Isaksson v Board of Directors of 280 Mott St. Hous. Dev. Fund
2017 NY Slip Op 32589(U)
November 22, 2017
Supreme Court, New York County
Docket Number: 151561/2016
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------x

MARY ANNE ISAKSSON f/k/a MARY ANNE SMITH,

Plaintiff,

-against-

Index No: 151561/2016
DECISION AND ORDER
Motion Seq. Nos. 001, 002 and 003

THE BOARD OF DIRECTORS OF 280 MOTT STREET HOUSING DEVELOPMENT FUND CORPORATION and 280 MOTT STREET HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

----------x

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises in connection with the reallocation and redistribution, in 1996, of certain spaces and shares of stock in the building located at 280 Mott Street, New York City ("Building"), that is owned by defendant 280 Mott Street Housing Development Fund Corporation ("Co-op"). The action was commenced by plaintiff, Mary Anne Isaksson ("plaintiff" or "Isaksson"), on February 24, 2016, by service upon the Co-op of the summons and complaint, asserting causes of action for declaratory judgment, injunctive relief, breach of fiduciary duty and attorneys' fees ("Original Complaint"). At the same time, plaintiff filed a motion (sequence number 001), by way of a proposed order to show cause ("OSC"), seeking, inter alia, emergency injunctive relief as to a notice from the Co-op, dated January 22, 2016, which stated that the Co-op would terminate plaintiff's lease for certain commercial space in the Building in thirty days ("Termination Notice"). This Court signed the proposed OSC, with modifications, on February 25, 2016. *See* NYSCEF #10.

On May 27, 2016, the Co-op filed a cross-motion to dismiss the Original Complaint and in opposition to the relief sought in the proposed OSC ("Cross-Motion"). While the Cross-Motion was pending, on October 7, 2016, plaintiff filed a second motion (sequence number 002), by way of another proposed order to show cause ("Second OSC"), seeking emergency injunctive relief as a notice from the Co-op, dated September 20, 2016, which stated that the Co-op would terminate plaintiff's tenancy in her residential apartment in the Building. Simultaneously, plaintiff filed the first amended complaint, seeking to add the Co-op's "Board of Managers" as a defendant, as well as to obtain injunctive relief with respect to her residential lease. This Court declined to grant the requested injunctive relief because such relief should have been presented to the housing court for determination. *See* NYSCEF #70 (signed proposed Second OSC, with modifications).

Thereafter, plaintiff filed the second amended complaint on October 20, 2016, wherein she renamed the Co-op's "Board of Managers" as "Board of Directors," and added allegations regarding her purported exercise of an option, in 2003, to purchase Co-op shares representing her commercial space in the Building, as discussed below. Later, on November 30, 2016, plaintiff filed the third amended complaint, wherein she deleted statements about the Co-op's attempted termination of her apartment lease, to reflect her conference with this Court on October 7, 2016. The foregoing proposed amendments to the Original Complaint were generally unopposed because, according to the Co-op, they implemented corrections and clarifications that did not adversely impact upon the pending OSC and the Cross-Motion. Accordingly, unless otherwise specified, the third amended complaint will be referred to hereinafter simply as the "Complaint."

The first oral argument in this action, heard on December 19, 2016, addressed the OSC, the Complaint, and the Cross-Motion. During the hearing, this Court commented that plaintiff and the Co-op should provide supplemental briefing to address certain issues of fact and law, including the issue of statute of limitations, that are pertinent to this action. On March 1, 2017, plaintiff filed a third motion seeking leave to further amend the Complaint, accompanied by a proposed fourth amended complaint (sequence number 003). The motion was opposed by the Co-op and its Board of Directors (collectively, "Defendants"). On May 10, 2017, this Court heard oral argument on plaintiff's motion to amend and Defendants' opposition, and reserved decision.

This decision and order addresses motion sequence numbers 001, 002 and 003, as well as the Cross- Motion. For the reasons stated below, the relief requested by the parties in their pleadings are granted or denied, as applicable, to the extent set forth herein.

I. Background

Plaintiff is the proprietary lessee of residential apartment 5R ("Apartment") and the lessee of commercial space 1R ("Commercial Space") in the Building owned by the Co-op, a cooperative corporation formed pursuant to section 402 of the New York Business Corporation Law ("BCL") and Article XI of the Private Housing Finance Law of New York, more commonly known as the Mitchell Lama Law. Complaint, ¶¶ 4-5. The Building originally consisted of 9 apartments, with 250 shares allocated to each apartment, for a total of 2,250 shares. *Id.*, ¶ 10. Plaintiff took possession of the Apartment in 1979, prior to the Building's cooperative conversion. *Id.*, ¶ 13. The lease term for the Apartment (99 years) began on February 2, 1988 and expires on February 2, 2087. *Id.*

In 1996, when two of the residential apartments in the Building became vacant, the Co-op's Board of Directors ("Board") decided to reallocate and redistribute the shares of stock and spaces in the Building. *Id.*, ¶ 15. As a result, each proprietary lessee-shareholder was granted the right to additional shares of stock and additional space, as applicable. *Id.*, ¶ 17. Plaintiff agreed, although without being given the additional shares of stock, to use and occupy the Commercial Space (328 square feet) at a rental rate of $0.5 per square feet, which was the rate in maintenance fees that all lessees pay for their additional spaces, residential or commercial. *Id.*, ¶ 17-18. Plaintiff took possession of the Commercial Space, which was located on the ground floor of the Building, pursuant to a five-year rental agreement, with a lease term that commenced on August 1, 2000 and ended on July 31, 2005, at a monthly rent of $164 ("Commercial Space Lease"). *Id.*, ¶¶ 20-21. "Rider A" to the Commercial Space Lease stated, in relevant part, that "[T]enant shall have the option to purchase shares of stock from the landlord that correspond to [the Commercial Space]. Tenant may exercise said option at any time during the term of the lease." *Id.*, ¶¶ 22; Rider. In the Complaint, plaintiff alleges that she "communicated her exercise of the option orally in 2003 during discussions with Toby Allan (Co-op's President)," but that Defendants "refused to sell the Commercial Space to Plaintiff," as "Defendants allege that because the Commercial Space is used solely for commercial purposes, to wit as an Acupuncturist Office, Defendants are prohibited by law from issuing shares to Plaintiff for the Commercial Space." *Id.*, ¶¶ 23-25.

Plaintiff also alleges that Defendants "refused to lease the Commercial Space to Plaintiff for a term that expires on February 2, 2087, so as to be coterminous with her lease for the Apartment and so as to be on equal footing with other proprietary lessees/shareholders in the

Building who received Additional Spaces to occupy consistent with the terms of their proprietary leases." *Id.*, ¶ 26. Plaintiff further alleges that, although she took possession of the Commercial Space in 1996, she "finally received" the Commercial Space Lease in 2000, and only after her repeated demands. *Id.*, ¶ 27. With respect to the Termination Notice, plaintiff asserts that Defendants "failed and refused to renew or extend the Commercial Space Lease after it expired." *Id.*, ¶ 32. Moreover, plaintiff asserts that the Termination Notice "constitutes a violation of Section 501(c) of the BCL, which requires, inter alia, that cooperative boards treat all shareholders of the same class equally," and that if "Defendants are to re-capture the Commercial Space, Defendants would be able to place it on the open market and lease it for commercial purposes at the market rate." *Id.*, ¶¶ 35, 37.

The Complaint asserts four causes of action: (1) for a judgment declaring, inter alia, that a distribution of additional shares and additional spaces in the Building to all but one shareholder (i.e. plaintiff) is unequal treatment under BCL § 501(c), and that plaintiff is entitled to use and occupy the Commercial Space through 2087 at $0.5 per square foot (equal to the benefit that other shareholders enjoy for their additional spaces), *id.*, ¶¶ 39-47; (2) for interim injunctive relief that tolls the running of the Termination Notice pending a resolution of this action, and mandatory injunction directing Defendants to renew the Commercial Space Lease, *id.*, ¶¶ 48-56; (3) for breach of the fiduciary duty owed to plaintiff by the Board, *id.*, ¶¶ 57-63; and (4) for an award of attorneys' fees, *id.*, ¶¶ 64-66.

In the Cross-Motion, Defendants seek to dismiss the Complaint pursuant to CPLR 3211 (a) (1), (5) and (7). Defendants argue, among other things, that the declaratory relief sought by plaintiff is barred by the applicable six year statute of limitations because the space and share

reallocation and redistribution occurred 20 years ago; the injunctive relief sought is improper, because BCL § 501(c) is inapplicable to the Termination Notice, which only aims to end the Commercial Space Lease; the breach of fiduciary duty claim fails because a corporation, such as the Co-op, does not owe a fiduciary duty to its shareholders; and the request for attorneys' fees is unavailing, because it is based upon a provision of the Commercial Space Lease that expired in 2005. The substantive arguments made by Defendants in the Cross-Motion, as well as the respective supplemental briefings of Defendants and plaintiff, are discussed in detail below.

In the proposed fourth amended complaint dated February 28, 2017 ("FAC"), plaintiff seeks to, inter alia, add individual members of the Board as co-defendants; revise and clarify the Complaint to more specifically state the cause of action for a declaratory judgment; supplement the facts concerning plaintiff's alleged exercise of the option provided under the Commercial Space Lease pursuant to the Rider, including an alleged modification of the option by which Defendants offered a long-term lease in lieu of shares of stock for the Commercial Space; and delete the cause of action for an award of attorneys' fees. Defendants oppose the motion seeking leave to amend (sequence number 003), arguing, inter alia, that the proposed amendments are prejudicial and patently devoid of merit, except as to plaintiff's withdrawal of her claim for attorneys' fees. Notably, the FAC reflects many of the same arguments and allegations made by plaintiff in her supplemental briefing that was filed on February 7, 2017. A copy of the FAC and a redlined version showing changes from the Complaint are attached as Exhibits "A" and "B," respectively, to the affirmation of Ally Hack in support of the motion to amend. Oral argument on the motion to amend was heard on May 10, 2017, and this Court reserved decision.

II. Discussion and Analysis

As noted above, the FAC reflects many of the allegations and arguments made in plaintiff's supplemental brief that was filed in connection with this Court's comments made at the oral argument heard in December 2016, which addressed the Complaint and the Cross-Motion. 12/19/16 tr. at 19, 35-36. Thereafter, at the oral argument held in May 2017 on plaintiff's motion seeking leave to amend, in addition to clarifying its December 2016 comments, this Court noted that "there was a specific reference in the record" that the Cross-Motion to dismiss the Complaint would be applicable to the FAC. 5/10/17 tr. at 3, 7-8, 15. In response, Defendants' counsel stated that plaintiff's allegations regarding the purported modification of the option, from that of purchasing shares of stock to obtaining a long-term lease for the Commercial Space, which allegation was offered by Defendants in 2009, was "part of the third amended complaint [i.e. the Complaint] which we've given notice to them that we were moving against because that's what we had previous oral argument [in December 2016.]" *Id.* at 15-16. As counsel's statement was neither refuted nor challenged by plaintiff, the Cross Motion is deemed to apply to the Complaint. Moreover, this Court observed, at the oral argument held in May 2017, that a resolution on the merits of the motion to amend could dispense with the procedural issue as to whether the Cross-Motion to dismiss the Original Complaint would apply to the Complaint and the FAC, because such resolution would bring everything to a "substantive conclusion" as to the propriety and/or validity of the proposed amendments in the FAC, including whether the statute of limitations defense would bar the claims and allegations asserted in the Original Complaint, the Complaint and the FAC. *Id.*, at 15. Accordingly, this decision will first address plaintiff's motion for leave to amend.

The Motion for Leave to Amend

CPLR 3025(b) provides, in relevant part, that a party may amend a complaint or pleading by "setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties," and that "[l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." While leave to amend is generally freely granted, "a motion for leave to amend is committed to the broad discretion of the court," and "the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered." *Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 (2d Dept 2015) (internal quotation marks and citations omitted). Moreover, "in the absence of prejudice or surprise to the opposing party," the motion to amend should be granted "unless the proposed amendment is palpably insufficient or patently devoid of merit." *Id.* Furthermore, prejudice has been found to exist where a proposed amendment "was based upon facts that the plaintiff had known since the inception of this action," but plaintiff "sought to add new theories of liability that were not readily discernible from the allegations in the complaint and the original bill of particulars." *Morris v Queens Long Is. Med. Group., P.C.*, 49 AD3d 827, 828 (2d Dept 2008).

Here, Defendants argue that they could not have known that plaintiff would change her theory of the case from one based on the alleged "unequal distribution" of shares/space in the Building that occurred in 1996, to another based on her not receiving the benefit of her bargain after she allegedly exercised the option under the Commercial Space Lease Rider in 2003, and then to a third theory based on the alleged modification of the option from shares of stock to a long-term lease for the Commercial Space in 2009. Defendants' opposition at 8. They also

argue that plaintiff has advanced "untenable interpretations of documents to suit her monetary interests," which adversely affected their ability to defend this action. *Id.* at 9. They further argue that the instant motion to amend reflects plaintiff's attempt at a "fourth modification" of the Original Complaint, "despite the parties having not exchanged a single shred of discovery," which shows that plaintiff "has repeatedly changed her allegations without actually learning of new facts," and that plaintiff would "manufacture new facts in an attempt to suit the law, even if it means she has to endorse blatantly unsound interpretations of documents." *Id.* Defendants also argue that they have been surprised and/or prejudiced by the proposed amendments, especially those asserted in the FAC, and, therefore, plaintiff's motion for leave to amend should be denied. *Id.*

In response, plaintiff contends that she never objected to the "unequal distribution" in 1996, but that her objection is aimed at the Co-op's failure to fulfill her rights under the option that she exercised in 2003, pursuant to the Commercial Space Lease Rider, which was later modified from shares of stock to a long-term lease in 2009. Plaintiff's reply at 6. Plaintiff also contends that Defendants could not have been surprised by her current claim regarding the option modification, because she had previously asserted the same claim in her opposition papers (filed in August 2016) to Defendants' Cross-Motion to dismiss, by referencing certain emails which showed that there were ongoing discussions between her and Defendants (as well as the Co-op's attorneys) regarding the modification. *Id.* at 5. Thus, plaintiff contends that, because the same emails were attached to and referenced in the FAC, "there is no rational reason for [the] Co-op to have been surprised by Plaintiff's allegation of the modified Option." *Id.* at 6.

A review of the majority of the referenced emails appears generally to support plaintiff's claim that she orally exercised the option in 2003, and that Defendants seemingly recognized her purported exercise. Yet, Defendants point to two emails written by plaintiff in 2007 and 2009, which appear to show that she did not validly or timely exercise the option in 2003, because the Rider required that the option be exercised during the term of the Commercial Space Lease, which expired in 2005. Defendants' opposition at 17-18. While plaintiff disagrees with Defendants' position (plaintiff's reply at 7), the dispute appears to involve the interpretation of these emails, rather than whether Defendants were surprised by such emails or the proposed amendments. Since Defendants challenge the validity of plaintiff's option exercise, which relates to whether the proposed amendments are palpably insufficient or patently without merit (an issue that will be discussed in detail below), plaintiff's motion to amend should not be dismissed based on Defendants' purported surprise or prejudice. Also, even though the option was allegedly exercised orally by plaintiff, it does not appear to run afoul of the Statute of Frauds because the Rider to the Commercial Space Lease, which contained the option agreement, was in writing. *Dynamic Med. Communications v Northwest Trade Printers*, 257 AD2d 524, 525 (1st Dept 1999) (Statute of Frauds did not bar the enforcement of an oral option exercise when the underlying option agreement was in writing and signed by the parties).

With respect to the option modification that allegedly took place in April 2009, plaintiff relies on certain emails exchanged among the parties to support her claim that the Co-op offered to modify the option from shares of stock to a long-term lease for the Commercial Space; that she accepted the offer; and that the Co-op "approv[ed] and endors[ed] the granting of a long-term lease to [plaintiff] instead of shares." Plaintiff's affidavit in opposition to the Cross Motion, ¶¶

14-39 (filed in February 2017 as part of plaintiff's supplemental briefing); plaintiff's affidavit in support of motion to amend, ¶¶ 6-7. In response, Defendants contend that the emails "were nothing more than a discussion of possibilities, and do not constitute an assent to be bound by either party." Defendants' opposition at 19. Also, Defendants contend that the April 16, 2009 email from Barry Mallin, the Co-op's attorney, did not "even mention or contemplate the possibility of a long-term lease," despite plaintiff's claim to the contrary, and that her "baffling" claim shows "the weakness of her position." *Id.* at 19-20. Although it is true that Mallin's email did not mention a long-term lease, plaintiff explains that she, through her husband, had a subsequent "phone conversation" with Mallin in which he offered her a long-term lease, which she then referenced, via her husband's April 19, 2009 email to the Board members, in relevant part, as follows: "[t]he good news is, Barry says [plaintiff] could get a 99 year lease from the Co-op or sell her option back to the Co-op . . . ." Plaintiff's reply at 11, 14 (quoting email exhibit). Defendants counter that the April 2009 emails from the Board did not constitute the Co-op's approval or grant of a long-term lease to plaintiff, because they also stated, in relevant part, that "there are lots of questions still," and that "the [long-term] lease is a better solution, though it is still a little messy." Defendants' opposition at 20 (quoting email exhibits). In sum, Defendants contend that these emails are "clearly insufficient to grant to plaintiff anything, and do not represent the Co-op's assent to any agreement." *Id.* In response, plaintiff explains that the Board members' emails were written in reply to her husband's April 28, 2009 email inquiry in which he asked: "Should Barry write up a 99 year lease for [plaintiff] or should the Co-op buy the rights to [plaintiff's] space?" Plaintiff's reply at 16 (quoting email exhibit). Thus, plaintiff asserts that the Co-op "chose one of the two solutions" and that "this is [the] classic offer and acceptance."

Id. (referencing caselaw for the proposition that even though the parties did not execute a final written agreement, the record showed that they intended to be bound).

Even though, as Defendants contended, the foregoing email exchanges are insufficient to show that the parties reached an agreement for a long-term lease for the Commercial Space, the emails demonstrate that the parties were negotiating and trying to reach a final solution for a modification of the option from the purchase of shares of stock to a long-term lease, as plaintiff[1] contended. In such regard, plaintiff also argues that, because the option was modified from the purchase of shares to a long-term lease, there was no longer anything to be "purchased," as the option modification was similar to a renewal of an existing lease, where "no consideration was required in order for the renewal to become effective." Plaintiff's reply at 12. Plaintiff further asserts that "she is prepared to tender payment to the Co-op immediately," and that "her failure to pay the purchase price simultaneously with the exercise of the option does not necessitate a forfeiture of the Commercial Space." *Id.* In further response to Defendants' argument that her option exercise was invalid for lack of consideration, plaintiff asserts that, because other shareholders of the Co-op who took bonus space in the Building did not pay (or have not yet paid) a purchase price for their space, the Co-op's requirement that plaintiff pay for her bonus space is a "patently discriminatory act" that violates BCL § 501(c). *Id.* at 10.

---

[1] Plaintiff asserts that the Co-op sought to amend the option from "shares" to a "long-term lease" because, in order for the shareholders to qualify for a tax deduction, the Co-op must only have one class of stock which entitles shareholders to occupy for dwelling purposes a house or an apartment in the building owned by the Co-op. Plaintiff's reply at 11, n 3. Plaintiff also asserts that under the Private Housing Finance Laws, cooperative shares can only be issued for residential occupancy in order for the shareholders to qualify for certain exemptions. *Id.*

Plaintiff's foregoing assertions appear plausible, in that they weave a probable story that fits the allegations of the Complaint, such that plaintiff's motion seeking leave to amend would survive a denial based upon the "palpably insufficient" standard under CPLR 3025. Also, when considering a motion to dismiss a complaint or cause of action, this Court is required to accept the facts alleged as true and afford the plaintiff the benefit of every favorable inference. *Sarva v Self Help Community Servs., Inc.*, 73 AD3d 1155, 1156 (2d Dept 2010). Thus, it is assumed, without deciding the merits of plaintiff's assertions and arguments, that the proffered amendments stand for the proposition that plaintiff exercised the option in 2003; that Defendants offered to modify the option; and that plaintiff accepted the offer in 2009. Notwithstanding such assumption, if the proposed amendments can be defeated by the statute of limitations defense, and thus found to be "patently devoid of merit" under CPLR 3025, the motion to amend must be denied. Indeed, Defendants contend that, "even accepting all of Plaintiff's allegations to be true, her claims are still time-barred by the statute of limitations," which, according to Defendants, renders the allegations and amendments "patently devoid of merit." Defendants' opposition at 11.

The Statute of Limitations Defense

The law is settled that the statute of limitations for a breach of contract claim is six years. CPLR 213 (a). Defendants contend that the six-year statute of limitations begins to run "when a contract is breached or when one party fails to perform a contractual obligation." Defendants' opposition at 12, quoting *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 65 (2d Dept 2013).

The instant dispute arises in connection with plaintiff's purported exercise of the option contained in the Rider to the Commercial Space Lease, which involves the respective contractual

rights and obligations of the parties. Defendants contend that, because plaintiff alleges that she exercised the option in 2003, but the Co-op failed or refused to perform its contractual obligation to sell plaintiff the shares of stock for the Commercial Space, the statute of limitations bars her 2016 claims filed 13 years after the alleged breach. *Id.* Defendants further contend that, even assuming the veracity of plaintiff's allegations that the Co-op modified the option by offering her a long-term lease rather than shares in 2009 and that she accepted the offer, it is undisputed that plaintiff never received the long-term lease, and that her failure to commence a lawsuit within six years thereafter (i.e. in 2015) bars her 2016 claims. *Id.* at 13. Therefore, Defendants assert that plaintiff's motion to amend is "devoid of merit" and must be denied. *Id.*

Plaintiff counters that, at no point prior to the January 2016 Termination Notice did the Co-op "fail" to perform (i.e. give her a long-term lease), because the Co-op "simply delayed carrying out its obligation," and as such, she was "not aggrieved and had no reason to believe that the statute of limitations began accruing," since she continued to use and occupy the Commercial Space undisturbed for years. Plaintiff's reply at 19. Plaintiff also maintains that the statute of limitations in this action "began accruing no earlier than 2016 with the Co-op's sending of the Notice of Termination," because that was the first and only "identifiable and adverse action" taken by the Co-op against her. *Id.* at 21- 23, citing *Benn v Benn,* 82 AD3d 548 (1st Dept 2011). Inasmuch as this action was started promptly after her receipt of the Termination Notice, plaintiff argues that the 2016 claims are not time-barred and the motion to amend should be granted.

In *Benn*, the plaintiff ("Eric") had commenced an action against his brother (defendant "Stefan") and defendant Bennco (a corporation formed by Stefan), in 2007, alleging breach of an oral agreement between Eric and Stefan whereby, in exchange for his money and labor, Eric

would receive title to a condominium unit in a building owned by Bennco. 82 AD3d at 548. Pursuant to the agreement, Eric's right to the unit had ripened in or about 1996, but defendants refused to transfer title to Eric despite his demand. *Id.* The Appellate Division stated that the statute of limitations had not begun to run in 1997, when the defendants were "legally able to convey the unit," because Bennco retained title to both Eric's and Stefan's units until 2004, and such retention of title was not adverse to Eric. *Id.* at 549. The Appellate Division also stated that "[s]ince plaintiff's claims are not based on Bennco wrongfully acquiring the apartment, but rather on defendants wrongfully refusing to transfer it to plaintiff, the statute of limitations began to run at the earliest in 2004, when Bennco transferred the deed to plaintiff's unit to Stefan," because such transfer was the only "identifiable, wrongful act" showing defendants' refusal to convey title to Eric. *Id.* (internal citation omitted).

Plaintiff's argument is unavailing and her reliance on *Benn* is misplaced. In essence, the holding in *Benn* stands for the proposition that the statute of limitations begins to run when an identifiable wrongful act is committed. In this action, it is undisputed that plaintiff's use and occupancy of the Commercial Space was shortened to a month-to-month tenancy when the Commercial Space Lease expired in 2005. Since then, her legal right to the Commercial Space has been adversely impacted, despite the fact that plaintiff allegedly exercised the option in 2003 and the Co-op permitted her to continue use and occupy the Commercial Space. Therefore, the change into a month-to-month tenancy, without granting plaintiff any shares, is akin to a refusal to convey title in *Benn*. Moreover, even assuming that the Co-op modified the option in 2009, as plaintiff alleges, by changing the option to purchase of shares to a long-term lease (and thereby modifying her month-to-month tenancy), it remains undisputed that she never received the long-

term lease, which has adversely impacted her legal right to the Commercial Space since 2009. Furthermore, plaintiff's assertion that the January 2016 Termination Notice was the "first and only" identifiable act that adversely affected her right, and it was only then that the relationship between her and the Co-op "went from cordial to contentious," (plaintiff's reply at 26; plaintiff's supplemental brief [NYSCEF # 102] at 19) seems untenable. Notably, besides the change to a month-to-month tenancy, it is undisputed that the Co-op's counsel, on September 23, 2014, wrote a letter to plaintiff demanding that all rents collected by her from her subtenant be paid to the Co-op, which also adversely affected her right to or interest in the Commercial Space. Plaintiff's further reply (NYSCEF #84) at 9, referencing letter exhibit. Had plaintiff promptly commenced suit at that time, the action would have been timely because it was then only five years after the alleged option modification in 2009. *See Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-404 (1993) (because the plaintiff became aware of the alleged wrongdoing by the defendant at a time when it still had time to sue, the statute of limitations barred its breach of contract action, as all the elements necessary to maintain a lawsuit and obtain judicial relief were present at the time of the alleged breach).

In 2015, several years after the *Benn* decision, the Court of Appeals revisited the issue regarding the accrual of the statute of limitations in contract actions. *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 (2015). Specifically, the Court stated that New York does not apply the "discovery" rule to statute of limitations in contract actions. *Id.* at 594, citing *Ely-Cruikshank*. The Court explained that the "statutory period of limitations begins to run from the time when liability for the wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury," and

that even though the result of this may be "harsh and manifestly unfair, and creates an obvious injustice," a contrary rule "would be entirely dependent on the subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules that have long governed this aspect of commercial repose." *Id.* (internal quotation marks omitted), quoting *Ely-Cruikshank*, 81 NY2d at 403-404. The Court further observed that: "[t]o extend the highly exceptional discovery notion to general breach of contract actions would effectively eviscerate the Statute of Limitations in this commercial dispute arena." *Id.* (internal quotation marks omitted), quoting *Ely-Cruikshank*, 81 NY2d at 404.

In this action, plaintiff argues that there is "no indication whatsoever" that the Co-op breached or repudiated its obligations under the Commercial Space Lease (which expired in 2005) at any time before January 2016, because "there is no deadline or time limit for when the Co-op was required to tender the long-term lease," and plaintiff has been allowed to use and occupy the Commercial Space for many years. Plaintiff's reply at 26. Plaintiff also urges this court to examine the facts of this case in a "more nuanced way" to determine when she was first aggrieved. *Id.* at 21. Specifically, plaintiff's counsel, at the oral argument held on May 10, 2017, repeatedly asked this Court to look at the statute of limitations issue in a "very nuanced way," because the issue is "not so black and white." 5/10/17 tr. at 24. Counsel also stated that, because this case involves "a nuanced lease" and "nuanced facts," plaintiff must be "put on notice" as to when the detriment starts or the statute or limitations commences," but that she was not "put on notice of any problem." *Id.* at 48. These arguments are unavailing. Notably, because this case involves a dispute regarding the Commercial Space Lease and the option therein, this Court must follow the bright-line rule enunciated by the Court of Appeals for the accrual of the statute of

limitations in commercial cases: the statutory period "begins to run from the time when liability for the wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." 25 NY3d at 594. Here, assuming the veracity of plaintiff's allegation that she accepted the Co-op's offer for the option modification in 2009, the Co-op's failure to deliver to plaintiff the contracted for long-term lease promptly thereafter started the running of the statute of limitations, even though she might be ignorant of the existence of the wrong or injury. In fact, plaintiff asserts that, "despite the Co-op's agreement to tender the long-term lease, for the next approximately six years, Plaintiff received nothing from the Co-op except more delays and discussions, until, January 2016 when she was sent the Notice of Termination." Plaintiff's reply at 30. Unfortunately, plaintiff had excessively delayed exercising her rights for more than six years when this action was commenced in 2016. *See, also, Gad v Almod Diamonds Ltd.*, 147 AD3d 417 (1st Dept 2017).

Nonetheless, plaintiff argues that the Co-op should be equitably estopped from asserting a statute of limitations defense because she was misled for many years by the Co-op, and that her delay in commencing this action was due to "fraud, misrepresentation or deception to refrain from filing a timely action." Plaintiff's reply at 30-31, quoting *Corsello v Verizon N.Y., Inc.*, 77 AD3d 344, 368 (2d Dept 2010), *affd as mod.* 18 NY3d 777 (2012). However, no portion of plaintiff's Complaint alleges fraud, misrepresentation or deception. In fact, the Complaint asserts that plaintiff communicated her exercise of the option orally to Defendants in 2003, that such exercise was later confirmed by various emails and correspondences, but that "Defendants have refused to sell the Commercial Space to Plaintiff." Complaint, ¶¶ 22-24. The FAC also asserts that plaintiff and Defendants were engaged in "cordial discussions and negotiations

concerning the long-term lease" for about seven years. FAC, ¶ 45. Indeed, as noted above, plaintiff admits that even though the Co-op agreed to tender the long-term lease, "for the approximately six years, Plaintiff received nothing from the Co-op except more delays and discussions." Plaintiff's reply at 30. Because the belated allegation of fraud, misrepresentation or deceit asserted in plaintiff's reply is not supported by any evidence (or echoed by any prior allegation), plaintiff's equitable estoppel claim/defense is unwarranted. Moreover, because plaintiff's belated argument is raised for the first time in reply, it should be disregarded and rejected. *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 (1st Dept 1992) (function of reply paper is to address arguments made in opposition to the movant's position and not to permit the movant to introduce new arguments).

In conclusion, because the statute of limitations defense defeats the FAC's proposed amendments and renders them "devoid of merit," plaintiff's motion seeking leave to amend should be denied.

The Complaint, the Order to Show Cause, and the Cross-Motion to Dismiss

As noted above, the Cross-Motion seeks dismissal of the Complaint and the causes of action therein pursuant to CPLR 3211 (a) (1), (5) and (7), including the statute of limitations defense. The Cross-Motion is also in opposition to the relief sought by plaintiff in the OSC, including her request for emergency injunctive relief with respect to the Co-op's Termination Notice (motion sequence number 001).

1. Declaratory Judgment Cause of Action

The first cause of action of the Complaint seeks a judgment declaring, among other things, that a distribution of additional shares and additional spaces in the Building to all but one

shareholder (i.e. plaintiff) is unequal treatment under BCL § 501(c), and that plaintiff is entitled to use and occupy the Commercial Space through 2087 at $0.5 per square foot (which equals the benefit other Co-op shareholders enjoy for their additional spaces). Complaint, ¶¶ 39-47.

Defendants argue that the declaratory judgment action is time-barred because a challenge to the Board's 1996 determination with respect to the reallocation and redistribution of spaces and shares, is governed by the four-month statute of limitations in CPLR 217 (1), which provides that "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . ." Cross-Motion at 8-10. Defendants also argue that, even if the most lenient statute of limitations is applied, plaintiff's challenge to the Board's determination must have been commenced within six years pursuant to CPLR 213 (1). *Id.* at 10. Defendants further argue that, even if the running of said statute were to begin in 2009, as measured from the date of plaintiff's May 2009 email, which stated that she found out from the Co-op's counsel that shares for the Commercial Space cannot be legally issued, the time to commence this action expired in May 2015. *Id.*

Plaintiff contends that the statement made by the Co-op's counsel does not qualify as a Board determination and did not trigger the running of the limitations period, and that the only adverse Board determination was the Termination Notice served in January 2016. Plaintiff's opposition (NYSCEF # 39) at 16. Because she seeks to challenge the Termination Notice, and this action was commenced in February 2016, plaintiff argues it is not time-barred. *Id.*

Plaintiff's argument is unpersuasive. Undisputedly, the Termination Notice only sought to terminate plaintiff's month-to-month tenancy in the Commercial Space, while the declaratory judgment sought by plaintiff relates to whether the distribution of rights to shares of stock and/or

spaces in the Building in 1996 ran afoul of BCL § 501(c). The argument that the 2016 Termination Notice also runs afoul of the BCL is tenuous, because plaintiff cites no legal authority to support her argument that the Termination Notice relates to an event that happened 20 years before. Notably, the Court of Appeals has stated that, in order to determine whether there is a limitations period prescribed by law for a particular declaratory judgment action, it is "necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought." *Solnick v Whalen*, 49 NY2d 224, 229 (1980). Here, plaintiff seeks a declaration that she is entitled to use and occupy the Commercial Space until 2087, which is the "long-term lease" sought by plaintiff. As discussed above, the statute of limitations in this action began to accrue, at the latest in 2009, when the Co-op allegedly offered to modify the option to a long-term lease and plaintiff accepted the offer. Since this declaratory judgment action was not commenced until 2016, the relief sought is time-barred. Also, because this declaratory judgment action must be dismissed based on the statute of limitations defense, it is unnecessary to discuss and analyze the remaining issues and arguments raised by the parties, including, among other things, the BCL issues and whether the Commercial Space Lease is separate and independent of plaintiff's status as a cooperative shareholder and residential tenant.

2. Injunctive Relief Cause of Action

The second cause of action seeks temporary and permanent injunctive relief, by tolling and staying the running of the Termination Notice issued by the Co-op with respect to plaintiff's Commercial Space Lease. Plaintiff argues that the requested injunctive relief should be granted because she is "likely to succeed on the merits" as to her first cause of action. Complaint, ¶¶ 49-56. For the reasons stated above, the declaratory judgment sought in the first cause of action is

denied. Therefore, the injunctive relief requested in this second cause of action also is denied. Correlatively, the temporary injunction granted in favor of plaintiff, pursuant to the February 25, 2016 OSC (NYSCEF #10) also is hereby terminated and dissolved.

3. Breach of Fiduciary Duty Cause of Action

The third cause of action alleges that the Co-op's Board owes plaintiff a fiduciary duty, and that such duty was breached when Defendants improperly sought to terminate her rights in the Commercial Space and to evict her therefrom, because "Defendants stand to profit financially if they retake possession of the Commercial Space." Complaint, ¶¶ 58-61.

Defendants argue, among other things, that the breach of fiduciary claim is barred by the statute of limitations for the same reasons that the first cause of action seeking declaratory relief is barred by the statute of limitations. Defendants' reply (NYSCEF #54) at 16. Plaintiff did not respond to the statute of limitations argument; instead, she states only that her second amended complaint rendered moot certain of the legal arguments made by the Co-op. Plaintiff's further reply (NYSCEF #84) at 10-11.

A breach of fiduciary duty claim is governed by a six-year statute of limitations if the relief sought is equitable in nature, CPLR 213 (1), or by a three-year statute of limitations if the relief sought is for money damages, CPLR 214 (4). *Weiss v TD Waterhouse*, 45 AD3d 763, 764 (2d Dept 2007). For the reasons stated above, because the declaratory judgment action is time-barred, this breach of fiduciary duty cause of action is also time-barred.

III. Conclusion

For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's motion seeking leave to amend the complaint (motion sequence number 003) is denied; and it is further

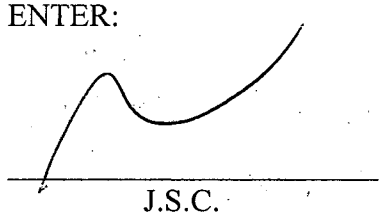
ORDERED that defendants' cross-motion to dismiss the complaint, as amended by the third amended complaint, is granted, and all causes of action of the amended complaint are dismissed; and it is further

ORDERED that any and all temporary injunctive relief granted by this court pursuant to the orders to show cause issued in February 2016 (NYSCEF #10; motion sequence number 001) and October 2016 (NYSCEF #70; motion sequence number 002) is terminated and dissolved.

The foregoing constitutes an order and decision of this Court.

Dated: November 22, 2017

ENTER:



J.S.C.

Shlomo Hagler
J.S.C.