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COURT OF APPEALS
STATE OF NEW YORK

FAISON,

Appellant,

-against-

No. 46

LEWIS, ET AL.,

Respondent.

20 Eagle Street
Albany, New York 12207
February 18, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 46, Faison v. Lewis.
2 Counsel, would you like any rebuttal time?

3 MR. GORDON: Yes, please, Judge. Two
4 minutes.

5 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

6 MR. GORDON: May it please the court, my
7 name is David Gordon. I'm here for the appellant,
8 who is also the plaintiff in this case. Judge, I - -
9 - I submit that the - - - there was only one issue,
10 as limited by our briefs on - - - on this appeal.
11 And I submit that it's a - - - a straightforward one
12 and admits of only one resolution. And that is that
13 an action to declare the nullity of a forged deed can
14 never be barred by a statute of limitations.

15 CHIEF JUDGE LIPPMAN: Isn't a forgery a - -
16 - a form of fraud?

17 MR. GORDON: I don't think so. There is a
18 convention that has been followed in some of the
19 cases talking about forgery as a species of fraud.
20 But if you look at the two - - - the two acts,
21 they're really very different. What we mean by fraud
22 generally is a false representation of fact that is
23 known by the - - -

24 CHIEF JUDGE LIPPMAN: Well, if you look at
25 the common meaning of it, it seems so removed from

1 you - - - from - - - to you from - - - from fraud,
2 forgery?

3 MR. GORDON: Well, the - - -

4 CHIEF JUDGE LIPPMAN: I mean, putting aside
5 any technical legal thing, someone forges something,
6 you don't think that that's - - - that's fraudulent
7 or a fraud or trying to commit a fraud?

8 MR. GORDON: In - - - in the sense that
9 it's a deceptive and a dishonest act, yeah, you can
10 call it fraudulent. But it's not - - -

11 CHIEF JUDGE LIPPMAN: It's a different kind
12 of dishonesty in your mind?

13 MR. GORDON: It's a different kind of
14 honesty (sic), and one critical distinction, I think,
15 is that with common law fraud, the speaker is - - -
16 is attempting to deceive and bilk the person that the
17 speaker is speaking to. With a forged deed, it's - -
18 - it's different. The deed is usually being given
19 either to the - - - to the forger or the forger is
20 handing it to somebody else. So the - - - the true
21 owner is not the - - - the true owner is the victim
22 of - - - well, the true owner is the victim of the -
23 - - of the forged deed, but not the person who is
24 relying on it.

25 JUDGE PIGOTT: You - - - you see any limit

1 on this in - - - in terms of - - - I know you're
2 arguing there's no statute of limitations,
3 apparently. But is there laches? Is there - - - is
4 there something that can be - - - you know, if - - -
5 if you own your house and - - - and you owned it for
6 forty years and someone comes in and hey, by the way,
7 that deed you got has been forged and move.

8 MR. GORDON: Well, I think that in an
9 appropriate case, since the remedy here is equitable,
10 that laches can be asserted.

11 CHIEF JUDGE LIPPMAN: Why isn't this an
12 appropriate case?

13 MR. GORDON: For laches? Well, there
14 certainly hasn't - - -

15 CHIEF JUDGE LIPPMAN: Yeah.

16 MR. GORDON: - - - been any showing that
17 there has been a loss of evidence or any other kind
18 of prejudice to the defendants here resulting from
19 the delay. In fact, even if the statute of
20 limitations - - - well, in - - - in a - - - in a - -
21 - in a case in which the discovery rule has not yet
22 been triggered, the statute of limitations could
23 conceivably go on as - - - as long as the delay is in
24 this case, and even go on potentially until - - -

25 CHIEF JUDGE LIPPMAN: Well, that goes back

1 to Judge Pigott's question that this can go on
2 forever. There's no - - - there's no outside,
3 really.

4 MR. GORDON: I don't think there's any - -
5 -

6 CHIEF JUDGE LIPPMAN: If it's void on its
7 face and it's no good, invalid from the beginning - -
8 -

9 MR. GORDON: That's correct, Judge.

10 CHIEF JUDGE LIPPMAN: - - - then - - - then
11 you can always sue on it, even when years and years
12 and years - - -

13 MR. GORDON: That - - -

14 CHIEF JUDGE LIPPMAN: - - - afterward - - -

15 MR. GORDON: That's - - - that's the case,
16 Judge, but I think, again, the - - -

17 JUDGE RIVERA: How would that affect the
18 property and - - - and deed recording in the state?

19 MR. GORDON: I - - - I don't think - - - I
20 don't think it does at all. I think that the court
21 can take notice of the fact that New York has a - - -
22 a healthy and very vigorous real estate market.
23 Property is regularly changed from hand to hand
24 without regard, on the part of the purchaser or
25 without regard to lenders who are taking mortgages,

1 of - - - of how long the - - - the owner, how long
2 the - - - the seller or the mortgage - - - mortgagor
3 has held that property.

4 Now, if the statute of limitations were
5 really a major concern here, you wouldn't see that
6 kind of vibrancy in real estate markets within six
7 years of the seller or mortgagor acquiring title. I
8 - - - so I think that the - - - the reality of New
9 York's real estate market suggests that the - - - the
10 - - - the horrors here that have been - - -

11 JUDGE ABDUS-SALAAM: Counsel, how - - - how
12 does the discovery rule play into this? You know,
13 assuming there was a six-year statute of limitations,
14 which is the statute currently for fraud, and you
15 have a two-year discovery rule, so even if it were
16 four years later, it would seem to me if the
17 discovery rule was followed, then the person who
18 wants to bring a lawsuit could bring that lawsuit
19 within two years of discovering the - - - the alleged
20 forgery.

21 MR. GORDON: That's correct. And we're not
22 saying that that's the situation in this case, but as
23 I indicated a moment ago, the - - - the concern here
24 that without application of the statute of
25 limitations to these sorts of actions that there will

1 be chaos in the real estate markets because there can
2 be contests over ownership going on indefinitely into
3 the future, is one that exists under the current
4 statute of limitations for fraud. If the - - - if
5 there is no reason why the - - - a true owner should
6 be aware that there's been a forged deed tendered to
7 somebody and doesn't discover it for ten or fifteen
8 or twenty years, that cause of action is still alive
9 even if the statute of limitations for fraud were to
10 survive.

11 JUDGE STEIN: In the Riverside case, you
12 had two parties entering into a cont - - - contract,
13 which the terms that they were making were void as
14 against public policy. Do you see a difference in
15 that context and in the - - - the context that we
16 have here in this case?

17 MR. GORDON: No, I don't, Judge. And - - -
18 and this court in Riverside Syndicate certainly drew
19 no distinction between different grounds for voidness
20 in their facts.

21 JUDGE STEIN: No, no. But that - - - that
22 case was deciding the facts, you know, before it.

23 CHIEF JUDGE LIPPMAN: It wasn't a forgery
24 case.

25 JUDGE STEIN: It wasn't a forgery.

1 MR. GORDON: It - - - it wasn't a forgery
2 case. And what the court said is that because it's -
3 - -

4 CHIEF JUDGE LIPPMAN: Is that a big leap to
5 - - - to what you're doing, forgery, which again,
6 might well be considered - - - and there are cases
7 that consider it - - - a species or a subset of
8 fraud.

9 MR. GORDON: I - - - I don't think that
10 it's - - - it's a big leap. The - - - I think this
11 court was clear in using the term void. And I know
12 of no cases that distinguish between different kinds
13 of instruments or different kinds of acts which are
14 void in terms of their effects.

15 JUDGE READ: Well, there's a big difference
16 between a deed and a contract, isn't there? I mean
17 there's a real interest in - - - in the security in
18 deeds that we have as a matter of public policy. I
19 mean, there's a - - - there's a big interest in the
20 security of contracts as well, but - - - but they're
21 not exactly equal, are they?

22 MR. GORDON: I - - - I don't know whether
23 the - - - the - - - the interests in - - - in
24 contracts and the interest in deeds are the same.
25 But I would say that - - -

1 JUDGE READ: But you're saying the rule
2 should be the same? That we - - - we decided in
3 Riverside for contracts and the rule should be the
4 same?

5 MR. GORDON: Yes, and you decided also,
6 Judge, in Cameron Estates, which involved a - - - a
7 tax deed which was issued erroneously, wasn't
8 illegal, and it wasn't an agreement. It was a deed.
9 But you held that because it was issued erroneously
10 and without statutory authority, it was void, and an
11 action to declare its nullity could not be bar - - -
12 barred by the statute of limitations.

13 I don't really see any distinction between
14 a deed that is void for forgery and a deed that is
15 void because it was issued by error in violation of a
16 statute. In both cases, I think the character of the
17 instrument, whether it's a - - -

18 JUDGE READ: Well, there was a difference
19 in Cameron, too, wasn't there? Because it was
20 equitable relief and the person who sought to - - -
21 or the person who sought to have the cloud on her
22 title removed was in possession of the property.
23 That's not the situation here, is it?

24 MR. GORDON: Well, we're - - - we're not in
25 possession of the property, but I don't see why that

1 would be determinative. We - - - we are saying that
2 we are a tenant in common with another person who,
3 presumably, is in possession of the property. So
4 that person's possession is not hostile to our - - -
5 our claim of - - - of a right to possession. The
6 situation I - - - I think is similar to - - -
7 therefore to the one in Cameron Estates. Where - - -
8 where the - - - nobody else had - - - had taken
9 possession hostile to the true owner's rights.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 Thanks.

12 MR. GORDON: Thank you.

13 CHIEF JUDGE LIPPMAN: Counsel.

14 MS. PANGILINAN: May it please the court,
15 the current rule of law in this state, and the
16 correct one, is that the six-year statute of
17 limitations which applies to claims of fraud applies
18 equally to claims of forgery. And appellant has
19 presented - - -

20 CHIEF JUDGE LIPPMAN: Your adversary says
21 forgery is not a - - - just a subset of fraud. But
22 it's a - - - a different thing, different motives.
23 You don't buy that?

24 MS. PANGILINAN: Oh, I would disagree, Your
25 Honor. Forgery as - - - as - - - as agreed upon in -

1 - - in virtually all of the departments in New York
2 State is a subspecies or a subset of fraud. There is
3 a fraudulent making in the instrument, thus rendering
4 it a fraud by some sort of trickery or deceit while -
5 - -

6 CHIEF JUDGE LIPPMAN: Why is it different?
7 Your adversary relies on Riverside and cases along
8 those lines that - - -

9 MS. PANGILINAN: Well - - -

10 CHIEF JUDGE LIPPMAN: Why - - - why is this
11 different?

12 MS. PANGILINAN: As Your Honor has pointed
13 out, Riverside Syndicate didn't even involve a
14 situation of fraud. There, the contractor - - -

15 CHIEF JUDGE LIPPMAN: But why isn't the
16 principle the same?

17 MS. PANGILINAN: Well, deeds, Your Honor,
18 specifically, which is the issue in our case, are
19 relied upon by more than just the parties to the
20 specific instrument.

21 CHIEF JUDGE LIPPMAN: So there's a special
22 interest in deeds?

23 MS. PANGILINAN: Absolutely.

24 CHIEF JUDGE LIPPMAN: Because of the nature
25 of the industry?

1 MS. PANGILINAN: Yes, Your Honor. Deeds
2 are relied upon by subsequent purchasers, subsequent
3 lenders, ad infinitum. And so there is something - -
4 -

5 CHIEF JUDGE LIPPMAN: But your adversary
6 says you have a robust industry anyway, so it doesn't
7 really bother anybody.

8 MS. PANGILINAN: Well, I would say that
9 that's because there is a statute of limitations in
10 place - - -

11 CHIEF JUDGE LIPPMAN: Ah, I see.

12 MS. PANGILINAN: - - - protecting property
13 rights.

14 CHIEF JUDGE LIPPMAN: Because you have the
15 statute of limitations is why you have a robust
16 industry.

17 JUDGE READ: So if you lose, it won't be so
18 robust?

19 MS. PANGILINAN: That's the - - - that's
20 the danger, Your Honor.

21 JUDGE READ: Okay.

22 JUDGE PIGOTT: So can I - - - can I do
23 this? If - - - if my mother is - - - is getting
24 older and she's in possession of the family household
25 and I backdate the deed so I can avoid Medicaid, and

1 as long as nobody catches me right away or if she
2 outlives the six years, I win. They can't challenge
3 the fact that I forged the deed and voided all of the
4 - - - having the - - - having the house lost to
5 Medicaid because of that?

6 MS. PANGILINAN: I'm sorry. Is - - - is
7 your mother still in possession of the property? Or
8 who is contesting the - - -

9 JUDGE PIGOTT: She dies.

10 MS. PANGILINAN: I'm sorry?

11 JUDGE PIGOTT: And all of a sudden - - -
12 all of a sudden Medicaid's coming in and saying wait
13 a minute, Mr. Pigott, you - - - you forged that deed.
14 And I'll say, you're damn right I did, and I did it
15 more than six years ago.

16 MS. PANGILINAN: Well, if they have an
17 interest then they need to bring the - - - or a claim
18 of forgery, then they need to bring that claim within
19 the statutory period, which is six years.

20 JUDGE PIGOTT: So - - -

21 MS. PANGILINAN: Or within two years of
22 when it could have been reasonably discovered.

23 JUDGE PIGOTT: Even though they had no clue
24 as to when it was - - -

25 JUDGE ABDUS-SALAAM: You mean when he - - -

1 when he admits that he forged the deed? Two years
2 after he admits that he forged the deed, then they
3 can bring the - - - the lawsuit, right?

4 MS. PANGILINAN: When they - - - when they
5 have the - - -

6 JUDGE PIGOTT: Then I take that back.

7 MS. PANGILINAN: When they have info - - -

8 CHIEF JUDGE LIPPMAN: He's going to change
9 the hypothetical shortly.

10 MS. PANGILINAN: If they have information
11 that - - - that would reasonably lead them to believe
12 that the forgery has occurred, then, yes, they have
13 to act quickly within two years of that point.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MS. PANGILINAN: Okay, all right.

16 CHIEF JUDGE LIPPMAN: Anything else?

17 MS. PANGILINAN: No.

18 CHIEF JUDGE LIPPMAN: Thank you.

19 MS. PANGILINAN: Thank you, Your Honors.

20 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

21 MR. GORDON: Yes, Judge, very briefly. I
22 think that this court has already balanced interests
23 at play where there's a forged deed. And I think it
24 did that as long ago as Marden v. Dorthy when it held
25 that a forged deed is void and not merely voidable.

1 There's a - - - a long and well-established
2 distinction made in the law between void and voidable
3 instruments, void and voidable acts. A void
4 instrument, like a forged deed, is one that can never
5 acquire effect through time, just like in the legal
6 contract in the Riverside Syndicate case. And it is
7 for that reason, it is on the strength of that
8 principle that a statute of limitations should never
9 be allowed to give that defunct stillborn instrument
10 a vitality.

11 JUDGE PIGOTT: Well, what's wrong with the
12 idea that you got to move speedily? What's - - -
13 what's - - -

14 MR. GORDON: What - - - what's wrong with
15 it?

16 JUDGE PIGOTT: What's wrong with that
17 argument? I mean, the idea that you can go six years
18 and - - - and - - - and not know that your property's
19 been sold out from under you seems kind of odd.

20 MR. GORDON: Well, certain people, I - - -
21 I think, are just not necessarily equipped to move
22 speedily. Sometimes it's a question of - - - of - -
23 - of - - -

24 CHIEF JUDGE LIPPMAN: Yeah, yeah. But
25 that's why you have laws that tell them how speedily

1 they have to move.

2 MR. GORDON: I understand.

3 CHIEF JUDGE LIPPMAN: And if they don't,
4 then sometimes they're out of luck, even though it
5 may not be pleasant for that person. But you - - -
6 you - - - you're supposed to know what the law is,
7 right?

8 MR. GORDON: Yes, Judge. But that presumes
9 the - - - the answer to the question here is that the
10 statute of limitations does apply to this kind of
11 action. And it's our - - -

12 CHIEF JUDGE LIPPMAN: Well, I get it that
13 you're saying that you can't - - - just by the length
14 of time you can't some - - - make something that's
15 void valid. And I under - - - I understand what
16 you're saying. But there's got to be some set of
17 rules, doesn't there, that - - - that governs
18 situations? Or forgery is so unique that there are
19 no rules in terms of time limitations? So no one has
20 to move with any speed whatsoever in a forgery
21 situation?

22 MR. GORDON: We're not going so far as to
23 say there are no rules. We think that laches, in an
24 appropriate circumstance, can put a limitation - - -

25 CHIEF JUDGE LIPPMAN: Okay.

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MR. GORDON: - - - on this kind of an
action.

CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
you both. Appreciate it.

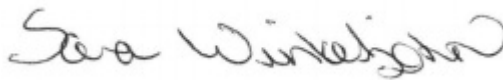
MR. GORDON: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Faison v. Lewis, No. 46 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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Date: February 22, 2015