

Benn v Benn

2009 NY Slip Op 33031(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 102344/2007

Judge: Doris Ling-Cohan

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12-30-09
do

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 102344/2007

BENN, ERIC

vs

BENN, STEFAN

Sequence Number : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for dismiss

PAPERS NUMBERED

1, 2
3, 4
5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

interim orders dated 6/11/08, 10/4/08, 10/19/09, 10/30/09, 10/12/07

Upon the foregoing papers, It is ordered that this motion

to dismiss by defendants

Stefan Benn v. ~~Stefan~~ Benn Co Properties, Inc. is granted in accordance with the attached memorandum decision.

(consolidated for disposition with motion seq. 002)

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

Dated:

12/21/09

[Signature]
J.S.C.

FILED
DEC 30 2009
NEW YORK COUNTY CLERK'S OFFICE
HON. DORIS LING-COHAN

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; PART 36**

ERIC BENN,)
)
Plaintiff,)
)
-against-)
)
STEFAN BENN, BENNCO PROPERTIES, INC.,)
BOARD OF MANAGERS OF LE TOULOUSE)
CONDOMINIUM,)
Defendants.)
-----)

Index No. 102344/2007
Motion Seq. No. 003 & 004

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

DORIS LING-COHAN, J.:

Defendant Stefan Benn (Stefan) moves (motion sequence number 002) for an order, pursuant to CPLR 3211 (a) (5), dismissing the second, third, fourth, fifth, seventh, and eighth causes of action upon the grounds that these claims are barred by the statute of limitations and/or the statute of frauds; pursuant to CPLR 3211 (a) (7), dismissing the first, second, fifth and sixth causes of action upon the ground that they fail to state a claim upon which relief can be granted; and pursuant to CPLR 6514, vacating the Notice of Pendency filed against the fourth and fifth floor apartments of the subject building.¹ By separate motion (motion sequence number 002), defendant Board of Managers of Le Toulouse Condominium ("Board of Managers") moves pursuant to CPLR 3211 (a) (7) dismissing the first, second, fourth, fifth, sixth, seventh and eighth causes of action of the complaint for failure to state a cause of action upon which relief can be granted, and pursuant to CPLR 3211 (a) (5), dismissing the second, third, fourth, fifth, sixth, seventh, and eighth causes of action of the complaint, upon the ground that the claims are barred by the statute of limitations and/or the

¹ The court notes that, as this case involves a family dispute between brothers, many hours have been spent trying to reach an amicable resolution, to no avail.

statute of frauds. Defendant Board of Managers also seeks costs of this motion and sanctions for the commencement and continuance of frivolous litigation.

According to Stefan, in 1994, he formed defendant BennCo Properties, Inc. (BennCo), an S-corporation, for the sole purpose of acquiring and developing the five-story building located at 79-81 East 2nd St. in Manhattan. He planned on turning this commercial building into five full-floor apartments, and eventually decided to turn them into condominiums. During the entire project, Stefan ran the project, acting as developer, construction manager, and general contractor.

At about the same time in 1994, Stefan's brother, plaintiff Eric Benn (Eric), was looking for an apartment. Stefan asked Eric if he wished to purchase a floor in the subject building and the brothers entered into a verbal agreement. According to Stefan, they agreed that, in exchange for a certain amount of money and a minimum of four days of labor a week on Eric's part for the full duration of the project, Eric would get title to the fourth floor.

Stefan claims that problems began to develop in 1995, when Eric would either come hours late or not show up at all. Despite Stefan's repeated requests that Eric come to work and perform as agreed, Eric continued in the same manner and eventually, in the Spring of 1995, ceased coming altogether. Stefan attributes Eric's behavior to his involvement in his own project in Manhattan, the leasing and renovation of a champagne bar and lounge called the Bubble Lounge. Eric signed the lease for such property in the spring of 1995 and opened in early 1996. Thereafter, a second branch of the lounge was opened in San Francisco.

Since Stefan had no interest in Eric's projects, Stefan felt it was unfair that Eric was spending all his time at his own project and not fulfilling his obligations at the subject premises. This led to a meeting in 1996 between the two brothers, in front of their mother, where the agreement was renegotiated.

According to Eric, however, the facts are as follows. As far back as 1993, the brothers were interested in purchasing a building together in which they could both reside, and they eventually found the subject property. The cost of the building was approximately \$480,000.00, and they estimated that it would take another \$520,000.00 to renovate. Since neither brother had the cash, nor the requisite credit history to borrow the money, they borrowed it from their mother, non-party Chantal Toulouse. The plan was to convert each floor into a single apartment, with each brother getting to keep one apartment and the other three units being sold to repay their mother. Neither brother was expected to provide personal funds for the project.

Stefan formed BennCo. to acquire the property on behalf of both brothers. According to Eric, in July of 1994, an initial deposit was made for the purchase of the property, and on September 13, 1994, BennCo entered into a contract to purchase the property on behalf of both brothers.

Eric further points out that they expected the whole project to take 12 months, and that since both brothers were quite handy, they were going to do much of the renovation

work themselves, leaving the electrical, plumbing and similar work to the licensed tradespeople.

Eric continues that, since Stefan had an MBA/MIA from Columbia University and a degree from Pratt University in construction, he acted as project manager and, in return, would receive the penthouse apartment and roof rights, while Eric would get the fourth floor apartment. Eric further claims that, although there was never any agreement as to what days and hours they would work, he provided at least four days a week from the time they started work on the project, on or about March 1994, which was six months before BennCo signed the contract of sale, and fulfilled all his work obligations. Eric states that it was only on August 1, 1996, when the project was near completion, that he signed a lease for what would become the Bubble Lounge.

In October 1995, Eric moved into his apartment, and Stefan moved into his apartment in 1996. In 1996, the first three floors were sold. According to Eric, some time in 1995, their mother forgave \$560,000.00 of the loan on condition both brothers received an apartment in the project and that both brothers divide equally the benefit of the loan forgiveness.

It was at the meeting in front of their mother in 1996, where Stefan claims that the agreement was renegotiated, that Eric claims he first found out that Stefan felt there was a problem; both brothers disagree as to what was agreed to at this meeting.

According to Stefan, at the time of this meeting, “my brother proposed, as compensation for his breach of agreement, that he could live on the fourth floor rent free (provided he pay for the common charges and assessments) and that when the Unit was sold to a third party, I would pay over to him the [m]oney he invested. I accepted his offer. At that point, he was no longer to receive the deed to the Unit but only permitted to occupy the Unit and pay the common charges, which he has done, accounting for the terms of his occupancy stated in the complaint.” Stefan affidavit paragraph 8.

Eric vehemently denies that he ever agreed to give up the right to title to his own apartment, and claims that Stefan never stated that the apartment would not be Eric’s or that Eric would not get a deed. Eric states, “later, for the sake of keeping peace, I offered to pay him for any costs he believed he had incurred to offset my perceived labor shortfall and even offered him the capital gains on my apartment if and when I, not he, sold it.” Eric affidavit, paragraph 20.

On September 20, 1996, the offering plan became effective and for the first time BennCo became legally capable of delivering deeds to the units. According to Stefan, sometime in 1996, Eric began to demand that he be given title to “his” unit, but Stefan refused, based on his understanding of their new agreement. On February 19, 2004, both the fourth and fifth floor apartments were deeded over from BennCo to Stefan.

According to Eric, he first learned that both apartments were transferred to Stefan in 2005, when his accountant questioned certain tax deductions. This led to Eric

inquiring into the title of the apartments for the first time, and this is how Eric learned that both apartments had been put in Stefan's name. After Eric learned of the transfer, he demanded that his apartment be transferred to his own name. On or about February 16, 2007, when Eric's claims could not be resolved amicably, he commenced the instant action.

The action contains eight causes of action. The first cause of action seeks an accounting of all money received by each defendant related to the project, and all profits of the project, and to pay over to Eric all money found due him based on said accounting. The second cause of action seeks an order imposing a constructive trust on plaintiff's behalf upon the assets of Stefan and BennCo, which represent all property due Eric. The third cause of action seeks \$3,000,000.00 in damages based on a theory of fraud. The fourth cause of action seeks the recovery of the same \$3,000,000.00 on a theory which sounds in breach of contract. The fifth cause of action seeks the recovery of the same \$3,000,000.00 on a theory of conversion. The sixth cause of action seeks an order piercing the corporate veil. The seventh cause of action seeks an order directing defendants to deed the fourth floor apartment to Eric. The eighth cause of action seeks to recover the same \$3,000,000.00 on a theory of unjust enrichment.

The gravamen of the six causes of action, which defendants seek to have dismissed based on the statute of limitations, is that defendants wrongfully failed to transfer title to the fourth floor apartment to Eric. Thus, the six-year statute of limitation for constructive trust, fraud, breach of contract, specific performance, and unjust enrichment and the three-year statute of limitation for conversion began to run when defendants first allegedly

wrongfully failed to transfer the apartment to Eric. According to Stefan, this happened on September 20, 1996, when the offering plan became effective and for the first time BennCo became legally capable of delivering deeds to the units. According to Eric, this happened on February 19, 2004, when both the fourth and fifth floor apartments were deeded over from BennCo to Stefan.

Both brothers, however are incorrect.

”A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition (see Augustine v Szwed, 77 AD2d 298, 300-301 [4th Dept 1980]; Bey Constr. Co. v Yablonski, 76 AD2d 875 [2nd Dept 1980]), or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property (see Augustine v Szwed, *supra* at 301) (Maric Piping v Maric, 271 AD2d 507, 508 [2nd Dept 2000]; Sitkowski v Petzing, 175 AD2d 801, 802 [2nd Dept 1991]).”

Morando v Morando, 41 AD3d 559, 561 (2nd Dept 2007).

Thus, in the case at bar, where the claim is not based on BennCo wrongfully acquiring the disputed apartment but on the defendants wrongfully refusing to transfer it to Eric, the statute of limitations began to run when Eric first asked to have the apartment transferred to him and the defendants refused. Jakacic v Jakacic, 279 AD2d 551, 552 (2nd Dept 2001). The alternative statute of limitation for fraud, which is two years from the time plaintiff discovered the fraud or with reasonable diligence could have discovered it (CPLR

213[8]), also runs from the point at which Eric knew, or should have known, that Stefan did not intend to transfer the apartment to him.

As noted earlier, the brothers disagree as to when Eric first requested that the apartment be transferred to him. Stefan claims that Eric began to demand that he be given title to “his” unit in 1996, while Eric claims that he did not demand that he be given title until 2005.

“On a CPLR 3211 motion made against a complaint, a court must take the allegations as true and resolve all inferences which reasonably flow therefrom in favor of the pleader (see, Sanders v Winship, 57 NY2d 391, 394 [1982]). In opposition to such a motion, a plaintiff may submit affidavits ‘to remedy defects in the complaint’ and ‘preserve inartfully pleaded, but potentially meritorious claims’ (Rovello v Orofino Realty Co., 40 NY2d 633, 635, 636 [1976]; but see, American Indus. Contr. Co. v Travelers Indem. Co., 42 NY2d 1041, 1043 [1997]). Though limited to that purpose, such additional submissions of the plaintiff, if any, will similarly be ‘given their most favorable intendment’ (Arrington v New York Times Co., 55 NY2d 433, 442 [1982]).”

Cron v Hargro Fabrics, 91 NY2d 362, 366 (1998). However, the court is not required to shut its eyes to the patent falsity of a claim. MRI Broadway Rental v United States Min. Prods. Co., 242 AD2d 440, 443 (1st Dept 1997), affd 92 NY2d 421 (1998); Sexstone v Amato, 8 AD3d 1116, 1117 (4th Dept 2004).

Here, in an e-mail to Stefan dated January 27, 2007, Eric writes, “Again, during our conversation I told you that I would not make any changes to our Hillside Association (another joint venture of the brothers not related to this case) until I have my apartment in my

name. This is an issue which has been lingering for over a decade and which was never fully resolved at any time during the project's process or since. I continue to invite you to resolve this immediately and remain open to selecting an independent mediator to help us develop logical consequences that are related, respectful and reasonable." Thus, Eric admits that the brothers have been disagreeing about putting the apartment in Eric's name for over a decade.

This was not the only admission made by Eric. Eric also wrote to Stefan in an e-mail dated December 5, 2006, "It has been over a decade that we have been going back and forth about my apartment and I need a written contract, agreement, or lease regarding what you see as a fair consequence for my supposedly not having respected a portion of our oral agreement in the mid 1990's." In an e-mail dated February 13, 2007, Eric wrote to Stefan, "The 'battle' began in 1995-1996. The value of my apartment at that time, fair market value as noted on the official 1996 Offering Plan, was \$550,000. The fact that it has taken over a decade to hopefully conclude this issue is not related to the case, nor are the capital gains on the apartment related to the issue."

Given the admissions made in these e-mails sent in 2006-7, Eric's claim that it was only in 2005 that he first asked to have the apartment put in his name, and only then realized that Stefan did not intend to transfer title to him, and only then began to have a dispute with Stefan about the apartment is incredible. MRI Broadway Rental v United States Min. Prods. Co., 242 AD2d at 443. The e-mails show that Eric admitted that the brothers were in disagreement over ownership of the apartment, for over a decade. Since this action was

commenced well after the two-year and six-year statutes of limitation had run, the second, third fourth, fifth, seventh, and eighth causes of action must be dismissed.

Plaintiff argues that even if the statute of limitations has run on these actions, moving defendants should be estopped from raising this defense:

“The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense.

‘Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant’s affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding’ (General Stencils v Chiappa, 18 NY2d 125, 128 [1966]).

Thus, this Court has held that equitable estoppel will apply ‘where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action’ (Simcuski v Saeli, 44 NY2d 442, 448-449 [1978]). Moreover, the plaintiff must demonstrate reasonable reliance on the defendant’s misrepresentations (see Simcuski, 44 NY2d at 449).”

Zumpano v Quinn, 6 NY3d 666, 673-674 (2006).

"It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit (see Matter of Steyer, 70 NY2d 990, 993 [1988]).

id. At 674.

Here, as demonstrated by the e-mails previously discussed, plaintiff was aware of Stefan's refusal to convey the apartment for a decade and was thus aware of the requisite facts necessary to commence an action. Accordingly, there is no basis for invoking estoppel.

While the court need not reach the following issue based upon the above determination, arguably, the second, third, fourth, fifth, seventh and eighth causes of action, which are based upon an alleged breach of an oral agreement for the conveyance of real property, are barred by the statute of frauds. *See* General Obligations Law §5-703.

When legal and equitable remedies exist as to the same subject matter, the equitable remedies are subject to the same statutory time bar as the legal remedies. Gold Shipping Limited v Ionian Transport Inc., 245 AD2d 420 (2nd Dept 1997); Schreibman v Chase Manhattan Bank, 15 AD2d 769 (1st dept 1962). Here, the first cause of action for an accounting and the sixth cause of action to pierce the corporate veil are both equitable remedies which seek to recover under the same subject matter that the conversion and breach of contract actions seek to recover. Thus, since the legal actions can no longer be maintained, these actions can no longer be entertained.

Moreover, the only purpose for the accounting in this action is to determine the amount and recover the damages sustained by plaintiff because of the alleged wrongful refusal to transfer the apartment to his name. Since plaintiff is timed-barred from claiming title to the apartment, he cannot maintain an action to recover any damages that are related to that.

In the same vein, piercing the corporate veil is for the sole purpose of collecting from the corporate owners any claim against the corporation. Since all the claims are being dismissed as against the moving defendants, there is no reason to continue this action as against these defendants.

Further, since the complaint is being dismissed as against Stefan and BennCo, the notice of pendency against the apartments in Stefan's name should be vacated.

Moreover, as there are no causes of action asserted specifically against the Board of Managers, there is no basis for maintaining this action against defendant Board of Managers; thus, defendant Board of Managers' motion to dismiss is granted. That portion of the Board of Managers motion which seeks costs and sanctions is denied.

While this court is constrained to dismiss this case based upon legal grounds, nevertheless, the parties are encouraged to resolve this family dispute amicably.²

For the foregoing reasons, it is

ORDERED that both motions to dismiss are granted and the complaint is dismissed in its entirety; the Clerk is directed to enter judgment in favor defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that Notice of Pendency of Action filed against the units known as R-3 and R-4 in the building known as 79-81 East 2nd St. and which are identified on

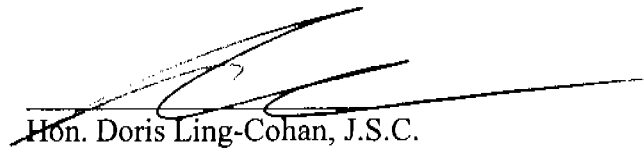
² The court has repeatedly tried to settle this case.

the tax map of the State of New York, County of New York as block 443 lots 1004 and 1005 are vacated; and it is further

ORDERED that upon being served with this order the County Clerk shall remove said Notice of Pendency of Action from the files; and it is further

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

Dated: December 21, 2009



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

J:\Dismiss\benn v benn\Benn v Benn.wpd