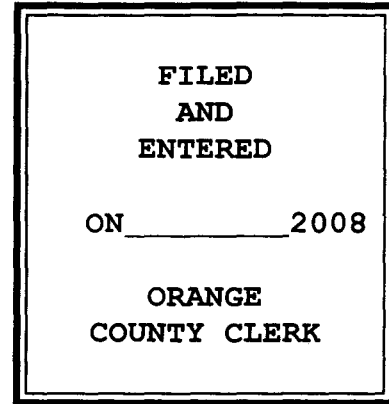


<b>Citicorp Trust Bank, FSB v Makkas</b>
2008 NY Slip Op 33701(U)
May 7, 2008
Supreme Court, Orange County
Docket Number: 1263/2003
Judge: William J. Giacomo
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE  
P R E S E N T: HON. WILLIAM J. GIACOMO, J.S.C.

-----X  
CITICORP TRUST BANK, FSB f/k/a TRAVELERS  
BANK AND TRUST, FSB

Plaintiff,

-against-

LIGERIE L. MAKKAS, KONSTANEINIOUS G.  
MAKKAS, LESHOLD REALTY CORP., NORSTAR  
MORTGAGE COMPANY, A DIVISION OF FLEET  
REAL ESTATE FUNDING CORP., JOHN DOE  
(Said name being fictitious it being the intention  
of plaintiff to designate any and all occupants of  
premises being foreclosed herein),

Defendants.

**DECISION & ORDER**

Index No. 1263/2003

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The following papers numbered 1 to 25 were read on plaintiff's motion to consolidate and for summary judgment:

Notice of Motion/Affidavit/Affirmation/Exhibits A-T	1-23
Affidavit in Opposition	24
Reply Affirmation	25

Based on the foregoing submissions the motion to consolidate the instant action

\* 2]

with the action known as Leshold Realty v. Angelo Makkas, Konstaneinous G. Makkas, Ligerie L. Makkas and Travelers Bank & Trust, FSB, bearing Orange County Index No. 3152/2002 (hereinafter the “Leshold Matter”) is GRANTED and the motion for summary judgment, dismissing the claims and defenses of Leshold Realty Corp. (Hereinafter “Leshold”) is GRANTED.

### **Procedural and Factual Background**

On June 7, 1994, Leshold obtained a money judgment (the “Judgment”) against Angelo Makkas<sup>1</sup> (hereinafter “Angelo”). Just prior to Leshold obtaining its Judgment, on March 31, 1994, Angelo transferred the real property known as 4238 Route 94, Goshen, New York (hereinafter the “Premises”) to his Brother Konstaneinous G. Makkas (hereinafter “Konstaneinous”). On October 21, 1997, Konstaneinous conveyed the Premises to Angelo’s daughter, Ligerie Makkas (hereinafter “Ligerie”).

On February 17, 1999, plaintiff made a mortgage loan to Ligerie on the Premises (the “Mortgage”) which Mortgage is presently in default and the subject of the instant foreclosure proceeding.

Leshold claims that the 1994 conveyance of the Premises from Angelo to Konstaneinous, just prior to Leshold obtaining its Judgment, was fraudulent and commenced the Leshold Matter asserting same.

In the instant matter Leshold asserts that its Judgment is a superior lien on the Premises on account of the fraudulent conveyance, thus, Leshold claims that plaintiff’s

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<sup>1</sup>Anthony Makkas is a defendant in the Leshold Matter.

Mortgage is subordinate to the Judgment. Plaintiff claims that even if the pre-Judgment conveyance from Angelo to Konstaneinous was fraudulent, Leshold's priority claim must fail as a matter of law. It claims that the Leshold Matter was commenced after the statute of limitation had expired and in addition Leshold's defenses in the instant proceeding were commenced and/or interposed also after the applicable statute of limitations expired.

### **The Motion to Consolidate**

Plaintiff's motion to consolidate the Leshold Matter with the instant proceeding is unopposed.

As the Leshold Matter and the instant proceeding involve common questions of law and fact, and involve the identical parties, this Court grants consolidation of the two cases pursuant to CPLR §602(a).

### **The Motion for Summary Judgment**

Plaintiff moves for summary judgment seeking an order dismissing the claims and defenses of Leshold because they are barred by the statute of limitations.

The Court will assume for the purposes of this motion that the 1994 pre-Judgment conveyance from Angelo to Konstaneinous was fraudulent. A judgment creditor's cause of action to set aside a fraudulent conveyance is governed by a six-year statute of limitations. CPLR §213(8) states that:

"the six-year statute of limitations for causes of action alleging fraud, ...commences to run at the time the allegedly fraudulent conveyance occurs: where actual fraud is alleged, the statute of limitations is six years from the fraudulent transfer or two

years from the time the fraud was discovered or could have been discovered with reasonable diligence.” Island Holding, LLC v. O'Brien, 6 A.D.3d 498, 500, 775 N.Y.S.2d 72, 74 (2nd Dept., 2004), *lv. app. dnd.*, 4 N.Y.3d 701, 824 N.E.2d 48, 790 N.Y.S.2d 647 (2004).

See also, Metzger v. Yuenger Woodworking Corp., 33 A.D.3d 678, 824 N.Y.S.2d 96 (2nd Dept., 2006). Thus, Leshold’s cause of action accrued on March 31, 1994, the date of the fraudulent conveyance. The Leshold Matter was commenced on May 9, 2002, approximately eight (8) years after the claim accrued, and therefore is time barred.

Based on the foregoing, plaintiff has demonstrated as a matter of law its *prima facie* entitlement to summary judgment. See generally, Gstalter v. State, 240 A.D.2d 541 (2nd Dept., 1997). The burden now shifts to Leshold who must establish a triable issue of fact by producing admissible evidence that precludes entry of judgment in favor of the movant as a matter of law. Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co., 168 A.D.2d 610 (2d Dept 1990).

By affidavit of its President, Leshold asserts that “there are factual issues present herein which require a trial and preclude the granting” of the summary judgment motion. “However, it is well settled that bald conclusory allegations are insufficient to defeat a motion for summary judgment”. Richardson v. Matarese, 206 A.D.2d 354, 355, 614 N.Y.S.2d 426, 427 (2nd Dept., 1994).

Leshold’s opposition consists of arguments seeking to bolster the merits of the fraudulent conveyance claim, but does not address why the statute of limitations does not bar its claims. Leshold does not assert, much less make show how it could not have, with reasonable diligence, discovered the fraudulent conveyance within the six-year limitations period, or that once it discovered the fraud, commenced its action to set aside the

conveyance within two years thereafter. See, CPLR §203(g).

Here, the deed from Angelo to Konstaneinous was duly recorded as was the deed from Konstaneinous to Ligerie. The fraudulent conveyance claim accrued upon the filing of the deed from Angelo to his brother Konstaneinous. See, Ehrler v. Cataffo, 42 A.D.3d 424, 840 N.Y.S.2d 375 (2nd Dept., 2007)[Fraudulent conveyance claims accrued when amended business certificate divesting debtor of his interest in business was recorded and when deed conveying debtor's 50% interest in real property to his wife was recorded.]; Island Holding, LLC v. O'Brien, supra [Causes of action accrued when fraudulent conveyances were recorded.].

Moreover, Leshold bears the burden of establishing that it could not have, with reasonable diligence, discovered the fraudulent conveyance earlier than two years before commencing the original action. Sabbatini v. Galati, 43 A.D.3d 1136, 842 N.Y.S.2d 539 (2nd Dept., 2007). Nothing in the instant record implies must much proves that Leshold was unable to discover, with reasonable diligence, the fraudulent conveyance less than two years before it commenced the Leshold Matter.

Because Leshold has failed to meet its burden establish a triable issue of fact, plaintiff's motion must be granted.

Plaintiff's motion to strike the defendant sued in the instant matter as "JOHN DOE", and amending all papers accordingly is GRANTED without opposition.

Finally, plaintiff's motion to appoint a Referee, pursuant to RPAPL §1321 is GRANTED without opposition.

THEREFORE, upon the Affidavit of Gloria Sexton, Vice President of plaintiff, sworn

to June 9, 2003f, and upon reading the Summons and Complaint, as well as the Answer of Leshold realty Corp., and upon the proof that all other defendants have been duly served and their time to answer has expired or they have filed Notices of Appearance, and after reviewing the motion papers submitted herein, it is

ORDERED, that the matter known as Leshold Realty v. Angelo Makkas, Konstaneinous G. Makkas, Ligerie L. Makkas and Travelers Bank & Trust, FSB, bearing Orange County Index No. 3152/2002 is consolidated with the instant proceeding; and it is further

ORDERED, that answer, claim and defenses of LESHOLD REALTY CORP. be and is hereby DISMISSED and that summary judgment be and is hereby GRANTED in favor of Plaintiff; and it is further

ORDERED, that the answer of LESHOLD REALTY CORP. Be treated as a limited Notice of Appearance, entitling said defendant's counsel, the Law Offices of Monte J. Rosenstein, P.C., to receive without prior notice, a copy of he Notice of Sale, Notice of Discontinuance and Notice of Surplus Monies; and it is further

ORDERED, that "JOHN DOE" be dropped as a party Defendant in this action and that the caption of this action be amended to reflect the deletion of "JOHN DOE" as a party defendant; and it is further

ORDERED, that Michelle Rametta, Esq. of Rametta & Rametta LLC, with offices at 15 Matthews Street, Suite 203, Goshen 10924 be appointed Referee in this foreclosure action to determine the amount due and to determine whether or not the Premises can be sold in parcels; and it is further

ORDERED, that by accepting this appointment the Referee certifies that she is in

