

**Trahan v Galea**

2006 NY Slip Op 30539(U)

December 5, 2006

Supreme Court, Nassau County

Docket Number: 009758/05

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**BETTY JEAN TRAHAN,**

**TRIAL/IAS, PART 11  
NASSAU COUNTY**

**Plaintiff,**

**INDEX NO.: 009758/05**

**-against-**

**MOTION DATE: 09-06-06**

**EMANUEL F. GALEA and DEBRA A. GALEA  
(a/k/a DEBRA K. GALEA), HIS WIFE and  
WASHINGTON MUTUAL BANK, FA, A FEDERAL  
ASSOCIATION,**

**MOTION SEQ # 003, 004, 005**

**Defendant(s).**

**The following papers having been read on this motion: [numbered 1-6]**

**Notice of Motion, Affidavit in Support of John Trahan,  
Affirmation in Support, Affidavit in Support of  
Betty Jean Trahan & Exhibits.....1**

**Defendant "WASHINGTON MUTUAL" Notice of Cross  
Motion, Affirmation in Opposition to Motion and  
in Support of Cross Motion with Exhibits.....2**

**Defendants GALEA Notice of Cross Motion, Affirmation,  
Affidavit of Emanuel F. Galea and Exhibits.....3**

**Plaintiff BETTY JEAN TRAHAN's Affidavit in Opposition  
To Cross Motions.....4**

**Defendants GALEA Reply Affirmation.....5**

**Plaintiff's Reply Affirmation.....6**

Motion by the plaintiff Betty Jean Trahan for: (1) summary judgment pursuant to CPLR 3212 on her partition cause of action and/or an order striking certain affirmative defenses interposed by the codefendants Emanuel F. Galea, Debra A. Galea and Washington Mutual Bank, F.A., A Federal Association; and (2) reargument and/or renewal of stated portions of her prior motion, which was denied by decision and order of this Court dated May 8, 2006.

Cross motion pursuant to CPLR 3212 by the defendant Washington Mutual Bank, F.A., A Federal Association, for summary judgment dismissing the plaintiff's complaint

insofar as asserted against it.

Cross motion by the codefendants Emanuel F. Galea, Debra A. Galea for summary judgment dismissing the plaintiff's complaint insofar as asserted against them.

Upon the death of her husband Leonard C. Trahan in October, 1988, the plaintiff Betty Jean Trahan – executrix of his estate – inherited a "one-third plus \$4,000" interest in certain residential premises located in Long Beach, New York, where she and Leonard resided prior to his death (Trahan [July 2005] Aff., ¶¶ 27-31).

The plaintiff subsequently resided in the house for a few months and then permanently relocated Tennessee – her former State of residence – after which the mortgage, tax debts and other expenses associated with the property lapsed into default (Trahan [July 2005] Aff., ¶ 33-34).

Prior to her departure, the plaintiff apparently made arrangements through the Estate's attorney to sell the property, but claims to have "received no further information" about the proposed sale she entrusted to the estate attorney during the years which later ensued (Trahan [July, 2005] Aff., ¶¶ 33-35).

The property then further deteriorated and accumulated additional building violations. In 1994, a foreclosure action was commenced; a judgment of foreclosure was ultimately rendered in June of 1995; and the property was sold at public auction to Berley Industries, Inc ["Berley"] (Trahan [July, 2005] Aff., ¶¶ 38-41; J. Trahan Aff., ¶¶ 4-6).

In 1996, Berley sold the premises to Laureen Buchanan – who has been named by the plaintiff in a companion, Surrogate's Court proceeding in which she seeks, *inter alia*, compensation from both Berley and Buchanan for the reasonable rental value of the premises (Surr. Petition, ¶¶ 18-20).

In February of 2002, the defendants Emanuel and Debra Galea purchased the premises from Buchanan for the sum of \$300,000.00, and contend that they have utilized the property as their sole and primary residence since that time (E. Galea Aff., ¶¶ 2-3).

In connection with their purchase, the Galea executed a \$231,000.00 mortgage in

favor of Washington Mutual encumbering the premises (Migatz, Aff., ¶ 8-9).

According to the plaintiff, at some unspecified time, "though parties not directly involved herein" she heard that the property " 'had been taken over by the City of Long Beach' apparently due to building [code] violations" (Trahan [July, 2005] Aff., ¶¶ 36; J. Trahan Aff., ¶¶ 4-7).

Based on the foregoing, she also allegedly believed "[f]or many years that the Premises had been disposed of by the City of Long Beach" – although she was purportedly "unable to determine either the exact procedure used or the ultimate disposition of Premises" (Trahan [July, 2005] Aff., ¶¶ 37-38).

Nevertheless, and after the passage of many years, the plaintiff claims that she learned for the first time in March of 2005, that the City of Long Beach had not, in fact, taken over or otherwise disposed of the property, but that instead, that the above-mentioned the judgment of foreclosure had been rendered in June of 1995 (Trahan [July, 2005] Aff., ¶ 38).

More significantly, she also allegedly learned at this time that her interest in the property had not been extinguished since she was not served with process in the foreclosure action (Trahan [July 2005] Aff., ¶ 40A). The plaintiff's papers do not identify the specific facts or events which promoted her inquiries into the property's status.

By order to show cause dated August, 2005, the plaintiff previously brought on an application for, *inter alia*, stated injunctive relief (1) precluding the Galeas from "renting, conveying or mortgaging" the subject premises; (2) enjoining codefendant Washington Mutual Bank from participating in any refinancing of the subject premises; and (3) granting her, as a purported tenant in common, "exclusive occupancy" of the subject premises for a stated, four-month period during the summer.

The Galeas opposed the application, and Buchanan cross moved for an order removing the related Surrogates Court proceeding to this Court and thereafter consolidating that proceeding with the instant action.

By order dated May 8, 2006, this Court denied the parties' respective applications.

While acknowledging the plaintiff's claim that she was not served in the underlying foreclosure action (May 8, Order at 2), this Court nevertheless declined to award the relatively intrusive preliminary relief sought, which included, *inter alia*, a pre-judgment order granting the plaintiff part time, exclusive occupancy of the premises on a "permanent basis".

The plaintiff now moves for renewal and/or reargument of stated branches of its prior application, *i.e.*, those branches of its prior motion which were for an order (2) granting the plaintiff "*pendente lite* and on a permanent basis" exclusive occupancy of the subject premises for a four month period of July 1, 2005 through October 1, 2005; and (2) setting a date and time when the plaintiff may enter upon the premises for, *inter alia*, the purposes of inspection, measuring, surveying, sampling, testing photographing and/or video recording the entire, subject premises.

The plaintiff also moves for summary judgment striking the respective defenses interposed by the defendants and for a further order granting the plaintiff an "interlocutory judgment of partition."

Then defendants Washington Mutual Bank, F.A., A Federal Association, and codefendants Emanuel F. Galea and, Debra A. Galea cross move for summary judgment dismissing the complaint insofar as asserted against them. The parties' applications are denied.

Initially, and with respect to that branch of the plaintiff's motion which for reargument and/or renewal of its prior motion, it is settled that "[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision" (*Viola v. City of New York*, 13 AD3d 439, 440; *Carrillo v. PM Realty Group*, 16 AD3d 611 *see*, *Giovanniello v. Carolina Wholesale Office Mach. Co., Inc.*, 29 AD3d 737; *McGill v. Goldman*, 261 AD2d 593, 594).

Further, "[a] motion for leave to renew must (1) be based upon new facts not offered on the prior motion that would change the prior determination and (2) set forth a reasonable justification for the failure to present such facts on the prior motion" (*Renna v. Gullo*, 19 AD2d 472, 473 *see*, CPLR 2221[e]; *O'Connell v. Post*, 27 AD3d 631).

"Leave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion" (*City of New York v. St. Paul Fire and Marine Ins. Co.*, 21 AD3d 982 *see*, *Elder v. Elder*, 21 AD3d 1055, 1056; *Renna v. Gullo*, *supra*, at 473).

A review of the plaintiff's submissions establishes that the instant application for reargument and/or renewal is, in substance, founded upon the same theories and claims which this Court previously considered and rejected in connection with her original application for discretionary, injunctive relief.

Further, and contrary to the plaintiff's contentions (*e.g.*, Trahan Aff., ¶ 5), the Court was fully aware of – and reviewed – all relevant facts underlying the parties' respective claims, including the plaintiff's assertion that she was never properly served in the underlying, 1995 foreclosure proceeding.

Specifically, the Court's exercise of its discretionary authority was not predicated upon a misapprehension of the plaintiff's title claim, but rather upon, *inter alia*: (1) the scope, nature and intensity of the preliminary relief actually sought – "exclusive" occupancy of the premises – which was alternatively demanded as a "permanent" remedy (Ptff's Aug. 2005 OSC at 1) – (2) a weighing of the relevant equities, as presented at that time; and (3) the undeveloped nature of the factual record existing at pre-discovery stage when the plaintiff's application was originally made.

Accordingly, the plaintiff's motion for reargument and/or renewal of its prior motion is **denied**.

The parties' motions for summary judgment on their respective claims are similarly denied.

Assuming the plaintiff was never served in connection with the underlying foreclosure proceeding, thereby leaving her "rights unaffected by the judgment and sale" (see, *6820 Ridge Realty LLC v. Goldman*, 263 AD2d 22, 26; *Nationwide Associates, Inc. v. Brunne*, 216 AD2d 547; *Polish Nat. Alliance of Brooklyn, U.S.A. v. White Eagle Hall Co., Inc.*, 98 AD2d 400, 403-406), the defendants' opposing submissions have generated issues of fact with respect to their claims predicated on, *inter alia*, the equitable doctrine of laches and or estoppel (e.g., *Kraker v. Roll*, 100 AD2d 424, 433-434)(Migatz Aff., ¶¶ 15-21; Sherwood Aff., ¶¶ 22-40).

Significantly, it is well settled that the right to partition is not absolute and may be precluded by the equities presented in a given case (*Ripp v. Ripp*, 38 AD2d 65, *affd*, 32 NY2d 755 [1973]; *Berlin v. Wojnarowski*, 32 AD3d 810, 811; *Ferguson v. McLoughlin*, 184 AD2d 294).

Further, the equitable bar of laches may be applied in cases where there has been, *inter alia*, "a lengthy neglect or omission to assert a right resulting in prejudice to an adverse party" (*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801, 816 [2003]; *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173 [2002]; *Solomon R. Guggenheim Foundation v. Lubell*, 77 NY2d 311 [1991]; *Amsterdam Sav. Bank v. City View Management Corp.*, 45 NY2d 854, 855-856 [1978] *cf.*, *Kraker v. Roll*, *supra*, 100 AD2d 424, 433-434).

In an analogous context involving title to real property, the Second Department has observed that where "laches is the equitable defense, it must be shown that plaintiff inexcusably failed to act when she knew, or should have known, that there was a problem with her title to the property" (*Kraker v. Roll*, *supra*, at 433 see also *Miceli v. Riley*, 79 AD2d 165, 169).

The Court further explained that, "the true owner's inequitable conduct must

essentially amount to a fraud to result in a deprivation of legal title" or that "he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part \* \* \* as to render it just that as between him and the party acting upon his suggestion, he should bear the loss'" (*Kraker v. Roll, supra*, at 433, quoting from, *Trenton Banking Co. v Duncan*, 86 NY 221, 230 [1881] [emphasis added]).

Laches generally entails "a fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities" and is "often not amenable to resolution on a motion for summary judgment, let alone a motion to dismiss" (*U.S. v. Portrait of Wally, A Painting By Egon Schiele*, \_\_\_ F Supp 2<sup>nd</sup> \_\_\_, Slip Op. at 22, 2002 WL 553532 [S.D.N.Y. 2002][NOR]).

Applying these principles to the unique facts presented, the Court agrees that triable issues of fact exist with respect to the application of the laches doctrine as a bar to the plaintiff's recovery (*e.g., Solomon R. Guggenheim Foundation v. Lubell, supra; Buller v. Giorno*, 28 AD3d 258; *Martin v. Briggs*, 235 AD2d 192, 199; *Board of Managers of Dickerson Pond Condominium I v. Jagwani*, 250 AD2d 717).

Here, although the plaintiff was executrix of her husband's estate and was therefore duty-bound to preserve its assets (*Matter of Donner*, 82 NY2d 574, 584 [1993]; *In re Estate of Skelly*, 284 AD2d 336), the record establishes that, for all intents and purposes, she abandoned the property upon departing for Tennessee. Moreover, as executrix, she knew or should have known, that the estate lacked any significant assets; that the mortgage was not being paid and apparently was in default since 1989; that taxes were left due and owing unpaid; and that the municipal violations were accumulating and not going to be cured or removed.

Upon this set of financial circumstances, the plaintiff is, at the very least, chargeable with knowledge that her inaction would ultimately result in the precisely the consequences which ultimately took place in 1995: the loss of the property and the subsequent transfer and/or conveyance of the premises to a third party or parties.

To be sure, the apparent error in discontinuing the action as against the plaintiff in 1995 was a factor in setting in motion the chain of events which subsequently transpired. However, if the plaintiff was, or should have been, aware of her alleged interest in the property, but did nothing during the ensuing years to assert it – thereby allowing the property to be transferred from one purchaser to the next – a viable claim sounding in laches would lie (*cf.*, *Miceli v. Riley, supra*).

It is significant in this respect that the plaintiff's affidavits repeatedly assert that her ownership was a matter of "public record" – yet she herself, as executor of her husband's estate, apparently claims that she was unaware that her interest existed until 2005 (Trahan Aff., ¶¶ 50, 71). Further, while the plaintiff – who has yet to be deposed – also contends that she only became aware of her claim in 2005, her assertions in this respect are vague and bereft of factual detail illuminating the precise manner in which she allegedly became aware of her interest.

The Court agrees that the operative facts relating to precisely how she acquired this knowledge could well be determinative in assessing whether, in fact, she could or should have acted upon her claimed interest at an earlier point in time so as to avoid undue prejudice to the defendants and other subsequent purchasers.

Lastly, the plaintiff's inconclusive assertions that some unnamed person at some unspecified time allegedly told her that the property had been taken by the City of Long Beach, is not a determinative factual averment under the circumstances presented (Trahan Aff., ¶¶ 43, 58).

It also bears noting that although the plaintiff claims that she first learned about her interest in the property in 2005, the record contains a letter – dated October of 2003 – from her current attorney addressed to Nassau County Clerk, which requests the file relating to the subject, 1994 mortgage foreclosure action (Galea Mot., Exh., "21").

Although an owner is not necessarily "chargeable with knowledge of all events affecting \* \* \* [his or her] property," (*ISCA Enterprises v. City of New York*, 77 NY2d

688, 698 [1991]), the Court of Appeals has more recently and no less definitively cautioned that, "[o]wnership carries responsibilities" (*Kennedy v. Mossafa*, 100 NY2d 1 [2003] 100 NY2d at 11 *cf.*, *Sheehan v. Suffolk County*, 67 NY2d 52, 58 [1986]; *Weber v. Suffolk County Division of Real Estate*, 1 AD3d 590, 591 [2003]).

Upon the factual record before the Court, triable issues of fact exist as to whether, *inter alia*, the plaintiff may have "failed to act appropriately when \* \* \* [she] knew, or should have known, that something was amiss with respect to \* \* \* [her] property rights" (*Miceli v. Riley, supra*, at 169; *Kraker v. Roll, supra*).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

The Court has considered the parties' remaining contentions and concludes that they fail to establish their entitlement to judgment as a matter of law.

Accordingly, it is,

**ORDERED**, that the parties' respective motions are hereby **denied**.

The foregoing constitutes the decision and order of the Court.

Dated:

12/6/06

ENTER:

J.S.C.

**ENTERED**

JAN 19 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE