Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable **LAWRENCE V. CULLEN** IAS PART 6
Justice

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LEWIS THOMAS, Index No.: 26845/04

Plaintiff, Motion Date: 10/2/07

-against- Motion Cal. No.:26

LYNETTE BOYCE, Motion Sequence No.:4

Defendant.

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The following papers numbered 1 to 7 read on this motion by plaintiff and cross motion by defendant.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1 - 3
Notice of Cross Motion-Affirmation-Exhibits.....	4 - 6
Reply Affirmation.....	7

Plaintiff moves for an Order "restoring this case to the court's calendar so that plaintiff may have his day in Court". Defendant opposes same and cross moves for an Order, *inter alia*, restoring defendant's counterclaim for partition. Plaintiff replied.

The underlying action involves a Deed dated October 31, 1998 which transfers certain property from the plaintiff, to the plaintiff and defendant, as joint tenants with rights of survivorship. The plaintiff argues that he did not intend to create a joint tenancy, but rather only transfer five percent interest in the property to the defendant, as tenants in common. As a result, plaintiff commenced this action seeking recession of the deed, reformation of the deed, and cancellation of the deed based upon, *inter alia*, a cause of action in fraud.

First, plaintiff's motion is procedurally defective in that it is bereft of any statutory authority for the relief requested. Plaintiff does not, and cannot, cite any CPLR provision authorizing motions to restore actions to the court calendar to provide a litigant their day in Court.

Moreover, even in an effort to consider substance over form, the contents of plaintiff's motion is completely devoid of any basis for this Court to grant same.

Specifically, the essence of plaintiff's motion is to renew and reargue this Court's Order dated June 26, 2007 which granted defendant's request for summary judgment and dismissed plaintiff's complaint.[1] Assuming, arguendo, that this Court treats plaintiff's motion as a motion to renew and/or reargue, the end result would be the same.

The relevant portions of CPLR §2221(d) provide:

"A motion for leave to reargue:
1. Shall be specifically identified as such;
2. Shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion...."

First, plaintiff's motion does not meet the requirements of CPLR §2221(d)(1). Next, plaintiff argues that this matter was wrongly dismissed as being time-barred by the Statute of Limitations for fraud, claiming that this action was brought within the discovery period of the fraud. A determination of the same involves computing the period of time provided by the statute of limitations, and the time in which said periods start to accrue.

Pursuant to CPLR §213(8), actions based on fraud must be commenced within six years from the time of the alleged fraud, or within two years from the time the fraud is discovered, or could with reasonable diligence been discovered.

The deed in question was executed by the plaintiff on October 31, 1998. This is the date plaintiff alleges said fraud was perpetrated upon him. Accordingly, the six year period expired on October 31, 2004. Plaintiff's action was commenced this action on November 30, 2004, and thereby time barred from the date of occurrence.

With respect to the discovery of the fraud, plaintiff admits to signing the deed on October 31, 1998. Plaintiff further admits that he intended to transfer an interest in the property to the defendant, but argues that he only intended to transfer 5%, and did not intend to create a joint tenancy.

Plaintiff's acknowledgment of his signature on the deed invokes the presumption that he knew what he signed and consented to the conveyance. (See, Lum v. Antonelli, 102 A.D.2d 258 [2nd Dept. 1984]). Plaintiff's allegation that the words "joint tenancy with the rights of survivorship" were inserted after he signed the deed, does not bear the weight of reliance that plaintiff places upon it, in that the deed would still provide defendant with a 50% interest, not 5% as allegedly intended. Additionally, plaintiff's argument that he did not read all of the

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[1] In fact, the wherefore clause of plaintiff's reply requests that this case be "restored/reargued".

documents, and may have unknowingly signed a second deed must also fail. The rule of law is clear, a party who signs a document without any valid excuse for having failed to read will be conclusively bound by its terms. (Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1)

Plaintiff is presumed to have known the contents of the deed when he executed the same, and to have consented to the conveyance, which in the very least would had been 50% as tenants in common. Accordingly, discovery is imputed at the time of execution. Inasmuch as plaintiff's action was commenced more than two years after said discovery, his action was time-barred and the plaintiff has not established the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. (Foley v. Roche, 68 AD2d 558).

If this court were to deem plaintiff's motion as a motion to renew, the same would not only be defective, but also would not provide any basis on which this court would grant the same.

Specifically, CPLR §2221(e) clearly provides that any such motion shall be specifically identified as such, which the instant motion does not. Further, it would be based upon new facts not offered on the prior motion that would change the prior determination, and would contain reasonable justification for the failure to present such facts in the prior motion.

Plaintiff's counsel's reply affirmation raises for the first time since the inception of this litigation, that plaintiff claims that the deed read five percent to the defendant. [2] The Court has reviewed its file, and there is no such allegation contained in plaintiff's complaint, plaintiff's prior affidavits in support of his motions for summary judgment, nor in his deposition. In fact, during plaintiff's deposition, when questioned if he recalled seeing anything in the deed that reflected 5% interest to defendant, plaintiff replied he did not remember. Taking into consideration that said deposition was held on December 12, 2005 and plaintiff could not remember the same then, plaintiff's epiphany some two years later is suspect at best. Nonetheless, plaintiff provides no explanation why this new alleged fact was not raised prior hereto, and plaintiff's motion to renew is denied.

Accordingly, plaintiff's motion to restore and/or renew and reargue is denied.

Defendant cross moves for an Order restoring her counterclaims. Inasmuch as no prior Order of this Court has dismissed defendant's counterclaims, said counterclaims remain to be viable causes of action herein. Accordingly, the defendant's cross motion is granted to the extent that any and all counterclaims asserted by defendant in her Answer herein shall continue and shall be placed on the active trial calendar.

Based upon the foregoing, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

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[2] The Court notes that this new allegation is not in the form of an affidavit of the plaintiff, but rather in his counsel's affirmation.

ORDERED that defendant's counterclaims shall continue as viable causes of action and shall be placed on the active trial calendar; and it is further

ORDERED that the parties shall appear for a Conference on March 3, 2008, 9:30 A.M. , at the Trial Scheduling Part herein.

Dated: February 4, 2008

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LAWRENCE V. CULLEN, J.S.C.