

Leather v 176 Broadway Owners Corp.

2007 NY Slip Op 30671(U)

February 28, 2007

Supreme Court, New York County

Docket Number: 0116460/2006

Judge: Shirley W. Kornreich

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: KORNREICH
Justice

PART 54

MARIA LOATHEN
- v -

176 BROADWAY OWNERS CORP

INDEX NO. 116468/06
MOTION DATE _____
MOTION SEQ. NO. 001
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 ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3-4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

MAR 07 2007

COUNTY CLERK'S OFFICE
NEW YORK

SHIRLEY WERNER KORNREICH
J.S.C.

Dated: February 28, 2007

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
MARIA LEATHER,

Plaintiff,

-against-

176 BROADWAY OWNERS CORP.,

Defendant.

KORNREICH, SHIRLEY WERNE

Index No.: 116460/06

**DECISION
and
ORDER**

FILED

MAR 07 2007

COUNTY CLERK'S OFFICE
NEW YORK

This is an action by plaintiff Maria Leather against the 176 Broadway Owners Corp. (the "Co-op") seeking injunctive relief, as well as attorney's fees and costs. Essentially, plaintiff claims that defendant should be required to render her apartment, Unit Mezzanine F (the "Apartment"), located at 176 Broadway, New York, N.Y. (the "Building"), legal for residential use. Plaintiff now seeks a preliminary injunction compelling defendant to take all steps necessary to "legalize the residential unit known as and located at Mezzanine F at 176 Broadway" and, at defendant's expense, "ensure and protect the residential premises and the Plaintiff from any hazards or dangers at 176 Broadway[.]" With the court's advance permission, the parties have submitted a reply and sur-reply.

I. *Statement of Facts*

Plaintiff avers that on or about June 25, 1999, she purchased the shares allocated to the Apartment, for the purpose of residential occupancy, and her purchase was approved by the Co-op's Board. While plaintiff originally averred that defendant breached its duty to sell her a legal apartment, in her reply affidavit, she admitted that she purchased the apartment from an

* 3]

individual shareholder, whom she has not identified. Defendant claims that it has never owned the premises and that the Building's sponsor (which is not a party) originally sold the apartment, which changed hands several times prior to plaintiff's purchase. Plaintiff claims that when she moved into the Premises, she believed it was "a legal residential cooperative unit." The Proprietary Lease mandates that the Apartment may not be used "for any purpose other than as a private dwelling for [Ms. Leather and her spouse.]"

After seven years, plaintiff attempted to sell the Apartment and discovered that "the subject premises was not on the [Building's] offering plan." She contacted the Building's management company, and was advised that the Apartment did appear on an amendment to the offering plan's Schedule A, which addresses maintenance.

Plaintiff exchanged emails with the Co-op's president, who agreed "to sign any document proving [plaintiff's] shares."¹ Plaintiff then checked with the Department of Buildings ("DOB") and found that the Building's certificate of occupancy ("CO"), issued on July 11, 1980, did not include the Apartment. The CO lists the Building's second floor as occupied by a bank and does not acknowledge the mezzanine, where plaintiff's apartment is located.

Plaintiff avers that Kimberli Freeman, of Key Management ("Key"), advised her that, on the Co-op's behalf, Key was accepting bids "from expeditors [sic] and architects for the work needed to be done to amend the certificate of occupancy." Plaintiff alleges that, when it discovered how expensive it would be to legalize the Apartment, the Co-op refused to pay the costs of legalization, which include upgrading the Building's elevator, adding a second means of

¹ The court will not consider the multiple emails plaintiff has submitted in support of her motion, since significant portions of each of those exhibits are obscured and, thus, the emails are illegible.

[* 4]

egress from the Apartment and installing a fire-rated entry door. According to plaintiff, her apartment violates various sections of the Multiple Dwelling Law, since it lacks proper fire exits/fire-stairs

The Building was formerly a commercial loft space that was converted to a residential cooperative housing corporation via an Offering Plan, issued by the Co-op's original sponsor, 176 Broadway Builders Corp. ("Sponsor"). The Offering Plan's Introduction clearly provides that:

The property and each unit thereof is offered and will be delivered in completely rehabilitated condition, with all violations, if any, cured and removed of record and with a certificate of occupancy issued by the Department of Buildings of the City of New York.

Offering Plan, Introduction (originally in all capitals). Plaintiff's apartment was added to the Offering Plan pursuant to the Sixth Amendment to the Offering Plan, issued on September 20, 1986.

II. *Conclusions of Law*

The Court may grant a preliminary injunction where plaintiff shows "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor[.]" *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); CPLR § 6301. The purpose of a preliminary injunction is "to maintain the status quo and to prevent any conduct which might impair the ability of the court to render final judgment[.]" *Putter v. City of New York*, 27 A.D.3d 250, 253 (1st Dept. 2006) (denying preliminary injunction where plaintiffs "did not seek to maintain the status quo, but rather sought the ultimate relief in their action").

However, plaintiff cannot demonstrate an "irreparable injury" where its relief can be rendered in money damages if plaintiff ultimately prevails. *Zandman v. Nissenbaum*, 53 A.D.2d 837 (1st

* 5]
Dept. 1976). *See also New York City Off-Track Betting Corp. v. New York Racing Ass'n*, 250 A.D.2d 437, 442 (1st Dept. 1998).

Here, plaintiff has failed to demonstrate her entitlement to a preliminary injunction. Initially, the relief plaintiff seeks on this motion is identical to the ultimate injunctive relief sought in her complaint. *See Wellbilt Equip. Corp. v. Red Eye Grill, L.P.*, 308 A.D.2d 411 (1st Dept. 2003) (determining ultimate rights of parties is not function of preliminary injunction, rather its function is “to maintain the status quo until there can be a full hearing on the merits”). Further, plaintiff has not demonstrated that she will suffer irreparable harm since defendant “has and will assist Plaintiff in her efforts to revise the certificate of occupancy.” With this assurance, plaintiff could legalize the apartment at her own expense and then recover money damages from defendant if she ultimately prevails.

Finally, plaintiff’s action is unlikely to succeed on the merits, since the Statute of Limitations appears to bar the instant action. Where “no limitation is specifically prescribed by law,” it must be commenced within six years. CPLR § 213 (1). Here, plaintiff purchased her apartment more than six years ago. The fact that there was no CO for the Apartment is a matter of public record and plaintiff could have found this out with any reasonable diligence. *Cf. Jordache Enterprises, Inc. v. Gettinger Assoc.*, 176 A.D.2d 616, 617 (1st Dept. 1991) (“plaintiff’s reliance upon an alleged misrepresentation by the defendant concerning the existence of a certificate of occupancy was not reasonable where the terms of the certificate of occupancy, a public record, were not within the exclusive knowledge of the defendant”); *Bales v. Pfeifer*, NYLJ, Apr. 26, 2006, at 19, col 1 (Sup Ct, Nassau County, Austin, J.) (“party cannot claim to have been misled when the misrepresentation consists of material that is public record or could

have been discovered through the exercise of due diligence”). Therefore, plaintiff’s action would be time-barred since it was commenced more than six years after she purchased the Apartment and her alleged cause of action accrued.

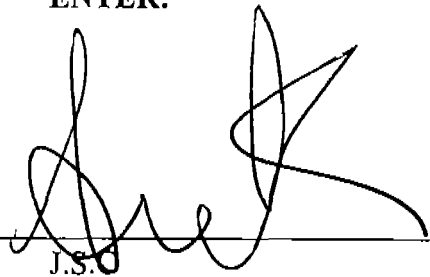
While plaintiff, in her reply papers, makes vague allegations against defendant that seem to claim a breach of fiduciary duty, the Co-op owed plaintiff no duty when she first purchased the Apartment as she was not yet a shareholder. “A fiduciary relationship . . . ‘is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another[.]’” *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 57 (1st Dept. 1988) (citation omitted). Absent such a special relationship, no duty exists. *Carnegie v. H&R Block Inc.*, 269 A.D.2d 145, 147 (1st Dept. 2000), *lv dismissed* 95 N.Y.2d 844 (2000). Accordingly, it is

ORDERED that plaintiff’s motion seeking a preliminary injunction is denied; and it is further

ORDERED that the parties shall appear before the court for a preliminary conference at 11:00 a.m. on March 22, 2007 at 111 Centre Street, Room 1227, New York, N.Y. 10013.

FILED
MAR 07 2007
COUNTY CLERK'S OFFICE
NEW YORK

Date: February 28, 2007
New York, New York

ENTER:

J.S.