

Island Holding, LLC v O'Brien
2002 NY Slip Op 30024(U)
November 25, 2002
Supreme Court, Suffolk County
Docket Number: 0020743/0743
Judge: William L. Underwood. J
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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM. PART XIV - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM L. UNDERWOOD, JR.

ISLAND HOLDING, LLC,

Plaintiff(s),

-against-

DENIS J. O'BRIEN a/k/a DENIS O'BRIEN,
et.al.,

Defendant(s).

ORIG. RETURN DATE: 07/31/02

FINAL RETURN DATE: 09/17/02

MTN. SEQ. #: 011-MG

012-MG

013-MD

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Upon the following papers numbered 1 to 78 read on this motion for summary judgment
Notice of Motion/Order to Show Cause and supporting papers 1-6: 7-18 ; Notice of Cross Motion and supporting papers 19-38; Answering Affidavits and supporting papers 39-43: 44-52: 53-56: 57-60 ; Replying Affidavits and supporting papers 61: 62-71: 72-74; Other 75: 76: 77-78; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the defendant/claimant Union Illinois (1995) Investment Limited Partnership motion **and** under separate notice of motion, defendants/claimants Albert J. O'Brien and Douglas Alan O'Brien as trustee for the Denis J. O'Brien Family Trust motion, both for *summary* judgment dismissing the pleading in support of the notice of claim to surplus monies by the Estate of George Harrison are granted under the circumstances presented herein. (CPLR 3212). It is further

ORDERED that claimants Nicholas Valner and Kenneth Roberts, **as** co-executors of the Estate of George Harrison's cross motion for leave to amend its' pleading is denied. (CPLR 3025 (b)).

The case at bar is a foreclosure action which is currently post judgment. On May **28, 2002**, claimant Estate of George Harrison, by its co-executors Nicholas Valner and Kenneth Roberts, filed a pleading in support of a notice **of** claim to surplus monies. The basis of such claim is a judgment granted by the Superior Court of California for the County of Los Angeles on January **10, 1996** on decedent George Harrison's behalf against defendant Denis O'Brien in the amount of \$**1,673,750.52**. On February **14, 1996**, the judgment was filed

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in the office of the Suffolk County Clerk.

Defendant/claimant Union Illinois (1995) Investment Limited Partnership (“UIILP”) is the successor by assignment to defendant Allegiant Bank of two mortgages originally given by defendant Denis O’Brien to defendant Union Bank of Illinois. Said mortgages originated on June 5, 1995 and June 14, 1995 and each were recorded in the Suffolk County Clerk’s office on June 22, 1995. On December 16, 1996, they were assigned to defendant Allegiant Bank and recorded on April 2, 1997, who assigned them to defendant UIILP on March 8, 2000.

Defendant Albert J. O’Brien is the holder of a mortgage granted by mortgagor defendant Denis O’Brien on June 5, 1995 and recorded on June 22, 1995. Defendant Denis O’Brien Family Irrevocable Trust is the holder of a mortgage granted by the mortgagor defendant Denis O’Brien also on June 5, 1995 and recorded on June 22, 1995.

The claimant Estate in its pleading, asserts three causes of action pursuant to the Debtor and Creditor Law and one cause of action sounding in unjust enrichment. Each of the causes of action aver that the afore stated mortgage liens were fraudulent conveyances made without fair consideration. Defendant UIILP and defendants Albert O’Brien and Douglas O’Brien as trustee for the Denis J. O’Brien Family Trust have moved for *summary* judgment on the ground that the Estate’s claim is time barred pursuant to CPLR 213 (8).

A party moving for *summary* judgment must make a prima facie showing of

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entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851,853, 487 N.Y.S.2d 316; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607,467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320,324,508 N.Y.S.2d 923 [1986]).

Pursuant to CPLR 213(8), an action based upon fraud must be commenced within six years. “The time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it.” CPLR 203 (g) further provides in part as follows:
***** where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided,

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computed from the time the cause of action accrued, whichever is longer.” The burden of establishing that the fraud could not have been discovered before the two-year period prior to the commencement of the action rests on the claimant Estate, who seeks the benefit of the exception (*see, Endervelte v Slade*, 214 AD2d 456). (*Lefkowitz v. Appelbaum*, 258 A.D.2d 563, 685 N.Y.S.2d 460 [2nd Dept. 1991]).

Each of the above referenced mortgages were recorded in the Suffolk County Clerk’s office on June 22, 1995. The subject judgment of the within Notice of Claim filed by the claimant Estate was recorded in the Suffolk County Clerk’s office on February 14, 1996. Clearly, with any degree of due diligence on the part of the claimant Estate’s decedent at the time he recorded his judgment, the mortgages granted to the movants and the alleged fraudulent conveyances would have been discovered. As such, pursuant to CPLR 213 (8) and CPLR 203 (g) the pleading asserted herein is time barred (*see, DiPietro v. City of New Rochelle*, 237 A.D.2d 324, 658 N.Y.S.2d 319 [2nd Dept. 1997]) and applicable to the within proceeding. (*See, Greenpoint Savings Bank v. Kijik*, ___ A.D.2d ___, 746 N.Y.S.2d 600 [2nd Dept. 2002]).

Accordingly, the motions for *summary* judgment are granted and the claimant Estate’s pleading is dismissed. The Estate’s cross motion to amend its pleading is denied as being moot. All parties are further directed to provide this **Court** with a final declaration of the .

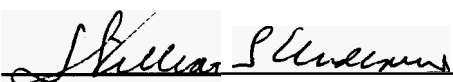
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priorities and amount of the claims of the claimants within twenty days of this order with Notice of Entry together with any additional information for the Court's consideration.

This shall constitute the decision and order of the Court.

So ordered.

Dated: November 25, 2002



HON. WILLIAM L. UNDERWOOD, JR.
J.S.C.

CHECKONE: FINAL DISPOSITION NON-FINAL DISPOSITION