

Artigas v Betancourt
2007 NY Slip Op 31397(U)
May 22, 2007
Supreme Court, New York County
Docket Number: 0115081/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Artigas

INDEX NO. 115081/06

- v -

MOTION DATE _____

Betancourt

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAY 31 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/22/07

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
GABRIEL ARTIGAS,

Plaintiff,

-against-

JOSE BETANCOURT and BRIAN L. LIMMER

Defendants.
-----X

Decision/Order

Index No.: 115081/06
Seq. No. : 001/002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Motion Sequence Number 001

Def's (BLL) motion [dismiss] w/AMF affirm in support, exhs 1

Motion Sequence Number 002

Def's (JB) motion [dismiss] w/SP affirm in support, affid JB, exhs 1

Numbered
FILED
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NEW YORK
COUNTY CLERK'S OFFICE

The underlying action is for fraud. Defendants Brian L. Limmer ("Limmer") and Jose Betancourt ("Betancourt) each separately move, pre-answer, for an order dismissing plaintiff's complaint in its entirety. CPLR 3211. For purposes of consideration and determination, these motions are hereby consolidated.

Plaintiff has not opposed either motion. Limmer's motion was served on Gilberto and Kricko, Esqs. in North Bergen, New Jersey, on April 2, 2007. Gilberto and Kricko, Esqs. are counsel for plaintiff as designated in the Complaint in this action. On March 1, 2007, Betancourt served his motion on Gilberto M. Garcia, Esq. in Englewood Cliffs, who is counsel for plaintiff listed in the Summons in this action. Inasmuch as plaintiff has chosen to designate two different sets of counsel on his Summons and Complaint,

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respectively, each defendant had a right to rely thereon, and accordingly serve plaintiff via either representative. While the court believes the better course of action might have been for each defendant to have served plaintiff at both addresses, here, the plaintiff was served with a motion to dismiss at each address and subsequently defaulted on both motions. Therefore, the court finds that plaintiff's substantial rights have not been prejudiced and service of each motion was valid. Therefore these motions will be considered on default and any issues with respect to the timeliness of these motions are deemed disregarded by the plaintiff.

Background

Plaintiff commenced this action on October 12, 2006 by filing a complaint with the New York County Clerk. Plaintiff claims as his sole cause of action against the defendants that they committed a fraud on him with respect to the conveyance of his interest in a building located at 45 Wadsworth Avenue in Manhattan (the "Property"). Plaintiff alleges that he and Betancourt were the joint owners of the Property. Plaintiff claims that on or about April 2004, his counsel was advised by Limmer that plaintiff had executed a deed to Betancourt which transferred his interest in the property for the sum of \$10.00.

Limmer, an attorney who allegedly represented both parties in the transaction, is also alleged to have stated that he had witnessed the transaction. Plaintiff maintains that he never executed any such deed and that, upon information and belief, Limmer and Betancourt "defrauded... plaintiff into signing the Deed or executed his signature without plaintiff's consent in order to effectuate the transfer." Plaintiff claims that, while performing a search on the property, he discovered that the property was recorded in

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the name of Betancourt only and that he transferred his rights to the property to Betancourt.

Both defendants have provided a copy of the Deed, as documentary evidence, which indicates that plaintiff transferred his interest in the property to Betancourt on September 23, 1998 for ten dollars (\$10).

In support of their motions to dismiss the amended complaint, Limmer and Betancourt contend, inter alia, that this fraud action is barred by the statute of limitations. CPLR 3211(a)(5). Both defendants also argue that the complaint should be dismissed because it does not plead fraud with the particularized allegations necessary to maintain such an action. CPLR 3016[b]. Betancourt also seeks dismissal on the basis that: (1) plaintiff lacks standing to maintain this action, pursuant to CPLR 1003 and 3211(a)(3); (2) res judicata and collateral estoppel in that there has been a final judgment against the plaintiff on almost the same facts and parties, pursuant to CPLR 3211(a)(5); (3) there is no New York address where legal papers in this action can be served upon plaintiff; and (4) failure to serve process within 120 days after commencement.

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243

A.D.2d 395 (1st dept. 1997).

The limitation period for actual fraud is either six years from when the fraud took place or two years from the date of discovery. Avalon LLC v. Coronet Properties Co., 306 A.D.2d 62 (1st Dept. 2003) *lv. denied* 100 N.Y.2d 513 (2003), CPLR 213, CPLR 203[g]. Since the September 23, 1998 Deed conveyed all of plaintiff's interest in the property, plaintiff's fraud claim vested at such time. Therefore, the six-year limitations period expired prior to the commencement of this action in October 2006. As plaintiff has alleged that he learned of the alleged fraud in April 2004, similarly, the two-year limitations period also expired prior to the commencement of this action.


Accordingly, the motions by Limmer and Betancourt to dismiss this action on the ground that the sole cause of action based on fraud may not be maintained because it is barred by the statute of limitations is granted. The complaint is hereby dismissed. Having dismissed the complaint, the court does not reach defendants other arguments.

Any requested relief not expressly granted herein is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 22, 2007

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

FILED
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