

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

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NICHOLAS SABBATINI	x	Index	
		Number <u>8546</u>	2003
		Motion	
- against -		Date <u>November 12,</u>	2003
BENITO GALATI, et al.		Motion	
		Cal. Number <u>28</u>	
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	x		

The following papers numbered 1 to 13 read on this motion by defendant Elizabeth Galati to dismiss the complaint pursuant to CPLR 3211.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-7
Answering Affidavits - Exhibits	8-11
Reply Affidavits	12-13

Upon the foregoing papers it is ordered that the motion is granted.

This action involves the premises located at 46-06 30th Avenue in Long Island City, Queens. On or about January 13, 1994, defendants Galati executed a second mortgage affecting the subject premises and a \$100,000 note in favor of the plaintiff as security for the payment of a loan they allegedly received from the plaintiff. On that date, a prior recorded mortgage and note executed by the Galatis were held by Astoria Federal Savings and Loan ("Astoria Federal") in the amount of \$225,126.00. Subsequently, on July 11, 1994, defendant Benito Galati executed a \$120,000 confession of judgment in favor of the plaintiff as additional security for the aforementioned \$100,000 debt and a second \$20,000 loan he received from the plaintiff. The plaintiff never recorded the subordinate mortgage executed in his favor by Benito and Maria Galati.

On or about August 4, 1994, Astoria Federal filed a lis pendens and complaint to foreclose its mortgage on the subject premises. The confession of judgment, dated July 11, 1994, was subsequently filed on November 2, 1994.

On September 21, 1995, defendant Joseph Gallo purchased the subject premises at a foreclosure sale conducted by a Referee. The Referee's report indicates that after the sale and payment of the judgment and fees, there remained a surplus of \$34,539.07. Thereafter, in August 2000, defendant Gallo sold the premises to defendant Elizabeth Galati, the daughter of defendants Benito and Maria Galati. The plaintiff contends that these transfers of title were designed to defraud him out of his \$120,000 and to frustrate any judgment that may be rendered against the defendants to enforce collection of the monies owed.

The plaintiff commenced this action sounding in fraud seeking (1) to set aside the deed which transferred title of the premises located at 46-06 30th Avenue, Long Island City, New York from defendant Joseph Gallo to defendant Elizabeth Galati; putting defendants Benito Galati and Maria Galati into title of the premises; allowing the January 13, 1994 mortgage executed by defendants Benito Galati and Maria Galati in favor of the plaintiff to be recorded in the office of the Registrar of Queens County and to allow this action to proceed as an action to foreclose the subject mortgage and (2) to require the sale of the premises to satisfy the November 2, 1994 confession of judgment executed by defendant Benito Galati in favor of the plaintiff in the amount of \$120,000.

Defendant Elizabeth Galati moves to dismiss the plaintiff's complaint, inter alia, on the grounds that the applicable Statute of Limitations has expired and that the complaint fails to state a cause of action. The plaintiff's pleading asserting fraudulent conveyances is time-barred by the Statute of Limitations for causes of action sounding in fraud (see, CPLR 213[8]). "A cause of action by a judgment creditor to set aside a fraudulent conveyance is governed by the six-year Statute of Limitations for causes of action alleging fraud, which commences to run at the time the allegedly fraudulent conveyance occurs: where actual fraud is alleged, the Statute of Limitations is six years from the fraudulent transfer or two years from the time the fraud was discovered or could have been discovered with reasonable diligence (see, Matter of Gaglione v Sam's Bargain Ctr., 283 AD2d 645; Liberty Co. v Boyle, 272 AD2d 380, 381; CPLR 203[g])" (Island Holding, LLC v O'Brien, ___ AD2d ___). In the present case, the causes of action were asserted more than six years after the first allegedly fraudulent conveyance was recorded in 1995, and

more than two years after the plaintiff discovered or could have discovered the alleged fraud with reasonable diligence. Accordingly, the complaint is time-barred.

In any event, the court finds that the complaint fails to state a claim upon which relief may be granted as the plaintiff is unable to demonstrate that he is presently entitled to foreclose on the unrecorded subordinate mortgage. The evidence presented herein establishes that defendant Joseph Gallo became a holder in due course of the title to the subject premises and took title without notice that the plaintiff held a subordinate mortgage when he successfully bid on the premises at the September 1995 foreclosure sale (see, M&T Mortgage Corp. v Alpha and Omega, Inc., 309 AD2d 905). When defendant Gallo sold the premises five years later, he did so without apparent notice of any claims against the premises. The plaintiff's claim that he was somehow defrauded is belied by the fact that defendants Benito and Maria Galati gave the plaintiff a security interest in the subject property which the plaintiff could have but failed to record prior to the foreclosure sale. In any event, the plaintiff has an adequate remedy at law since the debt which the plaintiff seeks to recover is secured by the confession of judgment obtained by the plaintiff on July 11, 1994. Since "[i]t is clear that the plaintiff's interest is solely monetary, that [he] has an adequate remedy at law, and restoration of the status quo ante is impractical," dismissal of this complaint is warranted (Sakow v 633 Seafood Restaurant, 1 AD3d 298).

Dated:

J.S.C.