

Commonwealth Land Tit. Co. v Fenton 135 LLC

2010 NY Slip Op 33385(U)

December 6, 2010

Supreme Court, New York County

Docket Number: 103761/10

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Justice

Index Number : 103761/2010
COMMONWEALTH LAND TITLE
 VS.
FENTON 135 LLC
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2
3
4

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

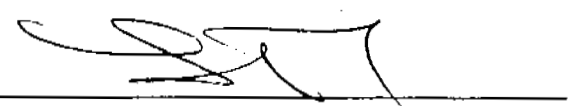
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

DEC 10 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/7/10



HON. EILEEN A. RAKOWER *L.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
COMMONWEALTH LAND TITLE COMPANY, Index No.
103761/10
Plaintiff,
-against- DECISION
and ORDER

FENTON 135 LLC, JACQUELINE GOINS, Individually, Mot. Seq.
VALLI WATSON, Individually, JOSEPH STERNSCHEIN, 001&002
Individually, JOHN DALLEY, Individually and MARC
ANDREW LANDIS, Individually, **FILED**
Defendants. DEC 10 2010

-----X
HON. EILEEN A. RAKOWER: NEW YORK
COUNTY CLERK'S OFFICE

Commonwealth Land Title Company ("Commonwealth") brings this action against defendants for fraud and negligence in connection with their alleged involvement in a fraudulent sale of real property. Commonwealth's Complaint alleges that, prior to August 5, 2003, Constance Fenton, Vera Fenton, Frank Fenton, Etta Fenton, Dolly Fenton, Aubrey Fenton Jr., and Clarice Orkewre (collectively "Fenton Owners") owned the lot of property located at 234 West 135th Street in New York County (the "Subject Property"). Defendant Jacqueline Goins ("Goins") managed the subject the property since 1999.

According to the Complaint, on or about August 5, 2003, Goins forged Durable General Power of Attorney forms for each of the Fenton Owners without their knowledge or permission, and recorded them with the New York City Department of Finance, Office of the City Register. Commonwealth further alleges that "each fraudulent Power of Attorney was notarized fraudulently by either Defendant Watson or Defendant Sternschein," who notarized the forms despite the fact that none of the Fenton Owners personally appeared before them.

On or around September 11, 2003, Goins conveyed the Subject Property to Fenton 135, an entity formed, controlled, and operated by Goins. On or around June

24, 2004, Goins caused Fenton 135 to sell the Subject Property to Labadero Associates ("Labadero") for approximately \$1,500,000 with a loan policy of approximately \$1,150,000. Also on or around June 24, 2004, Commonwealth insured title to the property.

Commonwealth alleges that at the closing of the loan for Labadero and Fenton 135, "Defendant Landis fraudulently issued an opinion letter to Labadero, in which Defendant [Landis]¹ confirmed the legal sufficiency and validity of the mortgage and other loan documents executed by Defendant Fenton 135." Commonwealth further alleges that Labadero "expressly and reasonably relied upon" Landis's opinion letter.

On or around March 1, 2006, the Fenton Owners discovered the fraudulent transfer of the Subject Property and commenced an action against Goins, Fenton 135, and Labadero. After discovering that Fenton 135 did not obtain title to the Subject Property in good faith, Labadero initiated a claim under its policy with Commonwealth. Commonwealth alleges that it settled the action, causing a loss of approximately \$1,144,917.65.

Landis, according to his own opinion letter, is an attorney who represented Fenton 135 "in connection with a loan in the aggregate principal amount of \$1,050,000 made by [Lanbar, and] secured by a mortgage on [the Subject Property]."

Presently before the Court are separate motions to dismiss by Landis and Watson pursuant to CPLR §3211. Turning first to Landis's motion, a copy of the subject opinion letter, dated September 11, 2003, is annexed as an exhibit thereto. According to that letter, Landis states that his law firm has "examined all of the documents executed by Borrower [Fenton 135] in connection with the Loan..." Commonwealth is not in any way associated with this transaction. Further, the opinion letter set forth the following parameters:

In all such examinations, we have assumed the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity to original documents of all copies submitted to us as certified,

¹The Complaint erroneously reads "Defendant Labadero".

photostatic or conformed copies and the authenticity of the originals of all such copies. We have assumed that, with respect to all parties other than Borrower, that the signatures on behalf of such parties were duly authorized to execute such documents on behalf of such parties, and that such documents are duly authorized and are the valid, binding and enforceable obligations of such parties.

The letter also provided that "As to various questions of fact material to our opinion, we have relied without independent investigation or further inquiry on certificates, written and oral statements and representations of Borrower [Fenton 135]..."

Based upon his investigation, Landis concluded, *inter alia*, that "Borrower has the right, power and authority to execute and deliver each of the Loan Documents executed by Borrower." The letter concludes:

This opinion is being given to you in connection with the Loan and is not to be relied upon by any other person or for any other purpose without our prior written consent, except for any purchaser, assignee, successor, participant or transferee of the Loan.

Landis contends that Commonwealth fails to state causes of action for fraud and negligence against him; that, in any event, those claims are barred by the statute of limitations; and that Commonwealth fails to plead fraud as against him with the requisite particularity.

With respect to Watson's motion to dismiss, Watson argues that Commonwealth's "conclusory" allegations with respect to Watson's alleged fraud fails to state a cause of action; and that any claim of negligence fails under the statute of limitations.

Commonwealth submits memoranda of law in opposition to both motions.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more

causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence; [and]
- (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the 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]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

With respect to Landis’s motion, the Court finds that Landis is entitled to dismissal. The opinion letter drafted by Landis flatly contradicts Commonwealth’s claim that Landis issued an opinion letter to Labadero in 2004, and demonstrates that Landis submitted an opinion letter to a separate entity, in connection with a separate transaction, in 2003. Moreover, as noted above, Landis expressly disclaimed responsibility for the authenticity of any of the signatures in Fenton 135’s loan documents, assuming the authenticity thereof for purposes of its review. Based upon the foregoing, Commonwealth fails to state a cause of action for fraud against Landis.²

As for Watson’s motion, the Court finds that Watson is entitled to dismissal of Commonwealth’s fraud claims based upon the applicable statute of limitations. CPLR §213(8) provides that

²The Court notes that Commonwealth concedes that its negligence claim against Landis is barred by the statute of limitations.

the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

Commonwealth states in its Complaint that, on or around June 1, 2006, the Fenton Owners discovered the fraudulent transfer of the Subject Property and commenced an action against Goins, Fenton 135, and Labadero (Commonwealth's insured). The Complaint further states that, in a deposition on June 12, 2007, Goins testified that she had forged the Fenton Owners' signatures on the Power of Attorney forms.

Commonwealth claims that it did not discover Watson's fraudulent activities "until late 2008 after an investigation into Defendant's Goins' [sic.] fraudulent activities," and argues that its action (filed on March 23, 2010) was thus timely commenced. However, Commonwealth, having paid Labadero for its loss with respect to the Subject Property, is Labadero's subrogee. As such, Commonwealth has only the rights which Labadero possessed, and the defendants in this action may assert any defenses against Commonwealth as they may have asserted against Labadero, including the statute of limitations (*see Allstate Ins. Co. v. Stein*, 1 N.Y.3d 416, 420-21 [2004]). Labadero could have, with reasonable diligence, discovered the identities of the defendant notaries, who falsely certified that the Power of Attorney forms were signed by the Fenton Owners in their presence, almost immediately after Goins's June 12, 2007 deposition testimony (if not sooner). Nevertheless, this action was commenced two years and nine months later. Accordingly, Commonwealth's fraud claims against Watson are time-barred.

However, Watson's motion is denied with respect to Commonwealth's cause of action for negligence.

Section 135 of the Executive Law creates a cause of action for persons injured by reason of notarial misconduct. By its very language there is no cause of action absent injury. Therefore, it follows that the misconduct is not the triggering factor for computation of the Statute of Limitations, but rather the injury.

(*Marine Midland Bank, N.A. v. Stanton*, 147 Misc.2d 426, 428 [Sup. Ct. Monroe Cty. 1990]). Here, Commonwealth's cause of action for negligence against the notary defendants accrued when Labadero, Commonwealth's subrogor, was forced to vacate the Subject Property, having never acquired valid title thereto. It is unclear on the record before the Court precisely when this occurred, but it nevertheless appears to be no more than three years prior to the commencement of this action, and thus not beyond the statute of limitations.

Wherefore it is hereby

ORDERED that the motions of defendant Marc Andre Landis to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendant Landis shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendant Valli Watson's motion to dismiss is granted as to the first and second causes of action of the Complaint; and it is further

ORDERED that Watson's motion is denied as to the third cause of action.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: December 6, 2010

FILED



EILEEN A. RAKOWER, J.S.C.

DEC 10 2010

NEW YORK 6
COUNTY CLERK'S OFFICE