

Gordon v Curtis

2008 NY Slip Op 33673(U)

July 11, 2008

Sup Ct, New York County

Docket Number: 112926/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Gordon

INDEX NO.

112926
42-969/07

- v -

MOTION DATE

Curtis

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 ...

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *to dismiss is granted*
in accordance with the attached memorandum
decision.

FILED

JUL 14 2008

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: _____

[Signature]

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon. DORIS LING-COHAN, Justice **PART 36**

GORDON, ANTHONY
Plaintiff,
-against-
CURTIS, CHRIS
Defendant.

ORDER

INDEX NO. 112926/07 MOTION DATE MOTION SEQ. NO 001

HON. DORIS LING-COHAN, J.S.C.:

This dispute over the sale of a New York City cooperative apartment located at 476 Broadway, Apt. 8F, New York, New York, dates back 10 years, to 1998, when the parties entered into a contract for sale, with a purchase price of \$774,000. The sale fell through in 1998, and plaintiffs' conjecture about the reasons for the collapse of the sale form the subject matter of this action.

When the apartment went back on the market in 2007, at a sale price of \$2.995 million, plaintiffs again approached defendants. Defendants claim that plaintiffs again sought to purchase the apartment. Plaintiffs claim that they sought to uncover the true story of why the sale did not go through in 1998. In any event, the parties did not enter into a new contract in 2007. Instead, plaintiffs commenced this lawsuit. In the intervening nine years, plaintiffs purchased a different apartment in the same building.

Plaintiffs now seek damages for defendants' conduct in connection with the contract entered into in 1998, based on allegations that defendants sabotaged the earlier sale in order to get a better price, along with allegations of fraud. Plaintiffs also seek specific performance of that contract.

Before the Court is defendants' motion to dismiss the complaint pursuant to CPLR

§3211 (a), or in the alternative for summary judgment pursuant to CPLR §3212, on the basis that: (1) the causes of action asserted are barred by the applicable statutes of limitations; (2) the causes of action asserted are barred by the doctrine of laches; and (3) the complaint fails to state a claim upon which relief may be granted.

There are three causes of action in the complaint, all of which refer back to the 1998 contract. The first cause of action states that plaintiffs have been damaged as a result of defendants conduct. The second cause of action states that plaintiffs are ready, willing and able to purchase the apartment at the agreed price of \$774,000. The third cause of action alleges that defendants induced the board of directors of the subject coop to decline approval of the sale to plaintiffs, and that if plaintiffs had known this, they would have refused the return of their deposit, and insisted on closing the sale. Defendants' misrepresentations are alleged to have been false when made, and to have been made with the intent to deceive and defraud plaintiffs, to induce them to agree to terminate the contract.

A threshold issue for the court to consider is the plaintiffs' almost 10-year delay in bringing this lawsuit. The six-year statute of limitations on the 1998 contract expired in 2004, long before this 2007 action was commenced.

Plaintiffs claim that the statute of limitations should be tolled since they only recently learned of defendants' complicity in sabotaging the 1998 sale of the apartment. CPLR 207. Plaintiffs argue that defendants absented themselves from the jurisdiction, by living in France, thereby frustrating personal service for nearly 10 years. Plaintiffs concede that the defendants' address in France was stated in the 1998 contract. Yet, they

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fail to explain why they did not attempt to gain personal jurisdiction over defendants using New York State's long-arm jurisdiction statute, which permits service outside the jurisdiction when the defendants own real property in New York. CPLR 302 (a) (4); *see also Beck v. Eins*, 305 AD2d 323 (1st Dept 2003) ("Cooperative corporations are a special form of ownership of real property [citation omitted]"). The tolling provisions of CPLR 207 do not apply in situations, such as the present one, where jurisdiction may be obtained over a defendant without personal delivery of the summons to the defendant within the state. CPLR 207 (3); *see Salamon v Friedman*, 11 AD3d 700, 701 (2nd Dept 2004).

Moreover, plaintiffs' claim for specific performance of a nine-year old contract for the sale of a cooperative apartment is barred by the doctrine of laches. *See Richardson v Vajiradhammapadip Temple*, 24 AD3d 649 (2^d Dept 2005). Plaintiffs' complaint fails to adequately allege the equities in their favor, or a lack of prejudice to defendants if this case is permitted to go forward. *See id.*; *Goodfarb v. Freedman*, 76 AD2d 565 (2nd Dept 1980). The second cause of action, for specific performance, is therefore dismissed.

Finally, plaintiffs have failed to sustain their burden of pleading with respect to the discovery rule for the limitations period applicable to fraud. The period of limitations on a claim for fraud is either six years from the date the cause of action accrued, or two years from the time the plaintiff discovered the fraud, or could have discovered it, with reasonable diligence. CPLR 213 (8), 203 (g). Plaintiffs concede that they were able to purchase another apartment in the same building that very same year, after being disapproved by the board in connection with their attempt to purchase defendants'

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apartment. Yet, plaintiffs failed to allege their own “reasonable diligence” in seeking out the reasons for the board’s disapproval of the sale of Apartment 8F, during the intervening nine years.

Nevertheless, even if this case was timely commenced and not barred by the relevant statutes of limitations and/or laches, defendants are entitled to dismissal of plaintiffs’ claims for failure to state a cause of action and based upon defendants having established a prima facie entitlement to judgment as a matter of law, which has not been sufficiently refuted.


Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted, and the complaint is hereby dismissed, with prejudice, costs and disbursements; and it is further

ORDERED that the Clerk shall enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiffs with notice of entry.

Dated: July 11, 2008



Hon. Doris Ling-Cohan, J.S.C.

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