SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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ROBERT SIEGEL,

Plaintiff,

Index No.: 154934/15
DECISION/ORDER

-against-

THE DAKOTA, INC., TONI SOSNOFF and
JAY GOLDSMITH,

Defendants.

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HON. DAVID B. COHEN, J.S.C.:

In this residential landlord/tenant action, defendants move to dismiss the amended complaint (motion sequence number 009). For the following reasons, this motion is granted.

BACKGROUND

Plaintiff Robert Siegel (Siegel) is the tenant, pursuant to a proprietary lease, of apartment 1-A in the residential cooperative apartment building known as "the Dakota," which is located at One West 72nd Street in the County, City and State of New York. *See* notice of motion, exhibit 1-A (amended complaint), ¶¶ 2, 5. Defendant the Dakota, Inc. (defendant) is the corporation that owns the Dakota, and individual codefendants Toni Sosnoff (Sosnoff) and Jay Goldsmith (Goldsmith) are former members of defendant's board of directors. *Id.*, ¶¶ 3-4, 6-7.[1]

The dispute between the parties herein has been the subject of contentious and vexatious litigation for several years, and, as the court has had occasion to discuss the facts of this case at length in numerous prior decisions, it will only briefly recount the important ones now. In 1999,

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[1] Defendants specifically state that they "do not dispute that [Sosnoff and Goldsmith] have been members of the board at various times since 1999." *See* notice of motion, Van Det Tuin affirmation, ¶ 6, n 3.

Siegel purchased the shares corresponding to apartment 1-A in the Dakota, which includes portions of the first floor and the level below it. *See* notice of motion, exhibit G. Siegel wished to make residential use of the lower floor portion. A dispute arose between Siegel and defendant, however, because, Siegel alleged, the Dakota's certificate of occupancy (C of O) purportedly precluded him from doing so. *Id.*, exhibit R. Years passed with no resolution, although, during that time, the parties allegedly intermittently agreed that defendant would file an amended C of O with the New York City Department of Buildings (DOB) if Siegel would prepare the necessary amendment application and obtain the necessary supporting paperwork. *See* notice of motion, exhibit A (amended complaint), ¶¶ 121-130. Siegel evidently never did so. Rancor ensued.

Siegel originally commenced this action against defendant on June 29, 2015. Defendant filed a motion to dismiss the complaint (motion sequence number 001), which this court (Ostrager, J.) granted in a decision dated October 7, 2015. Siegel appealed to the Appellate Division, First Department, and thereafter engaged in voluminous motion practice, which included several baseless demands that Justice Ostrager recuse himself from this case. All of these motions were either withdrawn or denied. The court notes that Justice Ostrager qualified his dismissal of Siegel's original complaint in two of his decisions. The first, dated October 7, 2015 (motion sequence number 001) states that "the defendant's motion is granted and the [C]lerk is directed to enter judgment dismissing the complaint without prejudice to the plaintiff's ability to file an amended complaint within thirty (30) days . . . alleging conduct that falls outside the statute of limitations." *See* notice of motion, exhibit D. The second, dated November 9, 2015 (motion sequence number 002), repeats that "the court hereby stays so much of its October 7, 2015 decision granting plaintiff 30 days within which to file any separate and independent

claims which would not be barred by the applicable statute of limitations."

On November 22, 2016, the First Department issued a decision upholding Justice Ostrager's dismissal of Siegel's original complaint (*Siegel v Dakota, Inc.*, 144 AD3d 555 [1st Dept 2016]), which stated, as follows:

> "The complaint was correctly dismissed as time-barred (see CPLR 3211[a] [5]). Plaintiff purchased shares in defendant cooperative corporation and entered into a proprietary lease for the occupancy of Apartment 1A in 1999. The apartment included lower-level space, used by the previous tenant as an art studio, that plaintiff planned to convert into bedrooms. Plaintiff alleges that defendant was aware of and approved his plan, but later took actions to thwart it, specifically, by improperly refusing to allow him to put a new air conditioning unit in the building's common area 'moat' and by improperly amending the building's certificate of occupancy to list the lower level of Apartment A as a basement instead of a cellar. As plaintiff was aware of defendant's position on these issues no later than in 2006 but did not bring suit until 2012, the action is barred by the applicable statutes of limitations.
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> "The continuing wrong doctrine is inapplicable to this case. Nor does the doctrine of equitable estoppel apply to bar the assertion of the statute of limitations defense, since plaintiff failed to allege that specific subsequent acts by defendant kept him from timely bringing suit. Indeed, the allegations in the complaint demonstrate that plaintiff had all the information he needed to bring an action before the limitations period expired.
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> "The breach of the warranty of habitability and breach of an easement claims also fail to state causes of action. Plaintiff alleges not that the apartment he purchased is uninhabitable but that he cannot create additional inhabitable space as he planned - a claim not encompassed by the protections of Real Property Law § 235–b ('Warranty of habitability'). His claim fails on the additional ground that he never made any bona fide attempt to reside in the building. The cause of action for breach of an easement fails to allege the existence of a writing containing plain and direct language unequivocally evincing the grantor's intent to create an easement.
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> "The motion court properly denied plaintiff's motion for recusal. The record is devoid of evidence that the court showed any bias, and plaintiff's claims of connections between the Justice and members of defendant's board are rank speculation.

> "Since plaintiff failed to demonstrate that his motions to renew defendant's motion to dismiss were based on any new facts not offered on the prior motion (CPLR 2221[e][2]), the appeals from the orders deciding those motions are deemed appeals from the denial of reargument (CPLR 2221[d][2]), which are not appealable. The appeal from the denial of plaintiff's second motion to recuse must also be dismissed, since the second recusal motion was in fact a motion for reargument of the first recusal motion."

144 AD3d at 555-557 (internal citations omitted). Siegel again sought to appeal, but the Court of Appeals denied him leave to do so in a decision dated June 6, 2017. *Siegel v Dakota, Inc.*, 29 NY3d 1026 (2017).

During the ongoing interim motion practice before this court, the parties executed a stipulation on January 9, 2017 that granted Siegel an extension of time in which to file an amended complaint (motion sequence number 008). On February 6, 2017, Siegel did file an amended complaint that proposes causes of action for: 1) breach of fiduciary duty (against Sosnoff and Goldsmith); 2) violation of Business Corporation Law (BCL) § 501 (c); 3) breach of contract; 4) breach of the covenant of good faith and fair dealing; 5) malicious interference with contractual relations (against Sosnoff and Goldsmith); 6) breach of the warranty of habitability; 7) partial actual eviction; 8) constructive eviction; 9) declaratory judgment; 10) "equitable relief"; 11) permanent injunction; and 12) attorney's fees. *See* notice of motion (motion sequence number 009), exhibit A. Rather than file an answer, defendants instead moved, on March 8, 2017, to dismiss the proposed amended complaint (motion sequence number 009). This action was later randomly transferred to this part via administrative order on July 20, 2017. Defendants' dismissal motion is now the subject of this decision.

DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the

court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994). Here, the court's parsing of the pleadings contained in the instant amended complaint must also take into account the holdings set forth in Justice Ostrager's October 7, 2015 and November 9, 2015 orders, and the First Department's November 22, 2016 decision.

As an initial matter, the court will consider Siegel's two proposed amended causes of action against the two new defendants, Sosnoff and Goldsmith. The first of these alleges breach of fiduciary duty, while the fifth alleges malicious interference with contractual relations. *See* notice of motion, exhibit A (amended complaint), ¶¶ 147-149, 175-182. The court notes that both of these causes of action are governed by a three-year statute of limitations. CPLR 214 (4).[2] The court further notes that Justice Ostrager's October 7, 2015 decision found that:

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[2] Breach of fiduciary duty claims are governed by a three-year statute of limitations "[w]here the remedy sought is purely monetary in nature." *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009). The proposed amended complaint recites that Siegel is entitled to "an award of actual and consequential damages," and "to recover punitive damages," each "in an amount to be determined at trial." *See* notice of motion, exhibit A (amended complaint), ¶¶ 147, 149. Because this proposed cause of action plainly seeks "purely monetary relief," it is governed by a three-year statute of limitations. Claims of tortious interference with existing contractual relations are also governed by a three-year statute of limitations. 12 NY3d at 141.

> "The motion to dismiss is predicated on the clear and irrefutable documentary evidence that each and every grievance plaintiff has with respect to his interaction with the Board of Directors of the Dakota was the subject of discussion between the plaintiff and the Dakota during the period 1999-2005. Consequently, all applicable statutes of limitations have long expired. The plaintiff has not and cannot dispute that he could have either filed suit during or before 2005 or entered into a tolling agreement with the Dakota which reserved his right to litigate the issues he presently wishes to litigate. Plaintiff took no steps to preserve the decade old claims asserted in the complaint."

See notice of motion, exhibit D. The court finally notes the portion of the First Department's November 22, 2016 decision, which held that:

> "The complaint was correctly dismissed as time-barred (*see* CPLR 3211[a] [5]). Plaintiff purchased shares in defendant cooperative corporation and entered into a proprietary lease for the occupancy of Apartment 1-A in 1999. The apartment included lower-level space, used by the previous tenant as an art studio, that plaintiff planned to convert into bedrooms. Plaintiff alleges that defendant was aware of and approved his plan, but later took actions to thwart it, specifically, by improperly refusing to allow him to put a new air conditioning unit in the building's common area 'moat' and by improperly amending the building's certificate of occupancy to list the lower level of Apartment 1-A as a basement instead of a cellar. As plaintiff was aware of defendant's position on these issues no later than in 2006 but did not bring suit until 2012, the action is barred by the applicable statutes of limitations."

144 AD3d at 555. Defendants now argue that Siegel's two proposed claims against Sosnoff and Goldsmith are also barred by the applicable three-year statute of limitations because they allege activity that similarly took place over a decade ago. *See* defendants' mem of law at 11-15. Defendants are correct. The relevant portions of the amended complaint refer to: 1) "misappropriating and concealing the apartment's appurtenances"; 2) "preventing him from using the lower level . . . as a lawful residence"; 3) "reneging on agreements to legalize use of the lower level"; and 4) "assuring that he never received approval for his alteration plans." *See* notice of motion, exhibit A (amended complaint), ¶¶ 143, 145. The latter three allegations refer

to the same pre-2006 activities that both Justice Ostrager and the First Department found to be unactionable because any claims derived from them are now time-barred. Therefore, these allegations cannot support claims against Sosnoff and Goldsmith now. The "appurtenances" referred to in the first allegation are the pipes and ventilation shafts in apartment 1-A that Siegel claims were originally "dedicated" to his unit when he purchased it, but that defendants improperly "misappropriated" by allowing the tenants in the units above apartment 1-A to connect their own pipes and vents thereto. *Id.*, ¶¶ 80-89. The proposed amended complaint is careful to obscure the time line by stating that Siegel "discovered" this "misappropriation" in 2012. *Id.*, ¶¶ 48, 80, 119. However it is evident that the renovation work constituting the "misappropriation" was actually performed at some point in 2000, or shortly thereafter. *Id.* Therefore, this allegation, too, is insufficient to support claims against Sosnoff and Goldsmith, because the three-year statute of limitations that governs such claims expired well over ten years ago. Further, as the earlier decisions in this action have observed, the parties never executed a tolling agreement which might have saved such claims. Therefore, the court agrees with defendants that Siegel's proposed claims against Sosnoff and Goldsmith must fail, as a matter of law, because they are barred by the statute of limitations.

Siegel, nevertheless, raises the opposition argument that a longer, six-year statute of limitations should apply to his proposed breach of fiduciary duty claim, because that claim is based on "actual fraud," and New York law holds that the statute of limitations for fraud begins to run as of the date that the fraud is "discovered." *See* plaintiff's mem of law at 12-14. Siegel is incorrect. As was previously discussed, it is the type of damages that a claim specifies which determines which limitations period applies. *IDT Corp. v Morgan Stanley Dean Witter & Co.*,

12 NY3d at 139. Here, the fact that Siegel's claims seek monetary damages means that they are governed by a three-year statute of limitations. Because the work that gave rise to those claims was performed nearly fifteen years ago, there is no question that the three-year statute of limitations period has already expired. Accordingly, the court finds that so much of defendants' motion as seeks dismissal of Siegel's first and fifth proposed causes of action against Sosnoff and Goldsmith should be granted.

The balance of Siegel's amended complaint asserts ten proposed claims against the corporate defendant, Dakota, Inc., which first asserts a general dismissal argument that the complaint "asserts facts and claims that violate this court's grant of leave to amend and that were already dismissed in the decisions of this court and the Appellate Division." *See* defendants' mem of law at 8-11. As was noted previously, the First Department upheld Justice Ostrager's finding that any claims which are based on the renovation dispute that took place between Siegel and defendants between 1999 and 2005 are now time-barred. A thorough reading of the proposed amended complaint confirms that a number of the remaining proposed claims do refer exclusively to activities within that time period. The court will review each cause of action in turn.

Siegel's third proposed cause of action for breach of contract alleges that defendant breached multiple sections of Siegel's proprietary lease, including: 1) the covenant of quiet enjoyment; 2) Siegel's lessor's obligation to repair; 3) the use clause; and 4) the implied covenant of good faith and fair dealing. *See* notice of motion, exhibit A, ¶ 160. The second and fourth of these alleged breaches ("obligation to repair" and "implied covenant of good faith and fair dealing") refer to the same activities that were discussed in the first section of this decision,

i.e., Siegel's attempts between 1999 and 2005 to secure permission to alter apartment 1-A, and the duct and pipe work that was evidently performed by his neighbors at that same time. Any claims derived from those activities would now clearly be time-barred. The first and third alleged breaches ("covenant of quiet enjoyment" and "use") also fail because they are too remote, and for the additional reason, identified by the First Department, that Siegel "never made any bona fide attempt to reside in the building." *Siegel v Dakota*, 144 AD3d at 556. Therefore, the court finds that Siegel's proposed breach of contract claim should be dismissed by operation of the statute of limitations, and for failure to state a claim.

Siegel's fourth proposed cause of action, for breach of the covenant of good faith and fair dealing, merely repeats the allegations of the previous proposed cause of action for breach of contract, and refers to the same time-barred activities that were just discussed (i.e., defendants' purportedly malicious refusal to grant Siegel permission, in approximately 2000, to carry out his proposed apartment alterations). *See* notice of motion, exhibit A, ¶ 171. As a result, the court finds that this cause of action should be dismissed as both time-barred, and because it is duplicative of Siegel's nonviable breach of contract claim. *See e.g. MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 (1st Dept 2011).

Siegel's sixth proposed cause of action, for breach of the warranty of habitability, also repeats these same allegations. *See* notice of motion, exhibit A, ¶ 187. As a result, the court finds that this cause of action, too, should be dismissed both because it is derived from time-barred activity, and, pursuant to the First Department's finding that Siegel may not assert a breach of this warranty where "he never made any bona fide attempt to reside in the building." *Seigel v Dakota, Inc.*, 144 AD3d at 556.

Siegel's seventh and eighth proposed causes of action, for partial actual eviction and constructive eviction, respectively each allege that said "evictions" resulted from defendants' purported "misappropriation" of apartment 1-A's gas pipes and ventilation shafts. *See* notice of motion, exhibit A, ¶¶ 195, 200. However, as was previously discussed, this activity appears to have taken place at approximately the same time that Siegel made his initial attempt to perform alteration work in apartment 1-A, i.e., between 1999-2005. Causes of action for constructive eviction are subject to a one-year statute of limitations. CPLR 215; *see e.g. Kent v 534 E. 11th St.*, 80 AD3d 106, 111 (1st Dept 2010). Any claims derived from this activity would therefore have expired long ago. The court further notes that this would be true even if it were to credit Siegel's assertion that he "discovered the misappropriation" in 2012, since he did not seek to raise these two new proposed causes of action until 2017. As a result, the court finds that Siegel's seventh and eighth proposed causes of action should be dismissed as barred by the statute of limitations.

Siegel's ninth proposed cause of action seeks a declaratory judgment that "the Dakota is not entitled to collect future rent, maintenance, assessments and or charges for the apartment from Mr. Siegel until it obtains a proper C of O." *See* notice of motion, exhibit A, ¶ 210. Siegel specifically complains that, "at the time [he] purchased the apartment, the entire apartment could be used for residential purposes," but that "by reason of the Dakota's subsequent acts and omissions, the apartment does not have a C of O permitting lawful occupancy of the lower level (cellar) for residential dwelling purposes." *Id.*, ¶¶ 208-209. This complaint is belied, however, by the building's current C of O which states that residential use is, in fact, permitted in both parts of the cellar and the first floor. *Id.*, exhibit R. Because Siegel's claim is, therefore, "flatly

contradicted by the documentary evidence," the court finds that it must be dismissed pursuant to CPLR 3211 (a). *Scott v Bell Atl. Corp.*, 282 AD2d at 183.

Siegel's tenth proposed cause of action seeks "equitable relief" in the form of a "preliminary and permanent injunction" compelling defendants "to take all acts necessary to permit the lower level to be lawfully occupied for residential purposes," and "compelling [defendants] to execute such documents and perform all acts necessary for Mr. Siegel to perform his alterations and to thereafter obtain a final C of O." *See* notice of motion, exhibit A, ¶ 215. The Court of Appeals has held that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988). Here, as was just discussed, Siegel's assertion that defendants do not have a valid C of O that permits residential occupancy of the lower level portion of his apartment is flatly contradicted by the C of O that defendants have produced. *Id.*, exhibit R. As a result, Siegel cannot demonstrate that he is likely to succeed on the merits of his claim for "equitable relief." Accordingly, that claim fails, as a matter of law, and the court finds that so much of defendants' motion as seeks the dismissal of Siegel's tenth proposed cause of action should be granted.

Siegel's eleventh proposed cause of action seeks a permanent injunction for the exact same relief. *See* notice of motion, exhibit A, ¶ 223. Accordingly, that claim, too, fails for the same reasons, and the court grants so much of defendants' motion as seeks its dismissal

Siegel's twelfth proposed cause of action seeks attorneys' fees pursuant to RPL § 234, which affords tenants the reciprocal right to recover such fees from their landlords when it is

found that the landlord failed to perform any covenant or agreement that is contained in the tenant's lease. *See* notice of motion, exhibit A, ¶ 226. However, the court has previously dismissed all of Siegel's proposed breach of contract and breach of warranty claims. Therefore, Siegel's claim for attorneys' fees, which is predicated on the success of one or another of those claims, must perforce also fail, as a matter of law. Accordingly, the court grants so much of defendants' motion as seeks the dismissal of this proposed claim.

The last matter to be addressed is Siegel's second proposed cause of action, which asserts that defendants violated Business Corporation Law (BCL) § 501 (c). *See* notice of motion, exhibit A, ¶¶ 150-158. Violations of this provision are considered to be "actions to recover liability imposed by statute," and are subject to the three-year statute of limitations set forth in CPLR 214 (2). *See e.g. Matter of People v County Bank of Rehoboth Beach, Del.*, 45 AD3d 1136, 1138 (3d Dept 2007), citing *Morelli v Weider Nutrition Group*, 275 AD2d 607, 608 (1st Dept 2000). Here, the activity that Siegel alleges as a basis for this proposed claim is the same as that alleged in his claims for breach of contract and breach of the covenant of good faith and fair dealing; i.e., the need for defendants to grant Siegel permission to carry out the apartment alterations that he initially proposed circa 2000. *Id.*, ¶ 154. As such, this claim clearly alleges conduct that falls outside the statute of limitations period, in violation of the First Department's November 22, 2016 decision. Siegel, nevertheless, argues that this claim is timely because defendants have engaged in several recent instances of "ongoing behavior," including: 1) demanding that Siegel pay $1.8 million for board approval of his alteration plans; 2) the board's use of a "special committee" to oust Siegel from his apartment; 3) the board's "misappropriation" of his apartments' pipes and vents; 4) the board's delay in approving his

alteration plans; and 5) the board's failure to amend the Dakota's C of O. *See* plaintiff's mem of law at 18. However, the text of the proposed amended complaint abandoned the first two allegations. *See* notice of motion, exhibit A, ¶¶ 13, 48-77, 85, 89, 99-108. Also, the court has already determined that the third and fourth allegations concern actions that are well outside the statute of limitations period, and that the fifth allegation is contradicted by the C of O that defendants produced. Finally, the court is mindful of the First Department's finding that "[t]he continuing wrong doctrine is inapplicable to this case." *Seigel v Dakota, Inc.*, 144 AD3d at 556. Therefore, the court rejects Siegel's opposition argument, and finds that his second proposed cause of action is barred by the statute of limitations. Accordingly, in light of the foregoing findings, the court finds that defendants' motion should be granted in full, and that Siegel's proposed amended complaint should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants the Dakota, Inc., Toni Sosnoff and Jay Goldsmith (motion sequence number 009) is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: New York, New York
February 6, 2018

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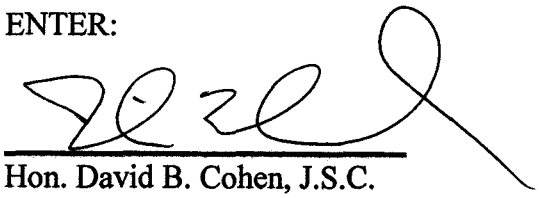

Hon. David B. Cohen, J.S.C.