

**Buller v Giorno**

2005 NY Slip Op 30007(U)

August 1, 2005

Supreme Court, New York County

Docket Number: 0601783/2002

Judge: Richard F. Braun

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

PRESENT: THE HONORABLE J. BRADY  
*Justice*

PART 23

0601783/2002

BULLER, MARC  
VS  
GIORNO, JOHN, *et al*

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/3/04  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

SEQ # 7  
AMEND SUPPLEMENT PLEADINGS

The following papers, numbered 1 to 5 were read on this motion to/for Summary judgment,  
*including for specific performance; cross motion for*  
*summary judgment*

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
*Notice of Cross motion*  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
AUG 09 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED
<u>1</u>
<u>2, 3</u>
<u>4, 5</u>

Cross-Motion:  Yes  No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

*part of cross*  
Upon the foregoing papers, it is ordered that this motion *is withdrawn by stipulation,*  
*dated October 13, 2004. R 10/15/04*

*it is further requested that the court is granted to the extent that*  
*ORDERED that plaintiff is awarded summary*  
*judgment on the fifth and sixth causes of action, the agreement, dated May,*  
*1997, between defendant Lynn Vinter and Michael Redberg, and*  
*plaintiff, is enforceable, those parties, and it is further*  
*ORDERED that the cross motion is granted to the extent*  
*of awarding defendant John Giorno and Giorno Betty*  
*Systems Institute Inc. summary judgment dismissing the*  
*seventh and eighth causes of action, and it is further*  
*ORDERED that the Clerk shall enter judgment accordingly,*  
*and it is further*  
*ORDERED that the remaining causes of action are severed and*  
*shall continue.*

*This constitutes the ENTER decision and order of this*  
*Court, see separate Opinion.*

Dated: New York, New York, July 30, 2005 \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

----- X  
MARK BULLER,

Plaintiff,

Index No. 601783/02

-against-

**OPINION**

JOHN GIORNO, GIORNO POETRY SYSTEMS  
INSTITUTE INC., MICHAEL GOLDBERG,  
LYNN UMLAUF, LYNDA BENGLIS, JANE  
OPPER and JOSEPH OPFER as personal  
representatives of the Estate of  
John Opper, ELLIOT MEISEL, BRILL  
& MEISEL and 222 BOWERY OWNERS CORP.,

Defendants.

----- X

**FILED**  
AUG 09 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

**RICHARD F. BRAUN, J.:**

Plaintiff moves for summary judgment. Defendants John Giorno and Giorno Poetry Systems Institute Inc. (the Giorno defendants) cross-moved for summary judgment or dismissal pursuant to CPLR 3211. The latter branch of the cross motion was withdrawn by two stipulations.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). Once done, to defeat summary judgment the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 968 [1985]).

Although plaintiff has demonstrated that he was entitled to have the shares to and lease for apartment 2-N transferred to him, pursuant to articles 11 and 24 of the shareholders agreement, there are questions of fact as to whether he was guilty of laches which would bar his equitable claims of rescission and specific performance (*see City of N.Y. v New York Cent. R. Co.*, 275 NY 287, 293

[1937]; *Groesbeck v Morgan*, 206 NY 385, 389 [1912]). Plaintiff's delay arguably caused prejudice to the Giorno defendants (*see Zaccaro v Congregation Tifereth Israel of Forest Hills*, 20 NY2d 77, 80 [1967]). Furthermore, damages may adequately compensate plaintiff (*see 11 Duke St. v Ryman*, 280 AD2d 429 [1<sup>st</sup> Dept 2001]). Thus, summary judgment has not been granted to plaintiff on the first cause of action. As the second and third causes of action are contingent on a denial of the first, summary judgment cannot be granted to plaintiff on the second and third causes of action unless the first is denied at some point.

Plaintiff has demonstrated an entitlement to summary judgment on the fifth cause of action. The purpose of a declaratory judgment, pursuant to CPLR 3001, is to avoid future litigation by adjudicating the rights of the parties before one is wronged by the other (*Klostermann v Cuomo*, 61 NY2d 525, 538 [1984]). Plaintiff has shown that the controversy between him, and defendants Michael Goldberg (Goldberg) and Lynn Umlauf (Umlauf), is ripe for adjudication (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 518 [1986]). They do not submit any affidavit from them or defendant Lynda Benglis. All of their answers to the complaint are unverified. Plaintiff has not demonstrated that there is any ripe controversy at this time with defendant 222 Bowery Owners Corp. (222) as to that claim. Thus, by this court's separate July 30, 2005 decision and order, summary judgment been awarded to plaintiff on the fifth cause of action as against defendants Umlauf and Goldberg.

The Giorno defendants have not shown that they are entitled to summary judgment dismissing the first cause of action (see discussion above). The fourth cause of action is for inducement to breach a contract, the shareholders agreement. Plaintiff has demonstrated that there are questions of fact defeating an award of summary judgment to the Giorno defendants as to that

cause of action (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

On the seventh cause of action, plaintiff seeks money damages for breach of fiduciary duty. The statute of limitations thereon is three years (*Carlingford Ctr. Point Assoc. v MR Realty Assoc.*, 4AD3d 179, 179-180 [1<sup>st</sup> Dept 2004]). Thus, the Giorno defendants are entitled to summary judgment on this claim.

As to the eighth cause of action, plaintiff is trying to hold the Giorno defendants responsible for the acts of the corporate defendant 222. The Giorno defendants have shown entitlement to summary judgment on this cause of action. Plaintiff has not demonstrated that there is any question of fact making the Giorno defendants responsible for the acts of defendant 222 underlying this claim (see *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]). Therefore, the Giorno defendants have also been awarded summary judgment dismissing this cause of action.

Dated: New York, New York  
August 1, 2005



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RICHARD F. BRAUN, J.S.C.

**FILED**  
AUG 09 2005  
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