Yudkin v Evergreen Terrace 888 Corp.
2022 NY Slip Op 33627(U)
October 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 521722/2020
Judge: Carolyn E. Wade
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: HON. CAROLYN E. WADE

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BRYAN YUDKIN,

Plaintiff,

- against –

EVERGREEN TERRACE 888 CORP., VINCENT LONGOBARDI, EDWARD DORAN, DERRICK GIBBS, WITNICK 888 FLUSHING AVE LLC, and 888 OSCAR & AUGUST LLC,

Defendants.

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Index No. 521722/2020

DECISION AND ORDER

MS # 3,4,5

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Defendants' Motions and Plaintiff's Cross-Motion:

Papers	NYSCEF #'s
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	29, 30, 31, 40
Cross-Motion and Affidavits/Affirmations	57, 58
Answering Affidavits/Affirmations	64
Reply Affidavits/Affirmations	73, 74
Defendant's Memorandum of Law	

Upon the foregoing cited papers, and after virtual oral argument, Defendant Edward Doran ("Doran") moves this Court, pursuant to CPLR § 3211 (a)(5) and CPLR § 3211(a)(8) (Mot. Seq. 3), for an order dismissing the amended complaint on the grounds that he was not properly served; and that the fraud and breach of contract claims are time barred.

Defendant, 888 Oscar & August LLC ("O&A") moves to dismiss the amended complaint pursuant to CPLR §§ 3211(a)(5) and (7) (Mot. Seq. 4), on the grounds that the breach of contract and fraud claims are time barred, and failure to state a cause of action.

Plaintiff, Bryan Yudkin ("Yudkin" or "Plaintiff") cross-moves for an order, pursuant to CPLR §306 (b), granting him an extension of time to serve, *nunc pro tunc* on defendant, Doran (Mot. Seq. 5).

The underlying action arises out of a contract of sale between defendant, Evergreen Terrace 888 Corp. ("Evergreen"), the sponsor of the condominium conversion at 888 Flushing Avenue, Brooklyn, New York ("subject building"), and the Plaintiff, for the purchase of a condominium unit ("Unit 1L").

On November 16, 2007, Evergreen submitted an Offering Plan for the subject building to the New York State Office of the Attorney General ("OAG") for condominium ownership as required by law. After the Plan was accepted by the OAG on December 1, 2010, Evergreen began to market the condominium units for sale.

On January 2, 2012, Plaintiff entered into a contract of sale with Evergreen to purchase Unit 1L in the building for $320,250.

The OAG declared the plan effective on March 15, 2013. According to the contract of sale, this would have triggered the scheduling of a closing date for Unit 1L. On April 15, 2013, Evergreen's broker, Christopher Polisano, informed the Plaintiff that "the building was remaining a rental and that Plaintiff should get [his] contract deposit back ASAP." On April 22, 2013, Defendant Doran reiterated this message in an email to Plaintiff stating that Evergreen had "decided just to keep it as a rental building." Doran explained to Plaintiff that this was due to issues that the OAG had with the subject building. These issues were vaguely described as "sign off and appraisal issues." On or about July of 2013, Evergreen's principal, Doran, once again informed the Plaintiff that the Offering Plan would be abandoned, and that the contract of sale was effectively terminated.

Under the subject contract of sale, the Offering Plan could be abandoned at any time prior to it being declared effective. However, once the Offering Plan is declared effective, 13 NYCRR § 20.1 and the Offering Plan governs condominium offerings, and the limited circumstances under which it can be abandoned. For example, under 13 NYCRR § 20.1, the Offering Plan may be abandoned if

there is a defect in title, substantial damage, or destruction of the building, or the taking of property by condemnation or eminent domain.

On or about June 18, 2014, Evergreen had closed on a deal to sell the subject building to defendants Witnick 888 Flushing Ave, LLC ("Witnick"), as 10% interest holder, and O&A as a 90% interest holder. The Offering Plan was still in effect at the time of this sale. Plaintiff alleges that defendants, Witnick and O&A, as the new owners of the subject building, assumed the role of successor sponsor and were bound by all of Evergreen's obligations. This included commitment to sell the units, and more specifically, its obligations under the contract and the Offering Plan. Within two months, on August 11, 2014, the Offering Plan was formally abandoned.

Plaintiff alleges that defendants, Witnick and O&A, worked with defendants, Evergreen, Doran, and Vincent Longobardi ("Longobardi") to ensure that the Offering Plan was formally abandoned. On November 4, 2020, Plaintiff commenced the instant action.

Defendants' CPLR § 3211 (a)(5) Motions to Dismiss (Mot. Seqs. 3 and 4)

Defendants, Doran and O&A (collectively "Movants-Defendants"), each move to dismiss on the grounds that Plaintiff's fraud and breach of contract claims are time barred (Mot. Seq. 3 and 4). In support of their respective motions, Movants-Defendants argue that the breach of contract and fraud claims accrued in April of 2013, when Evergreen's broker advised the Plaintiff that they were no longer moving forward with the Offering Plan and would not proceed with the contract of sale. Movants-Defendants contend that at this point Plaintiff knew Evergreen was not going to proceed with the sale of the unit. To support this proposition, Movants-Defendants argue that within two months, Yudkin had entered into a contract of sale on July 18, 2013 for a different property located at 18-34 26th Ave, Queens, New York.

In opposition, Plaintiff argues that both claims are not time barred. Plaintiff asserts that the fraud and breach of contract causes of action could only have accrued on either, June 18, 2014, the date the subject building was sold to Witnick; or August 11, 2014, the date the Offering Plan was formally abandoned.

Plaintiff maintains that the breach of contract action accrued on August 11, 2014, when the Offering Plan was abandoned. According to Plaintiff, he could not have brought a breach of contract claim prior to August 11, 2014, because the Offering Plan was not formally abandoned and, thus, the contract of sale was still valid and in effect.

As for the fraud claim, Plaintiff argues that it too did not accrue until the Offering Plan was abandoned, since that is when the injury element was satisfied at that point. Plaintiff alleges that beginning in March of 2013, Evergreen and Doran misrepresented the issues that arose with the OAG. Other alleged misrepresentations included issues with the subject building's certificate of occupancy, plumbing and electrical work. According to Plaintiff, Evergreen did not respond to requests for certain documents and failed to cooperate with the OAG office to correct issues that arose in the Offering Plan. Plaintiff believes that Evergreen and Doran's representations regarding the Offering Plan and the subject building were fraudulent as they were motivated by Evergreen's desire to compel him to cancel the contract of sale and sell the subject building at a higher profit.

Alternatively, Plaintiff contends that even if the Court was to find that the fraud claim accrued prior to June 2014, the continuous wrong doctrine applies. Under this theory, the statute of limitations did not begin to run until the last "wrong act." Plaintiff maintains that the last wrong act occurred on August 11, 2014, when the Offering Plan was formally abandoned. Thus, his fraud claim should be deemed timely.

In rebuttal, Movants-Defendants reiterate their contentions that Plaintiff's fraud and breach of contract claims are time barred; and that the Plaintiff was notified in April 2013 of Evergreen's intent not to proceed with the contract.

"On a motion to dismiss a complaint pursuant to CPLR § 3211 (a)(5) on a statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired" (*Doukas v Ballard*, 135 AD3d 896, 897 [2d Dept 2016]).

An action to recover damages for breach of contract is governed by a six-year statute of limitations period (*see* CPLR § 213 [2]). The statute of limitations begins to run when the cause of action accrues (*see* CPLR § 203[a]). "A breach of contract cause of action accrues at the time of the breach, even though the injured party may not know of the existence of the wrong or injury" (*Sternberg v Continuum Health Partners, Inc.*, 186 AD3d 1554, 1557 [2d Dept 2020]).

Here, the statute of limitations on Plaintiff's breach of contract claim began to accrue no later than April 22, 2013, when Defendant Doran informed the Plaintiff that that they decided to keep the building as a rental. "An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for [. . .] performance has arrived" (*Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133, 65 NYS3d 89, 87 NE3d 121 [2017] [internal quotation marks omitted]). "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be 'positive and unequivocal'" (*Lamarche Food Prods. Corp. v 438 Union, LLC*, 178 AD3d 910, 912 [2d Dept 2019]). Doran's statement to the Plaintiff constitutes an unequivocal repudiation of the contract of sale. At this point, Plaintiff should have known that Evergreen was not proceeding with the contract of sale and the Offering Plan. In fact, nearly three months after Plaintiff became aware of Evergreen's plan, he entered into a new contract

of sale on July 18, 2013, to purchase a different property. Accordingly, Plaintiff's breach of contract claim began to run no later than April 22, 2013, and expired on April 22, 2019.

"A cause of action based upon fraud must be commenced within six years from the time of the fraud, or within two years from the time the fraud was discovered, or with reasonable diligence could have been discovered, whichever is longer" (*Davis v Farrell Fritz, P.C.*, 201 AD3d 869, 872 [2d Dept 2022]).

Similarly, Plaintiff's fraud claim is also time-barred. Beginning in March 2013, Plaintiff by his own account grew weary of defendants, Evergreen and Doran's alleged misrepresentations regarding issues the OAG had with the Offering Plan. Doran informed Plaintiff on April 22, 2013, that the building was remaining a rental. Yudkin attests that on May 13, 2013, he received an e-mail from Doran which indicated that issues arose with respect to the certificate of occupancy, as well as plumbing and electrical sign offs. (Plaintiff's Affidavit in Opposition and in Support of Cross Motion, NYSECF Doc. No. 48). Plaintiff's request for further information from defendants, Evergreen and Doran, was met with delay and silence. Any viable fraud claim would have begun to accrue no later than May 13, 2013, at which point, Plaintiff possessed enough knowledge of facts to have discovered any fraud with reasonable diligence. Instead, Plaintiff took no further action because he was "unwilling to walk away from an increasingly valuable investment for no reason." Since Plaintiff did not commence this action until November 4, 2020, the fraud claim is deemed untimely.

Moreover, Plaintiff's argument that the continuous wrong doctrine saves his fraud claim is unfounded. That doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Blaize v NY City Dept. of Educ.*, 205 AD3d 871, 874-875 [2d Dept 2022] [internal citations and quotations omitted]). "The distinction is between a single

wrong that has continuing effects and a series of independent, distinct wrongs." *Id.* (*Blaize v NY City Dept. of Educ.*, 205 AD3d 871, 874-875 [2d Dept 2022] [internal citations and quotations omitted]).

Here, the abandonment of the Plan on August 11, 2014, does not constitute the "last wrong act." It was the continuing effects of the alleged earlier misrepresentations made to Plaintiff regarding the subject building. Plaintiff, by his own admission, was aware in May 2013 that Evergreen was not moving forward with the Plan. The fact that it was formally abandoned over a year later, does not constitute a distinct wrong. Therefore, the latest Plaintiff's fraud claim would have accrued was May 2013, which would have provided him until May 2019 to bring his fraud claim.

Plaintiff's Cross-Motion for Nun Pro Tunc Service (Mot. Seq. 5)

Plaintiff's cross-moves for an order, pursuant to CPLR § 306 (b), granting him an extension of time to serve, *nunc pro tunc* on defendant, Doran (Mot. Seq. 5). However, based upon the above rulings Plaintiff's cross-motion is DENIED as moot.

Accordingly, Defendant Doran's motion to dismiss (Mot. Seq. 3) the amended complaint pursuant to CPLR § 3211 (a)(5) is **GRANTED**.

Accordingly, Defendant O&A's motion to dismiss (Mot. Seq. 4) the amended complaint pursuant to CPLR § 3211 (a) (5) is **GRANTED**.

Accordingly, Plaintiff's cross-motion for a *nun pro tunc* service Order (Mot. Seq. 5) is **DENIED** as moot.

This constitutes the Decision and Order of the Court.

KINGS COUNTY CLERK
FILED
2022 OCT 18 AM 8:05

DATED: 10/7, 2022

HON. CAROLYN E. WADE, J.S.C.

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