

**Lucas-Plaza Housing Development Corporation v  
Corey**

2004 NY Slip Op 30287(U)

November 9, 2004

Supreme Court, New York County

Docket Number: 603319/03

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, JR.

PART 56

0603319/2003

LUCAS-PLAZA HOUSING  
VS  
COREY, RICHARD G.

SEQ 5  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 10/10/04  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

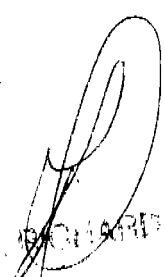
**FILED**

NOV 17 2004

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 11/9/04

  
HON. RICHARD B. LOWE, JR.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

----- X  
LUCAS-PLAZA HOUSING DEVELOPMENT  
CORPORATION and LUCAS METROPOLITAN  
HOUSING AUHTORITY,

Plaintiffs,

Index No. 603319/03

- against-

RICHARD G. COREY, FHA/GNMA FUNDING I,  
INC., UBS PAINWEBBER, INC., PECK, SHAFFER  
& WILLIAMS, SUNTRUST BANK, INC. and  
JOHN DOES 1-100,

Defendants.

----- X

RICHARD B. LOWE III, J.:

Motion sequence numbers five, six, seven, eight, and nine are consolidated for  
disposition.

The defendants Richard G. Corey (Corey), FHA/GNMA Funding I, Inc. (FHA/GNMA),  
UBS Financial Services, Inc. (UBS), Peck, Shaffer & Williams (Peck Shaffer), and SunTrust  
Bank Inc. (SunTrust) all move, pursuant to CPLR 3211 (a) (1), (3), (5), and (7), for an order  
dismissing the complaint on the grounds that a defense is founded upon documentary evidence,  
the plaintiffs lack standing to sue, the claims are time-barred, and the complaint fails to state a  
cause of action. The defendant SunTrust moves to dismiss on the additional ground that it is not  
subject to personal jurisdiction in New York.

The plaintiffs Lucas-Plaza Housing Development Corporation and Lucas Metropolitan  
Housing Authority (collectively, plaintiffs) move pursuant to section 130-1.1 of the Rules of the

Chief Administrator, for an order awarding costs, in the form of attorney's fees, against the defendants Corey and FHA/GNMA, and their counsel, Swindler, Berlin, Shereff, Friedman, LLP, for filing a frivolous motion for sanctions.

### BACKGROUND

The plaintiffs are government agencies providing public housing in the State of Ohio. On May 29, 1992, and on July 13, 1992, the plaintiffs, in order to take advantage of lower interest rates, re-issued their existing long-term tax exempt bonds. The refinancing was undertaken at the behest of the United States Department of Housing and Urban Development (HUD). The existing bonds, issued in 1982, paid 12% interest. The re-issued bonds paid 8.50% interest, and were secured by the plaintiffs' public housing project.

The predecessor firm to the defendant UBS was engaged to underwrite the refunding. The defendant Corey was an investment banker for UBS. The defendant FHA/GNMA was an entity set up by Corey to be the initial purchaser of the bonds. The defendant Peck Shaffer is an Ohio law firm that represented the plaintiffs. Pursuant to an agreement with FHA/GNMA, the defendant SunTrust is the trustee for the bonds escrow fund, securing payment of the bonds in question.

Pursuant to the terms of the closing documents, the refunding bonds were to be sold either to UBS or its assignee. That assignee turned out to be the defendant FHA/GNMA. Also pursuant to the closing documents, the refunding bonds were to be "defeased." A defeasance involved replacing the public housing project as security for the refunding bonds, with U.S. Treasury Bonds, thereby enhancing the bonds' value, and then reselling the defeased bonds in the marketplace at a still lower interest rate of 6.80%. In exchange for putting its capital, in the form

of the Treasury Bonds, at risk, FHA/GNMA retained the spread created in the market value of the defeased bonds i.e. the difference between the refunding bonds' interest rate of 8.50%, and the defeased bonds' interest rate of 6.80%.

This action was commenced in October 2003. The amended complaint sets forth causes of action for: conversion, against all of the defendants (first); fraud, against all of the defendants (second); constructive fraud, against all of the defendants (third); breach of contract, against the defendants Corey and FHA/GNMA (fourth); negligence, against all of the defendants (fifth); negligent misrepresentation, against all of the defendants (sixth); malpractice, against the defendant Peck Shaffer (seventh); and breach of fiduciary duty and unjust enrichment, against all of the defendants (eighth).

### ARGUMENTS

In support of their motions to dismiss, the defendants make the following arguments: (1) The entire complaint is barred by the statute of limitations; (2) the plaintiffs have not pleaded a single cognizable claim; (3) the plaintiffs lack standing to bring their claims; (4) the defendant FHA/GNMA has been dissolved and cannot be liable; and (4) there is no personal jurisdiction over SunTrust in New York.

In opposition to the motions to dismiss, the plaintiffs make the following arguments: (1) the sale and underwriting of the bonds was a single, integrated transaction; (2) the plaintiffs have standing to bring this action because the \$5,500,000.00 realized in the public sale of the defeased bonds are additional savings under HUD regulations and the refunding agreement (3) the plaintiffs have stated a valid cause of action for conversion because by defeasing the bonds, the defendant Corey converted the excess value of the trust estate assets; (4) the plaintiffs have

stated a claim for fraud because the tax compliance certificate did not contain the true public offering price; (5) the plaintiffs have stated a claim for constructive fraud and breach of fiduciary duty because the defendants had a duty to exercise the utmost good faith in dealing with the plaintiffs because of their complete dependency upon the defendants' superior knowledge; (6) in failing to account to the plaintiffs for their share of the public offering of the bonds, the defendants breached their contract obligation to the plaintiffs (7) that defendants repeated misrepresentations of the public offering price to the plaintiffs, to whom they owed a duty of care, sets forth a claim for negligence, gross negligence, and negligent misrepresentations; (8) as bond counsel, Peck Shaffer violated a duty of care to the plaintiffs when it assisted in the preparation of documents which misstated the public offering price for the bonds; (9) a cause of action for unjust enrichment is stated because the defendants have reaped a benefit without adequately compensating the plaintiffs; (10) the action is timely under both the Ohio and New York statutes of limitations; (11) the defendants are equitably estopped from interposing the statute of limitations as a defense; (12) SunTrust is subject to jurisdiction in New York because its parent corporation is doing business here, and because the issuance of the bonds had a substantial nexus with New York.

### DISCUSSION

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true, and determines simply whether the facts alleged fit within any cognizable legal theory (Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference (Leon v Martinez, 84 NY2d 83, 87 [1994]). The credibility of the



parties is not under consideration (S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 [1974]). A CPLR 3211 motion to dismiss may be granted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (Leon v Martinez, 84 NY2d at 88).

The court will first dispose of the jurisdictional and the choice of law issues, before turning to the substance of the motions.

A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted (Landoil Resources Corp. v Alexander & Alexander Services, Inc., 77 NY2d 28 [1990]). The evidence does not show that defendant SunTrust, a nonresident corporation, has had business contacts with this jurisdiction sufficiently regular and continuous as to justify the conclusion that it is doing business in New York and is, by reason of that presence, subject to the jurisdiction of New York's courts pursuant to CPLR 301. SunTrust does not maintain an office, telephone listing, or mailing address in New York (Duffy v Grand Circle Travel, Inc., 302 AD2d 324 [1<sup>st</sup> Dept 2003]).

In addition, the defendant SunTrust is clearly not subject to the jurisdiction of this court on the basis that its parent, SunTrusts Banks, Inc., is doing business in New York. While a parent-subsidiary relationship exists between non-party SunTrusts Banks, Inc., and the defendant SunTrust, only the defendant SunTrust entered into the relevant contract, and any tortious acts alleged by the plaintiffs occurred outside of New York and caused injury outside of New York. Additionally, there has been no proof of interference by SunTrusts Banks, Inc., the parent, in the subsidiary's activities, no failure to observe corporate formalities, and no control of the

subsidiary's operational policies by the parent.

The case primarily relied upon by the plaintiffs to support personal jurisdiction against SunTrust is clearly distinguishable on its facts. In Indosuez International Finance B.V. v National Reserve Bank (98 NY2d 238 [2002]), the defendant maintained a New York bank account for payment of the option payments, and two of the confirmations designated New York as the place of performance because the affected party was to be paid through a New York bank. In addition, a course of dealing had been established between the parties, as payment was made in five prior similar transactions through a New York bank. Such conduct constituted purposeful exercise by the defendant of the privilege of conducting business in New York State sufficient to subject it to personal jurisdiction. The defendant was also subject to this state's jurisdiction because the defendant expressly submitted to the jurisdiction of this state.

Furthermore, the plaintiffs cannot enforce, against SunTrust, the forum selection clause of the bond purchase agreement. SunTrust is neither a party to that agreement, nor a third-party beneficiary (Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc., 66 NY2d 38 [1985]), and thus, the plaintiffs may not enforce the bond purchase agreement's forum selection clause against SunTrust (ComJet Aviation Management LLC v Aviation Investors Holdings Ltd., 303 AD2d 272 [1<sup>st</sup> Dept 2003]).

Additionally, there is no basis for an assertion of jurisdiction pursuant to CPLR 302 (a) (3), since, as discussed below, this action sounds essentially in breach of contract, and not in tort (Warck-Meister v Diana Lowenstein Fine Arts, 7 AD3d 351 [1<sup>st</sup> Dept 2004]).

Turning to the choice of law issue, the bond purchase agreement provides that it:

shall be governed and construed in accordance with the laws of the State of New York, provided that the rights, duties obligations and liabilities of the Issuer shall

be construed in accordance with the laws of the State of Ohio.

Forum selection clauses are prima facie valid (M/S Breman v Zapata Off-Shore Co., 407 US 1 [1972]). The contractual provision in this case is clear and unambiguous. The plaintiffs do not allege any fraud with respect to the jurisdictional provision itself.

In addition, CPLR 202 applies in determining the limitations period applicable to the various claims that accrued outside of New York. CPLR 202 provides in relevant part:

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued \*\*\*.

Under New York's borrowing statute, the court must apply New York's statute of limitations to the plaintiffs' claims.

The applicable statute of limitations here is six years (CPLR 213) based on the contractual relationship between the parties (National Life Ins. Co. v Frank B. Hall & Co. of New York, 67 NY2d 1021 [1986]). At bar, the facts set forth in the complaint allege no more than causes of action to recover damages for breach of contract, which are barred by the applicable six-year statute of limitations (CPLR 213). The causes of action set forth in the complaint accrued in 1992, when the bond transactions were completed, and this action was untimely commenced more than six years later, in October 2003.

Since the conversion, negligence, malpractice, negligent misrepresentation, breach of fiduciary duty, and fraud causes of action are merely incidental to the breach of contract claims, the only purpose they serve is to circumvent the six-year statute of limitations. The plaintiffs' contention, that they discovered the alleged misappropriation in July 2002, when the United States Internal Revenue Service (IRS) announced an

investigation, because it was not until then that they knew that they had sustained damage, is without merit, it being a novel proposition that a claim once accrued, accrues yet again upon the announcement of an investigation.

A cause of action for fraud must be commenced within six years from the date of the fraudulent act or two years from the date the party discovered the fraud, or could, with due diligence, have discovered it (CPLR 213 [8]; 203 [g]). In the instant case, two occurrences clearly put the plaintiffs on notice of the potential fraud.

First, the very acts complained of are clearly disclosed in the closing documents. The intention of the parties is fully determinable from the language of the subject agreement, and the agreement is unambiguous (Kass v Kass, 91 NY2d 554 [1998]). Second, in 1995, the plaintiffs retained counsel to investigate the 1992 transaction. The plaintiffs thereby were put on notice in 1995 of their potential claims against the defendants for allegedly misrepresenting the profitability of the transaction. As a result, the plaintiffs' claims accrued at the latest in 1995, eight years before this action was commenced in October 2003.

A cause of action for breach of fiduciary duty may be governed by either a three-year or six-year limitations period, depending on the nature of the substantive relief sought by the plaintiffs (Santulli v Englert, Reilly & McHugh, P.C., 78 NY2d 700 [1992]). In either case, the limitations period has run, as this action was not commenced until approximately 11 years past the date that the activity complained of terminated.

The statute of limitations for legal malpractice in the State of Ohio is one year (Ohio Revised Code § 2305.11 [A]). The statute of limitations for legal malpractice in

New York is three years (CPLR 214 [6]). In either case, the plaintiffs' malpractice claims are barred by their 1995 discovery of the alleged improper structuring of the 1992 transaction (Ackerman v Price Waterhouse, 84 NY2d 535 [1994]).

Finally, no basis exists to equitably estop the defendants from interposing the statute of limitations defense absent facts demonstrating that the defendants' affirmative wrongdoing was responsible for the plaintiffs' delay in bringing this action (Rizk v Cohen, 73 NY2d 98 [1989]; General Stencils v Chiappa, 18 NY2d 125 [1966]). There is no allegation that the defendants intended to lull the plaintiffs into inactivity until after the expiration of the statute of limitations. Further, given notice, there can be no claim of fraudulent concealment warranting a tolling of the statute of limitations.

Although it is unnecessary to rule on the adequacy of the pleadings because the claims are so clearly time-barred, the court, nevertheless, will dispose of the pleading motions. Before turning to the merits, the court notes that, despite the volume of the papers submitted by the plaintiffs in opposition to the motions, they fail to even mention the fact that the defendants replaced the security for the bonds, a housing project, with U.S. Treasury Bonds.

The plaintiffs' tort causes of action lack merit. The first cause of action for conversion, and the second and third causes of action for fraud, must be dismissed. A cause of action for conversion cannot be predicated on a mere breach of contract (Fesseha v TD Waterhouse Investor Services, Inc., 305 AD2d 268 [1<sup>st</sup> Dept 2003]). The plaintiffs' conversion claim alleges no independent facts sufficient to give rise to tort liability, and thus, is nothing more than a restatement of their breach of contract claim. Similarly, a

fraud claim that only restates a breach of contract claim may not be maintained (Lama Holding Co. v Smith Barney, 88 NY2d 413 [1996]).

In order to obtain any kind of relief for either negligent misrepresentation or breach of fiduciary duty, it is essential for the plaintiffs to show reasonable reliance upon the misrepresentation (Home Mutual Ins. Co. v Broadway Bank & Trust Co., 53 NY2d 568 [1981]; Talansky v Schulman, 2 AD3d 355 [1<sup>st</sup> Dept 2003]). The plaintiffs had the means to discover the true nature of the transaction by simply reading the contract.

Where, as here, a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, it cannot claim justifiable reliance on the defendants' misrepresentations (Stuart Silver Assocs. v Bao Dev. Corp., 245 AD2d 96 [1<sup>st</sup> Dept 1997]). In the instant case, it is clear that the plaintiffs cannot establish the required element of justifiable reliance upon the alleged misrepresentation.

The plaintiffs' unjust enrichment claim must also be dismissed on the grounds that the parties' rights and obligations are defined by valid and enforceable written agreements (Clark-Fitzpatrick, Inc. v Long Island R.R. Co., 70 NY2d 382 [1987]).

The plaintiffs' motion for sanctions is academic in light of the court's decision dismissing their complaint. The defendants Corey and FHA/GNMA's request for sanctions contained within their motion papers will not be reached because it was not set forth in a notice of motion as required under CPLR § 2214(a).

CONCLUSION

Accordingly, it is


ORDERED that the defendants' motions to dismiss the complaint are granted, and the complaint is dismissed with costs and disbursements to the defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the plaintiffs' motion for sanctions is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 9, 2004

ENTER:



HON. RICHARD B. LOWE, III

**FILED**

NOV 17 2004

RENEE L. HARRIS  
COUNTY CLERK'S OFFICE