

Abramovitz v Skydell
2013 NY Slip Op 31144(U)
May 20, 2013
Sup Ct, Queens County
Docket Number: 22796/12
Judge: Robert J. McDonald
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.

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD IAS PART 34
Justice

- - - - - x

YVETTE ABRAMOVITZ, SHANNON (SHOSHANA) Index No.: 22796/12
ABRAMOVITZ and YEHUDA AREH (ARI)
ABRAMOVITZ, Motion Date: 3/1/13

Plaintiffs, Motion Seq.: 1

- against -

HARRY SKYDELL,

Defendant.

- - - - - x

The following papers numbered 1 to 29 read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211 (5), 3211 (a) (1) and (a) (3), and 3211 (a) (5).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 7
Answering Affidavits - Exhibits	8 - 25
Reply Affidavits	26 - 29

Upon the foregoing papers it is ordered that the motion to dismiss the complaint is granted.

Plaintiffs in this fraud, conversion action seeks damages based upon a failed real estate investment with defendant which occurred in or about 1987. Defendant moves to dismiss the complaint on the grounds that the causes of action are barred under the doctrine of res adjudicata as plaintiffs have already obtained judgment against defendant for the claims alleged herein; that plaintiffs lack standing to bring the instant action as plaintiffs previously assigned their claims to a third party; and that each of the causes of action are barred by the statute of limitations. Plaintiffs oppose the motion.

Facts

In or about March of 1987, defendant received \$130,000 from non-party Iser Abramovitz (Iser), the husband of plaintiff Yvette Abramovitz and the father of plaintiffs Shannon ("Shoshana") Abramovitz and Yehuda Aryeh Abramovitz ("Ari"), with respect to two (2) \$65,000 real estate related investments - one involving 580 Courtlandt Avenue, Bronx, New York (the Courtlandt Avenue Property), and the other involving 325 East 8th Street, New York, New York (the East 8th Street Property). At Iser's request, the investments were held in the name of the plaintiffs, as opposed to in Iser's individual name. In October 1987, title to the Courtlandt Avenue and East 8th Street Properties was transferred to the City of New York as the result of certain In Rem Tax Foreclosure Actions.

In July 1995, defendant executed two Confessions of Judgment, which were duly entered with the clerk of the Court, with regard to the \$65,000 investments held in the name of the plaintiffs - one in favor of Yvette with respect to the Courtlandt Avenue Property (the Yvette Judgment), and the other in favor of Shoshana and Ari with respect to the East 8th Street Property (the Shoshana/Ari Judgment). At that time, Iser also held two Judgments against defendant with regard to certain investments unrelated to the properties in which plaintiffs invested.

Thereafter, in or about April 2006, Steven Sales agreed to purchase all of the Abramovitz Family Judgments (which included, but was not limited to the Judgments held by the plaintiffs herein), as well as all of their other claims (both asserted and unasserted) against defendant Skydell (the Abramovitz claims), for the sum of \$375,000. Defendant attached a copy of the April 10, 2006 Agreement by and between plaintiffs and Iser, on the one hand, and Mr. Sales, on the other hand, providing for (i) the sale and assignment of the Abramovitz Family Judgments (which included, but was not limited to the Judgments held by the plaintiffs herein), to Mr. Sales; (ii) the sale and assignment of the Abramovitz Claims to Mr. Sales; and (iii) the payment of \$375,000 by Sales to Iser, Yvette, Shoshana and Ari in consideration of the aforesaid sale and assignment of the Abramovitz Family Judgments (including but not limited to the Judgments held by plaintiffs herein) and the Abramovitz Claims. Defendant also attached an Affidavit by Sales confirming that he has made all of the necessary payments under the Agreement and has not further assigned and or sold the Judgments and or Abramovitz Claims, nor authorized plaintiffs or anyone else to pursue this action.

Thereafter, in or about December 2011 or January 2012, Iser

contacted defendant to request money which respect to an unrelated claim that Iser asserted together with his corporation, Beer Sheva Realty Corp., against Skydell, Kew Realty Equities, Inc., Abraham Mordowitz, Marlene Mordowitz, Lola Mordowitz and Skyban Realty Corp. Ultimately, Iser was paid the sum of \$125,425, in exchange for, inter alia, General Releases. In total, defendant submits, Iser and plaintiffs received over \$1,000,000 on account of the Iser Family Judgments - \$375,000 from Sales; \$750,000 as a result of Iser's collection efforts; and \$125,425 in January 2012.

In October, 2012, Iser contacted defendant requesting additional monies. After defendant refused, plaintiffs commenced the instant action.

Discussion

" 'On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable' " (*Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL-CIO*, 91 AD3d 768, 768-769 [2012], quoting *Baptiste v Harding-Marin*, 88 AD3d 752, 753 [2011]).

"[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,' " whichever is later (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009], quoting CPLR 213 [8]). Whether or not a plaintiff should have discovered an alleged fraud is an objective test (see *Gorelick v Vorhand*, 83 AD3d 893, 894 [2011]). Thus, " 'plaintiffs will be held to have discovered the fraud when it is established that they were possessed of knowledge of facts from which [the fraud] could be reasonably inferred' " (*id.* at 894, quoting *Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 326 [1957]). Ordinarily, an inquiry into when a plaintiff should have discovered an alleged fraud presents a mixed question of law and fact (see *Trepuk v Frank*, 44 NY2d 723, 724-725 [1978]; *Gorelick v Vorhand*, 83 AD3d at 894).

Here, defendant established that the action was time-barred pursuant to CPLR 213 (8). In their first cause of action sounding in fraud, plaintiffs allege that Skydell defrauded them by misrepresenting that the Courtlandt Avenue and East 8th Avenue Properties were going to be purchased with plaintiffs' funds when Sky-Glass Realty Group had already purchased these properties

prior to plaintiffs' investment. Plaintiffs' reliance upon that alleged misrepresentation by the defendant was not reasonable where availability of the Courtlandt Avenue and East 8th Avenue Properties was a matter of public record and not within the exclusive knowledge of the defendant. (*Vermeer Owners v Guterma*n, 169 AD2d 442, 445, *lv granted in part* 77 NY2d 937 [1991].) Plaintiffs could have discovered the fact that the Courtlandt Avenue and East 8th Avenue Properties were already purchased as the relevant Deeds (which are public records) were recorded in 1986 - prior to the time plaintiffs made their investments. Thus, under either the six (6) year or two (2) year test, plaintiffs' fraud claims are barred by the Statute of Limitations. Accordingly, the branch of the motion which is to dismiss count one of the complaint, on the ground that it is barred by the Statute of Limitations, is granted.

Plaintiffs' second cause of action sounds in conversion. The statute of limitations for conversion is three (3) years (CPLR 214[3]). The controlling three-year statute of limitations for conversion (see CPLR 214[3]; *Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317 [1991]) runs from the earlier of the time when a defendant refuses to return the property after a demand, or the time when the defendant disposes of the property (see *Matter of White v City of Mount Vernon*, 221 AD2d 345, 346 [1995]; *Bernstein v La Rue*, 120 AD2d 476, 477 [1986]; *Johnson v Gumer*, 94 AD2d 955 [1983]). Here, plaintiffs' conversion claim accrued in 1987 when their investments were made. At the very latest, the statute began to run when the Tax Lien Foreclosure Deeds were filed in 1992 and 1993. In either event, any conversion claim plaintiffs may have had is barred by the three-year Statute of Limitations.

The third cause of action is for breach of contract. The general rule applicable to actions to recover damages for breach of contract is that a six-year statute of limitations begins to run when a contract is breached or when one party fails to perform a contractual obligation (see *QK Healthcare, Inc. v InSource, Inc.*, --- AD3d ----, 2013 N.Y. Slip Op. 03312 [2d Dept]; *Beller v William Penn Life Ins. Co. of N.Y.*, 8 AD3d 310, 314 [2004]; *Squeri v Moriches Assoc.*, 307 AD2d 260, 261 [2003]; see also CPLR 213 [1]). Although it is not altogether clear which contract plaintiffs are alleging defendant breached, it would appear that it would be the March 26, 1987 letter which sets forth the terms of the investment. The breach would then have to have occurred in 1992 or 1993, at the latest, when the Tax Lien Foreclosure Deeds were recorded, title to the properties were lost, and plaintiffs capital investment was lost as well. As such, this cause of action is time-barred as well.

The fourth and final cause of action is for breach of fiduciary duty. Where a party seeks monetary damages for breach of fiduciary duty, courts apply the three-year "injury to property" Statute of Limitations pursuant to CPLR 214(4) (*Pursnani v Stylish Move Sportswear, Inc.*, 92 AD3d 663, 664 [2012]; *Kaufman v Cohen*, 307 AD2d 113, 118 [2003]). However, "where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]; *Kaufman*, 307 A.D.2d at 119). Here, the conduct complained of is set forth in paragraph 53 of the Amended Verified Complaint, as follows: ". . . neglecting the properties, using them for his own benefit, failing to advise plaintiffs of the financial situation of the properties and the fact that the foreclosures were commenced and for allowing the properties to be foreclosed upon and sold." Assuming these allegations are true, they all occurred prior to 1993 (when title was lost), at the latest and are, therefore time-barred whether the three or six year period is applied.

Plaintiffs allege that defendant reaffirmed his obligation to repay plaintiffs their entire investment. Defendant denies this and even assuming this were true, a promise to take a claim out of the Statute of Limitations must be in writing (see GOL §17-101), and no such writing has been alleged to exist or produced.

Moreover, pursuant to CPLR 3211(a)(1), dismissal may be granted where the documentary evidence tendered by defendant utterly refutes plaintiffs' factual allegations, conclusively establishing a defense as a matter of law" (*Gomez-Jimenez v New York Law School*, 103 AD3d 13 [2012] citing *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Here, copies of the judgments submitted by defendant indicate that the amounts sued herein for, were previously paid. Plaintiffs have not properly refuted this fact.

Finally, the undisputed record indicates that on or about April 10, 2006, Steven Sales entered into an agreement with Iser, Yvette, Shoshana and Ari Abramovitz (the Abramovitz Family), pursuant to which Mr. Sales purchased four judgments that the Abramovitz Family held against defendant, as well as "any and all claims, asserted or unasserted" that the Abramovitz Family held against Skydell. The judgments included, but were not limited to: a judgment entered July 27, 1995 in favor of Yvette and against Harry Skydell in the sum of \$65,185; a judgment entered July 27, 1995 in favor of Shoshana and Ari and against Harry Skydell in the sum of \$65,185. The Agreement further provides

that Sales paid the Abramovitz Family \$375,000 for the judgments. The plaintiffs have not refuted this fact. Thus, based upon the said Agreement, the plaintiffs have no standing at this time to now seek payment for the investment which, it appears, was sold to Steven Sales.

Conclusion

The motion to dismiss the complaint is granted.

Dated: Long Island City, NY
May 20, 2013

ROBERT J. McDONALD
J.S.C.