Pericon v Ruck
2008 NY Slip Op 30500(U)
February 7, 2008
Supreme Court, Queens County
Docket Number: 0017639/2006
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

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JORGE PERICON,

Plaintiff,

-against-

FREDDY RUCK, MARIA RUCK, WASHINGTON MUTUAL BANK, NA, ANA MULLANE, AND JOHN DOE 1 - 5,

Defendants.

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Index No.: 17639/06
Motion Date: 12/17/07
[Ritholtz, J.]
Motion Cal. No.: 2
Motion Seq. No.: 3

The following papers numbered 1 to 14 read on this motion by defendant Ana Mullane for an order: (1) pursuant to CPLR §3211, dismissing the Amended Verified Complaint filed by plaintiff; and (2) pursuant to 22 NYCRR § 130-1.1, for sanctions.

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

Plaintiff Jorge Pericon ("plaintiff") commenced this action for a declaratory judgment and damages on July 30, 2006, for a declaration that an allegedly fraudulent deed is void *ab initio.* On December 2, 1992, plaintiff and defendant Maria Ruck jointly purchased as tenants in common real property in Jackson Heights, New York. Plaintiff alleges that subsequent thereto, Maria Ruck and Freddy Ruck ("Ruck defendants") obtained a conveyance of the subject property by executing a fraudulent deed which was notarized by defendant Ana Mullane ("Mullane") on April 5, 1993, and recorded on April 22, 1993. Plaintiff alleges that he only became aware of the purported transfer of the property in 2005, and at no point did he appear before defendant Mullane to execute the subject deed. Plaintiff further alleges that his ownership interest was transferred in the subject property without consideration and without his

knowledge while he was out of the Country in Bolivia from March 26 to April 23, 1993. By order of this Court dated August 8, 2007, defendant Mullane's prior motion to dismiss the complaint was granted to the extent that the second cause of action for negligence was dismissed on the ground that it was time-barred, and the first cause of action sounding in fraud, was dismissed without prejudice to replead, and plaintiff was directed to serve an amended complaint to particularize the assertions therein within (10) days of service of a copy of this order with notice of entry. The Amended Verified Complaint sets forth two Causes of Action for fraud and notarial misconduct. Defendant Mullane moves for an order, pursuant to CPLR §3211, dismissing the Amended Verified complaint upon the grounds that the action is barred by the statute of limitations and the complaint fails to state a cause of action.

Defendant Mullane moves to dismiss the amended complaint, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action. In applying this statutory provision, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Leon v. Martinez, 84 N.Y.2d 83 (1994); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept.2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, supra, 84 N.Y.2d at 88; International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005). Here, in viewing the instant complaint in its most favorable light as asserted against defendant Mullane, this Court finds that there are no potentially viable claims asserted.

In this Court's August 8, 2007 order, plaintiff was given leave to replead the fraud cause of action, because the cause of action in the original complaint was not pled with the requisite specificity to meet the CPLR 3016(b) standards for an allegation of fraud. As set forth in that decision and order, to plead a prima facie case of fraud, plaintiff must allege representation of a material existing fact, falsity, scienter, deception and injury, and a complaint that does not allege these essential elements of a fraud claim fails to satisfy the specificity and particularity requirements of CPLR 3016(b). See, Fredriksen v. Fredriksen, 30 A.D.3d 370 (2nd Dept.2006); Aranki v. Goldman & Associates, LLP, 34 A.D.3d 510 (2nd Dept.2006); Cohen v. Houseconnect Realty Corp., 289 A.D.2d 277 (2nd Dept. 2001); Barclay Arms, Inc. v. Barclay Arms Associates, 74 N.Y.2d 644, 647 (1989). Each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b), that the circumstances constituting the wrong shall be stated in detail when a cause of action based upon fraud or breach of trust is alleged. Complaints based on fraud which fail in whole or in part to meet this factual pleading standard have consistently been dismissed. See, Barclay Arms v. Barclay Arms

Assocs., supra; Walden Terrace, Inc. v. Broadwall Management Corp., 213 A.D.2d 630 (2nd Dept. 1995). Plaintiff failed to cure the defect, as the cause of action for fraud asserted in the amended complaint also lacks the requisite specificity.

Moreover, the statute of limitations further bars the fraud cause of action. "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, Rosenfeld v. Schlecker, 5 A.D.3d 461 (2nd Dept. 2004); Siegel v. Wank, 183 A.D.2d 158 (3rd Dept.1992). "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). "[]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). Here, although plaintiff was given a second opportunity to "aver evidentiary facts" to avoid dismissal on statute of limitations grounds, he failed to do so. As alleged by defendant, plaintiff could have discovered the alleged fraud had he, in the exercise of due diligence, discovered that the alleged fraudulent deed was recovered in the Office of the Register of the County of Queens in April 1993, which provided constructive notice of its existence. The statute of limitations for the fraud cause of action, which accrued on April 5, 1993, expired in April 1999; this action was commenced on July 30, 2006, six years after the expiration of the statute of limitations.

Accordingly, that branch of the motion for dismissal under CPLR § 3211, is granted to the extent that the first cause of action as asserted against defendant Mullane hereby is dismissed with prejudice, on the grounds that it fails to state a cause of action, as well as upon the expiration of the statute of limitations. Also granted is that branch of the motion seeking dismissal of the second cause of action alleging notarial misconduct. Inasmuch as plaintiff does not oppose the dismissal of this cause of action, the Court deems that cause of action abandoned.

Defendant Mullane also moves for sanctions based upon plaintiff's counsel alleged frivolous conduct, pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts. Part 130.1 authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and states, in pertinent part, the following:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined

> in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. []
>
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.
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> (c) For purposes of this Part, conduct is frivolous if:
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> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
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> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
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> (3) it asserts material factual statements that are false.

The "intent of [Part 130.1] is to prevent the waste of judicial resources and to deter [vexatious] litigation and dilatory or malicious litigation tactics." Kernisan v. Taylor, 171 A.D.2d 869 (2nd Dept.1999); Minister, Elders and Deacons of Reformed Protestant Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411 (1990); RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2nd Dept. 2006). The Rule further provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a "broad pattern of the [defendant's] conduct in this regard and not just the question [of] whether a strand of merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation []." Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1st Dept.1999); see, Wecker v. D'Ambrosio, 6 A.D.3d 452 (2 Dept. 2004). "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (citation omitted)." Id. at 34 (1st Dept.1999).

Here, defendant Mullane contends, inter alia, that plaintiff has asserted spurious claims in alleging fraud and notarial misconduct causes of action, as plaintiff disclaimed that he based his claims on Executive Law § 135 in opposition to the underlying motion Defendant Mullane further contends that although "this Court ordered the complaint dismissed as against Mullane with leave to replead fraud-the complaint now asserts a claim based on Executive Law § 135." She asserts that prior to the filing of this motion, she engaged in several discussions and communications with plaintiff to advise that there is no factual or legal support for the causes of action, to no avail. Defendant Mullane further asserts that notwithstanding the knowledge that the claims could not be sustained, plaintiff refused to withdraw the complaint. Thus, defendant Mullane contends that plaintiff has engaged in frivolous conduct and sanctions are appropriate.

Although this Court finds that the record supports a determination that plaintiff's counsel engaged in frivolous conduct pursuant to Part 130.1, defendant Mullane's contention that there is no viable claim for notarial misconduct, and the assertion of such is frivolous, is, in part, unfounded. In Rastelli v. Gassman, 231 A.D.2d 507 (2nd Dept. 1996), the Appellate Division, Second Department decision upon which defendant Mullane misplaces her reliance, the Court stated the following [231 A.D.2d at 508- 509]:

> There is no cause of action for notarial misconduct absent injury and there can be no injury unless a plaintiff can demonstrate that he or she relied to his or her detriment upon the alleged misconduct of the notary (see, Executive Law § 135; Maloney v Stone, 195 AD2d 1065; Amodei v New York State Chiropractic Assn., 160 AD2d 279, affd 77 NY2d 890; Marine Midland Bank v Stanton, 147 Misc 2d 426; Independence Leasing Corp. v Aquino, 133 Misc 2d 564). We agree that the appellants Petrone and Panarello could not have relied to their detriment upon the respondent's allegedly false notarization of the deed dated March 8, 1990, since their loan to the defendant was made on April 10, 1989, more than one year before the allegedly falsely notarized deed was even executed. Furthermore, an action for notarial misconduct must be commenced within six years from the time the cause of action accrued (Independence Leasing Corp. v Aquino, supra, at 572). Since the third-party complaint was not commenced until April 21, 1995, it was untimely because the appellants' cause of action accrued more than six years earlier, on April 10, 1989, the date they executed their mortgage with the defendant (Independence Leasing Corp. v Aquino, supra, at 572).

Nevertheless, the Appellate Division, Second Department, distinguished the aforementioned order in Plemmenou v. Anninos, 12 A.D.3d 657 (2nd Dept. 2004), a case similar to the factual assertions in the instant matter. In Plemmenou, the plaintiff alleged that the defendant notary public engaged in notarial misconduct under Executive Law § 135, because he notarized a signature on a power of attorney purporting to be hers, executed in favor of the plaintiff's former husband, at a time in which she was residing in Greece. In finding that plaintiff stated a viable

cause of action for notarial misconduct, the Court stated, in pertinent part, the following [12 A.D.3d at 657- 658]:

> As relevant to this appeal, the defendant moved to dismiss the first cause of action brought pursuant to Executive Law § 135. Citing this court's decision in Rastelli v. Gassman, 231 A.D.2d 507, 647 N.Y.S.2d 253, the defendant argued that in order to state a claim under the statute, a plaintiff must allege detrimental reliance on the notary's misconduct. He further argued that in this case, the plaintiff did not, and could not, allege or prove such reliance. Thus, she could not state a claim under the statute. The Supreme Court agreed with the defendant, and dismissed the Executive Law § 135 cause of action.
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> The plaintiff in the instant case occupies a different position from the parties seeking to recover damages pursuant to Executive Law § 135 in Rastelli v. Gassman, supra. She is the one whose signature allegedly was forged, not one to whom the allegedly forged signature was to be presented. Accepting the plaintiff's allegations as true, the whole point of her former husband's scheme was to keep her unaware of it. She could never prove reliance on the notary's alleged misconduct because, by the very design of the plan, she was not meant to know of it. We cannot conclude based on that circumstance that the plaintiff cannot recover, under Executive Law § 135, where she appears to be within a class of persons the Legislature clearly meant to protect.
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> On the facts of this case, the defendant's interpretation of Executive Law § 135 is not supported either by the statute's language or by Rastelli v. Gassman, supra. The plaintiff sufficiently alleged "misconduct by a notary public" in the performance of his duties that caused her damage (Executive Law § 135). Accordingly, that branch of the motion which was to dismiss the first cause of action in the amended complaint should have been denied.

Thus, this Court finds that notwithstanding defendant's assertion that the claim for notarial misconduct fails to state a cause of action, plaintiff, who alleges that his ownership interest was transferred in the subject property without his knowledge while he was out of the Country in Bolivia from March 26 to April 23, 1993, certainly had a factual basis to assert the claim. Thus the assertion of such was not frivolous within the meaning of the statute as the law is based upon reasonable minds differing on its interpretation and application. Nevertheless, frivolous conduct was demonstrated by plaintiff's counsel in asserting a claim for notarial misconduct in the 2007 amended complaint, based upon an allegedly fraudulent deed which was notarized by defendant Mullane more than fourteen years ago on April 5, 1993, and the expiration of the statute of

limitations of which occurred in 1999. See, generally, RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2nd Dept. 2006); Wecker v. D'Ambrosio, 6 A.D.3d 452 (2 Dept. 2004). Consequently, as plaintiff's counsel's "conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party," this Court finds that the facts and circumstances surrounding the assertion of the claim for notarial misconduct was not frivolous within the meaning of 22 NYCRR 130-1.1(c) and thus, the imposition of sanctions is warranted.

Accordingly, the motion by defendant Ana Mullane for an order pursuant to CPLR §3211, dismissing the Amended Verified Complaint filed by plaintiff, and pursuant to 22 NYCRR § 130-1.1, for sanctions, is granted in its entirety. Defendant is awarded costs and reasonable attorneys' fees associated with the making of this motion to dismiss in the amount of $1,500, payable by counsel for plaintiff to the respective firm within twenty (20) days of service of a copy of this order with notice of entry. Moreover, the complaint hereby is dismissed as to defendant Ana Mullane.

Dated: February 7, 2008

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J.S.C.