Herman v 36 Gramercy Park Realty Assoc., LLC
2014 NY Slip Op 30872(U)
April 2, 2014
Sup Ct, New York County
Docket Number: 652700/2012
Judge: Shirley Werner Kornreich

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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ROSEMARIE A. HERMAN, individually, as beneficiary of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990 and as beneficiary of the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991 and on behalf of MAYFAIR YORK LLC, WINDSOR PLAZA LLC, a New York Limited Liability Company, AVON BARD LLC, MERIT MANAGEMENT LLC, PRIMROSE MANAGEMENT LLC, KEYSTONE MANAGEMENT LLC by their 50% ownership of their membership interests; ROSEMARIE A. HERMAN as Natural Guardian for GAVIN I. ESMAIL and JESSE A. ESMAIL, individually, as beneficiaries of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990 and as beneficiaries of the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991,

Plaintiffs,

-against-

36 GRAMERCY PARK REALTY ASSOCIATES, LLC; 320 E. 22ND REALTY ASSOCIATES, LLC; 10 W. 74TH STREET REALTY ASSOCIATES, LLC; 150 W. 82ND STREET REALTY ASSOCIATES, LLC; 425 E. 76TH STREET REALTY ASSOCIATES, LLC; COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC; MMANN LLC; MANN MANAGEMENT, INC. D/B/A MANN REALTY ASSOCIATES; MAURICE A. MANN; "ABC COMPANY # 1" through "ABC COMPANY #10", the last ten entities being fictitious and unknown to the Plaintiffs, the entities intended being the entities, if any, involved in the acts or omissions described in the Complaint; and "JOHN DOE # 1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants.

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Index No. 652700/2012

DECISION &ORDER

KORNREICH, SHIRLEY WERNER, J.:

Defendants 36 Gramercy Park Realty Associates (Gramercy Realty); 320 E. 22nd Realty Associates, LLC (22 Realty); 20 W. 74th Street Realty Associates, LLC (74 Realty); 150 W. 82nd Street Realty Associates, LLC (82 Realty); 425 E. 76th Street Realty Associates, LLC (76 Realty,

(collectively with Gramercy Realty, 22 Realty, 74 Realty, 82 Realty and 76 Realty, Mann LLCs); Cosmopolitan Property Acquisition Co., LLC (Cosmopolitan); MMann LLC (MMann); Mann Management, Inc., d/b/a Mann Realty Associates (Mann Realty) and Maurice Mann (Mann, collectively with MMann, Mann Realty, Cosmopolitan and the Mann LLCs, Defendants) move (Motion Seq. 002) to dismiss the verified complaint (VC), on the grounds of documentary evidence, the statute of limitations and failure to state a cause of action. CPLR 3211(a)(1), (5) and (7). Plaintiffs oppose.

The plaintiff is Rosemarie Herman (Rosemarie), individually and as beneficiary of two trusts. Rosemarie's two sons, Gavin and Jesse Esmail, (collectively, Sons) were born on February 2, 2005 and June 23, 2009, respectively. Rosemarie also brings this action on behalf of the Sons, individually and as beneficiaries of the trusts, and on behalf of six limited liability companies. The VC contains four causes of action, numbered here as in the VC: 1) an action to quiet title against Gramercy Realty; 2) ejectment; 3) conspiracy; and 4) replevin. The readers' familiarity with this court's decisions on dismissal motions in two related actions[1] is assumed, and the facts will not be repeated at length here.

I. Background

In short, this action alleges that: 1) Gramercy Realty converted the apartment building located at 36 Gramercy Park East, New York, New York (36 Gramercy) to a condominum and sold some of the apartments although it did not have good title to it; and 2) Defendants conspired to commit four torts and concealed from Rosemarie that, in a December 31, 1998 transaction, her brother and trustee wrongfully sold her beneficial interest in two trusts. The four torts that Defendants allegedly conspired

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[1] *Herman v Herman*, Index No. 652205/2011 (Main Action) and *Herman v Atmas*, Index No. 652698/2012 (Atmas Action). In the Main Action, the court decided a motion to dimiss and a motion to renew and reargue (respectively, Dismissal Decision & Renewal Decision). Docs 62 & 63 (Doc refers to the New York State E-filing System number). In the Atmas Action, a decision was issued on a motion to dismiss (Atmas Decision). The VCs, here and in the Atmas Action, incorporate the amended complaint filed in the Main Action.

to commit are negligent misrepresentation, breach of fiduciary duty, fraud, and constructive fraud (Primary Torts). Defendants have an action pending in this court against Rosemarie to quiet title to 36 Gramercy and two other properties in which the trusts had an interest.[2]

The two trusts are a 1990 inter vivos trust created by Rosemarie's father, Harold Herman (1990 Trust), which owned fifty percent of 36 Gramercy, and a 1991 trust created by Rosemarie (1991 Trust, with 1990 Trust, Trusts), which owned half of the other five Herman Properties (together, the Herman Properties).[3] The six Herman Properties were inherited from Harold. Rosemarie's brother, Julian Maurice Herman (Maurice) inherited the other half of the Herman Properties from their father. Maurice was named as the trustee of the 1990 Trust. VC, Ex B, Doc 14. Solita Herman (Solita), the mother of Rosemarie and Maurice, was the original trustee of the 1991 Trust. Rosemarie is the life beneficiary of both Trusts. The remainder of the 1990 Trust goes to Rosemarie's issue per stirpes. Should Rosemarie predecease Maurice, he has a life estate in the 1991 Trust, with remainder to Rosemarie's issue per stirpes. Rosemarie had no children when she created the 1991 Trust. Maurice is unmarried and childless.

The 1990 Trust indenture, dated March 1, 1990, between Harold, as grantor, and Maurice, as trustee, was recorded on March 16, 1990. VC, Ex B, Doc 14. The only asset of the 1990 Trust was 36 Gramercy. *Id.* Harold, d/b/a as Mayfair York Co., conveyed 36 Gramercy to the 1990 Trust by a deed acknowledged March 1, 1990 (1990 Deed), which was recorded on March 16, 1990. VC, Ex C, Doc 15. On April 12, 1990, Maurice designated Rosemarie as co-trustee of the 1990 Trust, by an instrument acknowledged by Rosemarie, Maurice and Harold, and recorded on May 22, 1990

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[2] *36 Gramercy Park Realty Assoc. LLC et al, v Herman*, Index No. 654067/12 (Mann Action).

[3] The six Herman Properties were: 1) 952 Fifth Avenue (952 5th); 2) 36 Gramercy; 3) 320-330 East 22nd Street (East 22nd); 4) 8-10 West 74th St (West 74th); 5) 148-154 West 82nd St (West 82nd); and 6) 425 East 76th St (East 76th).

(Designation).[4] VC, Ex D, Doc 16. The 1990 Trust permitted the trustee to designate a co-trustee. VC, Ex B, Doc 14. Since 1993, Rosemarie has lived at 36 Gramercy, in apartment 5W. Doc 81, ¶4. The Sons have lived there since they were born. *Id*, ¶6.

The 1990 Trust terminated pursuant to its terms on March 1, 1997. *Id.* It directed that upon its expiration, half of the corpus (i.e., 36 Gramercy) would go to Maurice outright and the other half was to be held by the trustees in further trust for Rosemarie (the Springing Trust). *Id.* On March 2, 1997, Maurice wrote a letter to Rosemarie stating that he had resigned as trustee and was appointing Michael Offit (Offit) as his successor. VC, Ex E, Doc 17. Offit and Maurice are boyhood friends. Thus, at that point, Rosemarie and Offit were the trustees of the 1990 Trust. On April 24, 1997, however, ***Maurice*** as trustee of the 1990 Trust purported to convey 36 Gramercy to Mayfair York LLC (Mayfair), by deed recorded on June 19, 1997 (Mayfair Deed).[5] VC, Ex F, Doc 18. Neither Rosemarie nor Offit, the co-trustees, signed the Mayfair Deed. The Mayfair operating agreement (Mayfair OA), dated March 4, 1997, reflected that Mayfair had two members each owning fifty percent: Maurice and the Rosemarie A. Herman Trust. VC, Ex G, Doc 19.

In April 1997, Solita resigned as trustee of the 1991 Trust and was replaced by Offit. VC, ¶¶ 55 & 56. In January 1998, Offit conveyed the 1991 Trust's interests in the other five Herman Properties to the derivative plaintiff limited liability companies – Avon Bard LLC (Avon), Merit Management LLC (Merit), Primrose Management LLC (Primrose), Keystone Management LLC (Keystone) and Windsor Plaza LLC, a New York limited liability company (NYWindsor, collectively with Mayfair, Avon, Merit, Primrose & Keystone, LLCs). VC, Doc 13, ¶¶ 59-66. The grantors on the recorded deeds were Offit, as trustee of the 1991 Trust, and Maurice, individually, as tenants in common. Main Action

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[4] The Designation was not in the record when the court rendered the Dismissal and Renewal Decisions in the Main Action.

[5] The 1990 Trust Indenture, the 1990 Deed, the Designation and the Mayfair Deed all were recorded against the property, 36 Gramercy, section 3, block 876, lot 21.

Complaint, Ex 6 thereto, Doc 1-6 in Main Action. The deeds were recorded in July and August 1998. *Id.* After these transfers, the Herman Properties other than Mayfair were held as follows: Avon - East 22nd; Merit - West 74th; Primrose -West 82nd; Keystone - East 76th; and NY Windsor - 952 5th. *Id*

On December 31, 1998, Offit, as trustee of both Trusts, purportedly sold their fifty percent of all six LLCs to Consolidated Realty Holdings, LLC (Consolidated), an entity wholly-owned by Maurice for $8,000,000 (1998 Transaction), which plaintiffs allege was far less than they were worth. VC, Ex H, Doc 20. Offit did not obtain an appraisal. At the time of the 1998 Transaction, Maurice was the managing member of the LLCs and owned the other fifty percent of them individually.

After the 1998 Transaction, Consolidated purportedly[6] transferred its fifty percent interest in the LLCs other than NY Windsor (Transferred LLCs) to Ardent Investments, LLC (Ardent), a defendant in the Main Action, and another entity wholly-owned by Maurice. Consolidated retained ownership of NY Windsor, which owned title to 952 Fifth, where Maurice resides.[7]

In 2002, Ardent and Maurice sold most of their interests in the Transferred LLCs to Cosmopolitan Property Acquisition Company, LLC (Cosmopolitan) for approximately $100,000,000 (2002 Transaction).[8] The contract for the 2002 Transaction was signed on November 1, 2002, but closed in 2003 (2002 Contract). The 2002 Transaction buyer, Cosmopolitan, a defendant in the Main Action, is owned by defendant Mann. On the day of the closing, the Transferred LLCs were conveyed by Cosmopolitan to the Mann LLCs. Affidavit of Maurice Mann, sworn to on 11/26/12, Doc 61, ¶16.

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6 36 Gramercy could not be transferred since Maurice's attempt to transfer it to Mayfair in 1997 was a nullity, and Offit could not transfer it, even if Mayfair did own it, without the signature of Rosemarie, his co-trustee.

7 Solita Herman, mother of Rosemarie and Maurice, also lives at 952 Fifth.

8 In the Atmas Case, the complaint alleges that at the 2002 Transaction closing, certain insurance claims and litigation rights were transferred by Ardent to Atmas and Tudor, entities owned and controlled by Maurice.

West 74th and West 76th were sold in 2006 and 2011, respectively. *Id.*, ¶39. East 22nd was sold in 2012, on plaintiffs' consent subject to their claims for damages. Transcript, Doc 59, p 16. Hence, of the five Transferred LLCs, only two are still owned by the defendant Mann LLCs. Just before the 2002 Transaction, NY Windsor, which held title to 952 Fifth, transferred its interest to another entity with the same name, Windsor Plaza, LLC, a Delaware entity owned and controlled by Maurice (DE Windsor). DE Windsor still owns 952 Fifth.

The 2002 Contract, §6.1, contained a confidentiality provision with a penalty for breach by Cosmopolitan of up to one million dollars . VC, Ex I, Doc 21, §6.1, Bates 003321. Section 8.4 provided that Cosmopolitan, Ardent and Maurice would jointly send a notice to the tenants "in form and substance mutually satisfactory." *Id* at Bates 003334. Although Mann's affidavit denies that he had any knowledge of the 1998 Transaction, the 2002 Contract makes reference to Consolidated's remaining obligations under it. Schedule 4.1(g) states that Consolidated assigned and Ardent (referred to in the 2002 Contract as Del LLC) assumed the obligations of Consolidated on the promissory notes payable to the Trusts and the pledge agreements, dated December 31, 1998, i.e., the date of the 1998 Transaction. VC, Ex I, Doc 22, Bates 003362. Ardent and Maurice agreed to indemnify Cosmopolitan for third-party claims relating to the Herman Properties or the Transferred LLCs and for breach of contractual warranties, including: 1) that Ardent and Maurice owned one hundred percent of the Transferred LLCs, and 2) that Ardent had the power to perform its obligations under the 2002 Contract. VC, Ex I, §§ 4.1 (c) & (g) & §10.1, Doc 21, Bates 003307, 003308 & 00335-00338. The period of indemnification for third-party claims was until the statute of limitations expired, and the ceiling on the amount of the indemnity was the total purchase price. *Id* at Bates 003336. Defendants purchased a title insurance policy. Mann Reply Affidavit, sworn to on 8/16/13, Doc 107, ¶6.

On January 1, 2003, a notice was sent to the tenants of 36 Gramercy stating that Mann Realty was the new managing agent and that rent checks should be made out to Gramercy Realty and sent to Gramercy Realty, c/o Mann Realty. VC, Ex J, Doc 23. In contrast, a 2002 notice to the bank stated that the owner of 36 Gramercy had been changed. VC, Ex I, Doc 22, Bates 003481. On December 31, 2005, a rent increase notice from Gramercy Realty was sent to the tenants of 36 Gramercy. The letterhead on the notice indicated that it was from Gramercy Realty, c/o Mann Realty. Doc 74.

In January 2009, Rosemarie received from the attorneys for Gramercy Realty a proposed offering plan to convert 36 Gramercy to a condominium (Red Herring). Corrected Affidavit of Rosemarie Herman, ¶28, Doc 84; & Affirmation of Craig Avedesian in Opposition to Motion to Dismiss (Avedesian Aff), Doc 83, Ex 1, p 1. The Red Herring states that the Sponsor, Gramercy Realty, is the owner of fee title to 36 Gramercy, which it acquired from Mayfair on February 13, 2003. *Id.*, Avedesian Aff, Ex 1, p 13, Doc 83. Rosemarie, therefore, knew or should have known no later than January 2009 that Gramercy Realty claimed ownership of 36 Gramercy. Indeed, in April 2009, Rosemarie sent an e-mail to Offit that said: "[t]he buildings that my father left to me and Maurice have been sold (except for 952)". Main Action, Doc 41-15.

The condominium offering plan was declared effective on September 30, 2010. VC, ¶171. Some of the condominiums have been sold and some are rented. In November 2011, Mann was approached by Rosemarie's attorney, who inquired whether she could buy two units for less than the price offered to other tenants. Affidavit of Maurice Mann, sworn to on 11/26/12, Doc 61, ¶29.

II. Discussion

As this is a motion to dismiss, the facts alleged in the VC and affidavits plaintiffs submitted are assumed to be true and accorded the benefit of every favorable inference [*Rovello v Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976); *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316 (1st Dept

1989)], except where they are inherently incredible, conclusively refuted by documentary evidence or undisputed facts, or consist of bare legal conclusions [*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 (1st Dept 2006)]. The recitation of plaintiffs' alleged facts in this decision assumes their truthfulness solely for purposes of this motion.

A. Action to Quiet Title - 1st Cause of Action against Gramercy Realty

The first cause of action seeks to quiet title to 36 Gramercy, pursuant to Real Actions & Proceedings Law (RPAPL) §1501 et seq. RPAPL §1501(1) provides:

> Where a person claims an estate or interest in real property; or where he claims such estate or interest as executor or administrator of a deceased person; ... such person ... may maintain an action against any other person, known or unknown, ... to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make ....

RPAPL §1515 provides, *inter alia*, that the complaint must state the nature of the plaintiff's estate or interest, how it was acquired, that the defendant claims an interest adverse to plaintiff's, and describe the property. The complaint should demand judgment "that the defendant and every person claiming under him be barred from all claim to an estate or interest in the property described in the complaint, or that possession be awarded the plaintiff, or it may combine two or more of said demands with other demand for appropriate relief."

In this case, plaintiffs demand a declaration that the Mayfair Deed purporting to transfer the 1990 Trust's interest in 36 Gramercy to Mayfair is void, "but only with respect to the Unsold Condominiums." Plaintiffs also seek :

> title to condominium units at 36 Gramercy that have not been sold as of November 19, 2012 ... [and] damages for lost profits with respect to the sale of condominiums that have been sold.

VC, ¶172. The VC alleges that Rosemarie owns fifty percent of the unsold condominiums as trustee and beneficiary of the 1990 Trust, while Maurice owns the other fifty percent. *Id.*, ¶¶ 176 & 177. Plaintiffs claim, inconsistently, that they are the sole owners of the unsold condominiums and that they are entitled to possession as against Defendants and anyone claiming under them. *Id.*, ¶198. Defendants move to dismiss the claim as barred by the statute of limitations, laches, estoppel and ratification.

Upon expiration of the 1990 Trust, pursuant to its terms, Maurice, individually, and the Springing Trust became tenants in common of 36 Gramercy. A conveyance to two or more persons is presumed to be a tenancy in common. EPTL §6-2.2 ("A disposition of property to two or more persons creates in them a tenancy in common...."); 7-50 *Powell on Real Property* §50.02.

Where a trust has two trustees, both must a sign a deed conveying property, unless the trust instrument otherwise provides.

> Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power ... under the terms of the dispositive instrument , conferred upon three or more fiduciaries, ... may be exercised by a majority of such fiduciaries... Such a power conferred upon or surviving to two ... fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power.

Estates Powers & Trusts Law (EPTL) §10-10.7; *see also*, 3-46 Warren's Heaton on Surrogate's Court Practice § 46.05. The 1990 Trust does not provide otherwise. A deed transferring the 1990 Trust's interest in 36 Gramercy had to be signed by Rosemarie and Offit, the co-trustees of the 1990 Trust. However, the Mayfair Deed did convey Maurice's individual one-half interest. *Kraker v Roll*, 100 AD2d 424 (2d Dept 1984)(tenant in common estopped to deny transfer of his title, but could not convey title of his cotenants).

After the Mayfair Deed, the Springing Trust remained in possession of 36 Gramercy. In a tenancy in common, each cotenant has an equal right to possess all or any portion of the property as if

the sole owner; non-possessory cotenants do not relinquish their rights as tenants in common when another cotenant assumes exclusive possession. *Myers v Bartholomew*, 91 NY2d 630, 632-633 (1998). Occupancy of one tenant is presumed to be the possession of the other, but the presumption ceases after the expiration of ten years of continuous exclusive occupancy by such tenant, or immediately upon ouster by one tenant of the other. RPAPL § 541. Ouster requires a possessing cotenant to either expressly communicate an intention to exclude or to deny the rights of cotenants, or to imply that intention by engaging in acts so openly hostile that the non-possessing cotenants can be presumed to know that the property is being adversely possessed against them. *Myers v Bartholomew*, *supra* at 633.

The applicable statute of limitations in an action to quiet title is CPLR 212 (a), which provides that:

> an action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest was seized or possessed of the premises within ten (10) years prior to the commencement of the action.

Koo v Robert Koo Wine & Liquor, 170 AD2d 360 (1st Dept 1991). CPLR 212(a) must be read in conjunction with RPAPL 311, which provides:

> In an action to recover real property or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the legal title for ten years before the commencement of the action.

Elam v Altered Ego Realty Holding Corp., 2014 N.Y. App. Div. LEXIS 1270; 2014 NY Slip Op 1292 (2d Dept, Feb. 26, 2014)(nor). A record title owner's possession is presumed and the statute of limitations is not a bar unless the premises have been held adversely to the record owner for ten years. *Id.*; *Kraker v Roll*, *supra*. Where the record owners are tenants in common, possession by one will not be considered adverse, unless one tenant does something that unmistakably repudiates the other's

rights, on notice to the other, or so openly and notoriously that notice must be presumed. RPAPL 541; *Myers v Bartholomew, supra; Kraker v Roll, supra.*

The Mayfair Deed was not an ouster of the Springing Trust's interest in 36 Gramercy. Defendants admit in their memorandum of law that the Mayfair Deed did not damage Rosemarie and that it gave her a beneficial one-half interest in 36 Gramercy. Defendants' Memorandum of Law in Support of Motion to Dismiss, Doc 56, pp 4-5. The Mayfair Deed maintained the equal division between the cotenants as owners of fifty percent each of Mayfair.

Moreover, it cannot be said that the notices to the tenants in 2003 and 2005 unmistakably repudiated the 1990 Trust's ownership as a matter of law. Neither one says in so many words that Gramercy Realty owned 36 Gramercy, as compared to the notice to the bank, which openly declared that 36 Gramercy had a new owner. Coupled with the confidentiality agreement in the 2002 Contract, and the provision requiring the Sellers' (Ardent and Maurice) agreement to the form of the notice to the tenants, deliberate vagueness could be inferred. The Red Herring was an unmistakable act of hostility to the 1990 Trust's title, but that was in 2009, less than ten years before the action was filed.

Nor is laches a bar here. It is not a defense against a record title holder. *Koo, supra.* Where a defect in title is apparent from recorded instruments, a purchaser is charged with notice of the facts which an examination would have disclosed, even if the purchaser obtains title insurance. *Washington Temple Church of God in Christ, Inc.*, 55 AD3d 727, 729 (2d Dept 2008). Laches is inapplicable where the defendant has constructive knowledge of the recorded title. *Washington Temple, supra; Kraker, supra.*

Further, equitable estoppel should be applied with great caution when realty is involved. *Kraker, supra.* In order to estop the plaintiff, the defendant must show fraud, concealment of title, or silence in circumstances that would impel an honest person to act. *Id.* A party asserting estoppel must

show with respect to himself: 1) lack of knowledge of the true facts; 2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position. *BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 (1st Dept 1985).

Under the facts of this case, equitable estoppel does not apply. It would deprive Rosemarie of the benefit of the statutory period on a realty claim. In addition, Defendants had constructive notice of the 1990 Trust's fifty percent title, so it can not claim lack of knowledge of the true facts, the first element necessary to establish estoppel.

Finally, Defendants argue that plaintiffs ratified the 1998 Transaction because the Decision in the Main Action found that Rosemarie failed to present evidence that she didn't know about it, when faced with a statute of limitations motion. Defendants' Memorandum of Law, Doc 56, p 23 & Reply Memorandum of Law, Doc 108, p 14. However, in the Renewal Decision in the Main Action, the court ruled that she had presented sufficient evidence to withstand the motion. Accordingly, Defendants' ratification argument does not hold.

B. Ejectment - 2d Cause of Action

The second cause of action seeks a declaration stating that Gramercy Realty is ejected from the unsold condominiums and a declaration that plaintiffs are the lawful sole owners of the unsold shares. Defendants argue that the statute of limitations is CPLR 212, which requires the action to be commenced within ten years of the plaintiffs' possession of the premises. However, as previously noted, the Mayfair Deed did not convey the Springing Trust's interest; each cotenant has an equal right to possess all or any portion of the property as if the sole owner. Non-possessory cotenants do not relinquish their rights as tenants in common when another cotenant assumes exclusive possession; and

occupancy of one tenant is presumed to be the possession of the other. Hence, the motion to dismiss the second cause of action based on the statute of limitations is denied.[9]

C. Conspiracy - 3d Cause of Action

Plaintiffs allege that Defendants conspired with Maurice and Offit to commit negligent misrepresentation, fraud, breach of fiduciary duty and constructive fraud, as alleged in the Main Action. VC, ¶¶ 211 & 219. In the interest of brevity, the court incorporates the substantive law of conspiracy and its pleading requirements set forth in the decision in the Atmas Action disposing of the motion to dismiss (Seq 002).

1. Conspiracy to Commit Negligent Misrepresentation

Negligence cannot be the underlying tort for a conspiracy claim. *Rosen v Brown & Williamson Tobacco Corp.*, 11 AD3d 524 (2d Dept 2004). Consequently, the portion of the first cause of action based on conspiracy to commit negligent misrepresentation is dismissed for failure to state a claim.

2. Statute of Limitations

i. Relation Back Does Not Apply

Plaintiffs argue that the interposition of their claims in this action should relate back to the date that they filed the complaint in the Main Action. The court disagrees.

A claim in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading. CPLR§203(f); *Darby & Darby, P.C. v VSI Int'l., Inc.*, 268 AD2d 270, 273 (1st Dept 2000), *affirmed* 95

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[9] However, as noted above, Maurice had the power and is estopped to deny his transfer to Cosmopolitan of fifty percent of 36 Gramercy. As a result, if plaintiffs win, the Springing 1990 Trust would be a tenant in common with Gramercy Realty, and each tenant in common is entitled to possession of the whole. The court cannot dismiss on this ground because Defendants' motion to dismiss the ejectment cause of action was based only on the statute of limitations, not failure to state a claim.

NY2d 308 (2000). Where a new party is added, a three part test determines whether relation back to an earlier pleading is appropriate. *Buran v Coupal*, 87 NY2d 173, 178 (1995). The pleader must show that: 1) both claims arose out of the same conduct, transaction or occurrence; 2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and 3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well. *Id.* Where the pleader knows the identity of the party within the limitations period, but chooses not to name him, relation back is inappropriate. When a party intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the statute of limitations should not be extended. *Id; see also, Leylegian v Federal Paper Bd. Co.*, 251 AD2d 60, 61 (1st Dept 1998).

Here, relation back does not apply. First of all, this action is not an amended complaint in the Main Action. Also, plaintiffs cannot satisfy the third prong of the *Buran* test. Mann was mentioned in the Main Action complaint as the 2002 Transaction Purchaser. Main Action complaint, ¶¶ 42 & 110-112. Further, the condominium plan for 36 Gramercy is pleaded in the Main Action. *Id.*, ¶102. Then too, the fact that Mann transferred the Herman Properties to the Successor LLCs, who are defendants in this action, is alleged in the Main Action complaint. *Id*, ¶120. Plaintiffs knew about Defendants and intentionally did not name them as defendants in the Main Action. Thus, the claims in this action were not interposed when the Main Action was filed on the theory of relation back.

ii. Estoppel

Affirmative wrongdoing and concealment by a fiduciary are equitable grounds to estop a party from asserting the statute of limitations as a defense. *General Stencils, Inc. v Chiappa*, 18 NY2d 125 (1966). The acts of concealment must be separate from the wrongdoing underlying the cause of action,

even where there is a fiduciary relationship. *Zumpano v Quinn*, 6 NY3d 666, 674 (2006)(fundamental to equitable estoppel are subsequent and specific acts of concealment that prevented plaintiff from bringing suit); *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003); *Knobel v Shaw*, 90 AD3d 493 (1st Dept 2011). The fact that the defendant was aware of the wrongdoing and remained silent is insufficient. *Zumpano v Quinn, supra.* Moreover, due diligence on the part of the plaintiff in bringing his action is an essential element for application of the doctrine, and the plaintiff bears the burden to establish, in light of all the relevant circumstances, that the action was brought within a reasonable time after the facts giving rise to the estoppel have ceased to be operational. *Simcuski v Saeli*, 44 NY2d 442, 450-451 (1978). The length of the statutory period sets an outside limit on what will be regarded as due diligence. *Id.*

Here, estoppel does not apply. The parties agree that the statute of limitations for conspiracy claims is the same as for the underlying tort. A six year statute of limitation applies to constructive fraud, fraud and fraudulent breach of fiduciary duty; and a two year discovery rule applies to claims for fraudulent breach of fiduciary duty and fraud, if that would give the plaintiff more time to bring a suit. *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003). The statute of limitations for constructive fraud is six years and runs from the time it is committed. *Kesner v Title Guarantee & Trust Co.*, 284 NY 622 (1940)(constructive fraud). It is not subject to a discovery rule. *Lapis Enterprises, Inc. v International Blimpie Corp.*, 84 AD2d 286 (2d Dept 1981).

Plaintiffs brought this action more than six years after the 1998 Transaction, more than six years after the 2002 Transaction, and more than two years after Rosemarie had inquiry notice of them, i.e., in 2009 when Rosemarie received the Red Herring, or at the latest, April 2009, when she wrote the e-mail to Offit admitting that she knew that the Herman Properties had been sold (if not earlier, as discussed in the Renewal Decision). This action was not filed until August 3, 2012. In addition, Rosemarie knew

about the sale to Mann and his transfer of the Herman Properties to the Mann LLCs when she filed the complaint in the Main Action in January 2011, yet she did not name them as defendants. Plaintiffs exceeded the outer limit of reasonable due diligence after the facts allegedly giving rise to the estoppel ceased to be operational, i.e., the applicable statute of limitations. As a result, estoppel does not bar Defendants from asserting the statute of limitations for the conspiracy claim. *Simcuski v Saeli*, *supra*.

iii. Conspiracy to Commit Torts Other than Negligent Misrepresentation

The claim for conspiracy to commit constructive fraud, fraud and fraudulent breach of fiduciary duty is dismissed. As noted above, constructive fraud is subject to a six year statute of limitations and has no discovery rule. Here, the fraud was the 1998 Transaction, in which plaintiffs' beneficial interests in the Trusts was sold by Offit to Maurice's entity, Consolidated. The statute of limitations for this claim expired in 2004. Even if the fraud was the 2002 Transaction, the statute of limitations for constructive fraud would have expired six years later.

Similarly, a six-year statute of limitations applies to fraud and fraudulent breach of fiduciary duty. *Kaufman v Cohen*, *supra*. Fraud and fraudulent breach of fiduciary duty, however, are subject to a two-year discovery rule that runs from the time a litigant knew of, or with reasonable diligence could have discovered, the wrongdoing, if that is later than the applicable statute of limitations. *Id.* If inquiry notice occurs more than six years after the fraud, the statute begins to run on the date of inquiry notice and does not run anew each time the plaintiff discovers new evidence or details that support the claim:

> The basic facts that there had been such a conspiracy consummated by fraud and other wrong were embraced within the allegations of the earlier complaints and, if true, were known to the plaintiffs in the earlier actions. A new cause of action for fraud does not accrue each time a plaintiff discovers new elements of fraud in a transaction or new evidence to prove such fraud. Where there is knowledge of facts sufficient "to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises" and may thus start the running of the statute.

Sielcken-Schwarz v American Factors, Ltd., 265 NY 239, 245-246 (1934)(citations omitted); *T.G.-II v Price Waterhouse & Co.*, 175 AD2d 21, 23 (1st Dept 1991), *appeal denied* 79 NY2d 752 (1992)(date for two-year limitations period begins when plaintiff is charged with knowledge of sufficient facts to create duty of inquiry).

The second cause of action for conspiracy is dismissed against all Defendants on the ground of the statute of limitations. As previously noted, this action was filed more than six years after the 1998 and 2002 Transactions. In addition, as noted in the discussion of estoppel (II, C, 2, ii, *supra)*, this suit was filed more than two years after plaintiffs were on inquiry notice.

D. Replevin - 4th Cause of Action

Plaintiffs bring the fourth cause of action for replevin on behalf of the Trusts, derivatively with respect to the 1991 Trust, and Rosemarie brings it as co-trustee with respect to the 1990 Trust. VC, ¶222. The claim seeks the return of "Replevin Property", defined in the VC as half of the LLCs other than Mayfair, half of the Mann LLCs other than Gramercy Realty, and half of the proceeds from sales of those entities, including the proceeds from condominiums sold by Gramercy Realty. *Id.* On November 19, 2012, plaintiffs served a demand for return of the Replevin Property on Mann, which was refused on November 21, 2012. VC, ¶¶ 227-228, & Ex M. The VC alleges, upon information and belief, that the Replevin Property was unlawfully obtained by Defendants. VC, ¶230. Defendants claim that they are bona fide purchasers for value. Mann Reply Affidavit, sworn to on 8/16/13, Doc 107, ¶5.

Defendants move to dismiss the claim on the grounds of statute of limitations, failure to state a claim and lack of standing to bring a derivative claim. They also raise defenses of laches, estoppel and ratification. Three of the five Herman Properties that Cosmopolitan bought have been sold by the

Successor LLCs. As previously noted, 36 Gramercy was converted to a condominium, and some of the units have been sold.

With respect to failure to state a claim, defendants urge that neither real property nor a limited liability company membership interest (Membership Interest) is chattel, and that money damages cannot be recovered through replevin. Plaintiffs counter that, pursuant to General Construction Law (GCL) §15, a Membership Interest is chattel subject to replevin and that money can be obtained pursuant to CPLR 7101, which permits recovery of the value of the chattel at the time that it was sold. They dispute that they seek to recover real property.

GCL §15 provides:

> The term chattels includes goods and chattels; and, where the term appears in any statute or rule pertaining to an action to recover the same, it also includes all specific personal property, such as, but not limited to, certificates of stock, bonds, notes, or other securities or obligations.

Plaintiffs cite no authority for the proposition that a Membership Interest is chattel, and the court's independent research has found none. The court is faced with a question of first impression.

Where there is a question of title to realty, replevin does not lie. 23 *NY Jur Conversion, and Action for Recovery of Chattel*, §103, citing *Walden v Feller*, 99 Misc 576, 577 (Sup Ct Allegheny Co 1917)(deed not subject to replevin where issue was title to real estate); *Nichols v Mase*, 94 NY 160, 167 (1883)(lease not subject to replevin). A Membership Interest is not an interest in real property. *See Sealy v Clifton*, LLC, 68 AD3d 846 (2d Dept 2009)(notice of pendency not proper in case involving Membership Interest because not realty); *Yonaty v. Glauber*, 40 AD3d 1193 (3d Dept 2007)(same holding).

A Membership Interest is "personal property" but is not a chattel, since a member has no interest in specific property of a limited liability company. LLCL §601. But, in order to be recoverable in replevin, property must exist in specie so as to be capable of identification. *Equitable Life Assurance*

Soc. v Branch, 32 AD2d 959, 960 (2d Dept 1969). Black's Law Dictionary defines in specie as "in kind". *Black's Law Dictionary* (9th ed. 2009). However, a Membership Interest is not specific property, an identifiable object or a piece of paper, capable of being identified and delivered in kind. In that way, it differs from a stock certificate, a bond, or a note, which are defined as chattel, pursuant to the GCL. Replevin, therefore, does not lie. *See Barnett v. Selling,* 70 NY 492 (1877) (replevin does not lie without specific property in hand of defendant).

E. Standing to Assert Derivative Claims

Defendants argue that plaintiffs are collaterally estopped from bringing derivative claims against the LLCs by reason of the Dismissal and Renewal Decisions issued in the Main Action. They also urge that plaintiffs have no standing because they had no membership interests in the LLCs when this action was brought. In the Main Action, this court ruled that plaintiffs did not have standing to pursue derivative claims on behalf of NY Windsor and Mayfair, but that they did have individual claims, as beneficiaries of the Trusts, former shareholders of those entities, to pursue the thirteenth and fourteenth causes of action. The thirteenth and fourteenth causes of action alleged breach by Maurice of his fiduciary duty to the LLCs and the Trusts. Dismissal Decision, pp 26-27 & Renewal Decision, pp 25-26. The distinction between the two claims was that one was based upon the operating agreements and the other was based on common law. Mayfair and NY Windsor participated in the motion practice in the Main Action that resulted in the Dismissal and Renewal Decisions. However, the other LLCs did not appear.

Here too, plaintiffs cannot bring a derivative claim on behalf of the LLCs, but can bring an individual claims on behalf of the Trusts. *Bernstein v Keslo*, 231 AD2d 314 (1st Dept 1997) (where plaintiff sold his interest he had standing to make *individual* claim for breach of fiduciary duty against corporate managers for sale of corporation for inadequate price); *Ciullo v Orange & Rockland Utils.*,

Inc., 271 AD2d 369 (1st Dept 2000)(former stockholder cannot bring derivative action), *app den* 95 NY2d 760 (2000); *Silverman v Schwartz*, 248 AD2d 332 (1st Dept 1998)(same holding); *Tzolis v Wolff*, 10 NY3d 100 (2008)(applying derivative claim to limited liability companies). Hence, the derivative claims on behalf of the LLCs are dismissed, and the caption shall be amended accordingly.

F. Consolidation & Caption Amendment

The court sua sponte joins this action with the Mann Action for discovery and trial. CPLR 602. In addition, as the remaining first and second causes of action for quiet title and ejectment concern only 36 Gramercy, currently claimed to be owned by Gramercy Realty, the action against the other Successor LLCs is dismissed, and they will be deleted from the caption. CPLR 1001. Finally, as the only remaining issues concern 36 Gramercy, the caption is amended to reflect that it is not brought on behalf of the 1991 Trust. *Id.* Accordingly, it is

ORDERED that the motion by Defendants to dismiss the complaint (Mot Seq 002) is granted to the extent of dismissing the third and fourth causes of action against all Defendants for, respectively, conspiracy and replevin, dismissing the first and second causes of action against 320 E. 22ND REALTY ASSOCIATES, LLC; 10 W. 74TH STREET REALTY ASSOCIATES, LLC; 150 W. 82ND STREET REALTY ASSOCIATES, LLC; 425 E. 76TH STREET REALTY ASSOCIATES, LLC, and dismissing the derivative claims on behalf of MAYFAIR YORK, LLC,WINDSOR PLAZA LLC, a New York Limited Liability Company, AVON BARD LLC, MERIT MANAGEMENT LLC, PRIMROSE MANAGEMENT LLC, and KEYSTONE MANAGEMENT LLC; and the motion is otherwise denied; and it is further

ORDERED that the caption is amended as follows:

ROSEMARIE A. HERMAN, individually, as beneficiary of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990, and ROSEMARIE A. HERMAN as Natural Guardian for GAVIN I. ESMAIL and

JESSE A. ESMAIL, individually, as beneficiaries of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990,

Plaintiffs,

-against-

36 GRAMERCY PARK REALTY ASSOCIATES, LLC; COSMOPOLITAN PROPERTY ACQUISITION COMPANY, LLC; MMANN LLC; MANN MANAGEMENT, INC. D/B/A MANN REALTY ASSOCIATES; MAURICE A. MANN; "ABC COMPANY # 1" through "ABC COMPANY #10", the last ten entities being fictitious and unknown to the Plaintiffs, the entities intended being the entities, if any, involved in the acts or omissions described in the Complaint; and "JOHN DOE # 1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants

and it is further

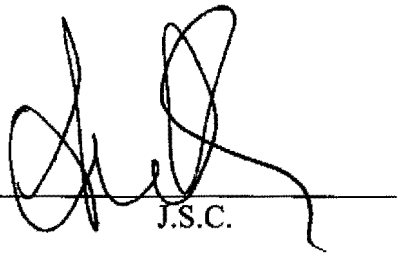
ORDERED that this action is joined for trial and discovery, but not consolidated, with the action entitled *36 Gramercy Park Realty Assoc. LLC et al, v Herman*, Index No. 654067/12; and it is further

ORDERED that upon service upon them of a copy of this order with notice of entry, the Clerks of the Court and the Trial Support Office (Room 158 M), the Clerk of the Court shall enter judgment: 1) dismissing the third and fourth causes of action against all Defendants; 2) dismissing all claims against 320 E. 22ND REALTY ASSOCIATES, LLC; 10 W. 74TH STREET REALTY ASSOCIATES, LLC;150 W. 82ND STREET REALTY ASSOCIATES, LLC; 425 E. 76TH STREET REALTY ASSOCIATES, LLC; and 3) dismissing the derivative claims on behalf of MAYFAIR YORK LLC, WINDSOR PLAZA LLC, a New York Limited Liability Company, AVON BARD LLC, MERIT MANAGEMENT LLC, PRIMROSE MANAGEMENT LLC, and KEYSTONE MANAGEMENT LLC; and severing the remainder of the action, which shall continue; and said Clerks shall note the severance and the amended caption in their records, and note the joinder of this action with *36 Gramercy Park Realty Assoc. LLC et al, v Herman*, Index No. 654067/12; and it is further

ORDERED that the parties in the joined actions shall appear for a preliminary conference on April 17, 2014 at 11:00 AM in Part 54, Room 28, of the Courthouse located at 60 Centre Street, New York, NY.

Dated: April 2, 2014

ENTER:



J.S.C.