

**Ward v Ward**

2013 NY Slip Op 30508(U)

March 16, 2013

Supreme Court, Albany County

Docket Number: 246/13

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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FRANK J. WARD, III,

Plaintiff,

**DECISION and ORDER**  
**RJI NO. 01-13-108991**  
**INDEX NO. 246-13**

-against-

JOAN A. WARD; CAPITAL COMMUNICATIONS  
FEDERAL CREDIT UNION; and PAUL R. ENGSTER ESQ.,

Defendants.

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Supreme Court Albany County All Purpose Term, February 25, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Frank Ward, III  
*Plaintiff, Pro Se*  
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Troy, New York 12180

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Robert Adams, Esq.  
*Attorneys for Defendant Joan Ward*  
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Bond, Schoeneck & King, PLLC  
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*Attorneys for Defendant Capital Communications Federal Credit Union*  
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Albany, New York 12210

Paul R. Engster, Esq.  
*Defendant, Pro Se*  
777 Hoosick Road  
Troy, New York 12180

**TERESI, J.:**

Plaintiff commenced this negligence/fraud action by filing his Summons and Complaint on January 15, 2013. Prior to answering, each Defendant has moved to dismiss the complaint, in part, pursuant to CPLR §3211(a)(5)'s statute of limitations provision. Plaintiff opposes the motions. Because this action was untimely commenced, Defendants' motions are granted.

“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.” (Morris v Gianelli, 71 AD3d 965, 967 [2d Dept 2010] quoting Savarese v Shatz, 273 AD2d 219 [2d Dept 2000]; Feldman v New York State Teachers' Retirement Sys., 14 AD3d 769 [3d Dept 2005]; Bronx-Lebanon Hosp. Ctr. v Daines, 101 AD3d 1431 [3d Dept 2012]). Such showing then “shift[s] the burden to plaintiff[] to present evidentiary facts establishing the applicability of [an exception].” (Boyle v Fox, 51 AD3d 1243, 1243-44 [3d Dept 2008]; Minichello v N. Assur. Co. of Am., 304 AD2d 731 [2d Dept 2003]; Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc., 168 AD2d 822 [3d Dept 1990]; Coombs v Jervier, 74 AD3d 724 [2d Dept 2010]).

As is applicable here, “[t]he limitations period for a fraud [/forgery] claim is the greater of six years after the cause of action accrued or two years after it could have been discovered with reasonable diligence.” (US Bank Nat. Ass'n v Gestetner, 103 AD3d 962 [3d Dept 2013]; CPLR §213[8]; Dowlings, Inc. v Homestead Dairies, Inc., 88 AD3d 1226 [3d Dept 2011]; Shalik v Hewlett Assoc., L.P., 93 AD3d 777 [2d Dept 2012]). Whereas, Plaintiff's “cause of action for negligence, [has] a three-year limitations period.” (McCormick v Favreau, 82 AD3d 1537, 1539 [3d Dept 2011] lv to appeal denied, 17 NY3d 712 [2011]; CPLR §214).

On this record, Defendants met their initial burden. Paraphrasing the inartfully drawn prose complaint, Plaintiff alleges that Joan Ward forged his name to a mortgage, held by Capital Communications Federal Credit Union (hereinafter “CCFCU”), and Paul Engster notarized it. Ms. Ward and Mr. Engster’s affidavits establish that such signature and notarization occurred in 2003, and provided a copy of the subject CCFCU mortgage. They also established that Plaintiff knew of the signing, notarization and mortgage by 2004. Ms. Ward alleged that the New York State Police investigated the incident in 2004 and interrogated her at that time, but brought no charges. Such investigation originated from Plaintiff’s 2004 report, to the State Police, of the forgery and improper notarization. Ms. Ward supported her allegations with a copy of the supporting deposition Plaintiff gave to the State Police, dated April 5, 2004. Mr. Engster similarly demonstrated that Plaintiff knew of the fraud alleged in his complaint in 2004. His affidavit recounted his compliance with the Committee on Professional Standards 2004 investigation into this matter, which again was based upon Plaintiff’s complaint. Mr. Engster also supported his allegations with documentary evidence. Lastly, a CCFCU manager personally recalled Plaintiff’s 2004 complaint of the fraud alleged in this suit. Based upon the foregoing proof, Defendants sufficiently demonstrated that Plaintiff’s claims accrued in 2003 and he had actual knowledge of the facts underlying his claim by 2004. Because Plaintiff did not commence this action until 2013, Defendants met their initial burden of establishing prima facie that the statute of limitations expired long before commencement.

With the burden shifted, Plaintiff failed to raise a triable issue of fact. He alleges that he “discovered the fraud” in 2011, by talking to his then attorney who told him he “could sue the defendants for civil fraud.” Such “discovery” allegation, however, is irrelevant. It alleges only

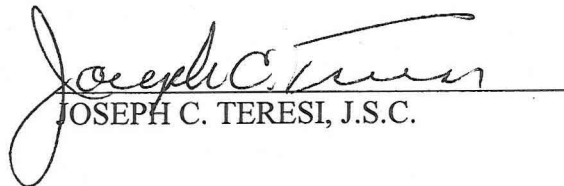
Plaintiff acquiring new knowledge of the law, not of the operative facts underlying his fraud claim. As such, he raised no issue of fact about his 2004 actual knowledge of the alleged fraud and improper notarization, and failed to establish an exception to the statute of limitations. (Fitzgerald v Fitzgerald, 301 AD2d 851 [3d Dept 2003]; Grasso v Grasso, 45 AD3d 1022, 1023 [3d Dept 2007]). Nor has Plaintiff proffered any non-conclusory fraud allegations relative to a 2010 mortgage. Because he proffered no allegations of fact that even imply fraudulent conduct relative to the 2010 mortgage, he failed to demonstrate that his action was timely commenced.

Accordingly, Defendants motions are granted and Plaintiff's complaint is dismissed.

This Decision and Order is being returned to the attorneys for Ms. Ward. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 16, 2013  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated February 1, 2013; Affidavit of Stuart Klein, dated February 1, 2013, with attached Exhibits A-D; Affidavit of Mary Beth Webster, dated February 1, 2013.
2. Notice of Motion, dated January 25, 2013; Affidavit of Robert Adams, dated January 25, 2013, Affidavit of Joan Ward, dated January 24, 2013, with attached Exhibits A-E.
3. Notice of Motion, dated January 28, 2013; Affidavit of Paul Engster, dated January 25, 2013, Affidavit of Joan Ward, dated January 24, 2013, with attached Exhibits A-E.
4. Affidavit of Frank Ward, dated 18<sup>th</sup> of 2013, with attached Exhibits A-C.
5. Affidavit of Stuart Klein, dated February 22, 2013, with attached unnumbered exhibit.
6. Affidavit of Robert Adams, dated February 20, 2013, with attached Exhibits A-C.