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

PRESENT: **HON.** JOAN A. MADDEN *Justice* **PART** 11

ROBERT BURTON,

Plaintiff,

- v -

1580 EAST 13TH STREET OWNERS CORP.,

Defendant.

INDEX NO.: 108229/10

MOTION DATE:

MOTION CAL. NO.

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ~~[X] Yes~~ [ ] No

Upon the foregoing papers, it is ordered that the this motion and cross-motion are determined in accordance with the annexed decision and order.

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 18, 2011

_____
J.S.C.

Check one: ~~[X]~~ **FINAL DISPOSITION** **[ ] NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ROBERT BURTON,

Plaintiff,

-against-

1580 EAST 13TH STREET OWNERS CORP.,

Defendant.

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INDEX NO. 108229/10

JOAN A. MADDEN, J.:

Defendant moves for an order pursuant to CPLR 3211(a) dismissing the complaint on grounds of res judicata, statute limitations, unclean hands, failure to state a cause of action and lack of standing. Plaintiff opposes the motion and cross-moves for an order pursuant to CPLR 3212 granting summary judgment on the four causes of action in his complaint.

On June 22, 2010, plaintiff pro se commenced this action by filing a Summons and Verified Complaint, seeking declaratory relief, compensatory and punitive damages, and attorney's fees. On or about July 12, 2010, defendant filed a Verified Answer. Plaintiff subsequently served but did not file a second Verified Complaint dated July 22, 2010, which adds a fourth cause of action.[1] Since both defendant's motion and plaintiff's cross-motion are

[1]The court's records do not indicate that the July 22, 2010 complaint was filed. However, defendant's motion papers state that "in lieu of an Answer to plaintiff's second Verified Complaint, defendant is making a motion to dismiss pursuant to CPLR 3211(a)." Also, plaintiff is cross-moving for summary judgment on the four causes of action in the July 22, 2010 complaint.

directed at the July 22, 2010 complaint, the court will likewise do so, and all references to the "complaint" in this decision mean the July 22, 2010 complaint.

The first cause of action alleges that plaintiff is the "current legal owner" of units 2-F and 5-L in the cooperative building located at 1580 East 13th Street in Brooklyn, New York; defendant 1580 East 13th Street Owners Corp., is the cooperative corporation that owns the building (the "co-op," or "1580"). The complaint alleges that non-party Dan Stubbs originally purchased the two apartments from the sponsor in 1986, and Stubbs "assigned" his interest in the apartments to plaintiff in 2001 The complaint also alleges that "[s]tarting in early 2005, plaintiff repeatedly asked 1580's managing agent, Bob Gambale, and lawyer, Joseph Kornfeld, to issue stock certificates and proprietary leases for the Apartments [2-F and 5-L] to him in his name and to acknowledge their status as 'Unsold Shares,'" and that defendant "did not respond to those requests in good faith, but instead responded by asserting a series of sequentially different objections, each of which was known to be factually and/or legally baseless."

The first cause of action asserts that defendant's "refusal to issue stock certificates and proprietary leases for apartments 2-F and 5-L to plaintiff was (i) a disparagement of plaintiff's title to those apartments, and (ii) a breach of its fiduciary duties to plaintiff," and seeks the following relief: 1) a declaratory judgment that plaintiff is the "holder of unsold shares" as defined by in paragraph 37(a) of the proprietary lease, and as such, plaintiff can sublet apartments 2-F and 5-L without the consent of defendant's directors, shareholders or managing agent; 2) an order directing defendant to issue plaintiff stock certificates and proprietary leases for apartments 2F and 5L "in accordance with the unsold share provisions of paragraph 37" of the proprietary

lease; 3) attorney's fees; and 4) punitive damages in the total sum of $5,000,000, for bad faith breach of contract ($1,000,000), breach of fiduciary duty ($1,000,000), disparagement of title ($1,000,000) and intentional infliction of emotional distress ($1,000,000).

The second cause of action alleges that the subtenant of apartment 5-L stopped paying rent in March 2009, and as a result plaintiff commenced a non-payment proceeding in Kings County Civil Court, which was initially dismissed for plaintiff's lack of standing, but after reargument, plaintiff ultimately prevailed in April 2010 and secured a judgment of possession and a money judgment of approximately $5,150. The complaint alleges that in July 2009, plaintiff received an offer to rent 5-L, which he lost when the subtenant did not move out until sometime in October 2009. In December 2009, plaintiff alleges he lost another offer to rent 5-L after the prospective tenant learned that the stock certificate and proprietary lease for the apartment were not in plaintiff's name. The second cause of action alleges that "long before July 2009," plaintiff informed defendant's managing agent, that the failure to issue the stock certificate and proprietary lease for 5-L "might impair or prevent plaintiff's prosecution" of the non-payment proceeding, and defendant's failure to do so "constituted an actual eviction of plaintiff from apartment 5-l, because it denied that plaintiff possessed the right to lawfully occupy and sublet apartment 5-L."

The third cause of action relates to a separate apartment in the same building, apartment 2-N, which plaintiff alleges he purchased in 1986. The third cause of action alleges that plaintiff sublet apartment 2-N in 1986 or 1987, and that defendant tortiously interfered with the subtenant's lease, by telling him the sublet was "illegal," and as a result the subtenant ceased

paying rent totaling more than $10,000. The third cause of action further alleges that plaintiff filed for bankruptcy in 1991, and "sometime in 1992 or 1993 [defendant] entered into possession of apartment 2-N and began renting that apartment out," and "sometime between 2005 and 2007," defendant sold apartment 2-N. The third cause of action asserts that defendant "has never accounted to plaintiff" for the net proceeds of the sale or the net rental income for 1992-1993, alleges that plaintiff is entitled to such amounts, and seeks an accounting and judgment for such amounts.

The fourth cause of action objects to the content of defendant's answer, which is verified by counsel. The fourth cause of action alleges that defendant's counsel "falsely sworn under oath . . . that it lacked 'knowledge or information sufficient to form a belief as to the truth' of the facts cited" in certain paragraphs in the complaint, and that those "false denials" are "directly impeached by documents or business records authored, prepared, maintained or received by agents" of defendant. Alleging that such "false denials" were made with the "specific intent of impeding, impairing, frustrating and/or undermining plaintiff's ability to prevail on his three claims," and the "separate specific intent of defrauding plaintiff of judgment upon his claims," the fourth cause of action seeks an order striking defendant's answer or an order of preclusion.

Defendant is now moving to dismiss the complaint on grounds of res judicata, statute of limitations, unclean hands, failure to state a cause of action and lack of standing.

It is not disputed that on or about June 30, 2007, plaintiff, as represented by counsel, commenced a prior action in Supreme Court, County of Kings entitled Dan Stubbs and Robert Burton v. 1580 East 13th Street Owners Corp., Joseph Kornfeld, Esq. and Steve Glass, Index No.

6103/07. The prior complaint asserted one cause of action (First Cause of Action) for a declaratory judgment that apartments 2-F and 5-L "qualify as and constitute 'Unsold Shares' as defined in paragraph 37(a) of the proprietary lease," and an order directing defendant 1580 East 13th Street Corporation to issue Burton stock certificates and proprietary leases for apartments 2-F and 5-L "in accordance with the Unsold Shares provisions of paragraph 37 of the proprietary lease." As additional relief, the prior complaint sought: 1) punitive damages for bad faith breach of contract ($500,000), harassment ($500,000) and intentional infliction of emotional distress ($1,000,000); and 2) "attorney's fees as damages" for breach of the covenant of quiet enjoyment, slander of Burton's title to apartments 2-F and 5-L, and bad faith breach of the coop's contract with plaintiff Stubbs in failing "to honor the Unsold Share provisions of the proprietary lease."

The prior complaint alleged that plaintiff Burton is the "equitable owner of the stock certificates and proprietary leases for apartments 2-F and 5-L at 1580 East 13th Street, Brooklyn, New York," that Burton purchased the apartments from Dan Stubbs on May 14, 2001, and that Stubbs "assigned" his status as a holder of "unsold shares" to Burton. The prior complaint also alleged that "[i]n December 2002, Mr. Burton formally requested that 1580 issue him stock certificates and proprietary leases for the Apartments [2-F and 5-L] and that it acknowledge that both apartments qualify and constitute 'Unsold Shares' as defined in paragraph 37(a) of its proprietary lease," and that "[o]n December 13, 2002, 1580's then managing agent Larry Bernstein, Esq. of Jonas Equities rejected Mr. Burton's Unsold Share and stock/lease requests on the basis of the Second Department's 1998 ruling in Gorbatov v. Gardens 75th Street Owners Corp., 247 AD2d 440" (¶15 and 16). The prior complaint further alleged that "[s]tarting in early

2005, Mr. Burton repeatedly asked 1580 to issue stock certificates and proprietary leases for the Apartment to him in his name, and to acknowledge their status as 'Unsold Shares,'" and that "[d]efendant 1580 responded to those requests by asserting a series of sequentially different objections" (¶17 and 19).

On April 2, 2008, the complaint in the prior action was dismissed. Defendant made what it characterizes as a "motion to dismiss/compel," which was on the court's calendar for April 2, 2008. After the second and final call of the calendar, the court questioned defendant's counsel, "Based on the default of your adversary, what relief do you request of the Court?" and counsel answered, "Plaintiff's complaint be dismissed." The court responded, "That is acceptable. The motion by defendants 1580 East 13th Street Owners Corp. and Steve Glass is hereby granted on default and plaintiff's complaint is hereby dismissed." At the same time the court issued a short-form order stating: "Motion by defendants 1580 East 13th Street Owners Corp & Steve Glass is hereby granted on default and plaintiff's complaint is dismissed." Plaintiff subsequently moved to vacate the default and the April 2, 2008 order of dismissal, which the court denied by an order dated June 3, 2009; judgment was entered in defendants' favor dismissing the complaint in its entirety on August 18, 2009.

Based on the foregoing, this court concludes that the first cause of action is not barred the doctrine of res judicata. Even though the allegations and the relief sought in the prior action are virtually identical to those in the instant action, the prior action was dismissed based on plaintiff's failure to appear at a scheduled call of the calendar, which is not a dismissal on the merits for res judicata purposes. See 22 NYCRR 202.27(b); Franchise Acquisitions Group Corp v. Jefferson Valley Mall Limited Partnership, 73 AD3d 1123 (2nd Dept 2010).

The first cause of action, which primarily seeks declaratory relief, must be dismissed, however, on statute of limitations grounds. Since the CPLR does not prescribe a specific limitations period for a declaratory judgment action, the applicable statute of limitations for such an action depends on the underlying claim and the nature of the relief sought. See Vigilant Insurance Company of America v. Housing Authority of the City of El Paso, Texas, 87 NY2d 36, 40-41 (1995); Solnick v. Whalen, 49 NY2d 224, 229 (1980); Rosenthal v. City of New York, 283 AD2d 156 (1st Dept), lv app dism 97 NY2d 654 (2001). If the nature of the underlying action reveals that the dispute could have been resolved through a specific action or proceeding for which a specific limitations period is prescribed, that limitations period is applicable. Vigilant Insurance Company of America v. Housing Authority of City of El Paso, Texas, supra; See Solnick v. Whalen, supra. Otherwise, the six-year catch-all statute of limitations set forth in CPLR 213(1) applies. See Vigilant Insurance Company of America v. Housing Authority of City of El Paso, Texas, supra; Solnick v. Whalen, supra.

For the purposes of the instant motion, this court will assume without deciding that the longer six-year limitations period applies to the first cause of action, since even applying the longer period, the first cause of action is time-barred. A question exists, however, as to when the first cause of action accrued. The Court of Appeals has stated that "a cause of action does not accrue until an injury is sustained," and that "[a]n action accrues, then when all of the facts necessary to sustain the cause of action have occurred, so that a party could obtain relief in court." Vigilant Insurance Company of America v. Housing Authority of City of El Paso, Texas, supra at 43.

Here, the primary relief sought in the first cause of action is: 1) a judgment declaring that plaintiff is the "holder of unsold shares" as defined by paragraph 37(a) of the proprietary lease, and as such, plaintiff can sublet apartments 2-F and 5-L without the consent of defendant's directors, shareholders or managing agent; and 2) an order directing defendant to issue plaintiff stock certificates and proprietary leases for apartments 2F and 5L "in accordance with the unsold share provisions" of paragraph 37(a) of the proprietary lease. The record establishes that a justiciable controversy first arose as to plaintiff's status as the holder of unsold shares, and his right to stock certificates and proprietary leases in accordance with that status, on December 13, 2002, when plaintiff admits that defendant first rejected his request for the issuance stock certificates and proprietary leases reflecting such status. See Stein v. Garfield Regency Condominium, 65 AD3d 1126 (1st Dept 2009); Stern v. BSL Development Corp, 163 AD2d 35 (1st Dept 1990); 1046 Amsterdam Avenue Housing Development Fund Corp v. Gomez, 1 Misc3d 901(A) (Civ Ct, NY Co 2003). In reaching this conclusion, the court relies on plaintiff's informal judicial admissions in the verified complaint in the prior action, which contains sworn statements by plaintiff that in December 2002 he "formally requested" that defendant issue him stock certificates and proprietary leases for the apartments and acknowledge that both apartments constitute unsold shares," and that "[o]n December 13, 2002, 1580's then managing agent Larry Bernstein, Esq. of Jonas Equities rejected Mr. Burton's Unsold Share and stock/lease requests." See Liquidation of Union Indemnity Insurance Company v. American Centennial Insurance Co, 89 NY2d 94, 103 (1996); Ocampo v. Pagan, 68 AD3d 1077, 1078-1079 (2nd Dept 2009). Plaintiff's foregoing sworn statements as to the December 2002 request and rejection appear to have been deliberately omitted from the complaint in the instant action. The instant complaint

solely alleges that plaintiff's requests and defendant's rejections did not "start" until 2005, which would conveniently make plaintiff's claim timely. Also, contrary to plaintiff's argument, the doctrine of a continuous or recurring wrong is not applicable to the facts in this case.[2]

The second cause of action for actual eviction is dismissed for failure to state a cause of action. Viewing the facts as alleged in the complaint as true and affording plaintiff the benefit of every possible favorable inference, see Leon v. Martinez, 84 NY2d 83, 87-88 (1994), the complaint does not allege any facts establishing that plaintiff was actually evicted, i.e. physically expelled or excluded from the premises, see Barash v. Pennsylvania Terminal Real Estate Corp, 26 NY2d 77, 82 (1970). Moreover, since the second cause of action is based on defendant's alleged failure to provide plaintiff with a proprietary lease and stock certificate for apartment 5-L as the "holder of unsold shares," the second cause of action is dependent on the viability of the first cause of action, which as determined above, is time-barred.

The third cause of action is also untimely, as it alleges a tortious interference that occurred in 1986 or 1987, which is barred by the applicable three-year statute of limitations. See Amaranth LLC v. JP Morgan Chase & Co, 71 AD3d 40, 48 (1st Dept 2009), lv appeal dism and denied, 14 NY3d 736 (2010). To the extent the third cause of action also alleges that defendant improperly acquired an ownership interest in unit 2-N, and that plaintiff is entitled to the rental income from that apartment from 1992 and 1993, and the proceeds of the sale of that apartment in February 2005, any claim based plaintiff's prior ownership interest in that apartment is

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[2]The court makes absolutely no determination as to whether plaintiff has a viable and timely claim for a declaratory judgment that he is entitled to stock certificates and proprietary leases for apartments 2-F and 5-L as a shareholder *other than* as a shareholder of unsold shares within the meaning of paragraph 37(a) of the proprietary lease.

likewise time-barred, since such claim accrued at the latest in August 1992, when defendant purchased apartment 2-N at auction.

Finally, the fourth cause of action which merely objects to the content of defendant's answer as "false denials," does not constitute a legally cognizable claim.

Based on the foregoing, defendant's motion to dismiss the complaint is granted, and plaintiff's cross-motion for summary judgment is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

DATED: ~~September~~ October 18, 2011

ENTER:

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.