

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

Index Number : 600813/2007

SOLDIERS' SAILORS' MARINES"

vs.

CARLTON REGENCY

SEQUENCE NUMBER : 002

DISMISS

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/22/10

CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
SOLDIERS', SAILORS', MARINES' AND
AIRMEN'S CLUB, INC.,

Plaintiff,

Index No. 600813/07

-against-

THE CARLTON REGENCY CORPORATION.,

Defendant.

-----X
THE CARLTON REGENCY CORPORATION.,

Third-Party Plaintiff,

-against-

JAMES CONFORTI, III and DEAN STEPHEN LYRAS,

Third-Party Defendants
And Counterclaim
Plaintiffs,

-against-

THE COMMINGLED PENSION TRUST FUND
(MORTGAGE PRIVATE PLACEMENT) OF JP MORGAN
CHASE BANK, N.A.,

Counterclaim Defendant.

-----X
JAMES CONFORTI, III and DEAN STEPHEN LYRAS,

Fourth-Party Plaintiffs,

-against-

CHICAGO TITLE INSURANCE COMPANY, ROBERT C.
WILSON, IVAN OBOLENSKY, HARRY J. MOTT III,
LORETTA ANDRES, MICHAEL A. BOYD, MARC
PUTTERMAN, DAVID MAY, MARTIN EDELMAN,
PETER LEBEAU, JOHN T. BARBER, CHARLES
C. ADAMS III, AND JOHN and JANE DOES 1-10.

Fourth-Party Defendants.

-----X
Charles Edward Ramos, J.S.C.:

Motion sequences 002 and 003 are consolidated for

disposition. In sequence 002, plaintiff Soldiers', Sailors', Marines' and Airmen's Club, Inc. (the "Club") moves, pursuant to CPLR 3212, for summary judgment on its third cause of action.¹ Additionally under sequence 002, Fourth-Party Defendant Chicago Title Insurance Company ("Chicago Title") moves, pursuant to CPLR 3211 (a)(1) and (7), to dismiss the second cause of action in the Fourth-Party complaint.² In sequence 003, Defendant and Third-Party Plaintiff The Carlton Regency Corporation (the "Co-op"), and Fourth-Party Defendants Marc Putterman and David May move to dismiss, pursuant to CPLR 3211 (a)(1) and (7), certain counterclaims asserted against the Co-op, and the Fourth-Party complaint against Putterman and May, brought by Fourth-Party Plaintiffs, James Conforti, III and Dean Lyras (collectively the "Sons").

Background

Since 1927, the Club has run a charitable not-for-profit corporation that provides facilities and overnight accommodations to military personnel and retirees on Lexington Avenue in New

¹ In its third cause of action, the Club seeks to invalidate a certain 50-year lease and a related 40-year option agreement by asserting a violation of New York's Rule Against Perpetuities (EPTL 9-1.1).

² Although not captioned as such, in the interest of clarity, the Court will treat Chicago Title's motion as a cross-motion to plaintiff's motion for summary judgment.

The Fourth-Party complaint's second cause of action seeks a declaratory judgment on whether Chicago Title is required to defend and indemnify the Fourth-Party Plaintiffs under a Title Policy that Chicago Title assumed by succession, as heirs to the former insureds.

York City. The Club purchased two connected buildings located at 281-283 Lexington Avenue (the "Clubhouse"), and in 1940, purchased the building located at 285 Lexington Avenue.

In 1972, the Club entered into a series of transactions with two developers, James Conforti, Jr. and Stephen C. Lyras (the "Developers"),³ whereby the Developers purchased the 285 Lexington property for \$227,000. Under an initial 50-year lease, with two options to renew for 25 years each (the "Lease"), the Club leased the Clubhouse to the Developers, who in turn subleased the Clubhouse back to the Club rent free for 25 years with a one 15-year renewal term (the "Sublease").

The parties also entered into an Option Agreement entitled "Demised Premises Contract" (the "Option Agreement"), which granted the Club the option to sell the Clubhouse to the Developers for \$500,000 at any time before the termination of the Sublease.

The transactions were authorized by court order in 1973. In 1980, the Developers built a residential tower at 137 36th Street using the air rights that were acquired in the Lease. That tower, along with a neighboring residential tower at 136 East 37th Street (also owned by the Developers) were thereafter converted to cooperative ownership. As part of the conversion, the Developers assigned their rights in the Lease, Sublease, and Option Agreement to the cooperative apartment corporation

³ The Developers are now deceased. Third-Party Defendants and Counterclaim Plaintiffs James Conforti, III and Dean Lyras are the Developers sons and alleged heirs.

eventually known as defendant, the Co-op.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). 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]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]).

Discussion

Plaintiff's motion for summary judgment seeks to invalidate the Lease and the Option Agreement pursuant to New York's Rule Against Perpetuities [or the "Rule"] (EPTL 9-1.1).

Threshold Issues

The Sons raise a number of threshold issues that will be addressed first.

Res Judicata, Collateral Estoppel, etc.

Because the Lease, Sublease, and Option Agreement were scrutinized by a law school dean and New York State Supreme Court Justice in 1972 and 1973 (the "prior proceeding"), the Sons seek

to bar the Club's action by res judicata and collateral estoppel.

Generally, the doctrine of res judicata embraces not only those matters that are actually litigated before a court, but also those relevant issues that could have been litigated (*Chadbourne & Parke LLP v Warshaw*, 287 AD2d 119, 123 [1st Dept 2001] *internal citations omitted*). The concept of collateral estoppel is somewhat narrower, requiring two distinct elements: that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue (*Id.*).

However, the fundamental inquiry is whether re-litigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of resources of the court and the litigants, and the societal interests in consistent and accurate results (*Id.*). No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings (*Id.*).

First, the record is clear and the Sons do not contest, that the issue of perpetuities was never raised nor addressed in the prior proceeding. Therefore, collateral estoppel is inapplicable. Second, res judicata is overridden by the public policy in favor of barring perpetuities, and must be addressed (See *Barnes v Oceanus Navigation Corporation, Ltd.*, 21 AD3d 975

[2d Dept 2005][the trial court has the inherent power to set aside a prior decision on public policy grounds for an overriding and persuasive reason, such as under the rule against perpetuities]).

The remaining estoppel arguments raised by the Sons have been carefully considered and deemed without merit.⁴

Rule Against Perpetuities

The Lease

In January 2008, this Court issued a decision on the Co-op's CPLR 3211 motion to dismiss plaintiff's public policy claims. As discussed therein, the holding in *Warren Street Associates v City Hall Tower*, (202 AD2d 200 [1st Dept 1994]) potentially invalidates the renewal option in Article 8 of the Lease because it could possibly be exercised after the initial lease term expires.⁵

The Restatement of Property § 395 provides that:

"When a lease limits in favor of the lessee an option exercisable at a time not more remote than the end of the lessee's term, (a) to purchase the whole or any part of the leased premises; or (b) to obtain a new lease or an extension of his former lease, then such option is effective, in accordance with the terms of the limitation, even when it may continue for longer than the maximum period..." (Emphasis added).

The renewal option in Article 8 of the Lease requires the

⁴ The Sons also raise the issues of judicial estoppel, promissory estoppel, and equitable estoppel to no avail.

⁵ Although the Rule generally does not apply to options appurtenant to leases (*Metropolitan Transportation Authority v Bruken Reality Corp.*, 67 NY2d 156, 165 (1986), the Restatement of Property § 395 sets forth an exception.

Co-op to give the Club written notice of its election to renew, at least one year prior to the expiration of the existing lease term. If, however, the Co-op fails to give such timely notice, the Club is required to give notice to the its mortgage lender (the "Lender") because the leasehold is collateral for the mortgage loan. The Lender then has the right to assume the Lease and exercise the Co-op's renewal option within 30 days thereafter (Lease, Section 8.01). This scenario can potentially violate § 395, because if the Club fails to give the Lender notice within the term of the Lease, the Lender would purportedly have the right to renew an expired Lease in perpetuity (see also, EPTL 9-1.1).

Now, however, upon a more thorough record and comprehensive argument, it is correctly pointed out that the Lease confines the two 25-year renewal terms to be exercised during the Lease term and to be applied consecutively and without interruption.

Section 8.01 provides that:

the Lender may "elect that this Lease be renewed for the relevant renewal term on the same terms, covenants and conditions and with the same effect as though such options had been exercised by the Tenant [Co-op] as herein provided..."

It follows that the Club's renewal options are for two consecutive twenty-five year terms. The term "consecutive" leaves no ambiguity. Therefore, the Lender cannot exercise its option to renew after the expiration of the initial term of the Lease because the renewal term must commence consecutively with, and without interruption from, the preceding term, regardless of

whether the Club tenders notice to the Lender.

The Club argues that in both *Warren Street Associates* (202 AD2d 200 [1st Dept 1994]) and *Bleeker St. Tenants Corp. v Bleeker Jones LLC* (65 AD3d 240 [1st Dept 2009]), a case discussed later, both renewal terms were held to be invalid even though they were consecutive terms. However, in both cases, the leases succinctly and unequivocally provided a right to renew the lease after the lease term, a fact not present here. In this case, a breach of multiple notice provisions would be required to allow for the Lease to be renewed after its expiration. A scenario far afield from the parties' contractual intent, the presumption of which is that the creator intended the estate to be valid [EPTL 9-1.3(a)-(b)].

For example, in *Warren Street Associates* (202 AD2d 200), the lease provided for a 50-year term with six 25-year options after the original term, to be exercised by the tenant by notifying the landlord at least three months before the expiration of the term then in effect; however, the clause included the following provision that invalidated the renewal options under the lease:

"(it being expressly understood, however, that a failure by Tenant to serve any such notice shall not extinguish the renewal option to which same would have related, and such renewal option will only be considered extinguished and not exercised after Landlord notifies Tenant that Tenant has not so exercised same and Tenant, within 40 days after receipt of such notice, still does not serve a notice exercising such option). If Tenant serves a renewal notice, the term hereof shall be deemed automatically renewed and extended."

Similarly, in *Bleeker St. Tenants Corp. v Bleeker Jones LLC*

(65 AD3d at 241-242), the lease provided for an initial term of 14 years, with nine options to renew for consecutive 10-year periods, exercisable through a series of notices. The tenant could exercise the renewal options by giving written notice at least six months before the end of the preceding term; the lease also provided that the landlord would send the tenant a "reminder notice" regarding the option, seven months before the end of the preceding term, if the tenant had not already exercised the option. In the event that the landlord did not send the seven-month notice, and the tenant did not exercise the option on six months notice, then the renewal option would remain in effect until such time as the landlord sent the tenant notice of its right to exercise the option. Once the landlord sent the tenant this final written notice, the tenant would have 60 days within which to exercise the renewal option. The lease further provided that, in the event that the renewal option went unexercised and the landlord did not send the 60-day notice, then, "[i]f the term shall have expired, Lessee shall remain in possession as a month-to-month tenant" until such time as the landlord sent the 60-day notice. The renewal term was held to be invalid under EPTL 9-1.1[b] because it could be exercised post-term in perpetuity.

In contrast, the First Department in *Double C Realty Corp. v Craps, LLC* (58 AD3d 480 [1st Dept 2009]) avoided application of the Rule Against Perpetuities. There, the original lease term was 30 years, with a provision permitting the lessee, at its

option, to extend the term of the lease for five years periods after the expiration of the initial term. The options were to be exercised by written notice to the lessor at least one year before the expiration of the term. If a renewal option was exercised, the provision specified, the lease "shall remain in full force and effect, changed only as to the matters specified in this paragraph" (such as the amount of rent payable). The lease renewal provision did not provide for any exercise of the renewal options after the expiration of the lease term; it simply provided for exercise of the option during the lease term. Since the renewal option clause originated in the lease and was not capable of separation from the lease,⁶ it qualified as an option appurtenant and therefore did not run afoul of the Rule against Perpetuities (see also, *Deer Cross Shopping v Stop & Shop Supermarket Co.*, 2 Misc 3d 401 [Sup Ct NY County 2003], [A renewal option in a lease was held to be valid even though it contained an explicit (60) sixty day extension of the lease term past the original expiration date for notice to be given by

⁶ Generally, an option to purchase land that originates in one of the lease provisions, is not exercisable after lease expiration, and is incapable of separation from the lease is valid even though the holder's interest may vest beyond the perpetuities period. Such options--known as options "appendant" or "appurtenant" to leases--encourage the possessory holder to invest in maintaining and developing the property by guaranteeing the option holder the ultimate benefit of any such investment. Options appurtenant thus further the policy objectives underlying the rule against remote vesting and are not contemplated by § 9-1.1-b (*Symphony Space v Pergola Props.*, 88 NY2d 466, 480 [1996]). Options appurtenant to a lease are considered "part of" the lease (see *Buffalo Seminary v McCarthy*, 86 AD2d 435, 441 [1982], *affd* 58 NY2d 867 [1983]).

landlord because the renewal options were appurtenant to the lease and the lease was held not to have expired during the extended period].

Here, the absence of an express right under the renewal terms of the Lease constrains EPTL 9-1.1 from being applied. Furthermore, the renewal option originates in one of the Lease provisions and is incapable of separation from the Lease (*Symphony Space*, 88 NY2d at 480). Therefore, summary judgment is denied as to this issue as a matter of law, and the cause of action dismissed.⁷

Additionally, the Club argues that the entire Lease violates the Rule because certain provisions constitute an unreasonable restraint on alienation. More specifically, the Club points to the Lease provision that obligates the Club to perform maintenance and repairs on the Clubhouse during the term of the Lease, no matter if it is in occupation. The common-law rule against restraints on alienation limits the power of an owner to create uncertain future estates by forbidding owners to impose conditions on conveyances that block the grantee from freely disposing of the property (*Metropolitan Transp. Autho.*, 67 NY2d at 161 [1986]). "Unlike the statutory rule against perpetuities, which is measured exclusively by the passage of time, the common-law rule evaluates the reasonableness of the restraint (*Symphony*

⁷ Pursuant to CPLR 3212 (b), this court has the discretion to grant summary judgment to a non-moving party, if it appears that such party is entitled to judgment (see also *Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]).

Space, Inc., 88 NY2d at 476).

The Club, as landlord, is responsible for the "operation, repair, replacement and maintenance" of the Clubhouse for the duration of the Lease (See Lease, Article 5.01). This puts the Club in the very reasonable position of every other landlord in New York City, and clearly does not constitute an unreasonable restraint on alienation.⁸ Therefore, the argument is rejected.

The Option Agreement

The Option Agreement entitled "Demised Premises Contract" granted the Club the option to sell the Clubhouse properties to the Developers for \$500,000 at any time before the termination of the Sublease.

The Club claims that the Option Agreement creates a remote vesting of a right to acquire property at a fixed price for a period in excess of the applicable perpetuities period, and therefore violates the Rule. However, because the Option Agreement creates an option to sell property held by the owner of that property, it is not subject to the Rule. The Club cites to no authority that holds that an option to sell property held by the owner is violative of the Rule because an option to sell (as opposed to purchase)⁹ does not impose any undue restraint on

⁸ New York City Administrative Code 127-8 provides a similar obligation.

⁹ There is a wealth of case law dating back to the 19th Century that disallows options to purchase property from the owner under the Rule against Perpetuities because where one has the right to take away another's property, it creates an interest or estate in the property, and unduly burdens alienation (See i.e. *London & Southwestern Railroad Co. v Gomm*, 20 CH. D. 562

alienation and creates no future estate or interest in the property.

Standing

In 1980, the Developers assigned all of their rights, title, and interest in the Lease, Sublease, and Option Agreement to the Co-op (the "1980 Agreement"). The Club argues that to the extent the 1980 Agreement created a remotely vesting possessory interest of the Club (through the Option Agreement) in favor of the Developers and/or assigns for a period in excess of the applicable perpetuities, the 1980 Agreement violates the Rule and is invalid. However, as previously discussed, the Option Agreement is not subject to the Rule, and therefore this argument cannot be sustained.

Furthermore, the Club's various assertions that the Sons have no interest in the Club, have no bearing on its motion for summary judgment and will not be addressed here.

Motions to Dismiss

Fourth-Party Defendant, Chicago Title, moves pursuant to CPLR 3211 (a)(1) and (7), to dismiss the second cause of action in the Fourth-Party complaint.

Under the same CPLR provisions, the Co-op, Putterman and May move to dismiss certain counterclaims asserted against them by the Sons.¹⁰

(1882) and its progeny).

¹⁰ The Co-op, Putterman and May seek to dismiss the Sons's counterclaims of unjust enrichment, promissory estoppel, declaratory relief, preliminary and temporary injunction, breach

"Dismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law'" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference" (*Id* at 87-88). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Id*). The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Chicago Title's Motion

The motion is granted and the second cause of action in the fourth-party complaint is dismissed. In addition to and in conjunction with the reasons expressed on the record during the January 20, 2010 oral argument, coverage under Chicago Title's policy of insurance (the "Policy"), which insured the Developer's leasehold interest under the Lease, ceased upon the Developer's transfer of their interest in the Leasehold in the 1980 Agreement, because the instrument was devoid of any covenant or

of the covenant of good faith and fair dealing, and negligence.

warranty of title that would have continued coverage. In *Burwell v Jackson*, (9 NY 535 [1854]), a case cited by the Sons purportedly for the proposition that an assignment carries with it an implied warranty of title, applies only to executory agreements. Here, the 1980 Agreement was made pursuant to a fully consummated Contract for Sale between the Developers and the Co-op, and was not executory as in *Burwell*. Moreover, the policy expressly requires that an instrument that transfers title contain a covenants or warranty of title (Conditions of the Policy, Section 3[f]).

All other arguments asserted in opposition to Chicago Title's motion have been considered and found unavailing.

The Co-op, Putterman and May's Motion

The fourth counterclaim is for unjust enrichment. The criteria for recovery under a theory of unjust enrichment are: (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002] [*internal citation omitted*]). To recover from a particular defendant, a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment (*Id.*). It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the

plaintiff must look to that person for recovery (Id).

The Sons cannot recover on this claim from the Co-op because, even though the Co-op may have received incidental benefit, the rent payments were made at the behest of the Club. Further, the Sons have not alleged, nor could they in good faith, that the Co-op did not pay the Club its due rent under the various agreements to support a claim for unjust enrichment. The counterclaim for unjust enrichment is dismissed.

However, the motion to dismiss the Sixth counterclaim of promissory estoppel is denied in part and granted in part. In order to state a viable cause of action for promissory estoppel, the following elements must be established: (1) a promise that is sufficiently clear and unambiguous, (2) reasonable reliance on the promise by a party, and (3) injury caused by the reliance (*N.Y. City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489 [1st Dept 2004]).

The complaint sets forth that the Co-op, through the Lease, Sublease, 1980 Agreement, the 2003 and 2006 Agreements,¹¹ and "numerous communications and promises," "promised and agreed that it would not interfere with... [the Sons's] right in and to the Remainder and, further promised and covenanted that it would

¹¹ The 2003 Agreement was between the Co-op and the Sons wherein the Co-op agreed to allow the Sons to occupy the Clubhouse if the Club did not exercise the Option Agreement.

The 2006 Agreement (again between the Co-op and the Sons) set forth that the Co-op recognized, inter alia, that the Sons were the successors in interest of the Developers (their fathers), and that the Sons were entitled to the Clubhouse if the Club did not exercise its rights under the Option Agreement.

affirmatively support...[the Sons's] right to...the Remainder" (① 216 Complaint). Further, the complaint alleges that "By reasons of the promises made by the Cooperative..., [the Sons's] justifiably relied upon same to their detriment" (① 223 Complaint). The complaint therefore sets forth the essential elements of a claim for promissory estoppel.

As to the Lease and Sublease, the Co-op's argues, and the Sons do not dispute, that documentary evidence plainly refutes the Sons's promissory estoppel claim because they were not parties to the Lease or Sublease. Therefore, the counterclaim is dismissed as to the Lease and Sublease. As to the 1980 Agreement, the Sons may only rely on this agreement upon a showing that they were never in breach by not continuously maintaining and appropriately funding the required escrow account. It is clear from the record that Dean Lyras is in clear breach of that requirement, barring his reasonable reliance under a promissory estoppel theory. However, further discovery is needed to determine the fate of James Conforti, III on this issue. Additionally, the Sons can only rely on the 2003 Agreement to the extent they can prove, through further discovery, an exchange of valuable consideration, which the agreement on its face does not express.

Finally, as to the 2006 Agreement, the Sons may not rely on this agreement because (1) Dean Lyras was not a party to that contract, and (2) James Conforti, III is in breach of that contract by not using his "best efforts" to "diligent[ly]

prosecut[ion]e" Dean Lyras to force his contribution to the escrow account. Therefore, the counterclaim for promissory estoppel is only sustained as outlined above.

The seventh counterclaim is for a declaration that the Club's right to sell the Clubhouse under Option Agreement will not be exercised because of the Co-op's alleged position that the Option Agreement is unenforceable. The counterclaim is dismissed because as discussed earlier, the Option Agreement is valid and potentially could be exercised by the Club, requiring an appropriately funded escrow account.

The ninth counterclaim seeks a "temporary and permanent injunction" against the Co-op from taking any action which creates, extends or otherwise confers rights in and to the Air Rights Parcel, or diminishes the remainder interest in the Clubhouse in any way. In furtherance of the required analysis for an injunction,¹² the counterclaim is sustained at this time because further discovery is necessary to ascertain the extent the Sons may rely on the various agreements as set forth above in the promissory estoppel analysis.

The tenth counterclaim asserts that the Co-op breached the covenant of good faith and fair dealing by acting to deprive the Sons of their right to the remainder interest in the Clubhouse. This counterclaim does not pass muster under CPLR 3013, in that

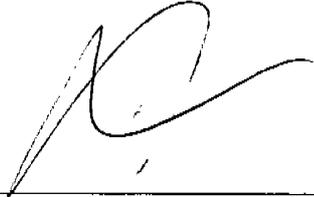
¹² The party seeking an injunction must establish the likelihood of success on the merits, irreparable harm if no injunction is issued, and a balance of the equities in favor of the party seeking same (see *Manhattan Real Estate Equities Group LLC v Pine Equity, NY, Inc.*, 16 AD3d 292 [1st Dept 2005]).

the allegation is too conclusory to put the Co-op upon proper notice as required thereunder. Therefore, this counterclaim is dismissed with leave to replead.

Lastly, Putterman and May move to dismiss the Sons's fourth party complaint alleging negligence against them. In addition to and in conjunction with the reasons expressed on the record during the January 20, 2010 oral argument, the Fourth-Party complaint is dismissed. The Sons's fail to advance an appropriate duty owed by Putterman and May to the Sons required to sustain such a claim.

Settle Order on Notice.

Dated: June 22, 2010



J.S.C.