

Zhong Ying Fan v Jianhua Pang

2007 NY Slip Op 31978(U)

June 26, 2007

Supreme Court, Queens County

Docket Number: 0007482/2007

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X
ZHONG YING FAN,

Index No: 7482/07

Motion Date: 5/16/07

Motion Cal. No: 10

Plaintiff,

-against-

JIANHUA PANG,

Defendant.

-----X

The following papers numbered 1 to 11 read on this motion dismissing the complaint as time barred by the applicable statute of limitations, pursuant CPLR § 3211(a)(5).

| | PAPERS NUMBERED |
|---|--------------------|
| Notice of Motion-Affidavits-Exhibits..... | 1 - 5 |
| Answering Affidavits-Exhibits..... | 6 - 9 |
| Reply..... | 10 - 11 |

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action sounding in breach of contract, fraudulent misrepresentation and unjust enrichment, based upon a contract for personal services entered into on January 20, 1998, whereby defendant agreed to provide immigration and naturalization services to plaintiff at a fee of \$35,000.00, and the alleged fraudulent conduct of defendant arising therefrom. Plaintiff contends that she was brought to the State of Virginia by defendant in 1999, where defendant introduced her to a "USCIS official" who stamped plaintiff's visa application with a temporary approval stamp which allegedly required renewal each year until a "permanent green card or visa was received on plaintiff's behalf." Plaintiff further contends that her documents were stamped by the immigration official annually through 2005, when in June 2006, she read an article stating that the "INS official who stamped her visa was arrested for fraudulently approving temporary visa applications." Plaintiff states that she confronted defendant who indicated that the process was fraudulent, and demanded return of the \$35,000.00 paid to defendant upon discovering the fraud in 2006. It is upon the foregoing that defendant moves for an order dismissing the complaint as time barred by the applicable statute of limitations, pursuant CPLR § 3211(a)(5).

"When a party moves to dismiss a cause of action on the ground that it is barred by the

statute of limitations, the movant bears the initial burden of establishing the affirmative defense by prima facie proof that the time in which to sue has expired." Assad v. City of New York, 238 A.D.2d 456 (2nd Dept.1997); see, also, Garcia v. Peterson, 32 A.D.3d 992, 993 (2nd Dept. 2006); Rosenfeld v. Schlecker, 5 A.D.3d 461 (2nd Dept. 2004). "The burden then shift[s] to the plaintiff to 'aver evidentiary facts establishing that the case falls within an exception to the statute of limitations' (citations omitted)." Rosenfeld v. Schlecker, 5 A.D.3d 461 (2nd Dept.2004).

Here, plaintiff asserts three causes of actions seeking redress for breach of contract, fraudulent misrepresentation and unjust enrichment, respectively, which each claim is subject to a six-year statute of limitations, pursuant to CPLR § 213.¹ Defendant, in seeking dismissal of the complaint, contends that the claims asserted in the complaint are time barred as the service contract occurred over nine years ago in 1998. Further, defendant states that the last recollection that plaintiff had of any dealings with defendant was more than seven years ago. Consequently, defendant contends that any claims that plaintiff may rely upon would have run in six or fewer years, therefore, those claims are barred by the Statute of Limitations. In opposition to the motion for dismissal, plaintiff asserts, inter alia, that the Statute of Limitations should be equitably tolled as she was unaware of her claims until she discovered the fraud in June 1996, and therefore, the causes of action asserted in the complaint are not time-barred.

"The doctrine of equitable estoppel is an "extraordinary remedy" (citations omitted) which provides that a defendant may be estopped from pleading the statute of limitations when the 'plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action' (Citations omitted)." Garcia v. Peterson, 32 A.D.3d 992, 993 (2nd Dept. 2006). "To rely on this doctrine [] the plaintiff [] assume[s] the burden to 'adequately plead[] facts which, if proven, would establish the existence of an equitable estoppel'(Citations omitted)." Pattera v. Nationwide Mut. Fire Ins. Co., 38 A.D.3d 511, 513 (2nd Dept. 2007). As stated by the Court of Appeals of New York in Zumpano v. Quinn, 6 N.Y.3d 666, 706 (2006):

Although sometimes imposing hardship on a plaintiff with a meritorious claim, statutes of limitations "reflect the legislative judgment that individuals should be protected from stale claims" (citations omitted). They cannot be deemed arbitrary or unreasonable solely on the basis of a harsh effect. The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense. "Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (citations omitted). Thus, this Court has held that equitable estoppel will apply "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (citations omitted). Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's

misrepresentations (citations omitted).

It is therefore fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit (citation omitted).

Moreover, “for the doctrine to apply, a plaintiff may not rely on the same act that forms the basis for the claim--the later fraudulent misrepresentation must be for the purpose of concealing the former tort (citations omitted). The uncommon remedy of equitable estoppel ‘is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient’(citations omitted).” Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 491- 2 (2007).

Here, notwithstanding plaintiff’s contentions to the contrary, equitable estoppel cannot serve as a bar to defendant’s assertion of the Statute of Limitations. Although defendant was purportedly involved in perpetrating a fraud upon plaintiff, the record is devoid of any evidence that there were any subsequent and specific actions by defendant to induce plaintiff to refrain from commencing action based upon the acts and representations of defendant. Moreover, as alleged by plaintiff, notwithstanding defendant’s knowledge of the fraudulent scheme and the annual stamps of plaintiff’s visa application by the immigration official, “[a] wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against [him], to get the benefit of a statute of limitations.” Zumpano v. Quinn, 6 N.Y.3d 666, 707 (2006). Consequently, as equitable estoppel is inapplicable, and plaintiff may not rely upon this doctrine to preclude defendant from asserting a Statute of Limitations defense, the first cause of action for breach of contract and the third cause of action sounding in unjust enrichment are barred by the Statute of Limitations.

Notwithstanding, the second cause of action, alleging fraudulent misrepresentation, stands on a different footing. “[A] cause of action sounding in fraud is subject to a Statute of Limitations of six years from the date of the commission of the fraud or two years from when the plaintiff discovered the acts or, with reasonable diligence, could have discovered them (citations omitted).” Emord v. Emord, 193 A.D.2d 775, 777 (2nd Dept.1993); see, generally, Percoco v. Lesnak, 24 A.D.3d 427 (2 Dept.2005). “Ordinarily the issue of whether the plaintiff was possessed of knowledge of facts from which fraud could reasonably be inferred involves a mixed question of fact and law (citation omitted). However, a complaint should be dismissed upon a motion where it conclusively appears that the plaintiff has knowledge of facts which should have caused her to inquire and discover the alleged fraud (citations omitted).” Rattner v. York, 174 A.D.2d 718, 721 (2nd Dept.1991); see, Percoco v. Lesnak, 24 A.D.3d 427 (2 Dept. 2005). “The burden of establishing that the fraud could not have been discovered during the two-year period before the commencement of the action rests on the plaintiffs, who seek the benefit of the discovery exception to the six-year statute of limitations (citations omitted).” Siler v. Lutheran Social Services of Metropolitan N. Y., 10 A.D.3d 646, 647 (2 Dept. 2004). As it appears that plaintiff, who came to this Country through defendant’s assistance, did not have sufficient knowledge to, with due diligence, discover the alleged fraudulent immigration and naturalization procedures prior to 2006, the cause of action sounding in fraud is not time-barred. Accordingly, the motion to dismiss the complaint is

granted to the extent that the first cause of action for breach of contract and the third cause of action sounding in unjust enrichment are barred by the Statute of Limitations, and therefore, dismissed.

Dated: June 26, 2007

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J.S.C.

- ¹ Although the complaint asserts two “second cause of action,” this Court surmises that this is a typographical error, and enumerates the claim for unjust enrichment as the third cause of action.