Golden Wheel Comdominium Bd. of Mgrs. v Lee
2017 NY Slip Op 31794(U)
August 24, 2017
Supreme Court, New York County
Docket Number: 651637/2015
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GOLDEN WHEEL COMDOMINIUM BOARD OF MANAGERS,

Index No.: 651637/2015

DECISION & ORDER

Plaintiff,

-against-

MARGARETTE LEE, IK-JONG KANG, and AG/WOO CENTRE STREET OWNER, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendant AG/Woo Centre Street Owner, LLC (the Sponsor) moves, pursuant to CPLR 3211, to dismiss the portions of the second, seventh, and eighth causes of action in the second amended complaint (the SAC) that are asserted against it. Plaintiff Golden Wheel Condominium Board of Managers (the Board) opposes the motion. For the reasons that follow, the Sponsor's motion is granted in part and denied in part.

As this is a motion to dismiss, the facts recited are taken from the SAC (Dkt. 89)[1] and the documentary evidence submitted by the parties. That said, the court assumes familiarity with its September 8, 2016 decision (the Prior Decision) on defendants' motion to dismiss the first amended complaint,[2] which extensively sets forth the allegations and the applicable terms of the Offering Plan and its amendments. *See* Dkt. 84. Capitalized terms not defined herein have the same meaning as in the Prior Decision.

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[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

[2] The standard of review on a motion to dismiss is set forth in the Prior Decision and is not repeated here. *See id.* at 8.

The Board filed the SAC on October 14, 2016. As pertinent to the instant motion, it asserts three causes of action against the Sponsor: (1) the second cause of action for aiding and abetting Lee's breach of fiduciary duty (which is pleaded as the first cause of action); (2) the seventh cause of action for a declaratory judgment that "the calculation of common interests for PH2 violated RPL 339-i(1)(iv)" [SAC ¶ 175];[3] and (3) the eighth cause of action for breach of contract (i.e., the Offering Plan) for failing to complete the required construction and for myriad construction defects (many of which, as discussed herein, allegedly are latent). On December 16, 2016, the Sponsor filed the instant motion to dismiss, and the court reserved on the motion after oral argument. *See* Dkt. 124 (6/13/17 Tr.).

In the Prior Decision, the court ruled that the Board has stated a claim, with the requisite particularity, against the Sponsor for aiding and abetting Lee's breach of fiduciary duty. *See id.* at 11-12. The Sponsor did not appeal that decision or move to reargue. The court, therefore, considers its ruling the law of the case and declines to revisit it.[4]

The declaratory judgment claim, however, is dismissed as against the Sponsor. The Board does not explain why the Sponsor is a necessary party to this claim, nor does the Sponsor contend that its rights would be adversely affected absent its participation in this lawsuit. The parties agree that the purpose of the declaratory judgment claim is to impel the requisite supermajority of unit owners to vote to change the common interest allocation.[5] It is undisputed

[3] This cause of action also is asserted against Lee and Kang, who answered the SAC and did not move to dismiss. *See* Dkt. 111 & 112.

[4] The court reviewed the new arguments the Sponsor proffers and finds them to be without merit for the reasons set forth in the Board's opposition brief. The SAC's addition of new factual allegations bolsters a pleading the court already found sufficient.

[5] This endeavor appears futile since it is doubtful Lee and Kang would consent. Lee and Kang, it should be noted, did not move to dismiss the portion of this claim asserted against them.

that the Sponsor has no right to prevent a new allocation, nor does it have the power to effectuate such a change. Given the Sponsor's lack of any role in the common interest allocation going forward, the claim serves no practical purpose. *See Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 (1st Dept 2009) ("The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations."). The declaratory judgment claim, as asserted against the Sponsor, is dismissed because "there is [no] justiciable controversy upon which a declaratory judgment can be rendered" with respect to the Sponsor. *See Ovitz v Bloomberg L.P.*, 18 NY3d 753, 760 (2012).

Finally, the Sponsor seeks dismissal of the breach of contract claims on the ground that some or all of the claims are time barred. There is no dispute that the statute of limitations is six years pursuant to CPLR 213(2). The issue is when the claims accrued. While the Sponsor may well have a meritorious statute of limitations defense, dismissal on that ground is not warranted at this juncture. Dismissal based on the statute of limitations requires factual determinations not amenable to resolution on this motion.

To explain, the timeliness of the claims turns on the date of substantial completion, whether the alleged shoddy work involves patent or latent defects and whether the issues are "punch list" problems. In this regard, the Offering Plan provides that the Sponsor must correct both patent and latent defects. *See* Dkt. 29 at 95-96. As is permissible under New York law,[6] the Offering Plan shortens the statute of limitations on a claim for failure to correct patent defects

[6] *Bank of N.Y. Mellon v WMC Mortg., LLC*, 151 AD3d 72 (1st Dept 2017) ("Parties may ... agree to shorten the time period within which to commence an action."); *see Dart Mech. Corp. v City of New York*, 121 AD3d 452 (1st Dept 2014) ("The motion court correctly applied the limitations period in the parties' construction contract to bar plaintiff's claim for delay damages. The six-month period was not unreasonably short.").

to when "Sponsor is notified by a majority of the members of [the Board] who are unrelated to Sponsor within two (2) months from the time they are elected at the first meeting of the Unit Owners." *See id.* at 95. The Offering Plan further provides that "Sponsor shall be deemed to have discharged any obligation it may have with respect to patent or latent defects, as the case may be, if [among other inapplicable conditions] Sponsor is not notified ... within the time periods specified herein." *Id.* at 96. It is undisputed that the first meeting of the Unit Owners that included board members unrelated to the Sponsor occurred no later than May 2010. It also is undisputed that the Sponsor was not notified of patent defects by unrelated board members within the specified two-month period.

The Board, however, alleges that the Building is awash in numerous *latent* defects. For instance, the Board alleges that "[t]he urinals in the men's restrooms situated in all the common hallways (seven floors, two per floor) do not flush" because "they have only sewer/discharge plumbing, **and lack risers** to bring water supply plumbing to permit a flush system", and that "to finish and correct in order to install water supply plumbing [would] cost an estimated cost of $200,000 to $240,000." SAC ¶ 93 (emphasis added). Moreover, "[t]he revised Architect's Report describes the roof and roof structures to be delivered, but nowhere discloses or excepts/carves out from removal a pre-existing, gargantuan metal framed structure left on the rooftop by a former licensee ... [which the Sponsor] failed or refused to have it removed." ¶ 97 (citation omitted). The SAC plausibly alleges that these problems constitute latent defects. The Board contends that factual questions about whether these problems exist (an assumption the court must make in the absence of proffered documentary evidence to the contrary) and whether they are indeed latent cannot be resolved on this motion.

The Board further contends that to the extent the alleged defects are not latent, the claims are not necessarily time-barred because the Board has alleged that the construction work the Sponsor was obligated to perform was not substantially completed. It is well established that "[a] cause of action for breach of a construction contract accrues upon **substantial completion** of the work." *Superb Gen. Contracting Co. v City of New York*, 39 AD3d 204 (1st Dept 2007) (emphasis added), citing *Phillips Const. Co. v City of New York*, 61 NY2d 949 (1984); *see Eastco Bldg. Servs., Inc. v New York City Hous. Auth.*, 98 AD3d 920 (1st Dept 2012) (same). The parties' understanding of this rule is manifest in the Offering Plan, which specifically addresses when different types of work shall be considered substantially completed:

> Sponsor's construction obligations shall be deemed fully completed in accordance with the Plans and Specifications when (a) a permanent Certificate of Occupancy for the Building shall have been issued by the Department of Buildings of the City of New York, **and** (b) Sponsor's engineer or architect shall have certified that the work to be performed by Sponsor as described in the Description of Property and Specifications or Building Condition **has been substantially completed** in accordance with the Plans and Specifications except for (i) work in Units to be done by or for the account of Unit Owners, (ii) work in the Building customarily left incomplete until after occupancy and (iii) punch list items. Issuance of a permanent Certificate of Occupancy and the certification of Sponsor's engineer or architect shall be deemed and considered conclusive evidence that Sponsor's obligation to make the improvements has been satisfied in accordance with the Plans and Specifications and the Description of Property and Specifications or Building Condition without prejudice however to any rights which the Condominium may have under Sponsor's obligation to cause defects in construction or materials to be corrected as may hereinafter be set forth in this Plan. (See "Rights and Obligations of Sponsor").

Dkt. 29 at 30 (emphasis added).[7]

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[7] Consistent with the provision regarding work on individual units (as opposed to Common Elements), the Offering Plan earlier provides:

> The renovations undertaken by Sponsor shall, with respect to each Unit be deemed to be substantially complete upon the issuance of a Temporary Certificate of Occupancy covering such Unit and with respect to any portion of the Common Elements, be deemed to be complete upon the issuance of a Temporary Certificate

The Board claims, and the Sponsor does not submit conclusive documentary evidence to the contrary, that substantial completion under the Offering Plan has not occurred. For instance, allegedly, the Sponsor never delivered a certification of substantial completion. The Sponsor does not meaningfully address this issue.[8] Rather, it suggests that when, as here, the construction obligations are set forth in a condominium offering plan, the substantial completion accrual rule does not apply. The Sponsor, however, cites no New York appellate case that stands for this proposition, which appears to conflict with settled New York construction law.[9] Moreover, even if there were some default rule to that effect, here, the parties executed an explicit agreement

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> of Occupancy covering such portion of the Common Elements. Each Unit will be delivered at Closing as unfinished space. Each Purchaser will be required to alter his Unit in order for the Unit to be suitable for occupancy.

Dkt. 29 at 29-30.

[8] The Board correctly notes that since construction on the building was intended to continue even after units were sold, such as work on the Common Elements, the date of substantial completion was clearly intended to occur after units were sold. Hence, the date units were sold cannot cause a claim to accrue when the alleged deficient work on the Common Elements was ongoing.

[9] The Sponsor misreads the trial court cases it cites. For instance, while the court in *Bd. of Managers of the S. Star v. WSA Equities, LLC*, 2014 WL 5390551 (Sup Ct, NY County 2014), *mod on other grounds* 114 AD3d 405 (1st Dept 2016), held that *claims by individual unitholders* (here, the claims are brought by the Board) against the condominium sponsor accrued when the final unit was sold, that court stated that the rule is different with respect to contractors, and cited a Court of Appeals case that stands for the proposition that "[i]n cases against architects or contractors, the accrual date for Statute of Limitations purposes is completion of performance." *Id.* at *3, quoting *City Sch. Dist. of City of Newburgh v Hugh Stubbins & Assocs., Inc.*, 85 NY2d 535, 538 (1995). In this case, the Sponsor is sued for its role as construction contractor (as discussed in the Prior Decision, Lee was a principal of both the Sponsor and YWA, the construction company she used for the job), and, thus, construction accrual rules apply. *See* Dkt. 29 at 92 ("Sponsor's Work" includes performing renovations).

about the scope of the Sponsor's work that governs when claims concerning different types of work would become time barred.[10]

It may well be the case that some of the alleged defective work are patent defects, which would be time-barred. However, "[i]n considering the motion, [the] court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Benn v Benn*, 82 AD3d 548 (1st Dept 2011), quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 (1st Dept 2008). Critically "plaintiff's submissions in response to the motion 'must be given their most favorable intendment.'" *Benn*, 82 AD3d at 548, quoting *Arrington v N.Y. Times Co.*, 55 NY2d 433, 442 (1982); *see Derrick v. Am. Int'l Group, Inc.*, 126 AD3d 576, 577 (1st Dept 2015).

Here, the record on this motion regarding the specifics of the defects is extremely confusing. Consequently, the Sponsor has not met its "initial burden" under CPLR 3211(a)(5), of establishing, "prima facie, that the time in which to sue has expired.'" *New York City Sch. Const. Auth. v Ennead Architects, LLP*, 148 AD3d 618 (1st Dept 2017), quoting *Benn*, 82 AD3d at 548. The Sponsor did not, as it could have under CPLR 3211(a)(1), proffer "documentary evidence [that] **utterly refutes** plaintiff's factual allegations." *See Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (emphasis added). A determination of what is wrong with the building and how each alleged defect implicates the statue of limitations is better made with a

[10] Likewise, in another case misconstrued by the Sponsor, *Bd. of Managers of Chelsea Quarter Condo. v 129 W. Residential Partners LLC*, 2007 WL 15956 (Sup Ct, NY County 2007), the court held that one must look to the specific language of the Offering Plan to determine accrual. *See id.* at *6. That court also noted that the offering plan should be construed strictly against the sponsor if the sponsor drafted it. *Id.*

complete factual record after discovery.[11] Only with such a record can the court properly determine how to characterize the issues (patent, latent, punch list, etc.). Accordingly, it is

ORDERED that the Sponsor's motion to dismiss is granted only on the second of action (declaratory judgment), which is dismissed only as against the Sponsor, and the Sponsor's motion is otherwise denied.

Dated: August 24, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

[11] As noted earlier, in the Prior Decision, the court explained the apparent applicability of the doctrine of fiduciary tolling. *See id.* at 13. Moreover, while the Board does not allege fraud, it does allege that Lee concealed the construction defects. *See* SAC ¶¶ 115-116. Estoppel based on fraud, therefore, might apply. *See Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 (2007), citing *Zumpano v Quinn*, 6 NY3d 666, 674 (2006). That said, since the Board did not assert tolling arguments on this motion, the court will not rule on whether any such tolling applies.