Dimson v Trump
2023 NY Slip Op 32612(U)
July 20, 2023
Supreme Court, Kings County
Docket Number: Index No. 518776/20
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of July, 2023.

PRESENT:

HON. RICHARD VELASQUEZ,
Justice.

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ISHMAIL DIMSON, MIGUEL RODRIGUEZ, EDWARD CROSS, LAURANE YEARWOOD, MARY ALSTON, PATRICIA NELSON, STEVEN CHERNOFF, TAISHA INESTI, ELAINE WILSON, ARTHUR SCHWARTZ, BETSY MUNOZ-BERMUDEZ, JOANN SINDONE, CAROL VACCA, LEONIE GREEN, MYRTLE SMITH, NANCY VASQUEZ, KATHLEEN BADYNA, DEREK MCKISSICK and HORACE VINCENT, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

Index No. 518776/20

DONALD J. TRUMP and MARYANNE TRUMP BARRY, the Co-Executors of the ESTATE OF FRED C. TRUMP, deceased, in their capacity as Co-Executors and individually, SHAWN HUGHES, the Executor of the ESTATE OF ROBERT S. TRUMP, deceased, in his capacity as Executor, ELIZABETH TRUMP GRAU, JOAN WALTER, the Executrix of the Estate of JOHN W. WALTER, deceased, in her capacity as Executor, E. TRUMP & SON COMPANY, TRUMP ORGANIZATION INC., TRUMP ORGANIZATION LLC, BEACH HAVEN APTS. NO. 1, INC., SHORE HAVEN INC., SUSSEX HALL, INC., TRUMP VILLAGE CONSTRUCTION CORP., WEXFORD HALL, INC., ALL COUNTY BUILDING SUPPLY& MAINTENANCE CORP., MIDLAND ASSOCIATES LLC, TRUMP MANAGEMENT INC., APARTMENT MANAGEMENT ASSOCIATES, INC., JACK MITNICK, SPAHR LACHER & SPERBER, INC., SPAHR LACHER & SPERBER L.L.P., MAZARS USA LLP, CAMMEBY'S REALTY CORP., ARGYLE APARTMENTS LLC, BEACH HAVEN APARTMENTS ASSOCIATES LLC, BEACH HAVEN GROUP LLC, BRIAR WYCK APARTMENTS LLC, EDGERTON APARTMENTS DEL LLC, FALCON APARTMENTS DEL LLC,

AMENDED DECISION AND ORDER

FONTAINEBLEAU TOWERS DEL LLC, GREEN PARK ESSEX APARTMENTS DEL LLC, GREEN PARK SUSSEX APARTMENTS DEL LLC, GRYMES HILL APARTMENTS DEL LLC, KENDALL APARTMENTS DEL LLC, LAWRENCE GARDENS APARTMENTS DEL LLC, LAWRENCE TOWERS DEL LLC, NAUTILUS APARTMENTS DEL LLC, SHORE HAVEN APARTMENTS DEL LLC, SOUTHHAMPTON APARTMENTS DEL LLC, SUSSEX APARTMENTS ASSOCIATES DEL LLC, STATEN ISLAND 18 ACRES LLC, TRUMP VILLAGE APARTMENTS ONE OWNER LLC, TRUMP VILLAGE APARTMENTS TWO OWNER LLC, TYSENS APARTMENTS LLC, WESTMINSTER APARTMENTS LLC, WEXFORD APARTMENTS DEL LLC, WILSHIRE APARTMENTS DEL LLC, WINSTON APARTMENTS DEL LLC, APARTMENT MANAGEMENT ASSOCIATES LLC, PARKOFF OPERATING CORP., BELCREST PARK ASSETS LLC, CHELSEA PARK ASSETS LLC, FIESTA PARK ASSETS LLC, D.S.J. REALTY, L.L.C., ATLANTIC MANAGEMENT CO INC., JOHN or JANE DOE 1-100 and XYZ CORPORATION 1-100,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed________	193-276, 277-299, 300-347, 355-360,379-384
Opposing Affidavits (Affirmations)_________	352-354, 365, 381, 383-384, 385
Reply Affidavits (Affirmations)____________	366-367, 368-370, 386, 387
Oral Argument Transcripts________________	393-397

Upon the foregoing papers, defendants Trump Organization, Inc., Trump Organization, LLC, Donald J. Trump, individually, and as Co-Executor of the Estate of Fred C. Trump, Shawn Hughes, the Executor of the Estate of Robert S. Trump, Elizabeth Trump Grau, Joan Walter, as Executrix of the Estate of John W. Walter, E. Trump & Son Company, Beach Haven Apts. No. 1, Inc., Shore Haven Apts. No. 1, Inc., Sussex Hall,

Inc., Trump Village Construction Corp., Wexford Hall, Inc., All County Building Supply & Maintenance Corp.. Midland Associates, LLC, Trump Management, Inc., Apartment Management Associates Inc., Beach Haven Apts. No. 1, Inc., Shore Haven Apts. No. 1, Inc., Sussex Hall, Inc., Trump Village Construction Corp., Wexford Hall. Inc., and Hon. Maryanne Trump Barry, Individually, and in Her Capacity as Executrix of the Estate of Fred C. Trump (collectively, the Trump Defendants) move (in motion sequence [mot. seq.] four), for an order, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), dismissing the March 15, 2022 Second Amended Class Action Complaint (SAC).

Defendants Parkoff Operating Corp., Belcrest Park Assets LLC, Chelsea Park Assets LLC and Fiesta Park Assets LLC (collectively, the Park Asset Defendants) move (in mot. seq. five) for an order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5) and (a) (7), dismissing the SAC.

Defendants Argyle Apartments LLC, Beach Haven Apartments Associates LLC, Briar Wyck Apartments, LLC, Edgerton Apartments Del LLC, Falcon Apartments Del LLC, Fontainebleau Towers Del LLC, Green Park Essex Apartments Del LLC, Green Park Sussex Apartments Del LLC, Grymes Hill Apartments Del LLC, Kendal Apartments, Del LLC, Lawrence Gardens Ardens Apartments Del LLC, Lawrence Towers Del LLC, Nautilus Apartments Del LLC, Shore Haven Apartments Del LLC, Southhampton Apartments Del LLC, Sussex Apartments Associates Del LLC, Trump Village Apartments One Owner, LLC, Trump Village Apartments Two Owner LLC, Tysens Apartments LLC, Westminister Apartments LLC, Wexford Apartments Del LLC, Wilshire Apartments Del

LLC, Winston Apartments Del LLC, Apartment Management Associates LLC, and Cammeby Realty Corp. (collectively, the Cammeby Defendants) move (in mot. seq. six) for an order, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), dismissing the SAC.

Plaintiffs Ishmail Dimson, Miguel Rodriguez, Edward Cross, Laurane Yearwood, Mary Alston, Patricia Nelson, Steven Chernoff, Taisha Inesti, Elaine Wilson, Arthur Schwartz, Betsy Munoz-Bermudez, Joann Sindone, Carol Vacca, Leonie Green, Myrtle Smith, Nancy Vasquez, Kathleen Badyna, Derek McKissick and Horace Vincent, on behalf of themselves and all others similarly situated (collectively, plaintiffs) move (in mot. seq. seven) for an order, pursuant to CPLR 3215, granting them a default judgment against non-appearing and non-answering defendants Jack Mitnick (Mitnick) and Mazars USA LLP. Defendant Mitnick moves (in mot. seq. nine) for an order granting him leave to intervene in motion sequences four and five.

Background

According to the SAC, this class action is based on a Pulitzer Prize winning investigative report by a team of reporters from the New York Times dated October 2, 2018, regarding an alleged scheme to defraud the tenants of various apartment buildings in Queens, Brooklyn, and Staten Island that were owned by the late Fred Trump and the Trump family (i.e., the Trump Portfolio). Specifically, the SAC alleges that, in 1992, the Trump Defendants created defendant All County Building & Supply Corp. (All County) whose "ostensible purpose" was:

> "to be the purchasing agent for Fred Trump's buildings, buying

> everything from boilers to cleaning supplies. It did no such thing, records and interviews show. Instead, All County siphoned millions of dollars from Fred Trump's empire by simply marking up purchases already made by his employees. Those millions, effectively untaxed gifts, then flowed to All County's shareholders, Donald Trump, his siblings, and a cousin [John Walter]. Fred Trump then used the padded All County receipts to justify bigger rent increases for thousands of tenants" (*see* NYSCEF Doc No. 152 at ¶ 5 [quoting from the New York Times exposé]).

The SAC alleges that the larger rent increases are based upon inflated capital projects due to All County's involvement, amongst other things, and constitute compensable damages in this lawsuit. The only three remaining causes of action in the SAC are for civil violation of the Racketeer Influenced and Corrupt Organization Act (RICO), conspiracy to commit RICO and common law fraud.[1]

The Trump Defendants claim that the use of All County as a purchasing agent was a legal way to avoid inheritance taxes when Fred Trump died since the "mark ups" were not unreasonable. They argue that the rent increases were approved by the Department of Housing and Community Renewal (DHCR) and that tenants had an opportunity to challenge such rent increases in that administrative forum. The Trump Defendants argue that All County enabled them to combine the company's purchasing power, as opposed to separate purchases by each building group or individual building.

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[1] The SAC, which is comprised of 834 paragraphs, originally asserted 15 causes of action. However, the fourth through fifteenth causes of action are now dismissed since plaintiff failed to oppose those branches of defendants' dismissal motions and conceded to the dismissal of those claims during the March 8, 2023 oral argument.

Defendants' instant pre-answer dismissal motions followed.

The Trump Defendants' Pre-Answer Dismissal Motion

The Trump Defendants move to dismiss the SAC on several grounds. Defense counsel explains and asserts that:

> "To dress up an otherwise statutorily barred claim of rent overcharge, which . . . were lawful and/or involved MCI [Major Capital Improvement] increases authorized by a State agency [DHCR] decades ago and at [every] step of the way, the rent regulated tenants had the right and opportunity to challenge any IAI [Individual Apartment Increase] or MCI increase taken [and] every MCI that was granted went through a rigorous review and challenge process at DHCR [which] cannot now . . . be collaterally attacked" (NYSCEF Doc No. 194 at ¶¶ 8-9).

Specifically, defense counsel argues that:

> "MCI applications filed by the Trump Owner Entities (i) were directly supervised, executed and filed with DHCR by former DHCR Deputy Commissioner and General Counsel, Dennis B. Hasher [Hasher], acting as general counsel to the Owner Trump Entities; (ii) disclosed to tenants and to DHCR that All County is owned by the children and nephew of the owner [Fred Trump]; (iii) tenants in the Trump Portfolio interposed objections to the requested MCI rent increases based upon the familial relationship between All County and the Trump Owner Entities; and (iv) after consideration by DHCR, MCIs were ultimately granted, notwithstanding the tenants' objections, after a heightened review process by the DHCR" (*id.* at ¶ 10).

Consequently, the Trump Defendants contend that plaintiffs are collaterally estopped from challenging the DHCR's final determinations regarding the subject rent increases. The Trump Defendants argue that plaintiffs had both actual and inquiry notice because several

tenants and tenant associations, including some of the same plaintiffs here, previously challenged the MCI and IAI increases based on the fact that All County's owners were the children and nephew of Fred Trump, the landlord.

The Trump Defendants further argue that plaintiffs are time-barred from challenging any rent increases prior to 2016, approximately 12 years after the Trump family divested itself of those properties and All County ceased all operations in 2004. Since the Trump Defendants divested themselves of those properties in 2004, and RICO has a four-year statute of limitations, the Trump Defendants contend that the latest a RICO claim could have been commenced was 2008. Applying that same reasoning, they argue that a common law fraud claim, which has a six-year statute of limitations, must have been commenced by 2010. The Trump Defendants contend that rent overcharge claims have a four-year look back period from the date of commencement (*see*, *e.g.*, *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d 332, 355 [2020]). Based on that four-year look-back period, the Trump Defendants assert that plaintiffs are precluded from investigating the rent histories for alleged overcharges from 1992 through 2004 because claims based on those charges are barred by the applicable statute of limitations.

The Trump Defendants further argue that All County was not created, as plaintiffs claim, for an illegal or fraudulent purpose to unlawfully hike rents, but rather, for: (i) the legitimate business purpose of centralizing the companies' bulk purchasing power by creating one purchasing agent for the Trump Owner Entities, for which services All County

charged a legitimate markup, and (ii) as a lawful estate planning tool to shelter Fred Trump's wealth from onerous estate taxes.

The Trump Defendants contend that the individual defendants, the Trump Organization, Inc. (TOI) and the Trump Organization LLC (TOLLC), lacked any ownership interest in the buildings that comprise the Trump Portfolio.[3] The Trump Defendants additionally assert that the SAC fails to include any detailed allegations supporting plaintiffs' RICO or fraud claims, including the amount of rent that plaintiffs are paying, what plaintiffs' legal rent should be and whether an increase in plaintiffs' rent is related to an MCI or an IAI.

The Trump Defendants also contend that the SAC fails to sufficiently allege that any of the Trump Individual Defendants' activities affected interstate and/or foreign commerce. The Trump Defendants note that the RICO predicate acts alleged in the SAC (i.e., mailing false invoices and checks to and from the Trump Owner Entities and All County, mailing of leases, renewal leases and rent registrations to DHCR and tenants) all occurred in New York, where the Trump Portfolio and All County were located.

The Park Asset Defendants' Pre-Answer Dismissal Motion

The Park Asset Defendants join in the defenses, arguments and grounds asserted in the Trump Defendants' dismissal motion, but add a standing defense, pursuant to CPLR

[3] Prior to any discovery, it is premature to determine what role, if any, TOI and TOLLC had with regards to the subject properties.

3211 (a) (3). The Park Asset Defendants contend that as recent purchasers of some of the former Trump properties in 2020, none of the named plaintiffs are, were or could have been their tenants. Essentially, the Park Asset Defendants argue that since they were created after publication of the New York Times article, as a matter of timing and logic, they could not have fraudulently misrepresented and/or concealed the conduct that was revealed in the October 2, 2018 New York Times article.

The Cammeby Defendants' Pre-Answer Dismissal Motion

Like the Trump Defendants and the Park Asset Defendants, the Cammeby Defendants also argue for dismissal of the complaint based on the statute of limitations and collateral estoppel. The Cammeby Defendants further assert that the SAC contains only conclusory allegations that they had reason to know of Trump's All County scheme at the time they purchased the Trump Portfolio.

All of the moving defendants rely on the DHCR's administrative records to support dismissal, pursuant to CPLR 3211 (a) (1).

Plaintiffs' Opposition

Plaintiffs, in opposition, claim that the moving defendants have failed to satisfy their burden of proof under CPLR 3211 (a) (1). Specifically, plaintiffs argue that none of the documentary evidence produced, nor the affidavits submitted, detail the relationship between All County, the central figure in the alleged fraudulent scheme, and the other defendants. Plaintiffs further contend that collateral estoppel is inapplicable as there is no identity of issues raised here compared to those previously raised before and decided by

the DHCR. Plaintiffs note that fraud was never determined by the DHCR, which only considered the reasonableness of the rent increases without regard to the actual costs incurred by defendants through All County's purchases.

Plaintiffs argue that while tenants may have had notice and an opportunity to be heard before the DHCR, they did not have a full and fair opportunity to contest All County's business model because defendants' scheme involving All County had not yet been revealed. Specifically, while the tenants and tenant associations that challenged the rent increases before the DHCR had knowledge of some of the alleged players, they did not have knowledge of the alleged scheme involving All County, which was concealed with the assistance of Hasher, the former deputy commissioner and general counsel of DHCR, prior to his employment by the Trump family.[4] According to plaintiffs, the higher scrutiny used by the DHCR did not include a review of the actual costs paid by All County, as only the All County invoice and the cancelled payment check from a Fred Trump entity were produced. In some cases, this resulted in a 50% mark up on the items and/or services purchased. Plaintiffs claim that what All County actually paid to third party vendors should have been the proper basis for the IAI or MCI increases.

[4] Hasher does not reveal which of the Trump entities he was employed by from 1992 to 2004.

Finally, plaintiffs contend that the statute of limitations is a mixed question of law and fact because the doctrine of equitable tolling applies under the circumstances here. Plaintiffs assert that the Trump Defendants' subterfuge in concealing All County's true purpose and role prevented plaintiffs from discovering defendants' fraudulent scheme sooner than the publication of the New York Times article on October 2, 2018.

DISCUSSION

(1)

Where a CPLR 3211 (a) (3) motion is based on an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law and "[t]o defeat a defendant's motion to dismiss, the plaintiff has no burden of establishing its standing as a matter of law but must merely raise a question of fact as to the issue" (*Wilmington Sav. Fund Soc'y, FSB v Matamoro*, 200 AD3d 79, 89-90 [2d Dept 2021]).

Here, the Park Asset Defendants claim that none of the plaintiffs are or were their tenants at any time since they purchased their properties in 2020. Absent a tenancy, they argue that there is no privity between the parties to support the claims asserted against them in the SAC. Plaintiffs, in opposition, claim that the proposed class representatives, at this stage of the litigation, need not be actual tenants to satisfy class standing. Defendants, in reply, claim that plaintiffs have conflated individual standing with class standing, and that both must exist to withstand dismissal.

"[I]n a putative class action, a plaintiff has class standing if he plausibly alleges (1)

that he 'personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant,' and (2) that such conduct implicates 'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class by the same defendants" (*NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co.*, 693 F3d 145, 162 [2d Cir 2012] [quoting *Blum v Yaretsky*, 457 US 991, 999 (1982) and *Gratz v Bollinger*, 539 US 244, 267 (2003)]). A named plaintiff does not require individual standing to bring each class member's claim to establish "class standing" (*NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co.*, 693 F3d at 158-162).

Contrary to the Park Asset Defendants' argument, it is reasonable to conclude that they purchased the properties (after the 2018 New York Times article was published) with full knowledge of the alleged fraud, which makes them necessary parties to the relief plaintiffs seek. Since the proposed class action plaintiffs claim to have suffered the same injuries (i.e., inflated base rents) based on defendants' alleged conduct, that branch of the Park Asset Defendants' motion to dismiss the SAC as against them, pursuant to CPLR 3211 (a) (3), is denied.

(2)

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 pleading a liberal construction, accept all facts alleged in the pleading to be true, accord plaintiff the benefit of every possible inference, and determine whether the facts alleged fit within any cognizable legal theory (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012, as amended

2013]). Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the question becomes whether plaintiff has a cause of action, not whether plaintiff has stated one, and unless it has been shown that a material fact as claimed by plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*Atalaya Asset Income Fund II, LP v HVS Tappan Beach, Inc.*, 175 AD3d 1370, 1371 [2d Dept 2019]).

Defendants claim that the remaining causes of action for RICO and fraud require specificity in the pleadings, pursuant to CPLR 3016 (b). Defendants assert that "the 315-page SAC, consisting of 834 paragraphs of only 429 paragraphs of 'factual allegations' with 417 paragraphs pled 'upon information and belief' alleging 15 duplicative time-barred causes of action must be dismissed in its entirety" (NYSCEF Doc No. 276 at 13). Defendants assert that plaintiffs have not alleged (1) the specific transactions between All County and Fred Trump or his entities; (2) the base rent(s) that were improperly increased; and/or (3) the dates of such transactions and increases, amongst other things. However, much of the foregoing information is exclusively within defendants' possession and control, as shown by the documentary evidence in the record.

The purpose of pleading with the requisite specificity is to provide a defendant with sufficient notice of the acts or transactions being alleged. "Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Systems Inc.*, 10 NY3d 486, 492 [2008]). "Although plaintiffs have not alleged specific details of each individual defendant's

conduct, we have never required talismanic, unbending allegations" because "sometimes such facts are unavailable prior to discovery" (*id.* at 493). Here, the allegations in the SAC present a clear inference of the fraud complained of by plaintiffs.

Regarding defendants' interstate commerce argument, "[t]he affect on interstate commerce alleged in the complaint is the purchase and sale of building materials including floor tiles, copper wire and cable, and valves" (*Riverbay Corporation v Steiner,* 144 Misc2d 530, 538 [Sup Ct Bronx County 1989]). Here, the SAC uses the generic terms "appliances, fixtures, building materials [and] supplies" purchased by All County, which is sufficiently pled, as a matter of law (*see* NYSCEF Doc No. 152, SAC at 650). Further, there is no requirement that the use of mail be interstate as predicate for fraud (*see* 18 USC 1341). However, the use of mail is sufficient to support a RICO claim (*Riverbay Corporation v Steiner,* 144 Misc2d at 537. Therefore, dismissal on these grounds is denied.

(3)

A motion to dismiss, pursuant to CPLR 3211 (a) (1), will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker*, LLP, 38 AD3d 34, 37 [2006]). For evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be "unambiguous, authentic, and undeniable" (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017]). It has been held that "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds [and] contracts"

constitute documentary evidence under CPLR 3211 (a) (1) (*Ralex Servs., Inc. v Sw. Marine & Gen. Ins. Co.*, 155 AD3d 800, 801-802 [2d Dept 2017]).

A party who seeks dismissal, pursuant to CPLR 3211 (a) (5), on the ground that the claims are barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired (*see Benjamin v Keyspan Corp.*, 104 AD3d 891, 892 [2d Dept 2013]). The burden then shifts to the nonmoving party to raise a question of fact regarding the applicability of an exception to the statute of limitations, such as whether the statute of limitations was tolled (*see Shalik v Hewlett Assoc., L.P.*, 93 AD3d 777, 778 [2d Dept 2012]), or whether the claim was interposed within the applicable limitations period (*see Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2d Dept 2011]).

Defendants claim that the DHCR records, which constitute documentary evidence within the meaning of CPLR 3211 (a) (1), establish that plaintiffs' claims are barred by the statute of limitations. Specifically, defendants contend that plaintiffs were on inquiry notice that a fraud may have been afoot during the period 1992 through 2004. Plaintiffs claim that either equitable estoppel or the two-year discovery rule applies to prevent dismissal based on the statute of limitations.

"[E]quitable estoppel will preclude a defendant from using the statute of limitations as a defense 'where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding'" (*Putter v North Shore University Hospital et al.*, 7 NY3d 548 [2006] [quoting

Zumpano v Quinn, 6 NY3d 666 (2006)]).

> "The elements of estoppel are, with respect to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) prejudicial change in his position" (*Lake Valhalla Civil Association, Inc. v BMR Funding, LLC,* 194 AD3d 803, 804-805 [2d Dept 2021] [quoting *First Union Natl. Bank v Tecklenburg,* 2 AD3d 575, 577 (2d Dept 2003)]).

Plaintiffs argue that it was defendants' conduct in concealing All County's true purpose that prevented them from discovering the fraud until publication of the New York Times article on October 2, 2018. Alternatively, plaintiffs contend that this lawsuit was filed two years to the day of discovery of the alleged fraud, to wit: October 2, 2020. Further, there was a toll in effect pursuant to Executive Orders due to the COVID-19 pandemic (Governor Cuomo's Executive Orders 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67 and 202.72), so this action, in any event, was timely filed, or at the very least, raises a mixed question of law and fact.

The SAC adequately alleges that defendants set up All County as a "sham" company buying materials and labor services at low prices, ostensibly negotiated by Fred Trump, without ever disclosing those actual costs to the DHCR. While plaintiffs may have seen the results of the All County purchasing operation, they did not see the mechanics of the allegedly fraudulent scheme, as it was concealed. The Trump entities would apply to DHCR for rent increases without revealing the actual purchase prices paid through All

County for the alleged purpose of enriching the Trump Defendants at the expense of plaintiffs, their tenants. There was no way for plaintiffs to discover what All County actually paid for materials and labor services on defendants' behalf, as that information was never disclosed by defendants to the DHCR. Since Hasher, the former Deputy Commissioner and General Counsel of the DHCR prepared the paperwork for submission to the DHCR on behalf of defendants, a finding of "reasonable" (a very subjective term) costs, was almost assured. Such "reasonable" costs, however, *were not the actual costs* (secretly paid by All County) upon which the tenants' base rent increases should have been calculated. Under those circumstances, it cannot be said that plaintiffs had sufficient inquiry notice (*see, e.g.*, *Riverbay Corp. v Steiner,* 144 Misc2d 530, 538 [Sup Ct Bronx County 1989] [holding that "no factual basis for the instant allegations of bribery and kickbacks emerged until the government prosecutors filed criminal complaints" more than four years after the last alleged violation]). Therefore, defendants' dismissal motions based on the statute of limitations are denied.

(4)

Collateral estoppel applies when "(1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Gersten v 56 7th Avenue LLC*, 88 AD3d 189, 204 [1st Dept 2011]; *see also Nachum v Ezagui*, 83 AD3d 1017, 1018 [2d Dept 2011]).

Here, defendants claim that plaintiffs are collaterally estopped from asserting claims regarding the rent increases because the DHCR, after an opportunity to be heard, previously determined that the rent increases were reasonable. The factual and legal issues that were before the DHCR, and that are now before this court, are not identical for collateral estoppel purposes. The issues before the DHCR were limited to whether defendants' requested rent increases were justified based on the information they provided to the DHCR, and not whether defendants committed fraud and/or RICO violations by concealing the true cost of the goods and services obtained by All County.

Further, while plaintiffs may have claimed collusion and fraud based on the familial relationship of the parties in their written objections to the rent increase requests before the DHCR, defendants have failed to prove that those issues were fully litigated or even considered by the DHCR. Indeed, the documentary evidence (the DHCR records) seemingly reflect that a "rubber stamp"[5] may have been used by the DHCR during those twelve years. For all of the foregoing reasons, defendants' dismissal motions are denied on collateral estoppel grounds.

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[5] A prime example can be found at NYSCEF Doc No. 285, the rider to the Petition for Administrative Review (PAR) of Joseph Solarchik. Based on the record, it puzzles the court how this rent increase was approved.

Defendants' remaining contentions have been considered and are without merit or are inappropriate for a pre-answer motion. Accordingly, it is hereby

ORDERED that defendants' motions to dismiss the SAC (mot. seq. four, five and six) are only granted to the extent that the fourth through fifteenth causes of action of the SAC are hereby dismissed without opposition and on consent (*see supra* at Fn. 1); defendants' dismissal motions are otherwise denied; and it is further

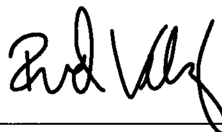
ORDERED that plaintiffs' motion (mot. seq. seven) for a default judgment against defendants Mitnick (without opposition) and Mazars USA is granted, and an inquest shall be held at the time of trial; and it is further

ORDERED, that defaulting defendant Mitnick's motion (mot. seq. nine) to intervene in defendants' dismissal motions is denied as moot; and it is further

ORDERED that all non-defaulting defendants shall serve their answers to the SAC within 30 days after service of this decision and order with notice of entry.

This constitutes the decision and order of the court.

E NTER FORTHWITH,



HON. RICHARD VELASQUEZ, J. S. C.

Hon. Richard Velasquez, JSC JUL 20 2023

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