Prand Corp. v County of Suffolk
2008 NY Slip Op 30844(U)
March 12, 2008
Supreme Court, Suffolk County
Docket Number: 0025310/2006
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX No. 25310-06

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/13/07
ADJ. DATES 9/28/07
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MG

----------X

PRAND CORP., f/k/a CHANDLER PROPERTY INC. and f/k/a TOUSSIE FAMILY ENTERPRISES LTD.,

Plaintiff,

-against-

COUNTY OF SUFFOLK and TOWN OF BROOKHAVEN,

Defendants.

----------X

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Upon the following papers numbered 1 to 19 read on these motions to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1-3; 4-7 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 8-9; 10-11 ; Replying Affidavits and supporting papers 12-13 ; Other 14-14 (memorandum); 16-17 (memorandum); 18-19 (memorandum) ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#001) by the defendant, County of Suffolk, for an Order to dismiss plaintiff's verified complaint pursuant to CPLR 3211(a)(1), CPLR 3211(a)(2), CPLR 3211(a)(5) and CPLR 3211(a)(7), is granted and the complaint is dismissed as to said defendant; and it is further

ORDERED that this motion (#002) by the defendant, Town of Brookhaven, for an Order to dismiss plaintiff's verified complaint pursuant to CPLR 213, CPLR 3211(a)(1), CPLR 3211(a)(2), CPLR 3211(a)(5), CPLR 3211(a)(7), General Municipal Law § 50-e and Town Law § 65(3), is granted and the complaint is dismissed as to said defendant; and it is further

ORDERED that the action is severed from the action entitled ***The State of New York and the People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York v Allen Grecco, Robert Toussie and Chandler Property Inc.***, bearing Index No. 02-9384; and it is further

ORDERED that movants shall each serve a copy of this Order upon the Calendar Clerk of this IAS Part 33 who shall note the dismissal of the complaint and the severance thereof in the Court's computerized records; and it is further

ORDERED that the moving defendants shall each serve a copy of this Order with Notice of Entry upon counsel for the plaintiff within forty (40) days of the date herein pursuant to CPLR 2103(b)(1), (2) and (3) and thereafter file the affidavits of service with the Clerk of the Court.

Familiarity with this matter and the related matter entitled the ***State of New York v Grecco*** and the previous Orders are presumed and only relevant facts will be restated where necessary.

The gravamen of the complaint of plaintiff, Prand Corp. (hereinafter "Prand") is set forth in four causes of action seeking rescission of the contract of sale based upon claims of mistake, fraud, negligent misrepresentation, lack of consideration and equitable rescission which seek adjudication after a future event which may or may not occur. The last two causes of action are obviously scrivener's errors as they are mislabeled as counterclaims; Prand is the plaintiff.

The County of Suffolk (hereinafter "Suffolk") and the Town of Brookhaven (hereinafter "Brookhaven") each move to dismiss Prand's complaint based upon the lack of subject matter jurisdiction because the action is not ripe for review as there is no present case or controversy; that the plaintiff is not entitled to any relief and should not profit from its own wrongdoing, based upon the equitable doctrine of unclean hands; that the express terms of the contract at issue preclude plaintiff from recovering because plaintiff has expressly disclaimed reliance upon any representation by defendant not expressly embodied in the contract; that plaintiff is barred by the equitable doctrine of laches for failing to promptly seek equity; that the action is time barred pursuant to CPLR 213 because the plaintiff failed to commence this action in the six year period required to commence an action based upon contract, an action based upon mistake or an action based upon fraud; that the action is time barred pursuant to County Law § 52 and Town Law § 65(3) because plaintiff failed to file a Notice of Claim and failed to timely commence this action; and the property at issue is dedicated parkland that can not be alienated without State Legislative action, thereby depriving the court of jurisdiction to provide relief sought by the plaintiff.

The Court will first address the issues raised by Suffolk and Brookhaven regarding the plaintiff's failure to file a Notice of Claim pursuant to County Law § 52, General Municipal Law § 50-e and Town Law § 65(3). The statutes govern and set forth the requirements for filing a Notice of Claim against a municipality based upon a claim founded upon a tort, which requires the service of a notice of claim as a condition precedent to the commencement of an action within the meaning of Town Law § 52 and General Municipal Law § 50-e(1)(a) (*see* ***Matter of State Farm Mut. Auto. Ins. Co. v Olsen***, 22 AD3d 673, 802 NYS2d 725 [2d Dept 2005]).

Prand claims that its complaint was not brought under a tort claim but in equity and thus, County Law § 52 and General Municipal Law § 50-e are not conditions precedent to the commencement of Prand's civil action. However, Prand's third cause of action seeks rescission based upon fraudulent inducement. Fraudulent inducement, as a particular species of fraud, combines both contract and tort law concepts and is at the juncture point of contract and tort law (*see* 48 Am. Jur. 3d Proof of Facts 329, §1 [2008]; ***Channel Master Corp. v Aluminum Ltd. Sales, Inc.,*** 4 NY2d 403, 176 NYS2d 259 [1958]).

County Law § 52 states:

> Presentation of claims for torts; commencement of actions
>
> 1. Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-e of the general municipal law. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. The place of trial shall be in the county against which the action is brought.

> 2. This section shall not apply to claims for compensation for property taken for a public purpose, nor to claims under the workmen's compensation law.

Town Law § 65 (3) states:

> On or after the first day of September, nineteen hundred thirty-nine, no action shall be maintained against a town upon or arising out of a contract entered into by the town unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued, nor unless a written verified claim shall have been filed with the town clerk within six months after the cause of action shall have accrued, but no such action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the town clerk.

The statutes are clear and specific in their compliance requirements to enable a plaintiff to institute and maintain a civil action as against the county and a town. As Prand's complaint contains a cause of action sounding in tort, Prand was required to comply with the provisions of County Law § 52. The record before the Court does not indicate that Prand complied with County Law § 52 and General Municipal Law § 50-e (*see* ***Henneberger v County of Nassau,*** 465 F. Supp 2d 176 [EDNY 2006]). Therefore, the complaint is dismissed against the County of Suffolk pursuant to the provisions of County Law § 52.

Additionally, the record also indicates that Prand did not comply with the provisions of Town Law § 65(3). The Town, in further support of its motion, submitted the affidavit of Blanche Oner, an employee in the Office of the Town Clerk of the Town of Brookhaven. In her affidavit, dated March 15, 2007, Ms. Oner states that she has reviewed the records in the Town Clerk's Office from September 2000 to the date of her affidavit and that her search has not revealed a notice of claim filed either by the Prand Corporation, Chandler Property, Inc. or Toussie Family Enterprises, Ltd. Here, the record indicates that Prand did not comply with the specific provisions of Town Law § 65(3) (*see* ***Trager v Town of Clifton Park,*** 303 AD2d 875, 756 NYS2d 669 [4th Dept 2003]; ***Walter H. Poppe Gen. Contr., Inc. v Town of Rampo,*** 280 AD2d 667, 721 NYS2d 248 [2d Dept 2001]). "In contrast to other notice statutes, Town Law § 65(3) contains no provision allowing a court to excuse noncompliance with its requirements" (***ADC Contr. & Constr., Inc. v Town of Southampton***, 45 AD3d 614, 850 NYS2d 121 [2d Dept 2007]). Therefore, the complaint is dismissed as against the Town of Brookhaven pursuant to the provisions of Town Law § 65(3).

In order to dismiss a cause of action pursuant to CPLR 3211(a)(5), the moving party, herein Suffolk and Brookhaven, "bears the initial burden of establishing prima facie that the time in which to sue has expired" (***In re Schwartz,*** 44 AD3d 779, 843 NYS2d 403 [2d Dept 2007], *citation omitted*). "The defendant must establish when the plaintiff's cause of action accrued" (***Swift v New York Med. Coll.,*** 25 AD3d 686, 808 NYS2d 731 [2d Dept 2006]).

The Statute of Limitations for actions based upon a fraud claim, a claim for rescission, a claim of mistake, a claim based on a contract or a claim for rescission, is six years (*see* CPLR 213; ***Ingrami v Rovanc***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]; ***Spinale v Tag Produce Corp.,*** 44 AD3d 570, 844 NYS2d 255 [1st Dept 2007]; ***Vollbrecht v Jacobson,*** 40 AD3d 1243, 838 NYS2d 188 [3d 2007]; ***DeMille v DeMille,*** 5 AD3d 428, 774 NYS2d 156 [2d Dept 2004]; ***Kurtish v Goldberg*** 253 AD2d 740, 677 NYS2d 482 [2d Dept 1998]; ***Zavaglia v Gardner,*** 245 AD2d 446, 666 NYS2d 671 [2d Dept 1997]; ***Mersten v Ticor Title Guar.,*** 216 AD2d 544, 628 NYS2d 578 [2d Dept 1995]; ***Ely-Cruikshank Co., Inc. v Bank of Montreal***, 81 NY2d 339, 599 NYS2d 501 [1993]; ***Emord v Emord,*** 193 AD2d 775, 598 NYS2d 266 [2d Dept 1993]). The statute of limitations for a negligent representation claim that does not sound in fraud is three years (*see* ***Fromer v Yogel,*** 50 F Supp 227 SDNY 1999]).

The contract to sell the property was signed by Prand on July 31, 2000 and by Suffolk and the Town on August 22, 2000. Prand certainly and conclusively had sufficient knowledge of the facts regarding the sale of the property at the time the contract was signed, which should have caused it to inquire and discover the alleged fraud (*see* ***Rattner v York,*** 171 AD2d 718, 567 NYS2d 174 [2d Dept 1991]). The test as to when one should have discovered alleged fraud is an objective one (*see* ***Presetandrea v Stein,*** 262 AD2d 621, 692

NYS2d 689 [2d Dept 1999]). When the circumstances suggest to a person of ordinary intelligence that they may have been defrauded, a duty of inquiry arises. A failure to inquire when it would have developed the truth and it ignores the facts which calls for an investigation, knowledge of the alleged fraud will be imputed to the party (*Id.*). It is knowledge of facts, not legal theories, that commence the running of the two year limitations period (*see* ***TMG-II v Price Waterhouse & Co.,*** 175 AD2d 21, 572 NYS2d 6 [1st Dept 1991]).

Here, the Court finds that Prand, a sophisticated business corporation, had that sufficient knowledge to ascertain any alleged fraudulent behavior by the defendants when it signed the contract over six years ago. The instant action was not commenced by Prand until September 8, 2006, more than six years later. Thus, it is time barred. The time began to run when the alleged mistake regarding the written contract was executed (*see* ***First Natl. Bank of Rochester v Volpe,*** 217 AD2d 967, 629 NYS2d 906 [4th Dept 1995]). Therefore, the complaint is also dismissed as against Suffolk pursuant to CPLR 3211(a)(5) and the Town pursuant to CPLR 213 and CPLR 3211(a)(5).

As to that application of the moving defendants to dismiss the complaint based upon laches, unclean hands and on the grounds that the property is now dedicated park land, the Court is not empowered to grant such relief which is not contained in movant's Notice of Motion or wherefore clause (*see* CPLR 2214; ***Northside Studios, Inc. v Treccagnoli,*** 262 AD2d 469, 692 NYS2d 161 [2d Dept 1999]; ***Arriaga v Michael Laub, Co.,*** 233 AD2d 244, 649 NYS2d 707 [1st Dept 1996]).

Accordingly, the motions by the defendants to dismiss the complaint are granted as noted herein. This constitutes the Order and decision of the Court.

DATED: 3/12/08

THOMAS F. WHELAN, J.S.C.