At an IAS Term, Part 29 of the Supreme Court of the state of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of December, 2008.

P R E S E N T:
Hon. Wayne P. Saitta, Justice.

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Index No.:33522/2006

CHARLES A. QUIMBY,

DECISION and ORDER

Plaintiff,

v.

CALVIN D. BERTIE and SANDRA NURSE BERTIE,

Defendants.

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Plaintiff CHARLES A. QUIMBY,(hereinafter "Plaintiff"), moves this court for an Order pursuant to CPLR §3212 for Summary Judgment on the claims asserted in the amended complaint and dismissing the affirmative defenses contained in the amended answer.

Upon reading the Notice of Motion of John M. Wilson, Esq., Attorney for Plaintiff, dated February 6th, 2008, together with the Affidavit of Charles A. Quimby, dated February 6th, 2008, and all exhibits annexed thereto; the Affidavit in Opposition of CALVIN BERTIE, (hereinafter "Defendant"), dated June 2nd, 2008, and the exhibit annexed thereto, together with the Memorandum of Law in Opposition to Plaintiff's motion, dated June 2nd, 2008, by Yvette Dudley, Esq., counsel for Defendant; the Reply Affidavit of Charles A. Quimby, dated July 23rd, 2008, together with all exhibits annexed thereto; the Reply Memorandum of Law in further support of Plaintiff's Motion for Summary Judgment, by John M. Wilson, Esq., counsel for Plaintiff, dated July 23rd, 2008, and after argument of counsel and due deliberation thereon,

Plaintiff's motion for Summary Judgment is denied for the reasons set forth below.

FACTS and ARGUMENTS

Plaintiff brings this action pursuant to RPAPL Article 15 seeking to quiet title of a property, located at 731 Dean Street, Brooklyn, New York, (hereinafter "the property"). The property is improved with a two car garage. He also asserts causes of action for conversion and unjust enrichment.

Plaintiff states that he purchased the property on April 14th, 1986, and has owned it ever since.

Defendants state they purchased the property from Plaintiff.

Defendants state that on September 25th, 1997, they appeared at a closing at which Plaintiff also appeared with an attorney and executed a deed conveying the property to them. It is not disputed that Plaintiff owned the property prior to the purported closing.

Defendants state that before the closing, they rented the property from Plaintiff to perform [auto] body work and continued to do so after the closing. Defendants assert they have paid the taxes on the property since the date of the closing.

In his EBT, Defendant Calvin Bertie testified that the man who appeared at the closing was black, with a fair complexion. Despite his deposition testimony, Calvin Bertie states in his Affidavit in Opposition that he believes that Plaintiff, who is white, is the man who appeared at the closing.

Plaintiff denies having attended the closing or conveying an interest in the property to Defendants. He maintains that the individual who appeared at the purported closing was an imposter.

Plaintiff states that Defendant Calvin Bertie's testimony that the purported seller was black should be sufficient to support Plaintiff's contention that an imposter appeared at the closing of September 25th, 1997, and therefore no interest in the property was conveyed.

Plaintiff also moves to dismiss Defendants' five affirmative defenses. Defendants plead that Plaintiff has failed to set forth a cause of action upon which relief can be granted. They also assert as affirmative defenses that Plaintiff's cause of action sounds in fraud, and because Plaintiff did not plead fraud with specificity, and the statute of limitations for fraud is six years, the Plaintiff's case should be dismissed. Plaintiff argues that the appropriate statute of limitations for an action pursuant to RPAPL Article 15 is ten years and therefore his claim is not time barred.

Defendants say the equitable defense of laches is applicable as Plaintiff delayed in bringing this action or that in the alternative, they are entitled to an equitable mortgage on the property for having paid the property taxes since the closing in 1997.

ANALYSIS

Motion for summary judgment

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact which require a trial of action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the

moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Id.

Plaintiff's burden on this motion for summary judgment is to demonstrate the absence of any material issue of fact. In support of his position, Plaintiff denies signing the purported deed or attending the closing. He says that Defendant Calvin Bertie's testimony that the seller was black, when he is white, is sufficient to establish the fact that the alleged seller was an imposter.

Additionally Plaintiff submits a photocopy of a driver's license which he asserts belongs to the imposter at the closing of September 25th, 1997.

It would appear that the name on the photocopied license is Charles A. Quimby and that the operator's address is in Newark, New Jersey. However, the image on the copy is too obscure and opaque to be able to tell who it is a photo of.

Further, there is no indication of how Plaintiff obtained the copy of a license presented at a closing he alleges he did not attend, nor is there any authentication that it is, in fact, a copy of the license presented at the closing. Accordingly, the Court cannot consider it in deciding the instant motion.

In opposition to Plaintiff's disavowal of the deed is the fact that the signature is acknowledged by notary public, Terri N. Stephen, as well as Defendant's Calvin Bertie's affidavit, which states that he recognizes the Plaintiff as the man who executed the deed.

"A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption . . . can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed". *Osborne v. Zornberg,* 16 A.D.3d 643, 792 N.Y.S.2d 183, (2nd Dept 2005), citing *Son Fong Lum v Antonelli,* 102 AD2d 258, 260-261 [1984], *affd* 64 NY2d 1158 [1985]. "[A] certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing as to amount to a moral certainty". Id., citing *Albany County Sav. Bank v McCarty,* 149 NY 71, 80 (1896).

The unsupported testimony of an interested witness is insufficient to rebut the presumption of due execution of the deed. *Osborne v. Zornberg,* 16 A.D.3d 643, 792 N.Y.S.2d 183, (2nd Dept 2005).

Plaintiff did not sustain his burden in the first instance of establishing his entitlement to judgment as a matter of law to set aside the deed as fraudulent (*see Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). Defendant Calvin Bertie testified both that the Plaintiff was the seller at the closing and also that the seller at the closing was black. No affidavit from the notary or any lawyers who attended the closing was presented nor was any affidavit from an expert to challenge the validity of the purported signature. The conflicting versions of whether Plaintiff signed the deed turn on issues of credibility which are best determined through testimony of witnesses subject to cross examination at trial. Plaintiff has not established, by clear and convincing evidence, that there is no question of fact as to whether he executed the disputed deed.

By reason of the foregoing Plaintiff has not met his burden for summary judgment on

his claim to quiet title and set aside the Defendants' deed. While Plaintiff sought summary judgment on his entire amended complaint, his papers do not address why summary judgment should be granted as to the causes of action for conversion and unjust enrichment.

Motion to Strike Affirmative Defenses

Failure to state a cause of action

Defendants' first affirmative defense that Plaintiff fails to state a cause of action is without merit.

It is undisputed that Plaintiff owned the property at one time. Plaintiff's allegation that he did not attend the closing and did not sign the deed clearly articulates a cause of action seeking to quiet title on the grounds that he never conveyed the property.

Statute of limitations

The Second Department in *Downes v. Peluso,* 115 A.D.2d 454, 496 N.Y.S.2d 691 (2nd Dept 1985), held that an action to quiet title brought pursuant to RPAPL Article 15 carries a ten year statute of limitations. The fact that Plaintiff in his RPAPL Article 15 action alleges that a deed purporting to transfer title is fraudulent does not subject the action to the six year statute of limitations for fraud, nor does it require that fraud be pled with specificity, where the ultimate relief sought is to quiet title. Therefore the second and fourth affirmative defenses are without merit.

Laches

Defendants' third affirmative defense is that Plaintiff's claims should be barred by the equitable doctrine of laches.

A proceeding under RPAPL Article 15 is a statutory action but it has been found to permit equitable considerations.

"An action to compel determination of a claim to real property brought under article 15 of the Real Property Actions and Proceedings Law is a statutory action. A plaintiff must, by pleading and proof, bring this action within the terms and conditions of statute. But beyond this, and in respect of the distinction between an action at law and an action in equity, the action is a hybrid one. It has been said that it is not an action in equity and the relief awarded is in large measure equitable in nature." *New York and Brooklyn Suburban Inv. Co. of New York v. Leeds,* 100 Misc.2d 1079 at 1085, 420 N.Y.S.2d 639, N.Y.Sup. 1979.

"The doctrine of laches bars recovery where a party's inaction has prejudiced another party, making it inequitable to permit recovery". *Rosenstrauss v. Women's Imaging Center of Orange County,* --- N.Y.S.2d ----, 2008 WL 4820240 (2nd Dept 2008), citing *First Nationwide Bank v. Calano,* 223 A.D.2d 524, 525, 636 N.Y.S.2d 122).

To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant. *Cohen v. Krantz,* 227 A.D.2d 581, 643 N.Y.S.2d 612 N.Y.A.D.,1996. (See *Dwyer v Mazzola,* 171 AD2d 726, 727).

The Second Department recently held that "[t]he essential element of the equitable defense of laches is delay prejudicial to the opposing party." *Rosenstrauss v. Women's Imaging Center of Orange County,* --- N.Y.S.2d ----, (2nd Dept 2008).

Plaintiff has offered no reasonable explanation for his ten year delay in commencing this action. Defendants' allegations that they have maintained the property for ten years and that they, and not Plaintiff, paid the taxes on the property could, if true, be a sufficient basis for the Court to exercise its equitable powers to deny Plaintiff relief.

Equitable mortgage

Defendants' fifth affirmative defense asserts an equitable mortgage.

An equitable mortgage has been defined as a transaction that has the intent but not the form of a mortgage and which a court will enforce in equity to the same extent as a mortgage. Such a mortgage may result from a writing from which an intention to execute a mortgage may be gathered.

In this case, there is no mortgage at issue. The sole amounts Defendants claim to have expended in reliance upon the validity of the deed were for property taxes, for which they supply copies of checks in proof of payment.

While Defendants have not articulated a basis for an equitable mortgage, they may be entitled to an equitable lien to recover the amounts they paid for property taxes since September 25th, 1997, if it is determined that Defendants were not conveyed an interest in the property at the closing. *Cruz v. Cruz,* 37 A.D.3d 754, 832 N.Y.S.2d 217 (2nd Dept 2007).

WHEREFORE by reason of the foregoing, Plaintiff's motion for summary judgment is denied, and Plaintiff's motion to strike the affirmative defenses is granted, as to the first, second and fourth affirmative defenses; and it is hereby

Ordered that the first, second and fourth affirmative defenses are dismissed.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

HON. WAYNE P. SAITTA
J.S.C.