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

PRESENT: BARBARA R. KAPNICK PART 12

Justice

Index Number : 603576/2006
DIBARTOLO, CYNTHIA
VS
BATTERY PLACE ASSOCIATES
Sequence Number : 002
DISMISS

INDEX NO. 603576/06
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

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
MAR 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3/10/08

BARBARA R. KAPNICK 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 : IAS PART 12

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CYNTHIA DIBARTOLO and JOHN E. PURPURA,

Plaintiffs,

- against -

BATTERY PLACE ASSOCIATES, now doing business as BATTERY PLACE ASSOCIATES LLC, and ROBERT R. LEWIS,

Defendants.

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DECISION/ORDER
Index No. 603576/06
Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

This action arises out of a Purchase Agreement dated October 31, 1989 by which plaintiffs Cynthia DiBartolo and John E. Purpura agreed to purchase Unit 12-C of the Liberty View Condominium located in Battery Park City from defendant Battery Place Associates, the Sponsor, now doing business as Battery Place Associates, LLC ("Battery Place") for $369,000.00. The Condominium Offering Plan dated October 27, 1989, which was approved by the Attorney General of New York, was incorporated into the Purchase Agreement.

At the time of the contract, the building was in the pre-construction phase, with occupancy planned no earlier than 1991. Plaintiffs paid a 10% down payment in the amount of $36,900.00 on the unit, which subsequently became subject to a separate escrow agreement dated April 27, 1992. Defendant Robert Lewis, Esq. acted as escrow agent and counsel for Battery Place.

Through a Fourth Amendment to the Offering Plan dated June 17, 1991, defendants inter alia reduced from 35% to 20% the percentage of residential units that had to be subject to purchase agreements before defendants could close on any given unit. Plaintiffs considered this Amendment to "materially and adversely" affect their rights under the Offering Plan, and thus chose to exercise their right to demand rescission of the Purchase Agreement under Paragraph 2 of the Purchase Agreement.

Defendants, nonetheless, scheduled the closing for July 22, 1991, pursuant to Paragraph 7 of the Purchase Agreement. The closing was subsequently adjourned numerous times between July 1991 and January 1992.

On or about January 14, 1992, plaintiffs commenced an action in this Court under Index No. 1296/92 against defendant Battery Place and several other parties. The Complaint sought damages for breach of contract, misrepresentation, fraud, intentional infliction of emotional distress and failure to comply with Article 23-A of the General Business Law. In addition to the return of their down payment and the awarding of punitive damages, the plaintiffs demanded rescission of the Purchase Agreement based on the Fourth Amendment to the Offering Plan.

On or about February 5, 1992, plaintiff DiBartolo brought an Order to Show Cause seeking interim injunctive relief to prevent Battery Place from noticing a closing date. On the return date of February 18, 1992 the parties entered into a Stipulation agreeing to stay the closing pending adjudication of the lawsuit or further Order of the Court.

DiBartolo then sent a letter dated August 14, 1992 to Lewis stating as follows:

> I was hoping that in light of the pending litigation that you [sic.] client would have reconsidered settlement in this case.
>
> Pursuant to the pending stipulation entered into on February 18, 1992, the closing of the subject Unit 12 C at 99 Battery Place is stayed pending adjudication of the complaint or further court order. Therefore, it is probably in your client's best interest to entertain my original demand for recession [sic.] of the subject contract.
>
> In order to avoid unnecessary fees, disbursements and further motions, I would ask that you again speak with your client, regarding settlement.

DiBartolo wrote Lewis again on January 15, 1993 stating,

> I tried to reach [you] several times over the course [of] the holiday month in order to settle this matter. According to you, your clients are "happy to simply let this matter sit in court for years." You stated that your clients have no interest in settling at this time.
>
> Given that, I suggest you proceed with depositions in this case. Be advised, at this time I do not intend to

> take any depositions in this case. All the facts, I need to proceed in this matter lay in front of me within the cold print of the purchase agreement and amendments.
>
> As you are aware, my health is quite challenged and I am scheduled for long-term radical chemotherapy treatment. Given, that kindly provide me with advance notice of the dates you are seeking to take my deposition. I will make myself available to you.

It appears that no further action was taken in that case and the lawsuit was dismissed on or about January 28, 1993, subject to it being restored by either party by motion.[1]

DiBartolo wrote another letter dated November 7, 1993 to Mr. Lewis stating,

> I appreciate the fact your clients are considering entertaining settlement. I am seeking simply to obtain recession [sic.] of the purchase agreement, the return of my down payment held in escrow and the interest earned on my down payment.
>
> At this juncture, I have [sic.] am forced to focus on my health. Therefore, I want nothing more than to simply resolve this matter and move on.
>
> I am anxious to hear from you.

By letter dated March 8, 1994 to Lewis, DiBartolo wrote,

> Pursuant to our conversation, I await some confirmation regarding the terms of settlement we discussed.

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[1] No such motion was ever filed by either party, and plaintiffs (through DiBartolo, who is an attorney) finally filed a Notice of Discontinuance of that action on June 22, 2004.

Apparently, no answer was forthcoming and DiBartolo wrote Lewis again on October 9, 1998 stating,

> Please contact me regarding the above dispute. I have tried to reach you half a dozen times and left several messages for you.

By letter dated July 10, 1999, DiBartolo wrote again to Lewis stating,

> Pursuant to our conversation, your clients are receiving substantial rent on Unit 12 C. However, this Unit is still subject to **my purchase agreement** *(which does not permit your clients to rental [sic.] the Unit)*. In addition, your client's [sic.] continue to retain my down payment for Unit 12 C in escrow while at the same time accepting rent from a third party. THIS IS EGREGIOUS!
>
> I made repeated demands for recession [sic.] of the purchase agreement, return of my down payment and interest accrued however, you continue to lead me to believe that you are discussing this matter with your clients in an effort to achieve settlement.
>
> Honestly, I am not sure that you are discussing this matter with your clients as you claim. Since your clients are receiving rental income on the subject unit, they likely have even less interest settling.
>
> WHERE DO THEY STAND? WHERE DO YOU STAND?

Finally, by letter dated November 20, 2000, DiBartolo notified Lewis as follows:

> After years of trying to obtain recession [sic.] on the Purchase Agreement of unit 12C of Liberty View

Condominium you advised me that your client has **no intention to ever settle this matter with me.** Your clients Battery Place Associates (i.e., the Milstein Family) are very sophisticated, powerful and wealthy. There is no doubt in my mind that they were well aware of my rights under the Purchase Agreement and the fact that I was legally entitled to rescission as a result of a material change to my contract springing from the Amendment. Nevertheless, they chose to keep this matter in dispute year after year. You made it clear when you said, "the Milstein's will spend a lifetime in court with you before they rescind the purchase agreement and return your deposit."

I question your good faith and that of your client over the years. Now, you have left me **no obtain [sic.] other than to close on my Purchase Agreement.** It is my understanding that the developer is approaching the threshold of 35% of the Residential Units being subject to an executed and accepted Purchase Agreements. Thus, I would now have some measure of comfort in this investment since the 35% threshold was reflected in my original purchase agreement.

Please be advised that I am ready, willing and able to close on Unit 12 C immediately [emphasis contained in original].

I have funds available in the amount of $332,050.00 which will be payable to "Battery Place Associates" representing the balance of the Purchase Price of my unit.

* * *

Finally, please calculate the interest on my down payment, which has been sitting with you in escrow for more than 10 years. I would assume the interest due me is substantial. I wish to be credited with the accrued interest at closing.

Kindly schedule the closing ASAP.

However, defendants never scheduled the closing.

Plaintiffs' current attorney then wrote a letter dated June 10, 2004 to Andrew Berkman, Esq., who had been retained to represent Battery Place, reiterating plaintiffs' demand for a closing date.

By letter dated June 23, 2004, Berkman responded by stating, in relevant part,

> 2. It would seem to me (without further investigation and review) that there is both a laches and failure to prosecute question here;
>
> 3. I would think that 12 years of inaction does not set the stage for a claim that it is now time to perform under the contract.

Plaintiffs claim that this letter constituted the first indication that Battery Place would not be willing to reschedule a closing.

Plaintiffs then commenced the instant action, and by Amended Complaint[2] seek specific performance of the contract (first cause of action)[3] or, in the alternative, to recover money damages

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[2] After service of the Original Complaint, defendants moved to dismiss. When plaintiffs then served an Amended Complaint, defendants withdrew that motion.

[3] Plaintiffs contend that the Purchase Agreement remains in full force and effect because Battery Place did not seek to cancel the Agreement by declaring them in default in accordance with paragraph 15(B) of the Agreement.

against defendant Battery Place for breach of contract (second cause of action).

Alternatively, plaintiffs seek an order compelling defendants to return the $36,900.00 down payment, with accrued interest, based on defendant Battery Place's alleged breach of the Escrow Agreement, the Offering Plan, the Purchase Agreement, GBL §§ 352-e and 352-h (the "Martin Act"), Lien Law § 71-a(3) and the regulations of the Attorney General compiled at 13 NYCRR § 20.3 (third cause of action), and awarding damages against both defendants for breach of contract and breach of fiduciary duty (fourth cause of action).

Defendants now move for an order:

(1) dismissing all of the causes of action in plaintiffs' Amended Complaint for failure to state a cause of action and based on the applicable six-year statute of limitations (see, CPLR § 213[2]); and

(2) dismissing the third cause of action against both defendants and the fourth cause of action against defendant Battery Place, for lack of capacity.

Defendants argue in the first place that because plaintiffs asserted in the prior action that the contract had been breached

and, thus, terminated, "they are bound by their first choice, and may not now, in a separate action, claim that the contract was still valid and seek specific performance thereof (see, *Whalen v. Stuart*, 194 N.Y. 495, 505, 87 N.E.2d 819, *rearg. denied* 195 N.Y. 524, 88 N.E. 1134; additional citations omitted)." Greven v. Muir, 128 A.D.2d 753 (2nd Dep't 1987).

> "[T]he doctrine of estoppel against inconsistent positions precludes a party from 'framing his ... pleadings in a manner inconsistent with a position taken in a prior proceeding' (citations omitted). The doctrine rests upon the principle that a litigant 'should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise' (citation omitted).
>
> "'The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings (citation omitted). In short, 'where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position' (citations omitted)."

Piedra v. Vanover, 174 A.D.2d 191, 197 (2nd Dep't 1992). See also, Bergstol v. Town of Monroe, 305 A.D.2d 348 (2nd Dep't 2003), lv. to app. denied, 5 N.Y.3d 701 (2005); Secured Equities Investments, Inc. v. McFarland, 300 A.D.2d 1137 (4th Dep't 2002).

However, in order

> for an election of remedies to bar the pursuit of alternative relief, legal and equitable, a party must have chosen one of two or more co-existing inconsistent remedies, and in reliance upon that election, that party must have also gained an advantage, or the opposing party must have suffered some detriment. *Hill v. McKinley*, 254

App Div 283, 4 N.Y.S.2d 656 (1st Dept. 1938); (additional citations omitted).

Prudential Oil Corp. v. Phillips Petroleum Co., 418 F.Supp. 254, 257 (S.D.N.Y. 1975). See also, 331 East 14th St, LLC v. 331 East Corp., 293 A.D.2d 361 (1st Dep't 2002), lv. to app. denied, 98 N.Y.2d 727 (2002), rearg. denied, 99 N.Y.2d 569 (2002).

Thus, the Appellate Division, First Department, held in Hill v. McKinley, 254 A.D. 283 (1st Dep't 1938) that an action for rescission of an agreement which was discontinued did not bar a subsequent lawsuit based on that agreement since no final judgment was ever obtained in the first lawsuit, and there was no proof that plaintiff's original suit operated in any manner to defendant's detriment or that defendant changed his position in any way as the result of the commencement of that action.

Likewise, plaintiffs' prior action, which was ultimately discontinued and did not result in a final judgment, does not bar the instant action since plaintiffs did not gain an advantage nor did defendant Battery Place suffer any detriment in reliance on the remedies sought in that lawsuit.

Defendants alternatively argue that plaintiffs' claims are barred by the applicable statute of limitations and by the doctrine of laches because they accrued prior to 2000.

The Amended Complaint alleges that plaintiffs demanded rescission of the Contract and return of their down payment on numerous occasions between 1991 and 2000, and that defendants refused said demands as early as 1991.

Since more than six years elapsed after defendants refused plaintiffs' demand for the return of the down payment and prior to the commencement of this action on October 12, 2006, this Court finds that the third cause of action for return of the down payment (and the second cause of action to the extent that the parties deem it to seek a return of the down payment) are time barred.

However, this action was filed within six years from the date of DiBartolo's November 20, 2000 demand for performance of the contract. See, Lopez v. Highmount Associates, 101 A.D.2d 618, 619 (3rd Dep't 1984) which held that where, as here, no time for performance was fixed in the contract, "the six-year period did not begin to run until one of the parties to the agreement made a

specific demand for performance (citations omitted)."[4] Therefore, this Court finds plaintiffs' claims for specific performance and breach of contract are not barred by the statute of limitations.

Alternatively, defendants argue that "[u]nconscionable delay in prosecuting one's rights [under a contract] is also a ground for denying equitable relief, when the defendant was prejudiced thereby (citation omitted)" EMF General Contracting Corp. v. Bisbee, 6 A.D.3d 45, 53 (1st Dep't 2004), lv. to app. denied, 3 N.Y.3d 656 (2004). In addition, "a substantial increase in value combined with an unreasonable delay has also been held to warrant denying specific performance on grounds of laches," where the granting of specific performance "would result in injustice or inequity". EMF General Contracting Corp. v. Bisbee, supra at 54-55.

However, "the increase in market value of the property does not in itself create injustice or inequity." Id. Although the unit has increased substantially in value since the original contract date, defendant has been renting the unit out and has collected rent at market rate for much of this period.

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[4] Although defendants previously maintained that the contract was valid and should be performed, they agreed (as discussed infra) on February 18, 1992 to stay the closing and never subsequently sought to reschedule a closing nor otherwise make a formal demand for performance of the contract.

Thus, this Court finds that defendants have not met their burden on this pre-Answer motion to dismiss of showing that plaintiffs' delay in bringing this action constitutes an unconscionable or unreasonable delay sufficient to bar plaintiffs from asserting their claims under the doctrine of laches.

Therefore, that portion of the motion seeking to dismiss plaintiffs' claims for specific performance and breach of contract as barred under the doctrine of laches is denied at this time.

Defendants alternatively argue that plaintiffs' claim for specific performance should be dismissed because plaintiffs cannot establish that they were ready, willing and able to close on the unit. See, Zev v. Merman, 134 A.D.2d 555 (2nd Dep't 1987), aff'd, 73 N.Y.2d 781 (1988). Plaintiffs, however, contend that they have, in fact, been ready, willing and able to close, but that defendants have failed to comply with their obligations.[5] Thus, there are triable issues of fact which preclude the granting of this branch of the motion.

Finally, defendants argue that plaintiffs' fourth cause of action should be dismissed on the grounds that there is no private right of action under the Martin Act, which encompasses General

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[5] Plaintiff DiBartolo claims that a line of credit and/or family savings and investments were and still are available and sufficient to meet all of her financial obligations under the Purchase Agreement.

Business Law §§ 352-e and 352-h, (see, Nanopierce Techs., Inc. v. Southbridge Capital Mgmt., 2003 WL 22052894) or under the regulations of the Attorney General compiled at 13 NYCRR § 20.3 (see, Vermeer Owners, Inc. v. Guterman, 78 N.Y.2d 1114 [1991]), and that Lien Law § 71-a(3) does not apply to the sale of a single unit.[6]

The motion is thus granted to the extent of dismissing those portions of the fourth cause of action based on alleged statutory and regulatory violations.

Defendants shall serve Answers to plaintiffs' Amended Complaint as limited by this Decision within 20 days of service of a copy of this order with notice of entry.

A preliminary conference shall be held in IA Part 62, 60 Centre Street, Room 341 on April 30, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: March 10, 2008

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

[6] Defendants made the same argument as to the third cause of action, but this Court has already dismissed that cause of action on other grounds, infra.