Shomshonov v Board of Mgrs. of the Hgts. Condominium
2022 NY Slip Op 33112(U)
September 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 527997/19
Judge: Carolyn E. Wade
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At an IAS Term, Part 84, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of September, 2022.

PRESENT:

CAROLYN E. WADE,
Justice.

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ELLA SHOMSHONOV, RODION YERMOLAYEV and WEN CHEN,

Plaintiffs,

-against-

Index No. 527997/19
Motion Seqs. 1, 2, and 3

BOARD OF MANAGERS OF THE HEIGHTS CONDOMINIUM, GARG DEVELOPMENT, INC., CARMINE GARGANO, ROSA GARGANO, MICHAEL GARGANO and GERARDO GARGANO,

Defendants.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	17-21, 38-39, 71-72
Opposing Affidavits (Affirmations)	65-68, 82, 88
Affidavits/ Affirmations in Reply	93, 94
Other Papers: Affidavits/Affirmations in Support	65-68

Upon the foregoing papers, and after oral argument, plaintiffs, Ella Shomshonov, Rodion Yermolayev and Wen Chen move for an order, pursuant to CPLR 3212, granting summary judgment on their verified complaint seeking a declaratory judgment compelling certain relief from defendants, Board of Managers of the Heights Condominium (Board), Garg Development, Inc. (Garg), Rosa Gargano (Rosa), Michael

Gargano (Michael) and Gerardo Gargano (Gerardo).[1] Garg, Rosa, Michael and Gerardo (collectively, Garg defendants) cross-move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the plaintiffs' verified complaint. The Board cross-moves for an order: (1) pursuant to CPLR 3211 (a) (3), (5) and (7), dismissing the verified complaint, (2) pursuant to CPLR 8106 and 8202, awarding the costs of the motion in the amount of $100 and (3) pursuant to CPLR 8101 and 8201, awarding the costs of this action in the amount of $200.

Background

Plaintiffs are individual unit owners in a 13-unit Condominium building located at 7902 15th Avenue in Brooklyn. The Condominium was established under a Condominium Declaration approved by the New York State Attorney General on January 17, 2001. Garg was the sponsor of the Condominium under the Offering Plan. Michael and Gerardo are the principals of Garg. Rosa, while not a principal of Garg or a member of the Board, allegedly assumed duties as managing agent of the Condominium. According to the verified complaint, the Garg defendants failed, refused and neglected to sell 7 of the 13 residential units in the building, and instead have conveyed them to "family members" for little to no consideration and rented to tenants.[2] Plaintiffs allege that by reason of the failure to sell the majority of the units, the Garg defendants breached the covenant of good faith and fair dealing implied in plaintiffs' purchase agreements,

[1] This action was voluntarily discontinued as against defendant Carmine Gargano on November 12, 2020.

[2] According to deeds submitted by the Garg defendants on their cross motion, two units were conveyed to Rosa, four units were conveyed to Carmine Gargano (Rosa's husband and father of Michael and Gerardo) and one unit was conveyed to "Rosa Gargano and Carmine Gargano as Trustees under the Declaration of Trust known as the Gerardo Gargano Living Trust."

frustrated plaintiffs' ability to resell their apartments and interfered with plaintiffs' ability to refinance their mortgages, as lenders are unwilling to loan money for the purchase or refinancing of apartments in buildings in which there is a high percentage of "Sponsor-owned units." Plaintiffs also allege that the failure or refusal of the Garg defendants to sell the units on the open market have caused common charges to increase due to apartments being retained by family members of the Garg defendants and rented out to transient tenants, causing wear and tear to the buildings, and requiring additional maintenance.

Plaintiffs allege that all of the defendants, in contravention of the Offering Plan, failed to produce financial reports of the Condominium budget and records demonstrating income received and payments made by the Condominium for the period between 2002-2017, and the limited amount of financial reports and profit/loss statements provided thereafter contained clear inconsistencies. Plaintiffs further allege that in or around February 8, 2005, without plaintiffs' knowledge or consent, cell phone towers and/or antennas were installed on the roof of the subject building, part of the common elements of the condominium, but at no point did defendants include in the budget or provide any profit/loss statements regarding rental income received from said cell phone towers/antennas to plaintiffs.

Plaintiffs further allege that in a notice to unit owners by the Board, dated September 13, 2016, the Board indicated that the water meter for the Condominium was removed in 2007 and not replaced until 2011, and that defendants failed to address the water meter and water and sewage bills issue for several years, resulting in $57,921.76 of water charges, payment of which is sought from plaintiffs. Plaintiffs also state that they

are in fear of losing the use of their storage units which they have owned and used since the time of purchase due to threats by Rosa to change the locks thereto.

Plaintiffs also contend that they are taxed in the wrong tax class; however, defendants have refused to apply for a tax abatement. Plaintiffs argue that they have suffered serious financial harm in that they cannot sell their units since other comparable condominiums are paying less in yearly property taxes and buyers are unwilling to pay higher property taxes for the units in the subject Condominium.

Plaintiffs state that an amendment to the Condominium Declaration dated August 15, 2007 eliminated parking space P10, but that on July 21, 2008, parking space P10 was transferred by deed from Garg to Carmine Gargano without authorization by any party acting under color of authority. Finally, plaintiffs contend that defendants have (1) failed to maintain the luxury status of the Condominium by neglecting maintenance of the building, resulting in Department of Buildings violations and fines as well as Department of Housing and Preservation and Development violations; that defendants then shifted responsibility of these violations and fines to plaintiffs by imposing common charge liens against plaintiffs' individual units; (2) that defendants' neglect has led to broken lights, peeling paint, unsteady and rusting railings, unrepaired water damage, broken smoke detectors, and issues with pests that require extermination services; and (3) that defendants have been using a vacant lot as an unauthorized dumping and storage area for garbage, creating a pest and rodent infestation hazard to the building and the neighborhood.

Based on the aforesaid allegations, plaintiff seek a declaratory judgment: (1) requiring defendants to undertake commercially reasonable efforts to market for sale at

commercially reasonable prices units that are either are (a) currently rented to tenants at the expiration of the existing leases for such units; (b) upon vacatur by current occupants; or (c) upon reversion of deeds that were owned by Garg and conveyed to relatives for less than fair market value; (2) compelling defendants to produce financial reports for the Condominium and records demonstrating income received and payments made by the Condominium; (3) compelling defendants to tender all revenue from the T-Mobile antenna lease and directing an accounting of the rental income received from the T-Mobile lease, as well as providing copies of any documentation and contracts entered into with T-Mobile; (4) directing defendants to pay the open water and sewage bill; (5) directing defendants to cease and desist in threatening to take away plaintiffs' storage units and/or restoring plaintiffs' ownership of their respective storage units that were seized by defendants; (5) directing defendants to apply for a tax certiorari for the building in order to reclassify its tax class for the benefit of the Condominium and its unit owners; (6) voiding the deed dated July 21, 2008 and restoring the ownership of parking space P10 to Garg; (7) ordering defendants to remove all monetary and non-monetary violations against the Condominium currently pending with city and state departments; (8) directing defendants to cease their storage of refuse in the area within common elements of the building; (9) directing defendants to pay outstanding water charges that have been transferred to the City of New York as a tax lien for which defendants have improperly shifted the liability to plaintiffs; and (10) directing the New York City Department of Finance Office of the City Register, Kings County, to rescind all common charge liens placed by the Board against plaintiffs' units and deem them to be a nullity.

On December 3, 2020, the Board filed an answer setting forth various affirmative defenses, including lack of standing and lack of capacity, as well as a counterclaim for indemnification. On December 7, 2020, the Garg defendants filed an answer interposing affirmative defenses, which include statute of limitations, lack of capacity and lack of standing, in addition to counterclaims against plaintiffs and cross-claims against the Board seeking: 1) reimbursement for their payment of property maintenance expenses due to the failure of plaintiffs to pay and the Board's failure to collect common charges, 2) compensation for Rosa in quantum meruit for her management of the Condominium and 3) appointment of a temporary receiver.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985][internal citations omitted]; *Junger v John V. Dinan Assoc., Inc.*, 164 AD3d 1428 [2d Dept 2018]). The court finds plaintiffs have not established entitlement to judgment as a matter of law as the motion is supported only by three duplicative affidavits by each plaintiff which do little more than parrot the allegations of the complaint (*see Mason v Simmons*, 139 AD2d 880, 881 [3d Dept 1988]). Moreover, absolutely no discovery has been undertaken in this action, including the filing of a preliminary conference/case scheduling order, making the instant motion for summary judgment premature (*see Gruenfeld v City of New Rochelle*, 72 AD3d 1025 [2d

Dept 2010]). At any rate, plaintiffs' motion for summary judgment must be denied as the complaint is subject to dismissal.

""[E]xclusive authority to manage the common elements and joint finances of the condominium is vested in the board of managers" (*Caprer v Nussbaum*, 36 AD3d 176, 184 [2d Dept 2006]; *see also* Real Property Law § 339–e [9]; § 339–v[1][a])." Although the individual unit owners have standing to sue derivatively, they simply have no standing to sue individually for injury to the common elements or finances of the condominium (*see Davis v Prestige Mgt. Inc.*, 98 AD3d 909, 910 [1st Dept 2012]; *Caprer,* 36 AD3d at190). As plaintiffs did not bring this action as a derivative action against the Board on behalf of the Condominium, the complaint as pleaded must be dismissed as against the Board (*see Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 637 [2d Dept 2009]).

Accordingly, the Board's cross-motion to dismiss the complaint as against it is granted.

Because the Board has exclusive capacity to litigate issues involving the common elements and finances of the Condominium, plaintiffs lack capacity to seek a declaratory judgment regarding financial statements, rooftop lease income, water charges, tax assessment, and the condition of the building. Accordingly, that part of the Garg defendants' cross-motion seeking dismissal of these declaratory judgment claims as asserted against them pursuant to CPLR 3211 (a) (3) is granted.

As to plaintiffs' claim for a declaratory judgment requiring the Garg defendants to market and sell the seven units conveyed to family members of Garg's principals and voiding the parking space deed, the Garg defendants maintain that such claims are barred

by the statute of limitations. "In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, the moving defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (*Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP*, 149 AD3d 788, 789 [2d Dept 2017]; *see Stewart v GDC Tower at Greystone*, 138 AD3d 729, 729 730 [2d Dept 2016]). The statute of limitations for a declaratory judgment action, generally, is six years, unless the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, in which case that specific limitation period governs the declaratory judgment action (*see Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 670 [2d Dept 2017]). A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties (*see* CPLR 3001; *Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776 [2d Dept 2013]; *Waterways Dev. Corp. v Lavalle*, 28 AD3d 539, 540 [2d Dept 2006]). "The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination" (*Zwarycz*, 102 AD3d at 776; *Waterways Dev. Corp.*, 28 AD3d at 540). "A dispute matures into a justiciable controversy when a [litigant] receives direct, definitive notice that [his or her adversary] is repudiating [the litigant's] rights" (*Zwarycz*, 102 AD3d at 776).

As this action was commenced December 26, 2019, the declaratory judgment claims must have accrued on or after December 26, 2013 to be timely. The claim for a declaratory judgment compelling the marketing and sale of the seven units which had

been conveyed to the family members of Garg's principals (including Rosa and her late husband, Carmine Gargano) is based upon breach of a covenant of good faith and fair dealing under each purchase agreement. In this matter, the latest deed to a unit conveyed to a family member of Garg's principals was executed on November 13, 2006, more than thirteen years prior to the commencement of this action. The parking space deed was executed on June 3, 2008, more than eleven years prior to the commencement of this action.

Thus, defendants have established that plaintiffs' declaratory judgment claims as to the unit sales and parking space deed are untimely as they were brought beyond the six-year limitations period. In opposition, plaintiffs argue that the statute of limitations with respect to the unit conveyances is tolled by the "continuing wrong doctrine." "The continuing wrong doctrine is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" and "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Affordable Hous. Assoc., Inc. v Town of Brookhaven*, 150 AD3d 800, 802-803 [2d Dept 2017] [citations and internal quotation marks omitted]; *see Thomas v City of Oneonta*, 90 AD3d 1135, 1136 [3d Dept 2011]). The conveyances of the seven units to family members of Garg's principals, which form the basis of plaintiffs' breach of covenant of good faith and fair dealing gravamen, were events which occurred between 2004 and 2006. While the conveyances are alleged to have continuing effects as to plaintiffs' ability to refinance or sell their units, there were no series of continuing wrongs occurring since 2006 to toll the limitations period.

Accordingly, the claims for a declaratory judgment compelling the marketing and sale of the seven units conveyed to family members of Garg's principals and voiding the parking space deed are untimely.

Finally, the declaratory judgment claim regarding the storage units is premature as plaintiffs allege only that Rosa has threatened to change the locks. As there is no ripe judicial controversy, plaintiffs have no viable cause of action for a declaratory judgment in this instance.

Conclusion

Accordingly, the cross-motion of the Garg defendants for summary judgment dismissing plaintiffs' complaint pursuant to CPLR 3212, 3211 (a) (3), (a) (5) and (a) (7) is granted. The complaint is dismissed without prejudice to plaintiffs to bring a derivative action. That part of the cross-motion for costs is denied. The counterclaims are hereby severed and shall continue.

The foregoing constitutes the Decision and Order of the court.

ENTER,

J.S.C.

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

KINGS COUNTY CLERK
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