

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18742
O/kmg

_____AD3d_____

Argued - March 4, 2008

STEVEN W. FISHER, J.P.
DAVID S. RITTER
MARK C. DILLON
WILLIAM E. McCARTHY, JJ.

2007-09011

DECISION & ORDER

Johannes Reiner, a/k/a Jan Reiner, appellant,
v Susan Jaeger, respondent.

(Index No. 11268/07)

Esseks, Hefter & Angel, LLP, Riverhead, N.Y. (William Power Maloney of counsel),
for appellant.

Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP, Riverhead, N.Y. (Patrick
B. Fife of counsel), for respondent.

In an action to impose a constructive trust on real property, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Baisley, J.), dated August 21, 2007, which denied his motion to preliminarily enjoin the defendant from, inter alia, evicting him from the subject property and granted the defendant's cross motion to dismiss the complaint as time-barred pursuant to CPLR 3211(a)(5).

ORDERED that the order is affirmed, with costs.

A cause of action to impose a constructive trust is governed by a six-year statute of limitations and begins to accrue "upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered" (*Soscia v Soscia*, 35 AD3d 841, 843; *see* CPLR 213[1]). Where, as here, the constructive trustee is alleged to have wrongly acquired the property, the accrual date is deemed to be the date of the alleged wrongful transfer of the property (*see De Laurentis De Laurentis*, 47 AD3d 750; *Soscia v Soscia*, 35 AD3d at 843; *Pisciotta v Dries*, 306 AD2d 262, 263; *Mazzone v Mazzone*, 269 AD2d 574, 575). Here, in

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support of her cross motion to dismiss the complaint pursuant to CPLR 3211(a)(5), the defendant made a prima facie showing that the action was time-barred by establishing that the cause of action accrued on December 16, 1997, the date she allegedly wrongfully acquired the subject property solely in her name, rather than as a co-owner with the plaintiff (*cf. Matter of Schwartz*, 44 AD3d 779; *Swift v New York Med. Coll.*, 25 AD3d 686, 687). Accordingly, the burden shifted to the plaintiff to “aver evidentiary facts establishing that the case falls within an exception to the Statute of Limitations” (*Savarese v Shatz*, 273 AD2d 219, 220 [internal quotations omitted]; *see Swift v New York Med. Coll.*, 25 AD3d at 687).

The plaintiff attempted to meet this burden by contending that the defendant is equitably estopped from invoking the statute of limitations defense. Under this doctrine, a defendant is precluded from invoking a statute of limitations 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” (*Zumpano v Quinn*, 6 NY3d 666, 673; *see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552; *Simcuski v Saeli*, 44 NY2d 442, 448-449; *Kamruddin v Desmond*, 293 AD2d 714, 715). However, because the complaint itself does not refer to or even raise any facts alleging conduct to which the doctrine would be applicable, the plaintiff cannot raise it in opposition to the defendant’s motion (*see Florio v Cook*, 48 NY2d 792; *Anderson Co. v Devine*, 202 AD2d 382). Moreover, even resolving all inferences in the plaintiff’s affidavits in his favor (*see Arrington v New York Times Co.*, 55 NY2d 433, 442; *Rovello v Orofino Realty, Co.*, 40 NY2d 633, 635; *see Davis v CCF Capital Corp.*, 277 AD2d 342, 343; *Sopesis Constr. v Solomon*, 199 AD2d 491, 493), the plaintiff failed to establish the applicability of the doctrine. The plaintiff contends only that, based on the defendant’s assertions prior to December 16, 1997, he simply assumed for nearly 10 years, without conducting any due diligence and without any fraudulent conduct on the defendant’s part after December 1997 that could have lulled him into not commencing a timely action, that the parties jointly held title to the subject property (*see Putter v North Shore Univ. Hosp.*, 7 NY3d at 552). In the absence of a fiduciary relationship between the parties, which the plaintiff does not allege existed, the defendant’s conduct did not trigger application of the doctrine (*see Zumpano v Quinn*, 6 NY3d at 674; *Gleason v Spota*, 194 AD2d 764, 765).

In light of our determination, we need not address the plaintiff’s remaining contentions.

FISHER, J.P., RITTER, DILLON and McCARTHY, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court