

**Residential Bd. of Mgrs. of Walker Tower
Condominium v Gotham Tower LLC**

2022 NY Slip Op 31918(U)

June 17, 2022

Supreme Court, New York County

Docket Number: Index No. 157064/2021

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X	INDEX NO.	<u>157064/2021</u>
THE RESIDENTIAL BOARD OF MANAGERS OF WALKER TOWER CONDOMINIUM,		04/04/2022, 04/04/2022, 04/04/2022, 04/04/2022,
Plaintiff,	MOTION DATE	<u>04/04/2022</u>
- v -		
GOTHAM TOWER LLC, RON J. VINDER, WELLS FARGO BANK, N.A., JOHN DOE OR JANE DOE 1-10,	MOTION SEQ. NO.	<u>001 002 003 004 004</u>

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 119

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 120, 121, 122, 123, 124

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 54, 55, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

Plaintiff, the Board of Managers, commenced this action seeking the ejection of Gotham Towers LLC and Ron J. Vinder, the owners of Penthouse Unit 1 (PH1) in the Walker Tower Condominium located at 212 West 18th Street, New York, New York 10011. Defendants-

Owners purchased the unit from the U. S. government, which had obtained title to the unit pursuant to a stipulated Consent Judgment of Forfeiture entered in a forfeiture action captioned *United States of America v. Real Property Located in New York*, New York, Civil Action No. 2:16-cv-5376-DSF-PLA (C.D.C.A.). Defendant Wells Fargo, a mortgage holder, and defendants-owners move pursuant to CPLR 3211 to dismiss this action on the grounds that plaintiff failed to join the U. S. as a necessary party and on the grounds that the complaint fails to state a cause of action (motions #001 and #002). In motion #003, plaintiff the Board of Managers seeks use and occupancy *pendente lite* for the unit and defendants-owners cross-move for sanctions. In motion #004, the U. S. moves to intervene in this action pursuant to CPLR 1012 and 1013. The motions are consolidated for purposes of this decision.

Defendants contend that the case must be dismissed under CPLR 3211(a)(10) based on plaintiff's failure to join the U. S. as a necessary party. Under CPLR 1001(a), an individual or entity is a necessary party to litigation "if complete relief is to be accorded between the persons who are parties to the action" or if the entity "might be inequitably affected by a judgment in the action." Plaintiff Board of Managers contends that the U. S. is not a necessary party as this is merely an action for ejectment under Article 6 of the Real Property and Proceedings Law. However, the plaintiff's complaint cannot be read so narrowly and as the Board of Managers admits that should it succeed in this litigation, title to the unit would revert back to the U. S. (see NYSCEF Doc. 75, p. 17) Since the U. S. would be affected by a judgment voiding or altering the deed transferring ownership of PH1, it is a necessary party to this action under CPLR 1001(a). *See Bonoff v. Troy*, 187 A.D.2d 302 (1st Dep't 1992) (plaintiff's failure to join all of the signatories to the agreement as necessary parties precludes rescission); *Frymer v. Bell*, 99 A.D.2d 91, 95 (1st Dep't 1984) ("In an action for rescission, all parties to the agreement must be brought

before the court.”); *12A C.J.S. Cancellation of Inst. Section 114* (“All persons whose rights, interests, or relations would be affected by the cancellation or rescission of an instrument or contract are proper and necessary parties.”).

The Board of Managers concedes that this court cannot obtain jurisdiction over the U. S. (NYSCEF Doc. 75, p. 19) and thus this case must be dismissed unless joinder is excused under CPLR 1001(b), which requires the consideration of the following factors:

(1) whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; (2) the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; (3) whether and by whom prejudice might have been avoided or may in the future be avoided; (4) the feasibility of a protective provision by order of the court or in the judgment; and (5) whether an effective judgment may be rendered in the absence of the person who is not joined.

With regard to the first factor, plaintiff argues that joinder should be excused because it does not have another forum to bring this action as it is barred by sovereign immunity. However, the Board of Managers ignores the Consent Judgment in the forfeiture action which states that “should any dispute arise about the interpretation of or compliance with the terms of this consent judgment . . . the parties may move this court to resolve this dispute” (NYSCEF Doc. 22, para. 16). Indeed, this very same dispute regarding whether the sale to defendants-owners violated the Board’s Right of First Refusal was already litigated in that court, which found that the Consent Judgment extinguished this right. Thus, contrary to plaintiff’s contention, there is another forum which is available to resolve this dispute. Plaintiff is merely dissatisfied with that forum’s decisions and seeks to relitigate the issue in this court.

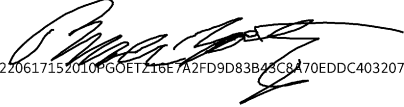
As to the second factor, the Board of Managers argues that the U. S. would not be prejudiced by the relief sought in this action as the unit could be sold for substantially more money. However, according to the affidavit of Penelope B. Marzulli, the Board of Managers' President, should the court vacate the transfer of title to defendants, the Board would exercise its Right of First Refusal in order to purchase PH1 for the same terms as the original contract of sale and then relist it for a substantially greater amount. Affidavit of Penelope B. Marzulli sworn to on October 29, 2021, para. 24. Thus, contrary to plaintiff's argument, the U. S. would not stand to make any more money from the subsequent sale. With regard to the third factor, the prejudice to the defendants-owners is obvious, as they will be ejected from the unit without being made whole and then would be forced to seek repayment from the U. S. As to the fourth factor, a potential protective provision cannot be granted by this court as it does not have jurisdiction over the necessary party. *U.S. v. Dalm*, 494 U.S. 596, 608 (1990) ("Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . ."). Finally, an effective judgment may not be rendered in this case without the U. S., which, if the Board of Managers obtains the relief it seeks, would necessarily be deemed the owner of the unit. Based on this balancing of the five factors delineated in CPLR 1001(b), the joinder of the U. S. cannot be excused.

Accordingly, it is

ORDERED that defendants' motions to dismiss are granted under CPLR 3211(a)(10) (motions #001 and #002) and the case is dismissed against defendants with costs and disbursements awarded to defendants, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the motions for use and occupancy (#003) and to intervene (#004) are denied as moot; and it is further

ORDERED that the defendants-owners' cross-motion for sanctions is denied.


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6/17/2022

DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE