

**Board of Mgrs. of Cathedral Tower Condominium v
Sendar Assoc. LLC**

2014 NY Slip Op 33846(U)

May 20, 2014

Supreme Court, Nassau County

Docket Number: 601602-13

Judge: Timothy S. Driscoll

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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**BOARD OF MANAGERS OF CATHEDRAL
TOWER CONDOMINIUM,**

**TRIAL/IAS PART: 15
NASSAU COUNTY**

Plaintiff,

**Index No: 601602-13
Motion Seq. No. 1
Submission Date: 3/7/14**

-against-

SENDAR ASSOCIATES LLC and ADAM KATZ,

Defendants.
-----x

Papers Read on this Motion:

- Notice of Motion, Affidavit in Support and Exhibits.....x**
- Defendants' Memorandum of Law in Support.....x**
- Affidavit in Opposition and Exhibits.....x**
- Plaintiff's Memorandum of Law in Opposition.....x**
- Reply Affidavits and Exhibits.....x**
- Defendants' Reply Memorandum in Further Support.....x**

This matter is before the court on the motion filed by Defendants Sendar Associates LLC ("Sendar") and Adam Katz ("Katz") ("Defendants") on January 6, 2014 and submitted on March 7, 2014, following oral argument before the Court. For the reasons set forth below, the Court grants Defendants' motion to the extent that the Court dismisses the first and second causes of action and dismisses all claims asserted against Defendant Katz personally, and otherwise denies the motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1), (a)(5) and (a)(7),

dismissing the Verified Complaint (“Complaint”).

Plaintiff Board of Managers of Cathedral Tower Condominium (“Board” or “Plaintiff”) opposes the motion.

B. The Parties’ History

The Complaint (Ex. A to Shemtoob Aff. in Supp.) alleges as follows:

The Cathedral Tower Condominium (“Condominium”) was created by Declaration dated September 30, 2004, made by the Sponsor, Sendar. It is an unincorporated association of unit owners owning real property located at 514 West 110th Street, New York, New York 10025 and consists of 49 residential units, 48 locker units, 1 storage unit and 1 laundry unit. Katz is the member of Sendar, and the Principal of the Sponsor.

The Offering Plan contains a Certification of Sponsor and Principals (“Certification”), pursuant to which Defendants jointly and severally certified that the Offering Plan, and documents that amend and supplement it will, *inter alia*, 1) set forth the detailed terms of the transaction and will be complete, current and accurate; 2) afford potential investors, purchasers and participants an adequate basis on which to found their judgment; 3) not omit any material fact; and 4) not contain any false representation or statement.

The Complaint sets forth relevant provisions of the N.Y.C. Administrative Code (“Code”) § 26-703, which mandates that a Sponsor of a Condominium conversion provide a minimum Reserve Fund for the Condominium. Pursuant to Code § 26-703(b), this funding can be accomplished in one of different ways, either by lump sum deposit equal to 3% of the total price (Code § 26-703(b)(i)), or through installments to be made over a statutorily prescribed time period, pursuant to a statutorily-prescribed calculation (Code § 26-703(b)(ii)).

Plaintiff alleges that the funding of the Condominium’s Reserve Fund was incorrect because the Sponsor used the incorrect price in calculating its funding obligation. Plaintiff alleges that the Sponsor was required to fund “3% of the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date” (Compl. at ¶ 19), and that the calculation of the “last price” is made by reference to relevant provisions in the Offering Plan, and the Fourth Amendment to the Plan dated February 14, 2005 which announced new offering prices for all of the units, as set forth in revised Schedule A.

Plaintiff alleges that, as a result of the Sponsor's use of incorrect prices in calculating the required contribution to the Reserve Fund, the Reserve Fund has been underfunded in an amount of no less than \$522,760.00. Plaintiff alleges, further, that all Unit Purchasers signed purchase agreements that incorporated the obligations made by Defendants in the Offering Plan for the Condominium, and the Offering Plan contains a section titled "Reserve Fund" which sets forth Defendants' contractual obligation to properly fund the Reserve Fund according to law.

The Complaint contains four (4) causes of action: 1) a request for a declaratory judgment declaring that Defendants have failed to fund the Reserve Fund in an amount which is 3% of the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date, 2) a request for an injunction directing Defendants to make additions to the Reserve Fund which calculates 3% of the Total Price as \$1,346,048.00, and 3) the third and fourth causes of action which allege breaches of the Offering Plan.

In support of Defendants' motion, Lida Shemtoob ("Shemtoob"), an officer of Sendar and member of the Board, provides copies of the Complaint, as well as the following documents, designated Exhibits B-U: Cathedral Tower Offering Plan, Sections A through GG; Section D of the Offering Plan titled "Offering Prices and Related Information - Schedule A;" Document 10A of Offering Plan (Sponsor Certification); First Amendment to Offering Plan dated June 10, 2004; Fourth Amendment to Offering Plan dated February 14, 2005; Fifth Amendment to Offering Plan dated April 21, 2005; Letter to Office of New York State Attorney General dated August 5, 2005; Sixth Amendment to Offering Plan dated August 19, 2005; Proof of Service of Sixth Amendment of Offering Plan; Eighth Amendment to Offering Plan dated April 24, 2006; Twelfth Amendment to Offering Plan dated September 21, 2010; Thirteenth Amendment to Offering Plan dated September 6, 2011; Fourteenth Amendment to Offering Plan dated August 30, 2012; Fifteenth Amendment to Offering Plan dated September 16, 2013; Proof of Deposits by Sendar into Cathedral Tower's Reserve Fund; Cathedral Tower's Financial Statements, April 30, 2013 and 2012; Cathedral Tower's Financial Statements, April 30, 2012 and 2011; Cathedral Tower's Financial Statements, April 30, 2011 and 2010; Cathedral Tower's Financial Statements, April 30, 2009 and 2008; and a copy of a summons and complaint in an action titled *Sendar Associates v. Board of Managers of Cathedral Tower Condominium*, Nassau County

Index Number 601316/13.

In opposition to the motion, Steven McGarry (“McGarry”), the President of the Board, affirms that he has been a member of the Board since 2005, and became its President in 2010. McGarry submits that the documentary evidence submitted establishes that the Sponsor did not fund 3% of the “total price” (McGarry Aff. in Opp. at ¶ 10), as required by statute, because the Sponsor used the “total initial Insider Prices to residential tenants” (*id.*). McGarry affirms that the last price that the Sponsor offered to tenants in occupancy was established in Revised Schedule A, which is Exhibit B to the Fourth Amendment to the Offering Plan (“Fourth Amendment”). The Offering Price set forth in Revised Schedule A is higher than both the “Initial Inside Price” and “Initial Outside Price” found in the initial Schedule A (*id.* at ¶ 11), and the Initial Inside Price did not last beyond 90 days following the initial presentation of the Offering Plan to tenants in occupancy. As a result of the miscalculation of the total price, as required by statute, the Sponsor underfunded the Reserve Fund.

McGarry submits, *inter alia*, that 1) there is no merit to Defendants’ argument that Plaintiff’s claims are barred by the statute of limitations because the Board’s claims did not accrue until June 2010, which is five years and 30 days after the closing of the conversion on May 20, 2005; and 2) Defendants’ waiver and laches arguments are without merit because the Sponsor “dominated the affairs of the Condominium through July 2010” (McGarry Aff. in Opp. at ¶ 17) and continues to be involved in Condominium matters and, since unit owners took control of the Board in July 2010, the Board has acted diligently to investigate and assert its rights against the Sponsor.

In reply, Shemtoob affirms that the financial statements submitted, which the Board approved, acknowledge that the Sponsor was obligated to establish a Minimum Reserve Fund for the Condominium in the amount of \$823,288, and that the Sponsor funded the unpaid balance of the Minimum Reserve Fund. Shemtoob affirms that these financial statements were discussed at the Board’s meetings, in the presence of the Board’s accountants, and then issued with the Board’s approval.

Defendants also provide an affidavit of Alan L. Kazlow (“Kazlow”), an attorney whose practice is devoted to the conversion of properties to cooperative and condominium ownership.

Kazlow affirms that he authorized the Offering Plan dated May 20, 2004, and its Amendments. Kazlow affirms that “[t]he Attorney General’s acceptance and filing of the Fifth Amendment necessarily is a finding that the two Tenant-purchasers being counted toward effectiveness entered into Purchase Agreements without discriminatory inducements and, as a result, the prices in the Fourth Amendment were offered to only Outsiders” (Kazlow Reply Aff. at ¶ 31). Kazlow submits, therefore, that the Initial Insider Price in Schedule A of the Plan was the last price to Tenants in occupancy prior to the effective date for purposes of computing the amount of the Reserve Fund under the Reserve Fund Law.

C. The Parties’ Positions

Defendants submit that Sendar deposited the correct sum into the Reserve Fund, using the installment method of paying into the Reserve Fund. They argue that the Sixth Amendment, which the New York State Attorney General accepted for filing, calculated the Minimum Reserve Fund Contribution to be \$823,288. This sum was calculated based on the last price offered to tenants before the Offering Plan was declared effective, specifically the Initial Insider Price to Tenants contained in Schedule A of Part I of the Offering Plan and repeated in the Revised Schedule A attached as Exhibit A to the First Amendment to the Offering Plan. Defendants also contend that the Board has acknowledged in its financial statements that Sendar has fully paid the Minimum Reserve Fund Contribution.

Defendants submit that the documentary evidence refutes Plaintiff’s contention that the insider price was modified by the Fourth Amendment to the Offering Plan and, therefore, that Sendar’s calculation of the Minimum Reserve Fund Contribution was wrong. Defendants argue that 1) the Fourth Amendment modified only the outsider price, and did not contain a new insider price offered to tenants in occupancy, which is the relevant price used in calculating the Minimum Reserve Fund Contribution; 2) the Sixth Amendment, which became effective after the price increase to outsiders in the Fourth Amendment, continued to calculate the Minimum Reserve Fund Contribution as \$823,288; and 3) the Board’s financial statements all reflect that the amount required to be paid into the Reserve Fund was \$823,288.

Defendants argue, further, that this action is barred by the statute of limitations. Defendants submit that the relevant dates for this analysis are 1) August 2005, when notice was

provided to all tenants, unit owners and purchasers that the amount of the Minimum Reserve Fund Contribution due from Sendar was set at \$823,288, 2) August 19, 2005, the date that this figure was set forth in the Sixth Amendment, which the Attorney General reviewed and accepted, and 3) August 23, 2005, the date on which the Sixth Amendment was served on all Cathedral Tower unit owners and unit purchasers. Defendants note, further, that this figure is set forth in numerous subsequent Board financial statements and Offering Plan amendments without challenge until the filing of this action, more than 8 years after the figure was set. Under these circumstances, Defendants argue, Plaintiff's claims are time-barred.

Defendants also argue that 1) Plaintiff's claims are barred by the doctrine of laches in light of the fact that the Board and its resident owners have "unreasonably sat on their rights for more than eight years" (Ds' Memo. of Law at p. 11); 2) Plaintiff has waived any claim that it may have had by failing, for over eight years, to assert any right to additional contributions to the Reserve Fund; 3) the Court should dismiss the third and fourth causes of action as asserted against Katz individually because Katz acted only in his capacity as a principal of the Sponsor and, therefore, there is no basis to hold Katz individually liable for contractual breaches by Sendar; 4) the Court should dismiss the second cause of action, seeking injunctive relief, in part because Plaintiff has an adequate remedy at law in the form of money damages; and 5) the Court should dismiss the cause of action seeking a declaratory judgment as duplicative and unnecessary because the resolution of Plaintiff's claims for a money judgment will address the same issues raised by the declaratory judgment demand.

Plaintiff opposes Defendants' motion, submitting that Defendants do not have a complete defense based on documentary evidence because the documentary evidence supports the conclusion that the last price that was offered to tenants in occupancy were the prices set forth in Revised Schedule A, which is Exhibit B to the Fourth Amendment. As the last price was higher than the expired "insider price" (P's Memo. of Law in Opp. at p. 8), Defendants did not fund 3% of the "total price" (*id.* at p. 3) as required by N.Y.C. Administrative Code § 26-703(b) and have underfunded the Reserve Fund.

Plaintiff submits, further, that its claims are not barred by the statute of limitations because Plaintiff's claims did not accrue until at least June of 2010, five years and 30 days after

the closing of the conversion on May 20, 2005, or August 2010 when Defendants made their last payment, which is when Defendants' breach of their funding obligations was first established. Thus, this action, commenced in June of 2013, was within the six-year statute of limitations period.

Plaintiff also argues that 1) its claims are not barred by the doctrine of laches because Defendants have not pled, or demonstrated, how they have been prejudiced by any delay; 2) Plaintiff has not waived its rights to sue Defendants because Plaintiff did not have knowledge that the Reserve Fund was underfunded until the Sponsor relinquished control of the Board and, therefore, there was no voluntary and intentional abandonment of Plaintiff's rights; and 3) the Court should not dismiss the causes of action asserted against Katz personally in light of case law holding that a plaintiff may seek damages for a breach of contract against the individual principals of the sponsor, based on certification of the offering plan and the incorporation of terms of the offering plan in a specific provision of the purchase agreement.

In reply, Defendants submit *inter alia* that 1) the Court should hold the Board responsible for the representations in its financial statements that Sendar had properly funded the Reserve Fund as the Board had the ability after 2010 to retain the agents and consultants of its choosing; 2) the documentary evidence does not support Plaintiff's contention that the new outsider price set forth in the Fourth Amendment should be construed as a "price offered to tenants in occupancy" as required by Code § 26-703, and the Offering Plan expressly refutes that argument; and 3) there is no basis for the causes of action asserted against Katz personally in light of the fact that Katz signed the Certification in his capacity as principal of the Sponsor, and there is no allegation of fraud, or any assertion that Katz made intentional or deliberate misrepresentations.

RULING OF THE COURT

A. Dismissal Standards

On a motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Nouveau Elevator Industries, Inc. v. Glendale Condominium Town and Tower Corp.*, 107 A.D.3d 965,

966 (2d Dept. 2013), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

When moving for dismissal of a cause of action on the ground that it is barred by the statute of limitations, pursuant to CPLR §3211(a)(5), the defendant bears the initial burden of establishing prima facie that the time in which to sue has expired and the court must assume the allegations in the complaint to be true and resolve all inferences in favor of the plaintiff. *Island ADC, Inc. v. Baldassano Architectural Group, P.C.*, 49 A.D.3d 815, 816 (2d Dept. 2008). Once the defendant has made a showing that the statute of limitations has expired, the burden shifts to the plaintiff to aver evidentiary facts establishing that the cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such exception applies. *Gravel v. Cicola*, 297 A.D.2d 620, 621 (2d Dept. 2002).

B. Establishment of Reserve Fund

Code § 26-702(b)(2) defines the term “total price” as used in the relevant funding provisions, with respect to condominium conversions, as “the sum of the cost of all units in the offering at the last price which was offered to tenants in occupancy prior to the effective date of the plan regardless of number of sales made.” *Bd. of Managers of 184 Thompson Street Condominium v. 184 Thompson Street Owner LLC*, 106 A.D.3d 542 (1st Dept. 2013) involved an action in which the sponsor elected to fund the reserve fund pursuant to the total price method set forth in Code § 26-703(b)(i). *Id.* at 542. The trial court, *inter alia*, granted the defendant sponsor summary judgment on a portion of the first cause of action to the extent of declaring that, having elected to establish the reserve fund for the subject condominium pursuant to Code § 26-703(b)(i), the sponsor was entitled to receive a credit against the mandatory initial contribution to the reserve fund pursuant to Code § 26-703(c), and the First Department affirmed that determination. *Id.* The First Department held that, under the plain language of the governing statutes, the “total price” referred to in Code § 26-703(b)(i) is not the price in effect

during the exclusive purchase period, *i.e.*, the so called “insider’s price,” but rather the last price offered to tenants in occupancy prior to the effective date of the plan. *Id.* at 542-543, quoting *Turtle Bay Towers Corp. v. Welco Assoc.*, 228 A.D.2d 189, 189-190 (1st Dept.), *lv. den.*, 89 N.Y.2d 804 (1996), quoting Code § 26-702(b)(1). The First Department agreed with the trial court that the record contained no conclusive evidence that the tenant-offeree prices set forth in the offering plan were increased prior to the plan’s effective date. 106 A.D. at 543.

In *Turtle Bay Towers Corp. v. Welco Assoc.*, *supra*, the First Department held that the trial court had properly construed the definition of “total price” in Code § 26-702(b)(1), which defines the total price with respect to cooperative conversions, as the price in effect just prior to the effective date and not, as contended by defendants, the price in effect during the purchase period, *i.e.*, the “insider’s price.” 228 A.D.2d at 189-190. Absent governing Second Department authority to the contrary, these rulings are authoritative. See *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663 (2d Dept. 1984) (trial courts must follow Appellate Division precedent from other departments until the Court of Appeals or its own Appellate Division pronounces a contrary rule).

C. Personal Liability of Officers or Agents of a Corporation

Officers or agents of a corporation are not personally liable on corporate contracts if they do not purport to bind themselves. See *Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1, 3-4 (1964); *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 65-67 (1961); *Ho Sports, Inc. v. Meridian Sports, Inc.*, 92 A.D.3d 915, 916-917 (2d Dept. 2012). There must be clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal. *Star Video Entertainment v. J & I Video Distrib.*, 268 A.D.2d 423, 424 (2d Dept. 2000), quoting *Savoy Record Co. v. Cardinal Export Corp.*, 15 NY2d at 4.

D. Injunctive and Declaratory Relief

Economic loss, which is compensable by money damages, does not constitute irreparable harm. *In re Rice*, 105 A.D.3d 962, 963 (2d Dept. 2013), citing *Family-Friendly Media, Inc. v. Recorder Tel. Network*, 74 A.D.3d 738, 739 (2d Dept. 2010), quoting *EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dept. 2007). Where a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue. *In re Rice*, 105 A.D.3d at 963, quoting

Dana Distribs., Inc. v. Crown Imports, LLC, 48 A.D.3d 613 (2d Dept. 2008).

Declaratory relief is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931), *reh. den.*, 256 N.Y. 681 (1931). *See also Olsen v. New York State Dept. of Env. Conservation*, 307 A.D.2d 595 (3d Dept. 2003), *lv. app. den.*, 1 N.Y.3d 502 (2003) (action for declaratory judgment unnecessary where action at law for damages is available, citing *inter alia James v. Alderton Dock Yards*, 256 N.Y. at 305).

E. Laches

Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party. *White v. Priester*, 78 A.D.3d 1169, 1171 (2d Dept. 2010), quoting *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003), *cert. den.*, 540 U.S. 1017 (2003). The doctrine may be applied in equitable actions where the defendant shows prejudicial delay, regardless of whether the statutory limitations period has expired. *White v. Priester*, 78 A.D.3d at 1171, citing *Saratoga County Chamber of Commerce, v. Pataki*, 100 N.Y.2d at 816.

F. Application of these Principles to the Instant Action

The Court grants Defendants' motion to the extent that the Court dismisses the first and second causes of action and dismisses all claims asserted against Defendant Katz personally, and otherwise denies the motion, based on the Court's conclusions that 1) the Complaint sufficiently states a cause of action for breach of contract based upon the alleged underfunding of the statutory reserve deposit and Defendants' documentary submissions have not conclusively or utterly refuted the Plaintiff's allegations in connection with its key claims because there is support for Plaintiff's contention that, because the insider period had expired before the Fourth Amendment was filed, the prices contained in that Amendment were necessarily offers applicable to all purchasers at that juncture, and there was no distinction in the prices offered or applicable to insiders and outsiders; 2) in light of evidence demonstrating that Sendar's final deposit, pursuant to the Code's reserve fund provisions, was made in 2010, Defendants have not established that this action is time-barred; 3) as the documentary evidence establishes that Katz executed the Certification exclusively as a Sendar principal, not separately or in his individual

capacity, and Plaintiff has not alleged that Katz acted fraudulently, there is no basis for holding Katz personally liable and dismissal of the Complaint as asserted against Katz is appropriate; 4) in light of the fact that Plaintiff has an adequate remedy at law in the form of money damages, and can secure full redress through its breach of contract claims, dismissal of the causes of action seeking injunctive and declarative relief is appropriate; and 5) even assuming *arguendo* the applicability of the laches doctrine to the remaining causes of action, Defendants have not established the applicability of that doctrine as a matter of law.

All matters not decided herein are hereby denied.

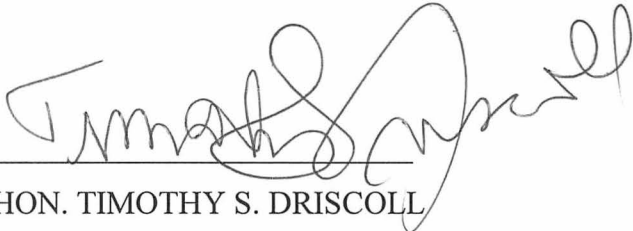
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on June 19, 2014 at 9:30 a.m.

ENTER

DATED: Mineola, NY

May 20, 2014



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

MAY 28 2014

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**