

Manginelli v Manginelli
2012 NY Slip Op 33398(U)
March 9, 2012
Sup Ct, Bronx County
Docket Number: 15031/10
Judge: Wilma Guzman
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[*1]

MAR 22 2012

PART 07

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
 Case Disposed
 Settle Order
 Schedule Appearance
-----X
MANGINELLI, MICHAEL

Index No. 0305674/2010

-against-

Hon. WILMA GUZMANMANGINELLI, NUNZIA
-----X

Justice.

The following papers numbered 1 to _____ Read on this motion, DISMISSAL
 Noticed on September 20 2010 and duly submitted as No. _____ on the Motion Calendar of

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this MOTION BY DEFENDANT NUNZIA MANZINELLI, IS
 DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION AND ORDER.

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

Dated: MAR 9 2012

Hon. _____

WILMA GUZMAN, J.S.C.

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

Index No. 15031/10
Motion Calendar No. 14
Motion Date: 1/9/12

MICHAEL MANGINELLI and
RITA MANGINELLI,

Plaintiff(s),

-against-

NUNZIA MANGINELLI
VITO MANGINELLI and REAL ESTATE MORTGAGE
NETWORK, INC.,

Defendant(s).

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court,

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for preliminary injunction.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affidavit in Support, Memorandum of Law and Exhibits Thereto.....	1
Affirmation in Opposition	2

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendant Nunzia Manzinelli moves this Court for an Order dismissing the plaintiffs complaint on the grounds that any action for fraud is time barred, the plaintiff has failed to state a cause of action for fraud because defendant has a duly executed deed that was duly recorded and that defendant Nunzia Manginelli has paid off the plaintiffs Mortgage. Defendant Vito Manginelli moves to dismiss plaintiffs cause of action as to this defendant, pursuant to C.P.L.R. §§ 3016(b), 3211(a)(5) and 3211(a)(7) on the grounds that he is a bona fide purchaser.

Nunzia Manginelli affirms that on October 17, 2001, she went with plaintiffs to attend a closing at the offices of Troy Blomberg, Esq., who represented the lender Alliance Bank. At this

closing, Nunzia Manginelli executed a mortgage and note with Alliance Bank in the amount of \$268,000.00 and plaintiffs executed a deed that transferred the subject property to her. Nunzia Manginelli used the proceeds from the loan to pay off the plaintiffs mortgage, which was originally held by Colony Bank and assigned to Household Mortgage Services in the amount of \$232,000.00/\$247, 567.37. Nunzia Manginelli affirms that the payment of the plaintiffs mortgage was the consideration paid for the transfer of the deed, in addition to the nominal consideration of \$10 as evinced in the Deed. Nunzia Manginelli affirms that plaintiffs continued to live in home and paid her rent up until October 2009. Nunzia Manginelli further affirms that she has refinanced her mortgage in 2005 and 2006, the proceeds of which were used to renovate the bathroom in the apartment that plaintiffs resided. Nunzia Manginelli submitted documents evincing federal mortgage interest deductions for the years 2001-2009. In April 2010, Nunzia Manginelli attempted to sell the home and in June 2010 commenced a holdover proceeding against plaintiffs for non-payment of rent.

The October 17, 2001 Deed, signed by Michael Manginelli and Rita Manginelli, whose signatures are not in dispute, conveys the subject property to Nunzia Manginelli for the consideration of \$10.00. This Deed was recorded on December 19, 2001. The October 17, 2001 Mortgage indicates that the Lender is Alliance Mortgage Banking Corp. and the Borrower is Nunzia Manginelli and the amount Borrowed is \$268,000. MERS the Mortgage Electronic Registration System is listed as the nominee for the Lender. This Mortgage does not indicate Michael Manginelli or Rita Manginelli in any way. The October 17, 2001 Mortgage was recorded on December 19, 2011.

CPLR § 3211(a)(5) states in pertinent part that “(A). A party may move to dismiss one or more causes of action asserted against him on the grounds that (5)the cause of action may not be maintained because of . . . statute of limitations . . .” Although not argued directly, this Court first considers whether the plaintiffs cause of action may continue under a claim for constructive fraud.

“In order to state a cause of action to impose a constructive trust, a plaintiff must allege (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer or reliance thereon and (4) unjust enrichment.” Nastasi v. Nastasi, 26 A.D.3d 32 (2nd Dept. 2005). (Internal citations omitted). “Generally, a constructive trust may be imposed when a property has been acquired in such a circumstance that the holder of the legal title may not in good conscience retain the beneficial interest.” Sharp v. Komalski, 40 N.Y.2d 119 (1976) (Internal citations omitted). In the instant case,

the familial relationship between plaintiffs and defendant, was of such a nature so as to evince a relationship of trust and confidence. Sharp v. Kosmalski, 40 N.Y.2d 119, 121. Furthermore, plaintiff asserts that he relied upon the promise of his sister Nunzia Manginelli that she would help out with the mortgage and at no time intended to convey his home. Taking the pleadings on its face, the plaintiff has alleged sufficient facts to state a cause of action for a constructive trust and unjust enrichment. Nastasi supra. The questions of the actual merit of whether there was in fact a constructive trust are not to be determined at this time. Notwithstanding the foregoing, the Statute of Limitations for a Constructive Trust is six years, and there is no two year extension for discovery. County of Ulster v. Highland Fire District, 29 A.D.3d 1112 (3rd Dept. 2006). As such, plaintiff's action if deemed to be that which seeks to declare constructive fraud would be time barred.

Plaintiff's cause of action would not be time barred under the theory of actual fraud. C.P.L.R. § 213(8) indicates that an action based upon fraud has a six year statute of limitations which is computed as 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. See also, Oggioni v. Oggioni, 46 A.D.3d 646 (2nd Dept. 2007). The Oggioni Court held that the November 6, 2003 cause of action for fraud was time barred because the plaintiff should have been aware of the actions which may have constituted fraud, to wit, the May 8, 1997 transfer of his father's real property, on January 24, 2001 when he was served with a petition to probate his father's estate and there was no record that his father owned any real property at the time of his death.

In the instant case, Michael Manginelli affirms that he did not learn of Nunzia Manginelli's fraud, to wit, stealing title to plaintiff's home on October 17, 2001, until the landlord tenant action to dispossess had been commenced on July 1, 2010. He further argues that in 2001, when plaintiffs were experiencing financial difficulty, his intention was that Nunzia Manginelli would be a guarantor to a loan to help plaintiffs out of an onerous loan. Not convey the property to Nunzia Manginelli. Plaintiffs continued to pay the water bills and oil bills, which are attached as exhibits and appear to be in his name alone. Michael Manginelli further asserts that up until 2005, he gave cash payments to his sister, Nicla to make the mortgage payments. Nunzia Manginelli paid use and occupancy for her first floor apartment she shared with Nicla, deceased in 2005. Once Nicla passed away, Michael

Manginelli gave the cash payments to Nunzia to make the mortgage payments. Furthermore, Michael Manginelli disputes Nunzia Manginelli's assertion that she renovated his apartment's bathroom. Michael Manginelli points to the discrepancies in the loan amounts and refinance amounts as further proof of Nunzia Manginelli's fraud in acquiring title to the property.

The Bargain and Sale Deed conveying the property to defendant Nunzia Manginelli, was signed in the presence of an attorney on October 17, 2001. However, this attorney was not the representative of plaintiffs. Applying the reasoning of those cases that discuss the objective test of when a plaintiff would be deemed to have discovered the fraud, thereby extending the statute of limitations, defendant's motion to dismiss must be denied. Gorlick v. Vorhand, 83 A.D.3d 893 (2nd Dept. 2011) ["a reasonable diligent person should be aware of fraud only where he possess knowledge from which fraud can be reasonably inferred]. In the instant case, Michael Manginelli continued to act in a way in which he believed he was still the owner of the property, to wit, paying taxes and the water bills. As well as continuing the prior arrangement, of making the mortgage payments through his sister Niela, with his sister Nunzia once Niela passed away. with his deceased sister, in making the mortgage payments the arrangement with the payment of the mortgage with his deceased sister. As such, a question of fact remains as to whether plaintiffs possessed any knowledge of the fraud prior to defendant Nunzia Manginelli's commencement of the Holdover proceeding. See Oggioni, 46 A.D.3d 646.

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211 motion should be granted only where "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or flatly

contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., supra, citing Kliebert v. McKoan, 228 A.D.2d 232, lv denied, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977)

To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury.” Moore v. Liberty Power Corp., LLC., 72 A.d.3d 660 (2010) quoting , Small v. Lorillard Tobacco Co., 94 N.Y.2d 43 (1999). C.P.L.R. 3016(b) further requires that the circumstances of the fraud must be ‘state in detail’ including specific dates and times. Moore v. Liberty Power, LLC. 72 A.D.3d at 661. A review of pleadings establishes that plaintiff is able to maintain a cause of action for fraud and has alleged facts sufficient to state in detail the circumstances of the fraud.

A bona fide purchaser is one that can establish that at the time of his or her purchase of real property, he had no personal knowledge of any fraud in a prior conveyance or the facts are not of such a nature that it should have alerted the purchaser to any fraud. Commandment Keepers Ethiopian Hebrew Congregation of the Living God v. 31 Mount Morris Park, LLC., 76 A.D.3d 465 (1st Dept. 2010); Booth v. Ameriquet Mortgage Co., 63 A.D.2d 769 (2nd Dept. 2009); Anderson v. Blood, et al., 46 N.E 493 (1897).

Vito Manginelli affirms that Nunzia Manginelli approached him for a loan in t he amount of \$22,000. On March 2, 2010 he obtained a note to repay the loan of \$22,000 and granting him a mortgage on the subject property. Prior to making the loan, Vito Manginelli did not obtain a title abstract from a title insurance company, which would have reflected through the review of public records, that Nunzia Manginelli was the record owner of the subject property. Furthermore, Vito Manginelli affirms that plaintiff Michael Manginelli admitted to him that he, Michael, had sold the subject property to Nunzia. Furthermore, Vito Manginelli affirms that he did not obtain Mortgage Insurance because the loan amount was small and his mortgage interest was subordinate to that of the Real Estate Mortgage Network. REMN mortgage, the first mortgage in the amount of \$492,000.000. Based upon the familial relationship and his belief that the subject property was sold

from Michael Manginelli to Nunzia Manginelli, Vito Manginelli asserts that his interest in the subject property was not void at its inception.

In opposition, Michael Manginelli alleges that Vito Manginelli, his cousin was aware that Michael's parents had sold him the subject premises and that Michael was the owner. Furthermore, Michael denies having told defendant Vito Manginelli that he sold the property to Nunzia. This question of fact is an issue of credibility that bears on whether Vito Manginelli was in fact a protected encumbrancer for value or whether he had knowledge of the fraud in the prior conveyance or should have been alerted to the fraud in the Nunzia/Vito conveyance. Furthermore, if Nunzia Manginelli is found to have obtained the Deed by fraud and void ab initio, the subsequent interest of Vito Manginelli is also void. ABN AMRO Mortg. Group v. Stephens, 91 A.D.3d 801 (2nd Dept. 2012).

Accordingly, it is

ORDERED that the defendant Nunzia Manginelli's motion to dismiss the plaintiffs complaint is hereby denied. It is further

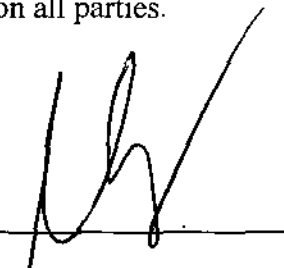
ORDERED that defendant Vito Manginelli's motion to dismiss the plaintiffs complaint is hereby denied with leave to renew upon the determination of the issue of fraud in the underlying conveyance from Michael Manginelli and Rita Manginelli to Nunzia Manginelli. It is further

ORDERED that defendant Nunzia Manginelli shall serve the a copy of this Order, within 30 days following the date of entry of this Order, by regular mail upon all parties.

This constitutes the decision and order of this Court.

MAR 9 2012

DATE



HON. WILMA GUZMAN, JSC