

221 Second Ave., LLC v Fidelity Natl. Fin., Inc.

2009 NY Slip Op 33046(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 106027/2009

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

221 SECOND AVENUE LLC,

INDEX NO. 106027/09

Plaintiff,

- v -

MOTION DATE 12/2/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 102

FIDELITY NATIONAL FINANCIAL, INC.,
FIDELITY NATIONAL TITLE INSURANCE
COMPANY, LYNCH MOB ASSOCIATES,
JOSEPH C. JANNETTY, THOMAS D. GAMMINO,
JR., JAMES GOMEZ, 14TH STREET HK
REALTY CORP. and 242 14TH STREET
ASSOCIATES, L.P.,

Defendants.

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion to dismiss

Notice of Motion— Affirmation — Exhibit A

PAPERS NUMBERED

1-2

Answering Affirmation — Exhibits A-B

3

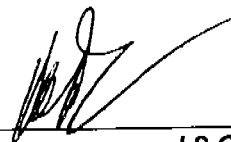
Replying Affirmation — Exhibit A

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the annexed memorandum decision and order.

Dated: 12/22/09
New York, New York



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MICHAEL D. STALLMAN
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
221 SECOND AVENUE, L.L.C.,

Plaintiff,

- against -

Index No. 106027/2009

FIDELITY NATIONAL FINANCIAL, INC., FIDELITY
NATIONAL TITLE INSURANCE COMPANY, LYNCH MOB
ASSOCIATES, JOSEPH C. JANNETTY, THOMAS D.
GAMMINO, JR., JAMES GOMEZ, 14TH STREET HK
REALTY CORP. and 242 14TH STREET ASSOCIATES, L.P.,

Defendants.
-----X

Decision and Order

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, in February 1998, the sellers of real property located at 221 Second Avenue in Manhattan misrepresented in the contract of sale that there were no encumbrances on the real property. According to plaintiff, the seller had granted an easement for light and air to neighboring property owners on September 3, 1997, but had not recorded the easement until June 26, 2008, months after title was conveyed to plaintiff.

The sellers, defendants Lynch Mob Associates, Joseph C. Jannetty, Thomas D. Gammino, Jr. (collectively, LMA defendants)¹ move to dismiss the complaint as against them as time-barred (Motion Seq. No. 001). The neighboring property owners, defendants 14th Street HK Realty Corp. and 242 14th Street Associates, L.P. (the Easement defendants), also move to dismiss the complaint as against them as time-barred, and for failure to state a cause of action. This decision addresses

¹ The complaint alleges that defendant James Gomez was part of defendant Lynch Mob Associates. However, Gomez is not part of the LMA defendants' motion, and apparently answered the complaint by his own counsel.

both motions.

DISCUSSION

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff.”

Island ADC, Inc. v Baldassano Architectural Group, P.C., 49 AD3d 815, 816 (2d Dept 2008); *Matter of Estate of Baird*, 58 AD3d 958, 959 (3d Dept 2009); see *Brignoli v Balch, Hardy & Scheinman*, 178 AD2d 290, 290 (1st Dept 1991)(“The defendant bears the burden of proof on an affirmative defense”).

The LMA defendants have established that the second, third, and fourth causes of action for breach of contract, breach of warranty, and unjust enrichment are time-barred. The Easement defendants have established that the sixth cause of action, for unjust enrichment, is also time-barred. Plaintiff commenced this action on April 29, 2009, more than 11 years after the easement was granted, and more than 10 years after the alleged misrepresentation in the contract of sale. Therefore, the second, third, fourth, and sixth causes of action are dismissed, for these causes of action carry a six year statute of limitations.

Plaintiff argues that the fifth and seventh causes of action, for fraud, are not time-barred, because it allegedly discovered the easement in December 2008.

“[A] fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or ‘could with reasonable diligence have discovered it.’ The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was ‘possessed of knowledge of facts from which [the fraud] could be reasonably inferred.’ “Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute.” “Where it does not conclusively appear

that a plaintiff had knowledge of facts from which the fraud could be inferred, a complaint should not be dismissed on motion and the question is left to the trier of the facts.”

Sargiss v Magarelli, 12 NY3d 527, 532 (2009) (internal citations omitted).

defendants contend that plaintiff was placed on constructive notice of the light and air easement when it was filed. Alternatively, the LMA defendants maintain that plaintiff could simply have searched the property records in the intervening decade. The LMA defendants contend that its title company could have learned about the easement before the deed was recorded, because the deed was recorded on June 29, 2008, three days after the easement was recorded. The Easement defendants contend that plaintiff would have discovered the recorded easement in March 2003, when plaintiff filed and recorded a document entitled “Zoning Lot Description and Ownership Statement” in connection with a permit application with the Department of Buildings (*see* Meister Affirm., Ex B). According to the Easement defendants, plaintiff would have conducted a title search of the records in order to certify that it then owned the premises described in the zoning lot in the ownership statement.

As plaintiff indicates, “[t]he mere fact that deeds had earlier been recorded was insufficient to constitute constructive notice of the conveyances in the absence of some knowledge that would have required plaintiffs to investigate the public records.” *Guedj v Dana*, 11 AD3d 368 (1st Dept 2004). Because it does not conclusively appear that plaintiff had knowledge of facts from which the fraud could reasonably be inferred, the Court denies the LMA defendants’ motion to dismiss as to the fifth cause of action. Discovery is necessary to determine whether plaintiff actually acquired knowledge of the easement when it filed its application with the Department of Buildings, or whether, through reasonable diligence, plaintiff could have discovered the existence of the easement

at some other point in time that was more than two years before the commencement of this action.

The LMA defendants argue that the fifth cause of action should be dismissed as duplicative of the causes of action for breach of contract. This argument is not persuasive. First, the breach of contract claims were dismissed, so there are no duplicative causes of action. Second, “a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim.” *First Bank of Americas v Motor Car Funding*, 257 AD2d 287, 292 (1st Dept 1999).

Notwithstanding issues of fact warranting discovery as to the plaintiff’s discovery of the alleged fraud, the seventh cause of action is dismissed for failing to plead fraud with particularity. The complaint alleges that the Easement defendants “actively participated in the fraudulent conduct of [the LMA defendants and Gomez] in connection with their sale to plaintiff of The 221 Second Avenue Property.” Meister Affirm., Ex A [Complaint ¶ 76]. However, the verified complaint does not allege that the Easement defendants themselves misrepresented any facts to plaintiff, or that they made any representation upon which plaintiff reasonably relied. Neither does the verified complaint allege any facts that would give rise to a duty for the Easement defendants to disclose the existence of the easement to plaintiff.

To the extent that plaintiff is asserting a theory of aiding and abetting the alleged fraud of the LMA defendants, the allegations are legally insufficient. The complaint is devoid of allegations that the Easement defendants “had actual knowledge of the primary wrong or that these parties rendered substantial, as opposed to inadvertent, assistance . . .” *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 (1st Dept 2007). The easement was allegedly granted in September 1997, prior to the transfer of title in February 1998. The verified complaint alleges that the agreement to sell the property was entered into “on or prior to February 1, 1998.” “[W]here the actual assistance allegedly

given the fraud is not clearly substantial, the allegations of scienter must be all the more detailed if the requisite connection of the purported aider and abettor with the fraud is to be made out.” *National Westminster Bank USA v Weksel* 124 AD2d 144, 150 (1st Dept 1987). Accordingly, the seventh cause of action is dismissed.

The eighth cause of action, for rescission of the light and air easement, is dismissed as inadequately pled. The verified complaint alleges that the Easement defendants procured the easement through fraudulent conduct, and paid no consideration for the easement. Verified Complaint ¶¶ 81-82. However, as discussed above, the verified complaint does not allege that the Easement defendants made any misrepresentations to plaintiff. Plaintiff is not the grantor of the easement; neither do the allegations indicate that plaintiff could be considered a creditor of the LMA defendants at the time the easement was granted. The allegations do not appear to fall under any viable legal theory that permits plaintiff to rescind the easement.

CONCLUSION


Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants Lynch Mob Associates, Joseph C. Jannetty, and Thomas D. Gammino, Jr. is granted to the extent that the second, third, and fourth causes of action are dismissed as against these defendants, and the motion is otherwise denied; and it is further

ORDERED that the motion to dismiss by defendants 14th Street HK Realty Corp. and 242

East 14th Street Associates, L.P. is granted, the complaint is severed and dismissed as against these defendants, with costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgment in their favor accordingly.

Dated: December 27, 2009
New York, New York

ENTER:


J.S.C.

MICHAEL D. STALLONE
J.S.C.

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