the

Lease with Chelsea Piers. In June 1996, the parties amended the Lease to increase the term to forty-nine years, renewable in ten-year increments.

The Lease places the burden of repairs and maintenance of the Piers on Chelsea Piers. Lease § 10.1 (a). Nonetheless, the Lease provides the following exception: "*in the event a comprehensive, public maintenance plan* for Hudson River waterfront piers in New York City (as opposed to a limited plan for certain designated piers) *is adopted and becomes effective during the term of this Lease, then [HRPT] shall . . . include [Chelsea Piers] in such plan.*" Lease § 10.1 (b) (emphasis added). Therefore, § 10.1 (b) provides that, if a "comprehensive" public maintenance plan for Hudson River Piers in New York City were adopted and made effective, then the burden of repairs or maintenance of the Piers shifts from Chelsea Piers to HRPT.

The predecessor of HRPT, the Empire State Development Corporation, through its subsidiary, Hudson River Park Conservancy, developed a Park Plan (Park Plan) in the summer of 1998. Chelsea Piers was excluded from HRPT's maintenance and rehabilitation work obligations included in the Park Plan at its adoption.

The problem for Chelsea Piers in this regard is that its Piers are threatened by marine borer infestation on their timber piles below the waterline. The Piers, completed in 1910, have been under marine borer assault for decades. The State and Chelsea Piers were well aware of this problem when they negotiated the Lease.

Between 1997 and 2001, Chelsea Piers issued frequent demands to be included in the Park Plan, which it claims HRPT largely ignored. Then, in 2003, HRPT agreed to provide Chelsea Piers with rent credits of $500,000 per year for the years 2004-2008 to offset the cost of repair of the Piers. According to Chelsea Piers, the amount of the rent credits which HRPT

extended to it between 2004 and 2008 was entirely sufficient for it to fund the repairs necessary to address the marine borer problem during those years. Because of this financial assistance at that time, Chelsea Piers saw no reason to bring suit against HRPT seeking to be expressly included in the Park Plan. HRPT, on the other hand, asserts it knew that the amount of the credits it extended for those years never was going to be sufficient to address Chelsea Piers' entire marine borer problem and, indeed, the credits it extended proved to be insufficient to fully address the extent of the problem at the Piers.[1]

In any event, when it became apparent to Chelsea Piers that HRPT was not going to extend rent credits beyond 2008 or to include Chelsea Piers in the Park Plan, it filed this litigation against HRPT in November 2011 seeking a declaration that the Park Plan itself is a "comprehensive, public maintenance plan for Hudson River waterfront piers in New York City" (Lease § 10.1 (b)), thus entitling Chelsea Piers to be included in it.

HRPT's response to the lawsuit essentially was to rely on the six-year contract statute of limitations as an absolute defense barring all of Chelsea Piers' claims. The court's original decision viewed things differently.

With respect to the 2003-2008 rent credits, the court viewed discovery regarding HRPT's intent to extend them to Chelsea Piers as possible support for a finding that Chelsea Piers had become constructively included in the Park Plan at this later time, thus giving rise to a viable cause of action notwithstanding expiration of the six-year statute of limitations when measured from 1998. And, with respect to the Park Plan itself, the court envisioned discovery pertaining to possible additional iterations of the plan since 1998 as extensions of the 1998 accrual date of

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[1] Chelsea Piers, on its own, since 2008, has contracted to expend at least $16 million in emergency maintenance and repair costs to further address the marine borer onslaught. It estimates that a total of $37.5 million of repairs must be made by 2014.

the statute of limitations to support a lawsuit by Chelsea Piers for inclusion in what it might be able to argue was a new comprehensive Park Plan.

HRPT's motion for reargument asks the court to revisit these conclusions as misapprehensions of matters of fact and law pursuant to CPLR 2221(d).

The court has done so, and here grants reargument to revise its decision as set forth below.

Discussion

Standards of Review

With regard to HRPT's motion to dismiss Chelsea Piers' complaint, CPLR 3211 authorizes motions to dismiss a pleading on the grounds that, *inter alia*, "a defense is founded upon documentary evidence; or . . . the pleading fails to state a cause of action." CPLR 3211 (a) (1), (7). Additionally, of course, CPLR 3211 authorizes such motions where "the cause of action may not be maintained because of . . . statute of limitations." CPLR 3211 (a) (5).

On any motion to dismiss, the court must determine whether "from the complaint's four comers, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (internal quotation marks omitted). The complaint must "be afforded a liberal construction" in plaintiff's favor, and the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "Although . . . the facts pleaded are presumed to be true" for purposes of a CPLR 3211 motion, "allegations consisting of bare legal conclusions, as well as factual claims either inherently

incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Kliebert v McKoan*, 228 AD2d 232, 232 (1st Dept 1996).

The Constructive Inclusion Theory

With respect to the court's initial decision which found there was a possibility that HRPT had constructively included Chelsea Piers in the Park Plan, HRPT argues in its motion for reargument that such a rent credit agreement as existed here cannot be the predicate for such a theory. HRPT cites NY Gen Oblig § 17-101 which provides: "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions."

In interpreting § 17-101 for part payments, New York courts have held:

> In order that a part payment shall have the effect of tolling a time-limitation period . . . it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder. *Lew Morris Demolition Co. v Board of Education*, 40 NY2d 516, 521 (NY 1976).

HRPT argues that NY Gen Oblig § 17-101 thus cannot remove the action from the limitations of time for commencing suits because the $500,000 per year agreement never was intended to cover the full repair costs from 2003 to 2008. Chelsea Piers has countered that the payment was indeed intended to cover the full repair costs for that period. As stated, *supra*, on a motion to dismiss, the court must "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Martinez*, 84 NY2d 87-88. The court is of the view, however, that even if the $500,000 per year credit was a full remedy for the years 2003-2008, the agreement could not

have been intended as a full remedy for the alleged breach *encompassing the entire term of the Lease*. Chelsea Piers does not argue that HRPT could have satisfied its obligation by including Chelsea Piers for merely five years and then requiring Chelsea Piers to pay for the repairs for the remainder of the Lease. The obligation, after all, was to include Chelsea Piers in a "comprehensive, public *maintenance* plan," Lease § 10.1 (b) (emphasis added), which implies an ongoing obligation to *maintain* the Piers. This obligation extended for the term of the Lease. As such, the 2003 agreement, at most, constituted a partial payment toward that maintenance plan, and it did not toll the statute of limitations. The credit was not "accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder." *Lew Morris Demolition Co.*, 40 NY2d 521. On the contrary, HRPT agreed to pay the credits only with the following non-waiver clause as part of its written agreement with Chelsea Piers: "Please note that our agreement . . . should not be viewed as a waiver, modification or concession by [HRPT] with respect to any of the terms and conditions of your Lease, including Section 10." 2003 Letter Agreement. This is the opposite of "circumstances amounting to an absolute and unqualified acknowledgment" of more being due. *Lew Morris Demolition Co.*, 40 NY2d 521. Accordingly, the constructive inclusion theory cannot be relied in these circumstances to extend the contract statute of limitations.

The Multiple Plan Theory

The court continues to be of the view that when the parties signed the Lease it was highly probable there would be multiple iterations of the Park Plan over the years of the Lease given the political nature of urban redevelopment and the large sums of money and spans of time which would be involved. Any one of these iterations might require HRPT to include Chelsea Piers in the Park Plan so long as the revised plan were a comprehensive public maintenance plan. Moreover, the language of the Lease is instructive in this regard: the Lease defines the "Waterfront Plan" as the 1990 Vision Plan "or any successor plan thereto." Lease Article 1. The language of the Act is similar: "'General project plan' means the Hudson river park concept & financial plan, dated May, 1995, as modified in the May 20, 1998 final environmental impact statement, and *any successor plan* or statement of findings *created thereafter*" (emphasis added). Act Sec 3 (d). In the court's view, HRPT's failure to include Chelsea Piers in any comprehensive successor plan would accrue a separate cause of action in favor of Chelsea Piers.[2] Nonetheless, the court is of the opinion that, to date, there has only been *one* Park Plan. No new plans have been adopted since 1998. Section 7.6 of the Act, for example, provides that "[i]n the

[2] Chelsea Piers makes a similar argument, predicated, however, on what it views as HRPT's continuing obligation to fund repairs of the Piers. Chelsea Piers relies on two Lease provisions. First, Chelsea Piers cites §10.1(b)(ii), which provides that if HRPT adopts and makes effective a comprehensive, public maintenance plan, Chelsea Piers' general obligation to repair and maintain the Piers shall not be "relied upon . . . *to reduce the amount of maintenance activity or funding* applied to the Premises *under such plan*" (emphasis added). Second, Chelsea Piers raises §19.3, which provides "[i]f [HRPT] is at any time in default of its covenants hereunder then" Chelsea Piers may "perform such obligation on [HRPT's] behalf. [Chelsea Piers] shall be entitled to take as credit against the Base Rent all reasonable sums paid."

Chelsea Piers' reliance on these two sections as the predicate for multiple plans is without merit. §10.1(b)(ii) does not create an obligation separate from the obligation to include Chelsea Piers. Instead, it gives context for what it means to "include" Chelsea Piers in a comprehensive, public maintenance plan. This is evidenced by the last words of that section, "under such plan," which reinforces that this language is only relevant if HRPT is obligated to include Chelsea Piers in the Park Plan. Similarly, §19.3 does not create a separate obligation but merely provides Chelsea Piers a remedy in case HRPT is in "default of its covenants" under the Lease.

case of any proposed significant action affecting the park or community, including the adoption of, and any amendment to, the general project plan," HRPT would have to provide for, *inter alia*, a public hearing. Chelsea Piers has not alleged that HRPT has provided such a hearing. Furthermore, according to Chelsea Piers' own pleading, "[a]lthough minor changes have been made over the years to specific details presented in HRPT's initial plan as construction has progressed, the vision remains the same." Complaint ¶ 52. This court reads the statutory scheme which created HRPT, together with the Chelsea Piers' own concession in its complaint, to mean there have only been minor changes which are not sufficient to constitute the creation of an entirely new plan. Chelsea Piers speculates about possible revisions to the Park Plan and the Act, given HRPT's recent financial troubles. But future plans are inapposite to the question of whether HRPT, as of today, has accrued multiple breaches.[3] Because there has been only one Park Plan, Chelsea Piers' action is time-barred by the six-year statute of limitations for contract claims.[4]

Conclusion

This court, in granting reargument, thus holds that the six-year contract statute of limitations bars Chelsea Piers from bringing a claim against HRPT for failing to include it in the Hudson River Park maintenance plan, and further that neither the constructive inclusion theory nor the multiple plan theory takes Chelsea Piers' claims out of the operation of the statute of limitations.

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[3] If HRPT amends the Park Plan in the future, Chelsea Piers might be able to bring a new suit if HRPT does not include Chelsea Piers in such an amended Park Plan. As of now, however, there has been only one plan and this question is thus not properly before the court.

[4] The court does not now resolve the issue of whether the current Park Plan constitutes a "comprehensive, public maintenance plan" pursuant to Section 10.1(b). Even if Chelsea Piers could plead a valid prima facie substantive case based on the facts as they have existed to date, its action remains time-barred.

Accordingly, it is

ORDERED that HRPT's motion for reargument is GRANTED; and it is further

ORDERED that HRPT's motion to dismiss is GRANTED.

Dated: July 26, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.