

**Walker St. LLC v 55 Walker St. Loft Corp.**

2011 NY Slip Op 33775(U)

May 23, 2011

Supreme Court, New York County

Docket Number: 600779/2006

Judge: Milton A. Tingling

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

PRESENT: Milton A. Tingling  
Justice

PART 44

Walker Streets LLC  
- v -  
55 Walker Street Loft Corp.

INDEX NO. 600779/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*Decision in accordance with attached  
memorandum of decision*

*S/O*

Dated: 5/23/11

MCA  
Judge Milton A. Tingling 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-COUNTY OF NEW YORK

**PRESENT: Honorable Milton A. Tingling**  
Justice

Part **44**

-----X

Index No.: 600779/2006

Walker Street LLC,

Plaintiff,

-against-

Decision

55 Walker Street Loft Corp.,  
Andrew Ellingson Beck, III

Defendants.

-----X

The Defendant's 55 Walker Street Loft Corp. (55 Loft) and Andrew Ellingson Beck, III (Beck) move for an order, pursuant to CPLR 3212, granting summary judgment to defendants and for such other and further relief as the Court may deem just and proper.

In their complaint, the Plaintiff Walker Street, LLC (Walker) seeks monetary and equitable relief for an alleged encroachment by a balcony upon asserted development rights. Walker is the owner of a commercial condominium unit located at 55 Walker Street, New York, New York. 55 Loft is the owner of the residential condominium unit at the same location. Beck is the owner of the second floor apartment. Walker alleges that their unused development rights were infringed upon by the defendants construction of an alleged unauthorized balcony.

In December, 2009, the Board of Managers of The 55 Walker Street Condominium (Bd. of Mgrs.) suing on behalf of its unit owners, brought an action against Walker for failure to pay common charges, assessments, late charges and interest. The complaint alleged that 55 Walker Street, the commercial unit had failed to pay monies owed when the building was converted to condominiums. The complaint also sought a judgment of foreclosure with respect to a lien.

Walker, by Mordechai Lipkis answered and asserted counterclaims. The Board of Managers moved for orders striking the answer with counterclaim, granting summary judgment and the appointment of a receiver for the commercial unit.

By prior decision of the Honorable Alice Schlesinger, an order was issued granting summary judgment to the extent of directing a money judgment for the Board of Managers against Walker in the amount of \$ 42,029.35 (inclusive of attorneys fees) and severing and continuing the counter claims for trial. The counterclaims of Walker and other defendants were dismissed without prejudice. Walker then proceeded to bring this action.

Mordechai Lipkis was both an attorney and a sponsor of the building located at 55 Walker Street. Between 1987 and 1988 the building was converted to a "cond-op." A Cond-Op is a building converted into essentially two condominiums, a commercial and a residential. After this is done the residential portion becomes a co-operative.

The current owner of the residential unit is 55 Walker Street Loft Corp. (55 Loft) which sponsored the offering of shares which included four (4) apartments in 55 Loft. The owners of the commercial unit was transferred to Walker Street LLC (Walker). In or about 1989, David Nicholls, owner of the second floor apartment unit at 55 Walker Street constructed a balcony at the rear of the building's second floor. In June 1999, Andrew Ellington Beck III purchased the interest of Nicholls in the Co-op and received the propriety lease for the second floor unit.

Movants assert that the complaint should be dismissed pursuant to applicable Statute of Limitations. All claims sounding in tort are subject to a three (3) year statute of limitations. (See CPLR 214 (4). All Non UCC claims sounding in contrast are subject to a six (6) year statute of limitation. (See CPLR 213(2)

**It is uncontested that the complaint generating event, namely, the building of the complaint of the balcony took place in or around 1989.**

**Movant also seeks dismissal based upon consideration and application of principals founded in laches. Laches may be asserted where neglect in promptly asserting a claim for relief causes prejudice to one's adversary and may operate as a bar to the relief sought.**

**Again, it is uncontested that Plaintiff first asserted any legally cognizable claim regarding the balcony by way of a counterclaim alleged in an order against it under Index No. 125615/00 (See Exhibit C to the motion.)**

**Movant also claims that at a minimum there is an easement by prescription.**

**The Plaintiff responds by an affidavit of the managing member of the plaintiff, Mordechai Lipkis (Lipkis).**

**Lipkis alleges that the balcony was built without the required approval of the Department of Buildings (DOB) and that the Plaintiff had expressed objections from the very inception. A letter from Lipkis to David Nicholls and 55 Loft, expresses his concerns and objections to the balcony. In 1999, the defendant 55 Loft notified defendant Beck of Lipkis's objections. Defendant 55 Loft received an indemnification agreement from seller Nicholls regarding the balcony.**

**In the year 2000, 55 Loft brought a foreclosure action against Walker. As and for a first counterclaim Walker alleged that 55 Loft has permitted the construction of a balcony at the rear of the second floor at 55 Walker Street in violation of the building codes of New York City.**

**The action there concluded with the court (Honorable Schlesinger) decided that the only issues left for her to resolve involved the dismissal of counter claims by plaintiff herein. Justice**

Schlesinger decided that the balcony is a continuing condition, which is not affected by a Statue of Limitation. (The Court notes that in spite of that ruling, the movant argues the statue of limitations should be applied to the case. The Court also notes that movant did not reference or attach a copy of Justice Schlesinger's decision, an omission the Court will factor into the ultimate decision on this motion). She also ruled at the time that our easement by prescription was an issue not yet sufficiently developed at that time.

Movant seeks dismissal on three primary grounds. 1) The claims are barred by the applicable Statue of Limitations. 2) The claim should be barred by the doctrine of Latches. 3) Plaintiffs claims are without merit and should be dismissed.

As previously stated, movant failed to apprise the Court that Justice Schlesinger had already ruled that the statue of limitations defense was inapplicable.

The motion to dismiss based upon statue of limitations is denied.

As to the issue of latches, the plaintiff's submit that it too must be denied because latches requires a demonstration that Defendant was prejudiced by the delay and that defendant lacked knowledge Plaintiff would assert the claim. Questions of fact exist as to the issue of latches precluding summary judgment.

The motion to dismiss based upon latches is denied.

Finally, movant asserts claim of easement by prescription. Again, the movant failed to apprise the Court of Judge Schlesinger's ruling that "such an easement must be a claim under a claim of legal right, which this balcony was not, since it was built without a required permit from the City."

The motion to dismiss based upon easement by prescription is denied.

Settle order on notice.

5/23/11  
Date

MAK  
Judge Milton S. Tingling