

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

D36106  
G/ct/kmb

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Argued - September 4, 2012

PETER B. SKELOS, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
JEFFREY A. COHEN, JJ.

2011-09158  
2012-08681

DECISION & ORDER

Whippoorwill Hills Homeowners Association, Inc.,  
etc., appellant, v Toll at Whippoorwill, L.P., et al.,  
respondents, et al., defendant.

(Index No. 24785/07)

Kurzman Eisenberg Corbin & Lever, LLP, White Plains, N.Y. (Eric D. Koster and  
Judith C. Zerden of counsel), for appellant.

McCarter & English, LLP, New York, N.Y. (Robert S. Bernstein of counsel), for  
respondents.

In an action, inter alia, to recover damages for negligence and breach of contract, the plaintiff appeals from (1) an order of the Supreme Court, Westchester County (Smith, J.), dated July 15, 2011, which granted the motion of the defendants Toll at Whippoorwill, L.P., Toll Peppertree, Inc., Toll Holdings, Inc., and Toll Brothers for summary judgment dismissing all causes of action relating to the sales of homes on which title had closed prior to December 5, 2001, as time-barred, and denied the plaintiff's cross motion, in effect, for a determination that the statute of limitations on its causes of action did not begin running until October 2003 and that each of its causes of action is timely, and (2) a judgment of the same court entered August 26, 2011, which, upon the order, is in favor of those defendants and against it, dismissing the aforementioned causes of action. The notice of appeal from the order is deemed also to be a notice of appeal from the judgment (*see* CPLR 5501[c]).

ORDERED that the appeal from the order is dismissed; and it is further.

ORDERED that the judgment is affirmed; and it is further,

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ORDERED that one bill of costs is awarded to the respondents.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

In this action by a homeowners association on its own behalf and on behalf of its member homeowners, the plaintiff alleges, among other things, that the defendants—the sponsors, contractors, and builders of the development where the homeowners live—defectively constructed and designed the homes, resulting in latent defects. Construction of the homes began in 1997 and title to some of them closed by December 5, 2001. The plaintiff did not commence this action until December 5, 2007. The defendants Toll at Whippoorwill, L.P., Toll Peppertree, Inc., Toll Holdings, Inc., and Toll Brothers (hereinafter collectively the Toll defendants) moved for summary judgment dismissing all causes of action relating to the sales of the homes on which title had closed prior to December 5, 2001. The Toll defendants argued that the causes of action related to those homes were barred by the statute of limitations. The plaintiff opposed the motion and cross-moved, in effect, for a determination that none of its causes of action was time-barred. The Supreme Court granted the Toll defendants' motion and denied the plaintiff's cross motion. The plaintiff appeals, and we affirm.

Contrary to the plaintiff's contention, the Toll defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the causes of action relating to homes on which title had closed by December 5, 2001. The causes of action as to those homes accrued upon the date of completion of construction, but no earlier than the closing date (*see Heritage Hills Socy., Ltd. v Heritage Dev. Group, Inc.*, 56 AD3d 426, 426-427). The Toll defendants established prima facie that construction was already complete on those homes by the closing dates. Moreover, the plaintiff's allegations of fraud, which are incidental to the breach of contract claims, may not serve to extend the statute of limitations (*see Cabrini Med. Ctr. v Desina*, 64 NY2d 1059, 1061; *Ruffing v Union Carbide Corp.*, 308 AD2d 526, 527). In opposition to the Toll defendants' prima facie showing, the plaintiff failed to demonstrate the existence of a triable issue of fact as to the completion of construction (*see Ruffing v Union Carbide Corp.*, 308 AD2d at 527). Additionally, the plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was equitably tolled or whether the Toll defendants should be equitably estopped from relying on the statute of limitations (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553).

The plaintiff's remaining contentions are without merit.

SKELOS, J.P., BALKIN, LEVENTHAL and COHEN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court

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