

**West Chelsea Bldg. LLC v Guttman**

2014 NY Slip Op 32261(U)

August 19, 2014

Supreme Court, New York County

Docket Number: 650968/14

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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WEST CHELSEA BUILDING LLC,

Index No. 650968/14

Plaintiff,

Motion Seq. No. 001

-against-

JACK GUTTMAN, YOUNG WOO & ASSOC., LLC, BASS  
ASSOCIATES, LLC, GUTTMAN REALTY FUND I LLC,  
and BOARD OF MANAGERS OF THE CHELSEA  
ARTS TOWER CONDOMINIUM,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action arising from construction related to a condominium conversion, defendants Jack Guttman (“Guttman”), Young Woo & Assoc., LLC (“Young Woo”), Bass Associates, LLC (“Bass”), and Guttman Realty Fund I LLC (“Guttman Realty”) (collectively, “defendants”)<sup>1</sup> move pursuant to CPLR 3211(a)(1), and 3211(a)(5) for dismissal of plaintiff West Chelsea Building LLC’s (“plaintiff”) complaint.

*Factual Background*

Plaintiff owns the ten-story building located at 526 West 26<sup>th</sup> Street in Manhattan (the “Building”). Defendants allegedly own a neighboring building located at 535-545 West 25<sup>th</sup> Street (the “Tower”). Plaintiff further alleges that defendants converted the Tower into condominium ownership; as part of the conversion, defendants increased the Tower’s height so that a portion of it extends higher than a chimney on top of the Building, which is within one

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<sup>1</sup> The court notes that defendant Board of Managers of the Chelsea Arts Tower Condominium did not join in the making of the instant motion.

hundred feet of the Tower.

Defendants allege that the conversion was completed on January 22, 2007, as evidenced by the temporary certificate of occupancy (“TCO”) issued by the New York City Department of Buildings (“DOB”) on that date.

Plaintiff alleges that the New York City Administrative Code (the “Code”) required defendants to ensure that and/or make the Building’s chimney conform to the Code. Also, plaintiff alleges that defendants failed to notify plaintiff of their construction plans as required by the Code. Because defendants failed to comply with the Code in these regards, plaintiff was wrongfully required to expend \$271,381.81 to make the chimney conform to the Code.

*Arguments*

In the moving papers, defendants assert that the action is barred by the statute of limitations. Since the Tower was issued a TCO on January 22, 2007, plaintiff’s claim for a violation of the Code accrued on that date. The claim is time-barred because claims based on statutory violations (as opposed to those recognized only in common law) are governed by a three-year statute of limitations embodied in CPLR 214(2), which mandated that the action be commenced by January 22, 2010, and not when it was actually commenced in 2014.

The TCO constitutes documentary evidence which establishes the accrual date of plaintiff’s claim because it is undeniable proof that the Tower, as of January 22, 2007, became habitable, and conformed substantially to the approved plans and specifications, and to the requirements of all applicable laws, rules and regulations.

Defendants further argue that the action was improperly brought against Guttman, Young Woo, and Guttman Realty. Bass was the Tower’s sponsor, which had only two members:

Guttman Realty (of which Guttman was a member), and Woo-25th Street, LLC, a non-party. This information is confirmed by the condominium offering plan submitted with the moving papers. Thus, since Bass is the Sponsor, and Guttman Realty is only a member of Bass, no claims lie against Guttman or Guttman Realty. And, since Young Woo had nothing to do with the Tower's development, it was improperly sued.

In opposition, plaintiff contends that the statute of limitations for plaintiff's action has not yet begun to run, or is tolled, as each of defendants has violated the Code. Since the first TCO was issued in January 2007, DOB has issued 28 additional TCOs, most recently on July 24, 2012 (which expired 19 months ago). Thus, pursuant to case law, and by defendants' reasoning, the statute of limitations would not run until July of 2015 at the earliest.

A final certificate of occupancy has never been issued. Thus, defendants have not completed their work, or have documentary proof that they did. Work completion, which is the catalyst for setting the statute of limitations in motion according to the controlling case law, has not yet occurred.

As to defendants' arguments regarding the purported incorrect addition of parties, the Code places the burden of compliance with its obligations on the "owner" of the building being constructed. "Owner" includes anyone with "legal ownership or control of the premises." Guttman's affidavit, in which he admits he was a member of Guttman Realty (itself one of two members of Bass), falls silent on the issue of "control" of the "owner." Thus, the motion should be denied as to the non-Bass moving defendants: Guttman, Guttman Realty and Young Woo.

Plaintiff also submits the affidavit of Mike Sosa, its building manager ("Sosa"). Sosa discusses one of plaintiff's other buildings, located at 508 West 26<sup>th</sup> Street, and how the Tower

[\* 4]  
affected plaintiff's other building, and how defendants failed to provide written notification of its construction required by the Code.

In reply, defendants begin by noting that plaintiff concedes that the three-year statute of limitations imposed by CPLR 214(2) governs the instant dispute. As to the merits of plaintiff's opposition, the statute of limitations begins running not when a final certificate of occupancy is issued, as plaintiff claims, but when all of the elements identified in the statute exist.

Thus, under a plain reading of the Code, defendants' obligations to make the requisite alterations to plaintiff's chimney accrued when the following facts existed: the Tower was erected (and construction was completed on January 22, 2007, as confirmed by the TCO); the Tower is located within one hundred feet from the Building; the Tower's height, except for chimneys or vents, exceeds the top of plaintiff's chimney. Even Sosa averred that all of the elements of a claim under the Code were present no later than 2007, when construction stopped on the building. Thus, plaintiff's cause of action accrued no later than 2007 and is time-barred by CPLR 214(2).

Likewise, the notice provision of the Code does not provide relief for plaintiff, as it has nothing to do with beginning the running of the clock for statute of limitations purposes. Plaintiff's reasoning that the statute of limitations has not begun to run even though, as confirmed by Sosa, plaintiff was aware of a violation of the Code as far back as 2007, is absurd.

Plaintiff's claims that the non-Bass moving defendants are "owners" of the Tower are erroneous, as the relevant portion of the Code was intended to apply to court-appointed fiduciaries who lack an ownership interest in the properties they administer, and not to persons who are members of a limited liability company, or shareholders of a corporation that own real

property. The dubious nature of plaintiff's legal interpretation is best highlighted by its failure to cite to any legal authority for its conclusions. Thus, in the event the complaint is not time-barred, the court must dismiss the complaint as against Guttman, Guttman Realty, and Young Woo because they never possessed an ownership interest in the Tower.

*Discussion*

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Fortis Financial Services, LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 737 NYS2d 40 [1<sup>st</sup> Dept 2002]; *Fischbach & Moore, Inc. v E.W. Howell Co., Inc.*, 240 AD2d 157, 658 NYS2d 859 [1<sup>st</sup> Dept 1997]).

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, the defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*see Hoatson v New York Archdiocese*, 25 Misc3d 1218(A), 901 NYS2d 907 [Sup Ct New York Cty 2009]; *see also Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290, 577 NYS2d 375 [1<sup>st</sup> Dept 1991] (the defendant bears the burden of proof on an affirmative defense)).

Section 27-860(a) of the Code provides, in pertinent part, that "whenever a building is erected, enlarged, or increased in height so that any portion of such building, except chimneys or vents, extends higher than the top of any previously constructed chimneys within one hundred feet, the owner of such new or altered building shall have the responsibility of altering such chimneys to make them conform with the requirements of section 27-859 of this article."

Actions brought under section 27-860(a) are governed by a three-year statute of limitations (*see* CPLR 214(2); *Mindel v Phoenix Owners Corp.*, 17 AD3d 227, 793 NYS2d 390 [1<sup>st</sup> Dept 2005]). And, claims under the section accrue at the time the subject work is completed (*id.*). In the instructive, similar scenario of defective construction and design, claims arising therefrom generally accrue “upon the construction, meaning completion of actual physical work” (*see State v. Lundin*, 60 NY2d 987, 988 [1983]). This means that “there can be completion of actual physical work even though incidental matters relating to the project may remain open.” (*Verderame Contracting Co. v Talel*, 1997 WL 34849945 [Sup Ct New York Cty 1997]), *citing Lundin*). In this regard, under *Lundin*, for purposes of the statute of limitations, the date of the final certificate of occupancy is not controlling (*Lundin*, 60 NY2d at 989).

A temporary certificate of occupancy is documentary evidence that construction work has been “completed” and/or has been “substantially completed” (*see Board of Managers of 60 Greene Condominium v Acacia SoHo, LLC*, 63 AD3d 516, 880 NYS 2d 643 [1<sup>st</sup> Dept 2009]; *Verderame, supra*). Plaintiff does not dispute the authenticity of the January 22, 2007 TCO submitted by defendants; thus, the TCO qualifies as documentary evidence under CPLR 3211(a)(1) (*see HSH Nordbank AG v Goldman Sachs Group, Inc.*, 43 Misc 3d 1225(A), 2013 WL 8476977 [Sup Ct New York Cty 2013], *citing Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). Thus, defendants demonstrate *prima facie* their entitlement to dismissal on the grounds that the statute of limitations expired on or about January 22, 2010.

In opposition, plaintiff contends that the statute of limitations has not yet begun to run (in that a final certificate of occupancy has not been issued) or that the statute began to run when the most recent TCO was issued in July 2012, and thus would not expire until July 2015. Plaintiff

[\* 7]

bases these arguments on the claim that defendants “have not completed their work; or at least have no documentary proof that they did.”

However, plaintiff cites no authority in support of its position. Moreover, as seen above, the January 2007 TCO in fact constitutes documentary evidence demonstrating that defendants completed the subject work, thus triggering the running of the three-year statute of limitations on or about January 22, 2007. And, as seen above, contrary to plaintiff’s contentions, a final certificate of occupancy is not the trigger to the running of the statute in this case. Accordingly, since the action was not filed until 2014, the complaint is time-barred as to all defendants.<sup>2</sup>

Moreover, because the complaint is time-barred as to all moving defendants, the court does not address the issue of whether Guttman, Guttman Realty and/or Young Woo are “owners” of the Tower under the Code.<sup>3</sup>

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that defendants’ motion to dismiss plaintiff’s complaint is granted in its entirety, and the complaint is hereby severed and dismissed with prejudice as against Guttman, Young Woo, Bass, and Guttman Realty; and it is further

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<sup>2</sup> Plaintiff’s contentions regarding section 27-860(2)(c) of the Code are unavailing to defeat the motion, as they go only to notice and not to the statute of limitations. Likewise, Sosa’s affidavit is entirely ineffective, as it pertains exclusively to the building at 508 West 26th Street, which is not the Building as detailed in plaintiff’s complaint, which is located at 526 West 26th Street.

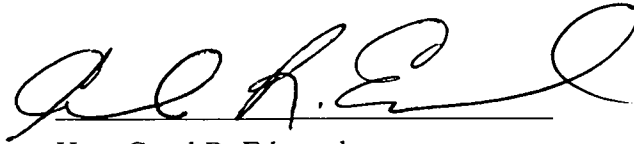
<sup>3</sup> Nevertheless, it appears that, based on the documentary evidence before the court, Guttman, Guttman Realty and Young Woo are not “owners” under the Code. The Tower’s offering plan indicates that Bass is the sole sponsor of the Tower, and that Bass is comprised of Guttman Realty and non-party Woo 25<sup>th</sup> Street LLC. The offering plan further provides that the principals of Guttman Realty and Woo 25<sup>th</sup> Street LLC are Guttman and non-parties Young Woo (an individual) and Margarete Lee. Plaintiff’s opposition, which asserts that an issue of fact exists as to whether the non-Bass moving defendants had “control” of the Tower, cites to no authority for its claim that these parties would have “control” of the Tower under the Code.

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties shall appear for a Preliminary Conference on September 23, 2014, at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: August 19, 2014



Hon. Carol R. Edmead

**HON. CAROL EDMED**