SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 5

----------X

AMALGAMATED DWELLINGS INC., STEPHEN HOLLANDER, JOHN DERGOSITS, and ANTOINETTE CARONE-GARBER,

Plaintiffs,

-against-

Index No. 160393//2016

THE CITY OF NEW YORK and HILLMAN HOUSING CORPORATION,

DECISION/ORDER

Defendants,

----------X

HON. W. FRANC PERRY, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this derivative taxpayer action pursuant to Section 51 of the New York General Municipal Law (Gen Mun Law § 51), plaintiffs Amalgamated Dwellings Inc. (Amalgamated), Stephen Hollander, John Dergosits (Dergosits) and Antoinette Carone-Garber (the individual plaintiffs) seek to set aside the 1949 conveyance by deed from defendant The City of New York (the City) to co-defendant Hillman Housing Corporation (Hillman) of portions of discontinued streets on the Lower East Side, namely, Broome Street, between Willet Street and the former Columbia Street, now known as Abraham Kazan Street, and the former Sheriff Street between Grand and Broome Streets (the subject property).

Plaintiffs also seek a declaratory judgment that the City be adjudged and ordered to be the rightful owner of the subject property in accordance with its reversionary interest and pursuant to the issuance of a corrected deed, and a permanent injunction barring the City from

continuing to refuse to assert its purported ownership rights in the subject property and compelling it to obtain public access to the subject property.

In motion sequence number 001, the City moves for an order to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7).

In motion sequence number 002, Hillman moves, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), to dismiss the amended complaint, and, pursuant to 22 NYCRR §§ 130.1 et seq., for an award of sanctions against plaintiffs and/or for recovery of the attorneys' fees, costs, and expenses incurred by Hillman. Plaintiffs cross-move for an order removing plaintiff John Dergosits from the case.

For the reasons stated, the City's motion to dismiss is granted, Hillman's motion to dismiss is also granted, and that branch of its motion for sanctions is denied, and plaintiffs' cross- motion to remove Dergosits is granted.

I. Background and Procedural History

Amalgamated is a cooperative housing corporation with an address of 504 Grand Street, New York, New York, which owns land and buildings on one square block in lower Manhattan, bounded by Broome Street on the North, Grand Street on the South, the former Sheriff Street on the West and the former Columbia Street, now known as Abraham Kazan Street, on the East. The individual plaintiffs are owners of shares in Amalgamated, and their taxpayer status pursuant to Gen Mun Law § 51 is undisputed.

Hillman is a cooperative housing corporation with an address of 530 Grand Street, New York, New York, which owns land and several buildings located on two square blocks directly east and west of Amalgamated.

Prior Litigation

On December 4, 2000, Amalgamated commenced an action against Hillman in the Supreme Court, New York County *(Amalgamated Dwellings, Inc. v Hillman Housing Corp.*, index No. 124357/2000 [Sup Ct, NY County]). In this prior action, Amalgamated, on behalf of itself and its residents, sought to void, reform or impose a constructive trust over the 1949 deed from the City to Hillman, based on the contention that a portion of the closed street beds did not abut all of Hillman's property, allegedly in violation of a condition subsequent contained in the deed. In addition, Amalgamated sought ownership of those portions of the closed street beds that abutted its property.

The court takes judicial notice of the following facts gleaned from the record during the prior litigation:

> "Of relevance to this proceeding, the closed streets which were conveyed to the defendant included that portion of Sheriff Street which makes up the western perimeter of the square block which plaintiff owns and that portion of Broome Street which makes up the northern perimeter. The closed streets were conveyed to Hillman by deed on April 5, 1949. In connection with the City's conveyance of these streets to the defendant, the plaintiff passed a resolution acknowledging and approving the deed relating to the closed streetbeds. In addition, it executed a release expressing its desire to have the streets closed and discontinued and waiving all claims against the City and its successors which it may have had by reason of the closing and discontinuance. Thereafter, Hillman made repairs on the closed streetbeds and apparently developed them by, *inter alia*, building a garden on the Broome Street portion and a park on the Sheriff Street portion. Over the following forty years, it appears that plaintiff and its residents had considerable access to both of these closed streetbeds and were, *inter alia*, able to use the Broome Street portion as a site to store trash and garbage which would then be collected and to use the Sheriff Street park in order to make repairs on the westerly facades of the Amalgamated buildings bordering thereto."

(*Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 2001 WL 35985598, Sup Ct, NY County, May 25, 2001, Diamond, J., index No. 124357/00, *affd* 299 AD2d 199 [1st Dept 2002]).

Amalgamated's complaint set forth the following seven causes of action:

> "The first cause of action seeks the imposition of a constructive trust under which plaintiff and defendant would jointly own the Sheriff Street park. The second and third causes of action seek an injunction and easement with respect to the Sheriff Street park which would allow plaintiff to use the park for the purpose of repairing one or more of its buildings. The fourth cause of action seeks an order declaring that the 1949 deed given by the City to the defendant with respect to the closed streetbeds is null and void. The fifth and sixth causes of action seek an injunction and easement with respect to the portion of Broome Street between Sheriff Street and Columbia Street which would allow plaintiff access so that trucks can pick up trash which has been stored in that area. The seventh cause of action seeks to have the 1949 deed reformed to reflect that plaintiff has an equal interest with the defendant in the two streetbeds which abut its property."

(*Id.*).

Hillman's pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a), was granted, with the exception of the fifth and sixth causes of action (*id.*). The decision and order dated May 25, 2001 was upheld by the Appellate Division (299 AD2d 199).

On January 28, 2005, the court rendered an opinion after a bench trial on the issue of whether Amalgamated is entitled to easements, either by prescription or by necessity, to various properties owned by Hillman, which abut the residential building owned by Amalgamated, denying all of Amalgamated's requests for easements.

By decision and order dated April 7, 2005, after a non jury trial, the court granted Hillman's motion to dismiss, pursuant to CPLR 3211 (a)(1), (a)(3), (a)(5) and (a)(7), and declared that Amalgamated was not entitled to prescriptive easements over two areas of Hillman's property for pedestrian and vehicular use. The judgement was affirmed by the Appellate Division, bringing the litigation to a close (*Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 33 AD3d 364 [1st Dept 2006]).

The Instant Action

On December 12, 2016, plaintiffs filed a complaint under Gen Mun Law § 51 seeking that the City be adjudged and ordered to be the rightful owner of the subject property in accordance with its reversionary interest, since Hillman does not abut said streets, and that the April 5, 1949 deed be declared illegal and null and void, as it lacked the necessary legislative authority,.

The City filed motion sequence number 001 to dismiss the complaint on January 11, 2017.

An amended complaint was filed on February 16, 2017 notably expanding on the original complaint by referring to the aforementioned prior litigation between Amalgamated and Hillman, and by including two additional causes of action in addition to the derivative taxpayer cause of action, namely, a cause of action for a declaratory judgment that the transfer of the non-abutting streets to Hillman is void, and another to permanently enjoin the City from continuing to refuse to assert its ownership rights in the subject streets.

In their amended pleading, plaintiffs claim that, on or about April 5, 1949, the City, after numerous resolutions by its Board of Estimate (BOE), fraudulently and collusively made and entered into an illegal and wrongful arrangement, whereby it transferred the ownership of the subject property to Hillman by deed.

Plaintiffs allege that the language of the deed provides that, if it appeared at any time that Hillman was not the abutting land owner of the subject property, the deed would be null and void. Plaintiffs maintain that the City has a reversionary interest in the subject property, which arises out of the deed, and that it improperly and wastefully refuses to assert it.

Plaintiffs assert that Hillman does not front, or abut, any portion of Broome Street from Abraham Kazan (formerly known as Columbia) Street to the midline of the former Sheriff Street, nor any portion of the easterly half of Sheriff Street.

According to plaintiffs, the BOE's street closings and conveyances were not needed for any public purpose.

In addition, plaintiffs characterize the aforementioned conveyance as a fee on condition deed with a condition subsequent, and they point to paragraph 9 of the deed, which provides:

> "That the party of the second part [Hillman] is the owner of the land fronting on the section of the road, street or avenue hereby conveyed, and should it at any time appear that the party of the second part was not on the date of this deed the owner of the land abutting the section of the road, street, or avenue hereby conveyed, then this release shall become null and void."

(Amended complaint, ¶ 63; Todd Krichmar affirmation, exhibit E at 9).

Plaintiffs also claim that the US Supreme Court concluded in *Board of Estimate of City of New York v Morris* (489 US 688 [1989]) that the BOE's very being violates the United States Constitution, and, therefore, plaintiffs conclude that the resolutions adopted by the BOE to close and discontinue the subject property and transfer it to Hillman were unconstitutional. In the alternative, plaintiffs allege that the City acted in violation of Section 383-2.0 of the former Administrative Code of City of New York [Land in closed or discontinued street; conveyance to abutting owners or other persons].[1] According to plaintiffs' interpretation of the statute, the City

[1] Section 383-2.0 of the former Administrative Code of City of New York provides:

> "a. Whenever the city shall have any right, title or interest in and to the land lying within a street, closed or discontinued in whole or in part, the owner of land fronting thereon at the time of such closing or discontinuance, or his heirs or assigns, may acquire such right, title and interest in and to any parcel or parcels of such land lying in front of the lands owned by such person or persons, upon payment . . . b. Such person or persons shall apply, in writing, to the board of estimate for such grant or conveyance within two years after the date of the entry of the final decree of the

and its BOE acted illegally at the very least by not waiting two years prior to transferring streets to Hillman in violation of the Administrative Code, which allegedly bestowed Amalgamated, as land owner whose land fronted the property, a right of first refusal to acquire such land from the City, prior to the City being authorized to transfer it to a non-abutting land owner, namely Hillman. Plaintiffs also claim that the City's refusal to assert its rightful ownership rights to these street segments is in violation of NY Constitution's article VIII, § 1, which generally prohibits the gift or loan of property by local subdivisions.

Plaintiffs allege that Amalgamated sent a letter on January 16, 2007 to Michael A. Cardozo, then Corporation Counsel of New York City, putting the City on notice that the deed should be null and void and that the conveyance of the subject property constituted an illegal gift, and demanding that the City assert its ownership in these two street segments, because Hillman did not front the sections of property conveyed, nor was Hillman the owner of the land abutting the street.

According to plaintiffs, the instant lawsuit accrued on January 16, 2007 and is subject to a ten year statute of limitations applicable to an out of possession party, i.e. the City, seeking to recover its reversionary interest.

Finally, plaintiffs argue that Amalgamated never released the City of its obligations to enforce the terms of the deed and the individual plaintiffs never entered into a release of any kind with the City.

---

court or of the confirmation of the report of the commissioners of estimate and assessment, as the case may be."

Plaintiffs filed their opposition papers on March 16, 2017, wherein they request amongst other things that the court deny the City's motion because it only addresses the original complaint (Abraham Bragin aff, ¶¶ 4-6). The City filed its reply papers on March 30, 2017.

On April 25, 2017, Hillman filed motion sequence number 002 to dismiss the amended complaint, and plaintiffs filed their opposition and cross-motion papers to remove Dergosits on June 8, 2017. Hillman's reply and opposition papers to the cross-motion were filed on July 5, 2017.

II. Legal Standard

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994], citing CPLR 3026).

Where dismissal of an action is sought, pursuant to CPLR 3211 (a) (1), on the ground that it is barred by documentary evidence, such relief may be warranted only where the documentary evidence "'utterly refutes plaintiff's factual allegations'" and "'conclusively establishes a defense to the asserted claims as a matter of law'" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal citations omitted]). The court is "not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint" and can "consider documentary evidence proved or conceded to be authentic" (*West 64th Street, LLC v Axis U.S. Ins.*, 63 AD3d 471, 471 [1st Dept 2009], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept 1987] [internal quotation marks omitted]).

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), "the court should accept as true the facts alleged in the

complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory" (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]).

A defendant moving to dismiss a cause of action as barred by the applicable statute of limitations under CPLR 3211(a)(5) bears the initial burden to demonstrate that the time within which to commence the action has elapsed (*see Baptiste v Harding-Marin,* 88 AD3d 752, 753 [2d Dept 2011]; *Savarese v Shatz*, 273 AD2d 219, 220 [2d Dept 2000]; *Doyon v Bascom*, 38 AD2d 645, 645-646 [3d Dept 1971]). In order to make a prima facie showing, the defendant must establish, *inter alia*, when the cause of action accrued (*see Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]). Once the defendant has satisfied its burden to demonstrate that the action is untimely, the burden then shifts to the plaintiff to set forth evidentiary facts sufficient to establish or raise a question of fact as to whether the cause of action is timely. Namely, plaintiff must show that the statute of limitations was tolled, or was otherwise inapplicable, or that the action was commenced within the applicable limitations period (*see Kitty Jie Yuan v 2368 W. 12th St., LLC,* 119 AD3d 674 [2d Dept 2014]; *Beizer v Hirsch*, 116 AD3d 725 [2d Dept 2014]; *Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2d Dept 2011]).

III. Motion Sequence Number 002:

Plaintiffs' Cross Motion to Remove Dergosits as Plaintiff from the Case

As an initial matter, the court turns to plaintiffs' cross-motion to consider and only retain the proper parties in this case.

A. Contentions

In their cross motion, plaintiffs seek the removal of Dergosits as plaintiff on the grounds that an error was made to include him as a plaintiff at the time the pleadings were originally filed. In support of their motion, plaintiffs submit an affirmation by Peter I. Livingston, Esq. (Livingston), their attorney, stating that he misunderstood a conversation he had with Amalgamated's managing company in which he was left with the mistaken impression that the company had contacted Dergosits, and that he was willing to participate as plaintiff in this lawsuit. Livingston subsequently learned that Dergosits, who is allegedly hard to contact, had not been contacted, and he states that he doesn't know Dergosits's position with respect to whether or not he was interested in becoming a plaintiff in this action. Livinsgston also relates that, upon discovery of this error, he immediately contacted both defendants' counsels to request a stipulation to remove Dergosits from the caption and the pleadings, to no avail.

Hillman opposes the cross motion on the basis that Dergosits did not submit an affidavit that his joinder was a mistake or that he never intended to be a party to the action. In addition, Hillman argues this cross motion is just another shell game and merely an attempt by plaintiffs designed to distance themselves and differentiate this cases from the prior action where Dergosits was a key witness, to avoid the doctrines of res judicata and collateral estoppel.

B. Analysis

The court is troubled to learn that plaintiffs' counsel never contacted Dergosits and yet included him as an individual plaintiff in this action. It begs the question what did counsel rely upon as the basis of his authority to provide legal representation for this plaintiff and even Stephen Hollander and Antoinette Carone-Garber.

Notwithstanding the foregoing, the court does not wish to penalize Dergosits for plaintiffs' counsel's shortcoming as he might still not be aware to date that he was made a party to a lawsuit without his consent.

Based on the foregoing, plaintiffs' cross motion to remove Dergosits as a plaintiff in this case is granted.

IV. Motion Sequence Number 001

A. Contentions

In its motion, the City argues that plaintiffs' original complaint is facially and factually deficient.

Whereas the limitations periods applicable to claims to recover public property under Gen Mun Law § 51 range from four-months, one year, to three-years, the City contends that plaintiffs' sixty-seven year delay in filing their complaint is untimely.

The City also claims that plaintiffs fail to state a cause of action under Gen Mun Law § 51 as, first, they do not satisfy the CPLR 3016(b) threshold which requires that the circumstances constituting a wrong alleged in connection with a cause of action based on misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence must be stated in detail.

Second, plaintiffs fail to allege facts showing that Amalgamated was actually entitled to purchase the discontinued streets pursuant to former Administrative Code § 383-2.0. The City argues that the foregoing provision provides an adjacent owner of property abutting a discontinued street the opportunity to apply to the BOE to purchase the former street within two year after it was discontinued, rather than vesting a right of first refusal in the property owner to acquire such land, as erroneously stated by Amalgamated before the City could convey it to another. Furthermore, the City points out that Amalgamated, did not allege that it applied to the BOE to purchase the property from the City. Rather, Amalgamated expressly waived any claim arising from the closing and discontinuance of the streets at issue as a pre-condition to the conveyance to Hillman, as evidenced by the BOE proceedings of November 1948 (Krichmar affirmation, exhibit C).

Third, Amalgamated conceded that Hillman owned property fronting the streets when they were discontinued, nonetheless it contends that Hillman was ineligible to acquire the easterly half of the former Sheriff street, or the discontinued half of Broome street east of the former Sheriff street because Hillman did not own property fronting those portions of the discontinued streets. The City highlights that, in contrast to Amalgamated's position, Administrative Code § 383-2.0(c) expressly permits the City to "convey all of the lands in any such closed or discontinued street to the owner of the land abutting on one side thereof" and the BOE "shall not be obliged to convey the land within one-half of such closed or discontinued street, to the owner of the land abutting on such half." Moreover, Hillman did own property abutting Broome Street east of the former Sheriff street.

Fourth, the City maintains that Amalgamated cannot premise any claim upon the gift and loan clause of the New York State Constitution (NY Const, art VIII, § 1), that the City conveyed

the property to Hillman without consideration. The City points to pages 1257-1260 of the transcript of the February 24, 1949 BOE proceedings to dispute this contention, and to show that the City conveyed that property to Hillman in exchange for other property that Hillman conveyed to the City, in order for streets to be widened as part of the City's redevelopment of the neighborhood.

Fifth, the City disputes plaintiffs' interpretation of the US Supreme Court's decision in *Board of Estimate of City of New York v Morris* (489 US 688), that it invalidates the BOE's prior actions.

Finally, the City argues that Amalgamated's claim is barred by the release executed by Amalgamated on November 8, 1948, providing that Amalgamated acknowledged that it owned land abutting Broome Street between Willet and Columbia (now Abraham Kazan) Streets, and Sheriff Street, that "it desires to have said streets closed and discontinued," and that it agreed to release the City of any claims by reason of the closing and discontinuance of the affected streets.

In opposition, plaintiffs argue first that the release signed on behalf of Amalgamated is not applicable. Plaintiffs contend that while the release released the City with respect to any claims that Amalgamated and its successors have "by reason of the closing and discontinuance of the" streets, it says nothing about not suing the City with respect to the conveyance of the property to Hillman, or other causes of action pertaining to this matter. Plaintiffs claim that, because the release was signed six months before the deed was executed, it could not, as a matter of law, release future events, and, therefore, it is irrelevant to the present controversy.

Plaintiffs contend that, contrary to the City's claims, they are not concerned with the "closing and delisting" of the streets. Rather, they are seeking to compel the City to reacquire

the land which it has illegally donated to Hillman without consideration for the last nine plus years.

Plaintiffs maintain that they are also concerned with the lack of access of fire trucks and emergency vehicles to Broome and Sheriff Streets. Furthermore, plaintiffs argue that the release is not binding on the individual taxpayers, since they were not parties to it.

Plaintiffs also argue that the Supreme Court did not reach a decision on the merits with respect to Amalgamated's cause of action to nullify the deed, which conveyed the streets to Hillman in the action captioned under index No. 124357/00 on May 25, 2001.

Secondly, plaintiffs argue that their claims are timely on the basis that the action was filed in December 2016, less than 10 years after it became clear to the City that it had a reversionary interest. Plaintiffs describe Condition 9 of the deed in question as a fee on condition subsequent according to Estates, Powers and Trusts Law (EPTL) § 6-1.1(a)(2), which purportedly gives the grantor, namely the City, a "right of reacquisition" if the condition comes to pass by maintaining an action in the Supreme Court pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1953(2) to compel a conveyance upon the grantor.

Plaintiffs claim that, as taxpayers, they are asking the court to compel the City to exercise its rights of reverter, and that the statute of limitations starts to run from the date that the reversionary condition occurred pursuant to RPAPL § 612(1).[2] Plaintiffs explain that the deed

---

[2] RPAPL §612 Where action cannot be maintained; action based on reverter or breach of condition subsequent

"1. Except as otherwise provided in this section, an action to recover the possession of real property cannot be maintained where it is founded upon a claim of reverter of an estate in fee conveyed upon special limitation or founded upon a claim of breach of a condition subsequent, other than a condition of a lease for a term of years, unless (a) within ten years after the occurrence of the reverter or the first

provides for the tolling of any such period, the reversionary interest accrued at such time as it did "at anytime appear" to the City that Hillman did not own the land abutting the segments of the former Broome and Sheriff Streets that front and abut the Amalgamated buildings. Hence, plaintiffs claim that their causes of action arose in January 16, 2007, when they brought the relevant facts to the City's attention by letter, and that having filed this action in December 2016, it is timely. Plaintiffs state that the City does not address the statute of limitations for the remaining two causes of action, and, therefore, they survive.

Finally, plaintiffs argue that the City's failure to bring an action to recover the subject property is actionable under Gen Mun Law § 51. Plaintiffs contend that the amended complaint alleges that the street closure and conveyance to Hillman was for the sole benefit of Hillman, for a purely private purpose actionable under that provision. Plaintiffs add that the same private purpose, was echoed in BOE's February 1949 minutes (Krichmar affirmation, exhibit D at 1255), and repeated in BOE's November 1948 report (*id.*, exhibit C at 8400).

Plaintiffs point to the amended complaint to highlight that they have alleged all the factual requirements for a claim actionable under Gen Mun Law § 51, namely by characterizing the City's failure to exercise its rights against a private corporation as corrupt or improper waste of municipal property, and in contravention with New York Constitution article VIII, § 1. Plaintiffs maintain that the City, by failing to exercise its reversionary interest, is effectively donating the subject property to Hillman in violation of the gift and loan clause.

---

occurrence of the breach, the plaintiff, or any predecessor in interest then entitled to possession or to exercise the power of termination, shall have served upon the person or persons against whom the action might then have been commenced a written demand that possession be delivered, stating the ground thereof, and the action is commenced within one year thereafter or (b), if no such demand is served, the action is commenced within such ten years. "

In its reply, the City explains that it elects not to withdraw the motion which was submitted before plaintiffs filed their amended complaint, and opts instead to apply it to the new pleading because, it argues, the amendment fails to cure the fatal defects in plaintiffs' case.

The City stresses first that the three causes of action are untimely. It argues that plaintiffs' first cause of action, which is the same in both complaints, which seeks to undo the City's 1949 conveyance to Hillman, is untimely. Plaintiffs concede that the remedy available under Gen Mun Law § 51 entails enforcement of a penalty or forfeiture created by statute, which compels the application of the one-year limitation period of CPLR 215(4), or at most, the three-year limitations period of CPLR 214(2), if not the four-month period of CPLR 217(1).

The City states that plaintiffs allege no facts supporting any theory under which either limitations period could have preserved their Gen Mun Law § 51 claim through December 2016.

The City disputes plaintiffs' contention that they can avail themselves of the ten-year limitations period under RPAPL § 612, on the basis that: (1) plaintiffs are not suing under RPAPL § 612; (2) plaintiffs would in any event lack standing to pursue a claim under that provision, which only allows the grantor or any predecessor in interest, namely the City, the right to sue; (3) the ten-year limitations period could not have commenced running only in January 2007 as, unless there is fraud, which is not alleged here, the operation of subsection 6 of RPAPL § 612 is "not affected by . . . any lack of knowledge"; (4) even if somehow plaintiffs had standing under that provision, plaintiffs do not allege that any actual fraud prevented Amalgamated itself from suing the City prior to December 2016; (5) under RPAPL § 612(5), any purported reversionary interest must be conclusively presumed to have been extinguished as plaintiffs do not allege that the City served a written demand to Hillman to relinquish possession and/or commence a reverter action within one year after serving the demand; and (6) contrary to

plaintiffs' interpretation; the language in the deed cannot override the applicable statute of limitations, and the deed's Condition 9 does not state that any reversionary interest is created when facts "appear to the City,"thus vesting in Amalgamated the unilateral power to trigger the ten-year limitations period by sending a letter to the City. Rather, the language reads "if it should appear any time that" Hillman did not own property adjacent to the subject property as of April 5, 1949.

With respect to the two new claims added in the amended complaint, for declaratory and injunctive relief, respectively, the City argues that these causes of action seek relief that is duplicative of the relief sought in the first cause of action. The City argues that the longest period that could possibly govern plaintiffs' claims is the six-year "catchall" provision of CPLR 213(1), and that these causes of action accrued no later than the year 2000 when Amalgamated had information constituting the basis for these claims and sued Hillman on the same facts. Even if the new claims somehow did not accrue until January 2007, they became time-barred in January 2013 according to CPLR 213(1).

Secondly, the City claims that none of the claims in the amended complaint state a cause of action. The first cause of action under Gen Mun Law § 51 still fails, as it lacks any allegation that any City official engaged in any fraud or illegality, or any actual details of any specific facts constituting any purported acts of fraud or collusion, including who committed them and when. The City contends that the second and third causes of action merely restate the first cause of action, which states no cause of action. In any event, the City argues that plaintiffs lack standing to assert a plenary claim for declaratory and injunctive relief to undo the 1949 conveyance, because Amalgamated does not have any interest in the subject property. Furthermore, the City characterizes the May 25, 2001 decision under index No. 124357/00, which was affirmed by the

First Department, as law of the case that the City conveyed the subject property to Hillman in 1949 for a manifestly lawful purpose.

The City argues that plaintiffs fail to allege that the conveyance to Hillman violated any applicable law, including but not limited to the former Admin Code § 383.2.0. Here, as the 2001 decision confirms, the City's conveyance was an arms-length, compensated transaction effectuated in accordance with extensive public proceedings in furtherance of a public project. Plaintiffs do not allege that the City's inaction after receiving Amalgamated's letter is the result of any fraudulent or illegal conduct by any City personnel; nor do plaintiffs allege that Amalgamated applied to purchase the subject parcels after they were discontinued as public streets in order to qualify to acquire them under that provision. Neither does this provision provide for a reversion to the City, or a right of first refusal, as described by plaintiffs.

Plaintiffs also fail to state a viable cause of action premised upon the gift and loan clause of the New York Constitution. While plaintiffs argue that an illegal gift occurred in 2007, because the City took no action to recover title "after being made aware of its [purported] reversionary interest" by Amalgamated, and thereby "in effect, donated the land to Hillman," this allegation is contradicted by the certified and public account, recited in the November 1948 and February 1949 BOE minutes and the deed, that the City received valuable consideration, sufficient under the NY Constitution, in exchange for the conveyance to Hillman. Plaintiffs' allegations are further belied by this court's 2001 order, affirmed by the First Department, rendering the holding law of the case.

The City argues that plaintiffs implicitly concede that US Supreme Court did not retroactively invalidate the 1949 transfer to Hillman.

Finally, Amalgamated's November 1948 release bars all of its claims; Abraham E. Kazan executed the release on behalf of Amalgamated, as its Vice-President, and was concurrently Hillman's President. As a result, the City concludes, Amalgamated was fully aware that the City would be discontinuing the streets in order to convey them to Hillman.

B. Discussion

At the outset, the court notes that the conveyance by the City of the subject property to Hillman must be viewed in the larger context of the period's "project to revive the [L]ower [E]ast [S]ide by razing dilapidated and abandoned tenements and constructing apartment buildings for middle-class residents" (*Amalgamated*, 2001 WL 35985598, index No. 124357/00 [May 25, 2001]). As part of this redevelopment project, Hillman acquired land from the City for $1.3 million between 1945 and 1949 for the erection of cooperative housing units. Hillman conveyed to the City certain strips of land in the vicinity of the proposed cooperative apartments, so that the City could widen several streets bounding the housing project, and

> "[i]n return, the City agreed to legally close portions of the public streets bordering the property which Hillman had acquired and convey these closed streetbeds to the defendant. This conveyance was made only after public hearings were held and approval was given by the Board of Estimate, the Deputy Mayor, the Comptroller, the City Council President and the Presidents of all five boroughs."

(*Id.*).

1. Relevant Excerpts from BOE Resolutions and the Deed

Leading up to the conveyance of the subject property, the City conducted a hearing by its BOE on November 18, 1948 that resulted in a resolution closing and discontinuing as public streets "Broome Street between Willett Street and Columbia Street, and between Columbia Street and Lewis Street; Sheriff Street between Grand Street and the northerly line of former

Broome Street; and Cannon Street between Grand Street and a new street." (Krichmar affirmation, exhibit C at 8404). The resolution also provided for the following release signed by Abraham E. Kazan, Vice-President of Amalgamated on November 8, 1948:

> "Whereas, The party of the first part [Amalgamated] is the owner of a certain parcel of land abutting thereon and desires to have said streets closed and discontinued; and
> "Whereas, The Board of Estimate, deeming it in the public interest, favors such change in the City's street system, . . .
> "That the party of the first part, in consideration of one dollar ($1) and the adoption of the above entitled map and the adoption of said resolution, relative to Broome, Sheriff Street and Cannon Street in the Borough of Manhatta [sic] for itself, its successors and assigns does hereby:
> "(1) Remise, release and forever discharge the said, The City of New York, and its successors of and from any and all claim or claims and cause or causes of action whatsoever, which it has or may hereafter have, or which it, or its successors and assigns may hereafter have against The City of New York by reason of the closing and discontinuance of the portion of Broome Street between Willett and Lewis Streets, Sheriff Street between Grand and New Streets, and Cannon Street between Grand and New Streets, in the Borough of Manhattan, City of New York."

(*Id.*).

On February 24, 1949, the BOE held a hearing adopting another resolution whereby Abraham E. Kazan, in his capacity as Vice-President of Hillman, conveyed on December 9, 1948 four parcels to the City as follows:

> "the party of the first part [Hillman], in consideration of one dollar ($1), . . . paid by the party of the second part [the City], does hereby grant and release unto the party of the second part, its successors and assigns forever,
> "All those certain lots, pieces or parcels of land, together with the buildings and improvements thereon, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows . . ."

(Krichmar affirmation, exhibit D at 1257).

> "The Housing Company [Hillman], in exchange for lands received by it from the City hereunder, . . ., shall simultaneously dedicate and convey to the City title to

such strips of land bordering the boundary streets of the area as may be necessary for the purpose of widening the several boundary streets . . ."

(*Id.* at 1259).

The deed, executed on April 5, 1949 by the City and Hillman, provides in relevant part that:

"whereby the part of the first part [the City] agreed, among other things, that at the request of the party of the second part [Hillman], to cause the public streets or portions thereof traversing the area of the party of the second part to be legally closed and discontinued, and to convey to the said party of the second part all its right, title and interest in and to such closed streets; and

"WHEREAS, the Board of Estimate by a resolution adopted on the 18th day of November, 1948 (Cal. No. 4-B), approved four similar maps providing for the discontinuance and closing of Broome Street between Willett Street and Columbia Street, and between Columbia Street and Lewis Street, Sheriff Street between Grand Street and the northerly line of the former Broome Street, and Cannon Street between Grand Street and a New Street, in the Borough of Manhattan, and directed that such streets, hereinafter more particularly described, shall become and be discontinued and closed . . .

* * *

"WHEREAS, the Board of Estimate at a meeting held on the 24th day of February, 1949 (Cal. No. 23-0), adopted a resolution whereby it determined that the property hereinafter bounded and described, is not needed for any public use, and pursuant to the provisions of Section 383 of the Administrative Code, and in pursuance of the aforesaid agreement and amended supplemental agreements, authorised a release to HILLMAN HOUSING CORPORATION, of the interest of The City of New York, . . .

(*Id.*, exhibit E at 1 and 2).

Any contention that the BOE's resolutions are null and void on the basis of *Board of Estimate of City of New York* (489 US 688) is unsupported, as plaintiffs cite no authority supporting their argument that the US Supreme Court's decision, which ruled that the structure of the BOE was unconstitutional, affects the validity of the BOE resolutions, passed prior to that holding *(see Matter of Upper East Side Coalition, Inc. v Board of Estimate of the City of New*

York, et al., NYLJ, August 2, 1989 at 17 col. 5 [Sup Ct, NY County 1989], quoting *Arc Plumbing & Heating Corp. v Board of Responsibility of Dept. of Gen. Servs. of City of N.Y.*, 135 Misc 2d 413, 416, n. 2 [Sup Ct, NY County 1987] [holding that the challenge to the constitutional makeup of the BOE in *Morris v Board of Estimate*, 647 F Supp 1463 [ED NY 1986], a decision which, this court notes, was later affirmed by the US Supreme Court in *Board of Estimate of City of New York*, 489 US 688, does not affect the validity of its resolutions]).

2. Timeliness of the Taxpayer Action

Section 51 of the General Municipal Law gives specified taxpayers standing to maintain an action, also known as a taxpayer's action, against officers, agents, commissioners, and other persons acting, or who have acted, for and on behalf of any county, town, village, or municipal corporation in New York State, against them to "prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation."

The General Municipal Law does not specify the limitations period governing taxpayers' actions. However, it is well established that the substance of the action, and the correlated nature of the relief sought, dictate the appropriate statute of limitations *(Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 443-444 [1995]).

Generally, actions seeking to recover upon a liability, penalty or forfeiture created or imposed by statute are governed by a three-year statute of limitations pursuant to CPLR 214(2) (*Schechtman v Sverdrup & Parcel Consultants*, 226 AD2d 268, 268-269 [1st Dept 1996], holding that allegations of waste, illegal gifts and overbilling pursuant to Gen Mun Law § 51 are governed by CPLR 214[2]), whereas actions to enforce a penalty or forfeiture created by statute

are subject to a one-year statute of limitations governed by CPLR 215(4). Therefore, an action alleging illegal official acts or waste of municipal funds, as the subject lawsuit, is ruled by a three-year limitations period (*see Espie v Murphy*, 35 AD3d 348, 348-349 [2d Dept 2006]). In *Espie*, the Appellate Division, Second Department held that a taxpayer's action, containing allegations that the purchase of certain real property by the town of Poughkeepsie constituted illegal official acts or waste of municipal funds, is subject to a three-year statute of limitations, and that the limitations period started to run from the date of the execution of the closing agreement.

The court is unpersuaded by plaintiffs' claim that the limitations period started to run when the City was made aware, by Amalgamated's letter dated January 16, 2007 (Amended Complaint, ¶ 65), that Hillman did not front the sections of the property conveyed, and that it was not the owner of the land abutting the street. This purported method of picking the date from which the statute of limitations starts to run would prove arbitrary, as it rests solely in the hands of plaintiffs, and depends on when they decide to act upon an allegation.

The City has established to the court's satisfaction when plaintiffs' taxpayer cause of action accrued. The allegations forming the basis of plaintiffs' current lawsuit, namely that the City engaged in waste when it conveyed portions of the discontinued streets without consideration to Hillman, would have occurred when the deed was executed in 1949. Therefore, plaintiffs would have had three years from April 5, 1949 to start a derivative action.

Plaintiffs' attempt, in their opposition papers, to borrow or tack on the limitations periods from other statutes, such as the ten-year statute of limitations arising out of RPAPL § 612, is of no moment. Plaintiffs are suing under Gen Mun Law § 51, and not RPAPL § 612. Even if

RPAPL § 612 were available to plaintiffs under the circumstances, their lawsuit would be untimely based on when it accrued and the statute's limitations period.

While the doctrine of equitable estoppel may be raised to bar the interposition of the defense of statute of limitations if plaintiffs establish that a defendant engaged in wrongful concealment, deception, or misrepresentation causing delay in the commencement of their action, no such behavior is described in plaintiffs' papers which would justify tolling the statute of limitations in this action (*see Clowes v Pulver,* 258 AD2d 50, 55 [3d Dept 1999]).

Finally, plaintiffs' reliance on the former Section 383-2.0 of the Administrative Code is unavailing in the context of this derivative action, nor would it be timely. As a matter of fact, plaintiffs claim that they are seeking to enforce the City's reversionary interest in the subject property, not that they are seeking any right, title, or interest in the property in their capacity as owner of the land fronting it at the time of its closing and discontinuance.

3. Res Judicata and Collateral Estoppel

In any event, this lawsuit is barred under the principles of res judicata and collateral estoppel.

The doctrine of res judicata also known as claim preclusion dictates that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*UBS Sec. LLC v Highland Capital Mgt., L.P.,* 86 AD3d 469, 474 [1st Dept 2011], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] [internal quotation marks omitted]). This rule applies to the parties in a litigation and those in privity with them (*id.*).

If any doubt remained, on this record, that the conveyance was made for a lawful public purpose pursuant to valid resolutions and in exchange for consideration, the Appellate Division,

First Department, resolved any uncertainty in its 2002 decision affirming the trial court's decision with respect to, in relevant part, "the dismissal of plaintiff's causes of action for nullification of the 1949 deed from the City conveying the closed street beds to defendant or for reformation of the deed so as to make the parties co-owners of the conveyed street beds:"

> "Plaintiff's [Amalgamated] last possession of any interest in the street beds was in 1948 when it released any claims it might have had against the City by reason of the closing of the streets. Thus, the cause of action to nullify the deed, which is based on the grant of the entire area constituting the closed street beds, including portions that abutted its property but not defendant's property, is at variance with limiting language in the deed, is time-barred (CPLR 212[a]). Similarly, the cause of action for reformation is time-barred, since, if it was a mistake to convey the entire area only to defendant [Hillman], any such mistake occurred in 1949 when the deed was made (CPLR 231[6]; *see Federal Deposit Ins. Corp. v Five Star Mgt.*, 258 AD2d 15, 20 [1st Dept 1999])."

(*Amalgamated*, 299 AD2d at 199, *affg* index No. 124357/00 [Sup Ct, NY County 2001]).

In their amended complaint plaintiffs notably prayed that the conveyance of the subject property be rendered null and void based on the breach of a condition subsequent in the deed, and that the City reacquire same. The record reveals that Amalgamated previously raised similar claims in the December 4, 2000 litigation, and that the Appellate Division rejected them as a matter of law. While in the previous litigation, Amalgamated was seeking to nullify the deed and conveyance, or in the alternative, to reform the deed to make the parties [Amalgamated and Hillman] co-owners of the closed street beds because the conveyance "is at variance with limiting language in the deed" (*id.*), the gravamen of their allegations and prayer for relief is similar.

To be sure, the language in the trial court's May 25, 2001 decision regarding Amalgamated's cause of action challenging the City's conveyance of the subject property to Hillman reads as follows:

> "As to the fourth cause of action to nullify the deed, the complaint alleges that title to the area on Broome Street between Sheriff Street and Columbia Street was erroneously transferred to Hillman. According to the plaintiff, under the deed, the transfer of title to this streetbed was conditioned on Hillman being the owner of the abutting property. Pointing out that it was Amalgamated, not Hillman, which owned the property abutting this area of Broome Street, plaintiff argues that the deed should therefore be declared null and void. Amalgamated, however, does not have standing to raise this issue. It was not a party to the deed and did not impose the condition which it now claims was not met. It was the City which imposed the condition and which transferred title to Hillman. Only the City has standing to invoke the condition as a basis for nullifying the deed. To be sure, plaintiff claims that, as the owner of the abutting property, it had a reversionary right to title once Broome Street was closed. This claim, however, does not entitle the plaintiff to essentially enforce a provision in a contract to which it was not a party. *See James v. Lewis*, 135 AD2d 785, 786 (2nd Dept 1987). Moreover, it would be inappropriate for the court to entertain the plaintiff's claim that the City improperly transferred title to the streetbeds to the defendant in view of the fact that the City has not been made a party to this action. In any event, since the plaintiff is not an owner in possession, its claim for title is barred by both the ten-year statute of limitations for the recovery of real property (CPLR 212 [a]) and the omnibus six-year statute of limitations (CPLR 213[1]). *See Ford v. Clendenin*, 215 NY 10, 16 (1915); *Welch v. Prevost Landowners, Inc.*, 202 AD2d 803 804 (3rd Dept 1994); *James v. Lewis*, 135 AD2d at 786."

(*Amalgamated*, 2001 WL 35985598, index No. 124357/00 [May 25, 2001]).

Therefore, res judicata bars Amalgamated's action and the judgment in the prior action is also binding on the individual plaintiffs due to the privity between the plaintiffs. Indeed, generally, privity is established where the connection between the parties is "such that the interests of the nonparty can be said to have been represented in the prior proceeding" *(Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]). Here, by virtue of the nature of the relationship between a cooperative and its shareholders, Amalgamated was responsible for, and had authority to represent, the individual plaintiffs' interests in the prior proceeding, and/or they controlled Amalgamated's conduct in the prior action to further their own interests (*Castellano v City of New York*, 251 AD2d 194, 194-195 [1st Dept 1998]). The instant action has been rendered moot

by virtue of the Appellate Division's decision affirming the trial court's decision on Hillman's pre-answer motion to dismiss, which operated as a final judgment on the merits (*id.*).

Furthermore, plaintiffs are also subject to the doctrine of collateral estoppel, or issue preclusion, to the extent that they had a full and fair opportunity to contest the underlying issues raised in this lawsuit, and given prior disposition thereof. Indeed, whether then or now, plaintiffs are challenging the validity of the deed based on the alleged violation of a purported condition subsequent, and lack of consideration.

Based on the foregoing, plaintiffs are precluded from seeking a second chance to litigate these claims, and the City's motion to dismiss is hereby granted.

4. Declaratory Judgment Cause of Action and Injunctive Relief Remedy

It is well established that the doctrine of res judicata also applies to subsequent declaratory judgment actions (*Jenkins v State of N. Y. Div. of Hous. Community Renewal*, 264 AD2d 681, 681 [1st Dept 1999]). Based on the foregoing analysis, the declaratory judgment cause of action and the injunctive remedy sought by plaintiffs are rendered moot, and are hereby dismissed (*see also Spectacolor Inc. v Banque Nationale de Paris*, 207 AD2d 726, 726 [1st Dept 1994] [where the cause of action for injunctive relief is predicated on the same assertions in the dismissed cause of action, the relief sought is rendered moot]).

II. Motion Sequence Number 002

A. Contentions

According to Hillman, the court dismissed all of Amalgamated's deed based claims in 2001, and the Appellate Division, First Department, upheld the foregoing decision unanimously, finding as a matter of law that Amalgamated had no ownership interest in any of the closed street beds; that Amalgamated waived any claims in 1948 that it may have had against the City or its

successors by reason of the City's closing and de-mapping of the closed street beds; and that any deed related claims Amalgamated may have had were time-barred. Following a bench trial during which Dergosits testified on behalf of Amalgamated, the Supreme Court granted Hillman a judgment, which was affirmed by the Appellate Division, First Department, dismissing all claims and denying Amalgamated any easements or property rights in the closed street beds, or any other Hillman property. Notwithstanding the foregoing, Hillman voluntarily granted Amalgamated a limited pedestrian easement for ingress and egress only to and from its buildings over the Broome Street parcel and a portion of the Hillman park parcel.

Hillman claims that, with the instant action, Amalgamated is attempting again to obtain possessory interests over the Broome Street parcel and the Hillman park parcel based on the exact same transactions and occurrences and the exact same condition subsequent in the deed litigated in the prior action. Hillman contends that Amalgamated is trying to circumvent the court's prior adjudications by joining three of its resident shareholders as plaintiffs, along with the City as defendant, and by proffering a brand new theory.

Hillman argues that Amalgamated is seeking to void the deed derivatively on behalf of the City through what it terms a "taxpayer" action pursuant to Gen Mun § 51, by enforcing the City's reversionary interests in the deed, based on the failure of Hillman's property to abut the entire closed street beds, and because the deed between the City and Hillman was a collusive transaction by which the City gifted the subject property for no consideration in 1949. Hillman adds that by voiding the deed, Amalgamated seeks to divest Hillman of title and obtain possessory rights over the aforementioned parcels.

Hillman argues that the amended complaint should be dismissed with prejudice because plaintiffs' claims are barred by the res judicata doctrine, as they seek to relitigate the exact same

transactions and occurrences that were the basis of the deed and easement related claims in the prior action. Namely, in the prior action, Amalgamated sought to obtain both pedestrian and vehicular access easements. Its claims were based on Condition 9 of the deed, and the allegation that Hillman's property did not abut the entire length of the closed street beds, and in particular the Broome Street and Hillman park parcels. Similarly, the individual plaintiffs' claims are also precluded by the doctrine of res judicata, which bars the relitigation of prior claims not only between the same parties, but also those in privity with them. Hillman contends that the individual plaintiffs' only alleged right to the parcels is as shareholders of Amalgamated. In the prior action, the Appellate Division acknowledged Amalgamated's standing in connection with its easement claims based on its tenants' adverse possession of the parcels.

Furthermore, Hillman contends that plaintiffs' claims are barred by the doctrine of collateral estoppel, which precludes a party from religitating an issue previously decided against it in a proceeding, which allowed for a fair and full opportunity to litigate. Hillman argues that the only difference between this action and the prior one is the novel statutory derivative legal theory plaintiffs rely on, rather than the common law theories of recovery previously raised. Hillman also states that the joinder of the City is a straw man, as its inclusion in the litigation does not differentiate the underlying facts, transactions and occurrences between the two actions.

Hillman argues that the amended complaint's claims were ruled untimely in the prior action, and they are still untimely today. Plaintiffs set forth three causes of action based on Gen Mun Law § 51. According to Hillman, the statute of limitations for a Gen Mun Law § 51 claim is based on the nature of the remedy and the period can be between four months and three years. In the prior action, the courts determined that Amalgamated's claims arose in 1948 when it released the City from any claim based on the closed street beds. However, Amalgamated

waited until 2000 to assert any claim. The City deeded the closed street beds to Hillman in 1949, and therefore any failure to abut occurred at that time. As nothing on the maps changed in the meanwhile, and despite Amalgamated's awareness in 2004, according to its own documentary evidence, of a potential taxpayer claim against the City, it failed to bring any claims forward in a timely fashion, and said claims remain time-barred.

With regards to its request for sanctions, Hillman argues that plaintiffs brought litigation that is duplicative and frivolous within the meaning of 22 NYCRR Part 130 et seq., which is barred by the doctrines of res judicata and collateral estoppel and the statute of limitations. In addition, plaintiffs falsely claim that the City gifted the closed street beds to Hillman whereas Hillman paid valuable consideration and conveyed a portion of its own land to the City to be used for widening public streets in exchange for the closed street beds.

In opposition, plaintiffs argue that, because the City was not a party to Amalgamated's earlier litigation, and because the trial court did not and could not rule as to the City's entitlement to reclaim the streets in question, this is now the first time the court has to decide this issue on the merits. Furthermore, the individual plaintiffs, as taxpayers, have the right to a full and fair opportunity to litigate and are not precluded by the theory of collateral estoppel.

First, plaintiffs assert that their claims are timely. They describe the deed as creating a condition subsequent, because it is a condition that may occur after the property has been conveyed, and ascribe the City a corollary right of reacquisition. Plaintiffs state that the reversionary interest is connected to the doctrine of adverse possession according to CPLR 212(a) and that the limitations period is measured from the date that the reversionary condition occurred. Plaintiffs maintain that the applicable statute of limitations is ten years pursuant to RPAPL § 612 (1).

Plaintiffs contend that the segments of the former Broome and Sheriff Streets that front and abut Amalgamated's property do not front and abut the land that Hillman owned on April 5, 1949 or now. Therefore, the subject property fails to comply with Condition 9 of the deed.

According to plaintiffs, the date that the action accrued is the date at which time it did appear to the City that Hillman did not own the land abutting the subject property on April 5, 1949, namely on January 12, 2007, when the relevant facts were first brought to the City's attention.

Plaintiffs state that the individual plaintiffs' rights to compel the City to take back land it owns should not be overlooked, and that the deed provides for the tolling of the limitations period according to the language "at any time appear."

Secondly, plaintiffs claim that the City's failure to bring an action to recover the subject property is actionable under Gen Mun Law § 51, and plaintiffs argue that the issue here is whether the City's taxpayers can sue the City under that provision if the City refuses to bring an action against Hillman to recover its reversionary interest in the subject property after the matter is brought to the City's attention.

Plaintiffs argue that the closing and discontinuance of the streets and their conveyance to Hillman was made for a private purpose, namely Hillman's sole benefit, instead of the required public necessity. In support of this argument, they rely, respectively, on the February 1949 minutes (Krichmar affirmation, exhibit D at 1255), and the November 1948 minutes of the BOE (*id.*, exhibit C at 8400).

Plaintiffs claim that they sufficiently allege a prima facie cause of action, and that their amended complaint alleges all the factual requirements for a claim under Gen Mun Law § 51. Plaintiffs state that they have effectively alleged that the City's failure to exercise its rights could

be fairly characterized as corrupt or improper waste of municipal property. Indeed, they carry on, that by failing to exercise its reversionary interest under the deed once it was put on notice, the City has in effect donated the land to Hillman in violation of the NY Constitution's gift clause, and thus, contributed to waste.

Plaintiffs' final argument refers to the release. Plaintiffs argue that Amalgamated's release is not a bar to the amended complaint, and that there is an issue of fact as to the meaning of the release. Plaintiffs claim that Amalgamated only released the City with respect to any claims that Amalgamated might have "by reason of the closing and discontinuance of the" streets. Plaintiffs state that the release is silent about not suing the City with respect to the conveyance of the property to Hillman or other causes of actions pertaining to this matter.

Plaintiffs assert that the release was signed six months before the deed was even executed, so the release could not, as a matter of law, release future events, and, therefore, it is irrelevant to the present controversy. In addition, it was not signed by the individual taxpayers.

Plaintiffs reiterate that they are concerned not with the closing and delisting of the streets, but with the illegal donation without consideration by the City of the land to Hillman, and the City's failure to reacquire the subject property.

Finally, plaintiffs conclude that they are concerned by Hillman's contention that it has the exclusive right to exercise dominion over the street segments abutting Amalgamated's building, in contravention with a condition in the deed, and the City's rights to that land, that there is now a dangerous condition created by Hillman to residents of both coops as well as the general public, which is a result of the inability of fire trucks and emergency vehicles to gain access to Broome and Sheriff Streets.

In reply, Hillman maintains that the action is barred by the statute of limitations, in that the Appellate Division, First Department held in 2002 that Amalgamated's claims with respect to the closed street beds accrued in 1948, and were untimely at the time it commenced the prior action in 2000. They remain untimely, and plaintiffs' Gen Mun Law § 51, claim and the inclusion of the City as a defendant, does not change this result.

Hillman claims that plaintiffs, assuming the individual plaintiffs were born, could have commenced this derivative action against the City in 1948, and, at the very latest, in 2001, when the Supreme Court held that only the City had standing to enforce the deed.

Hillman emphasizes that the issue is not whether the City has a timely re-entry claim for breach of a fee on condition subsequent, but whether plaintiffs' derivative action claim is timely. Hillman also challenges plaintiffs' conflation of Gen Mun Law § 51's three-year statute of limitations available to plaintiffs, and RPAPL § 612's ten-year statute of limitations available to landowners, which plaintiffs were not, to bring an action for reentry based on a breach of a condition subsequent. Plaintiffs cite no law holding that the statute of limitations for a derivative action is coextensive with that of RPAPL § 612.

Hillman reports that Amalgamated's then Board President (Mr. Bragin) wrote a letter to Amalgamated's tenants in 2004 advising that Amalgamated could sue the City to challenge the deed. However, Amalgamated waited more than ten years before filing the instant action. Notwithstanding the foregoing, whether one were to calculate the statute of limitations, be it three or even ten years from any of the foregoing dates, plaintiffs' claims would be time-barred.

Plaintiffs' attempt to graft the ten year statute of limitations set forth in RPAPL § 612 onto Gen Mun Law § 51, and their argument that they can bring a claim at any time during which the City has a right to reentry based on Condition 9, fail as (1) the ten year statute of

limitations does not apply to Gen Mun Law § 51; (2) plaintiffs' premise, that the City's first awareness that Hillman did not abut the closed street beds was in 2007, is contradicted by the official municipal records, the deed, and the maps attached to the deed; (3) Condition 9 cannot be construed to mean that every inch of the closed street beds had to physically abut every inch of Hillman's property in 1949; rather, the only requirement was that Hillman's property be contiguous with the closed street beds on April 5, 1949, which it was and still is; (4) Condition 9 does not create a fee on condition subsequent, which is a construction of language generally disfavored by courts, and the purported corresponding right of reentry cannot be upheld as Hillman has no control over what may "appear" to the City making the operative condition impossible to comply with and too indefinite to enforce; the condition that Hillman's land abut the closed street beds was fulfilled on the date of the deed itself and cannot be read as an ongoing obligation; (5) nothing in the deed provides for any tolling of the statute of limitations, and plaintiffs have failed to cite any legal support for this argument; (6) there is no merit to plaintiffs' attempt to equate the definition of the word "appear" with actual knowledge; in any event, the City knew or should be chargeable with knowing the state of affairs, which has not changed, and furthermore, whether or not the City knew, under RPAPL § 612, is irrelevant under that statute; and (7) the manner in which Amalgamated attempts to apply Condition 9 to commence the running of the statute of limitations in 2007 is also improper, and runs contrary to how limitations period are calculated since taxpayers do not have the exclusive ability to control the running of the limitations period for a Gen Mun Law § 51 claim based on when they choose to inform the City and a statute of limitations runs based on an objective event not under the control of a party, except in discovery rule cases according to specific statutes.

Secondly, plaintiffs' claims are barred by res judicata and the doctrine of collateral estoppel. In 2002, in the prior action, the Appellate Division, First Department upheld the Supreme Court's determinations, finding as a matter of law that (1) Amalgamated had no ownership interest in the closed street beds; (2) in 1948, Amalgamated waived any claims that it may have had against the City or its successors by reason of the City's closing and de-mapping of the closed street beds; and (3) any deed related claims that Amalgamated may have had were time-barred, and were also dismissed for lack of standing and due to the written release. In the final judgment rendered after trial in 2005, which was also affirmed by the Appellate Division, the court denied Amalgamated any relief pertaining to easement requests.

Amalgamated and the individual plaintiffs may not relitigate these dispositive issues again and seek to interfere with Hillman's ownership rights. Namely, the issues include Amalgamated's deed related claims, which are time-barred under the statute of limitations, Amalgamated's 1948 release to the City, and its lack of any rights to the deed.

The instant action against Hillman and to a certain, but critical, extent the City, is based on the same transactions and occurrences litigated and decided in the prior action.

Finally, plaintiffs' lawsuit, pursuant to Gen Mun Law § 51, cannot be sustained against Hillman as it is a private corporation, and not a City or political subdivision thereof, and plaintiffs did not allege any direct claims against it. Hillman also again disputes plaintiffs' characterization that the City's conveyance of the closed street beds to Hillman was a gift.

B. Discussion

For the reasons stated in motion sequence number 001, that branch of Hillman's motion to dismiss the amended complaint is granted.

With respect to the question of sanctions against plaintiffs, the court notes that 22 NYCRR Part 130-1.1 (c) defines conduct as frivolous if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false."

According to CPLR 1001 (a), persons should be joined as necessary parties where a determination of the court might "inequitably" affect their rights. In a taxpayer's action, a plaintiff generally has a right to join as a defendant a person who has a contract with the municipality or a public officer.

Plaintiffs' claims that the subject property was illegally conveyed by the City to Hillman, and seeking a declaratory judgment that the City is the rightful owner of the discontinued and closed street beds implicates both defendants. Here, it was proper practice for plaintiffs to put Hillman on notice by joining it in the action as a party, as it had a stake in the litigation.

While ultimately the court determined that the action is without merit, this outcome does not warrant sanctions, therefore, that branch of Hillman's motion seeking sanctions against plaintiffs is denied.

III. Conclusion

Accordingly, it is

ORDERED that the motion of defendant The City of New York to dismiss plaintiffs' amended complaint (motion sequence No. 001) is granted, and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the branch of defendant Hillman Housing Corporation's motion to dismiss plaintiffs' amended complaint (motion sequence No. 002) is granted, and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the branch of defendant Hillman Housing Corporation's motion for an award of sanctions against plaintiffs and/or for recovery of the attorneys' fees, costs, and expenses incurred (motion sequence No. 002) is denied; and it is further

ORDERED that plaintiffs' cross-motion to remove John Dergosits as a plaintiff from the case (motion sequence No. 002) is granted.

This constitutes the decision and order of the court.

Dated: February 5, 2018
New York, New York

W. Franc Perry, J. S. C.