

**333 E. 91st St. Owners Corp. v 1765 First Ave.  
Assoc., LLC**

2022 NY Slip Op 32189(U)

July 7, 2022

Supreme Court, New York County

Docket Number: Index No. 655500/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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333 EAST 91ST STREET OWNERS CORP.,

Plaintiff,

- v -

1765 FIRST AVENUE ASSOCIATES, LLC,

Defendant.

INDEX NO. 655500/2020

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

In motion sequence number 001, defendant 1765 First Avenue Associates, LLC (Sponsor) moves to dismiss, pursuant to CPLR 3211(a)(1), (5), (7), and 213(1) and (2), plaintiff 333 East 91<sup>st</sup> Street Owners Corp.’s (Azure) first, second, and fourth causes of action.

**Background**

Azure, a New York corporation, is the owner of a residential cooperative building located at 333 East 91<sup>st</sup> Street, New York, New York (Building) that consists of over a hundred residential apartments, including a residential manager unit (RM Unit).

(NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶¶ 1-2, 4.) “The Sponsor converted the Building to cooperative status pursuant to a leasehold offering plan that was accepted for filing by the New York State Attorney General’s office on September 12, 2007”

(Offering Plan), and thereafter amended<sup>1</sup> at least sixty-four times between 2007 and 2018. (*Id.* ¶ 1.) This breach of contract action concerns Sponsor's alleged failure to transfer the RM Unit to Azure in contravention of the Offering Plan.

"Special Risk No. 17 in the Offering Plan required the Sponsor to transfer ownership of [the RM Unit] in the Building to [] Azure for a fixed price." (NYSCEF 1, Complaint ¶ 2; *see also* NYSCEF 22, Offering Plan at 14<sup>2</sup>.) Special Risk No. 17 required that "Sponsor shall within three (3) months of the First Closing sell the [RM Unit] to [Azure]." (NYSCEF 22, Offering Plan at 15.) However, between the three month period of the First Closing and transfer of ownership,

"Sponsor reserves the right to not to sell an Apartment to the Apartment Corporation for period of up to three months following the date of the First Closing during which period Sponsor will rent the Apartment occupied by the Resident Manager to the Apartment Corporation. In such event from the date of the First Closing until the transfer of title of the Apartment the Apartment Corporation shall pay to Sponsor the rent for which will equal reasonable market rent in the amount of \$5,675 per month (representing an estimate of the (a) principal and interest which would have been due on the Purchase Money Note, had same been executed by the Apartment Corporation and (b) Maintenance Charges assessed against the Apartment occupied by the Resident Manager) until the Resident Managers Apartment is conveyed to the Apartment Corporation. In the event Sponsor exercises the right to rent the Apartment to the Apartment Corporation the rental payments will not be credited against the purchase price."

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<sup>1</sup> Amendments to co-op offering plans must be filed with the New York State Attorney General's office. (13 NYCRR 17.5; *see also* NYSCEF 28, tr at 8:10-17.) Azure fails to allege the purpose of the sixty-four amendments to the Offering Plan, but Sponsor asserts that the multiple amendments amended the anticipated date of conveyance of the RM Unit until as late as the sale of the final unit by the Sponsor. (NYSCEF 7, Sponsor's Memo of Law at 10-11; *see* NYSCEF 15, 64<sup>th</sup> Amendment to the Offering Plan; *see generally* NYSCEF 9-15, Amendments to Offering Plan.)

<sup>2</sup> Pages refer to NYSCEF generated pagination.

(*Id.*) Once the three month rental period expired, Azure alleges that the Sponsor was “to apply payments received from purchasing shareholders against the balance of the Purchase Price for the RM Unit” and “had the right to make a loan whose principal and interest would be reduced as shareholders purchased and made their RM Unit Contributions, but no such loan was ever memorialized.” (NYSCEF 1, Complaint ¶ 56.)

Azure alleges that the “First Closing” occurred as early as May 24, 2010 when the Sponsor sold shares belonging to apartment 4E; however, Azure did not learn of this closing until March 2020, after records were supplied to its counsel. (*Id.* ¶¶ 13-14.) Azure alleges that the first disclosed closing occurred on September 8, 2010 when the Sponsor sold the shares belonging to apartment 6D, evidenced in the Eighteenth Amendment to the Offering Plan. (*Id.* ¶ 15.) Azure claims that Sponsor was obligated to transfer ownership of the RM Unit by September 2010, three months after the May 2010 closing or at the latest, December 2010, three months following the September 2010 closing. (*Id.* ¶ 2.) Sponsor did not transfer the RM Unit until September 2020. (*Id.*)

Azure alleges that the Sponsor breached the Offering Plan by improperly charging Azure rent for the RM Unit for nearly ten years until the RM Unit was finally transferred. (*Id.* ¶¶ 50-51.) Azure also alleges that Sponsor breached a proprietary lease by failing to pay maintenance due on the RM Unit for April, May, June, July, August and September 2020. (*Id.* ¶¶ 63-69.) Azure also seeks damages for breach of the covenant of good faith and fair duty, alleging that “Sponsor maintained control of the Board of Directors of [] Azure until at least June 2017,” which caused Sponsor’s “appointed directors to elevate [Sponsor’s] interests . . . over those of [] Azure and

cause [] Azure to make unauthorized rent payments to the Sponsor,” and by its control, “prevent[ed] its appointed directs from demanding the timely transfer of the RM Unit.”

(*Id.* ¶¶ 57-59.) Alternatively, Azure asserts a claim for unjust enrichment in the amount of the unauthorized rent payments the Sponsor collected on the RM Unit. (*Id.* ¶¶ 70-76.)

## Discussion

Sponsor seeks dismissal of the first, second, and fourth causes of action, claims all based on Offering Plan.<sup>3</sup>

### Statute of Limitations

Sponsor, moving pursuant to CPLR 3211(a)(5), contends that Azure’s claims for breach of the Offering Plan, breach of the covenant of good faith and faith dealing, and unjust enrichment are time barred under CPLR 213(1) and (2).

Under CPLR 3211(a)(5), the moving party

“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. Further, plaintiff’s submissions in response to the motion must be given their most favorable intendment.”

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<sup>3</sup> As to Azure’s third cause of action arising from the proprietary lease, Sponsor notes that it does not seek to “dismiss this claim at this stage, upon the dismissal of the remainder of the Complaint, Defendant is confident that Plaintiff will withdraw this claim, which would be entirely offset by a counterclaim to be asserted at the appropriate time by Defendant for unpaid rent and/or use and occupancy for which Plaintiff either owes Defendant rent that is in excess of the maintenance Plaintiff alleges is unpaid or use and occupancy that would be equal to or greater than the alleged unpaid maintenance. Further, upon the dismissal of the other causes of action, the Third Cause of Action, seeks an award below the threshold for New York Supreme Court and should accordingly be transferred to a Court with the appropriate jurisdiction.” (NYSCEF 7, Sponsor’s Memo of Law at 6, n 1.)

(*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017]

[internal quotation marks and citation omitted].)

The statute of limitations for a breach of contract claim is six years (CPLR 213 [2]).

“New York does not apply the ‘discovery’ rule to statutes of limitations in contract actions. Rather, the ‘statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury.’ This is so even though the result may at times be ‘harsh and manifestly unfair, and creates an obvious injustice’ because a contrary rule ‘would be entirely dependent on the subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules that have long governed this aspect of commercial repose.’ Indeed, ‘[t]o extend the highly exceptional discovery notion to general breach of contract actions would effectively eviscerate the Statute of Limitations in this commercial dispute arena.’”

(*ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 594 [2015] citations omitted.) Admittedly, the First Closing occurred in either May 2010, when the Sponsor sold shares belonging to apartment 4E, or in September 2010, when the Sponsor sold the shares belonging to apartment 6D (NYSCEF 1, Complaint ¶¶ 13, 15). Thus, 2010 is when the breach occurred, although Azure did not discover it until March 2020. (*Id.* ¶ 14).

To avoid the barring of its claims as untimely, Azure invokes the continuing wrong doctrine, arguing that the obligation to transfer the RM Unit was a continuing one and each overpayment of monthly rent constitute a new breach in a series of continuing wrongs. “The continuous wrong doctrine is an exception to the general rule that the statute of limitations runs from the time of the breach though no damage occurs until later.” (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017], *citing Ely-Cruikshank*, 81 NY2d at 402 [internal quotation marks omitted].) Where applicable, the

doctrine “serves to toll the running of a period of limitations to the date of the commission of the last wrongful act” and “may only be predicated on continuing, unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs.” (*Id.* [internal quotation marks and citation omitted].)

Since the submission of this motion, recent cases have shed additional light on the applicability of the doctrine and merits discussion.<sup>4</sup>

In *CWCapital Colbalt VR Ltd. v CWCapital Investment LLC (Cobalt)*, the plaintiff asserted a breach of contract against defendant CWCapital Investment, LLC (CWCI) for CWCI’s failure to manage certain commercial mortgage-backed securities (CMBS) based on their agreement. (195 AD3d 12, 13-16 [1st Dept 2021].) The agreement, in pertinent part, required CWCI to appoint a special servicer to “direct and supervise the disposition of nonperforming and underperforming loans that are held by a particular CMBS trust so as to mitigate the losses suffered by the trust.” (*Id.* at 14.) The parties’ arrangement also required CWCI “to ensure that the value of [plaintiff’s] assets is maximized.” (*Id.*) The plaintiff alleged that CWCI breached their agreement in three distinct ways, each category of wrongdoing dealing “with the actions of the special servicer CWCI selected on [plaintiff’s] behalf,” CWCI’s affiliated entity and defendant CWCA. (*Id.*) CWCI moved to dismiss the complaint in its entirety, arguing that plaintiff’s causes of action were time-barred.

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<sup>4</sup> As such, at argument, the court requested the parties submit supplemental briefings on the issue. (NYSCEF 28, tr. at 22:6-7.)

The First Department in *Cobalt* held that the doctrine of continuing wrong applied to the case and tolled the statute of limitations as to the last wrongful act as

“[t]he explicit language of the [agreement] conferred on CWCI a continuing duty to manage [plaintiff’s] investment. Cobalt alleges that, with respect to special servicers like CWCA, this responsibility included wielding the power not only to appoint and terminate, but also to ensure that all services being performed by the special servicer were done only to benefit the CDO investors. Essentially, the allegations describe an arrangement by which CWCI acted as [plaintiff’s] eyes and ears with respect to the CMBS trusts and had a responsibility to do everything in its power to prevent any activities that could possibly be to [plaintiff’s] detriment. Thus, while certainly a claim accrued the first time CWCI failed to act upon CWCA’s engagement in behavior that allegedly diminished the value of its investment, there is no basis for the argument that each subsequent time CWCI failed to act did not constitute a separate, actionable, wrong.”

(*Id.* at 19-20.)

The First Department in *Cobalt* placed heavy emphasis on the parties’ agreement which conferred a “contractual obligation to manage the CMBS trust assets on an ongoing basis, with ‘reasonable care and in good faith,’” ultimately concluding there was a continuing duty on CWCI to management plaintiff’s investment. (*Id.* at 20.) Therefore, defendants’ subsequent breaches were based on new failures or omissions of the ongoing, recurring duty.

In *Marcal Finance SAA v Middlegate Securities Ltd (Marcal)*, the plaintiff contracted with defendant Middlegate Securities Ltd. (Middlegate) to “manage [plaintiffs’] inheritance for their benefit.” (203 AD3d 467, 468 [1st Dept 2022].) Plaintiffs sued Middlegate in October 2015 for breaching their agreement by misappropriating the funds, involving “at least one of the transfers [ ] made in or about March 2011.” (*Id.*) The First Department held that plaintiffs sufficiently alleged a “series of unauthorized transfers” whereby the “continuing wrong doctrine tolled the running of the statute of limitations until the last such transfer was made.” (*Id.*)

Similarly, in *Manipal Education Americas, LLC v. Taufiq (Manipal)*, defendant, who was plaintiff's former director of marketing, repeatedly contracted with company Exit Editorial, Inc. (Exit) for video editing services. (203 AD3d 662, 663 [1st Dept 2022].) Plaintiff sued defendant, asserting that defendant "falsely represented to it that he negotiated with Exit at arm's length and that Exit's prices were reasonable, when in fact its prices were well above market rate, he had an ownership interest in Exit, and he received a cash finder's fee for each contract with Exit." (*Id.*) There, the First Department found that "a separate exercise of judgment, and thus a separate wrong, was committed each time Exit was hired, thereby enabling the application of the continuing wrong doctrine." (*Id.*)

In contrast, the doctrine of continuing wrongs does not apply where the subsequent wrongs are consequences of the original, time-barred wrongful act. (See *Henry*, 147 AD3d at 602.) The distinction between consequences of a wrongful act and the wrongs themselves was discussed in *Henry*, a case involving a plaintiff being enrolled into two credit card programs without his consent and being billed monthly for those programs. (*Id.* at 600.) The First Department held that the doctrine of continuing wrong would not toll the applicable limitations period for two related reasons: one, the absence of a breach of a recurring duty and two, the First Department's finding that the wrongful acts -- automatic monthly credit card fee charges -- "represent the consequences of those wrongful acts in the form of continuing damages, not the wrongs themselves, and do not qualify for the application of the continuous wrong doctrine." (*Id.* at 602.)

The same was true in *Matter of Yin Shin Leung Charitable Foundation v. Seng (Matter of Yin Shin)*, where the First Department held that the doctrine of continuing wrong would not save plaintiffs' claim arising from the singular decision to permit corporate property to be used gratis. (177 AD3d 463, 464 [1st Dept 2019].) "The loss of corporate income was merely a continuing effect of the initial decision." (*Id.*)

Here, Azure does not allege there is a recurring duty to transfer the RM Unit and Special Risk No. 17 does not impose a recurring duty. Instead, Azure alleges that "the first closing occurred in either May 2010 or September 2010, and thus the RM Unit should have been transferred no later than August 2020 or December 2010; when Sponsor failed to do so it "breached its contract with the Azure by failing to timely transfer the RM Unit to Azure," and "by charging it rent beyond the three-month period permitted by the Offering Plan." (NYSCEF 1, Compl. ¶¶ 45-46, 50-51.) Special Risk No. 17 explicitly states that the "Sponsor shall within three (3) months of the First Closing sell the [RM Unit] to the [Azure] for use . . . subject to unavoidable delays which are no fault of Sponsor."

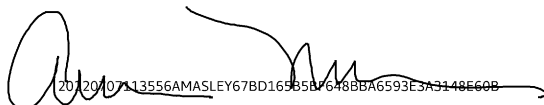
Thus, accepting as true Azure's allegations, Sponsor breached that its obligation to timely transfer the Unit as early as September 2010 and as late as December 2010. And, because, the transfer was allegedly never made on time, the alleged rent payments—over the three-month period permitted—occurred because of the initial alleged breach in 2010. It was Sponsor's single failure to transfer on time that gave rise to the excessive rent payments and other contributions, and without a contractual obligation imposing a recurring duty and no breach of a recurring duty thereof, the monthly rent payments are consequences of the alleged failure to timely transfer the

RM Unit. Thus, the doctrine will not toll the statute of limitations period. The applicable limitations period accrued in December 2010 at the latest and the limitations period expired in December 2016.

The court disagrees with Azure’s contention that “each monthly overpayment of rent constituted a new breach in a series of continuing wrongs”. The monthly overpayment of rent is more aptly analogous to the “consequences of wrongful acts,” as Azure’s overpayment of monthly rent, following the permissible three-month period of rent payments, flowed from the alleged breach of parties’ contractual obligation to transfer the RM Unit within the three months of the First Closing.

Accordingly, it is

ORDERED that defendant’s motion to dismiss is granted.



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7/7/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: