

<b>Mills v Whosoever Will Community Church of Christ</b>
2015 NY Slip Op 30837(U)
May 14, 2015
Supreme Court, New York County
Docket Number: 160143/2014
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

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DAVID MILLS,

Plaintiff,

- against -

Index Number: 160143/2014

Sequence Number: 001

Decision and Order

WHOSOEVER WILL COMMUNITY CHURCH OF  
CHRIST, CATHERINE JOHNSON and SHILOH  
KINGDOM DELIVERANCE INTERNATIONAL  
MINISTRIES,

Defendants.  
-----x

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's order to show cause for a temporary restraining order and preliminary injunction and defendants' cross-motion to dismiss the complaint:

Papers Numbered:

Order to Show Cause - Affirmation - Affidavit - Exhibits .....	1
Notice of Cross-Motion - Affirmation - Affidavit - Exhibits .....	2
Affirmation in Reply and Opposition .....	3

Upon the foregoing papers, plaintiff's motion is denied and defendants' cross-motion is granted.

Brief Background

On December 19, 2014, plaintiff commenced this action for specific performance of a contract to purchase a building located at 369 Lenox Avenue, New York, New York ("the Building"), owned by defendant Whosoever Will Community Church of Christ ("the Church"), and for fraudulent transfer of the Building by defendant Catherine Johnson, the Church's Co-Pastor, to defendant Shiloh Kingdom Deliverance International Ministries ("Shiloh"), another church of which Johnson is the sole Pastor and Trustee. Defendants answered the complaint and asserted several affirmative defenses, including, inter alia, Statute of Limitations and lack of standing.

The pertinent facts are not in dispute. Pursuant to a Contract of Sale dated "December, 2002," David Mills, plaintiff herein, and Lenaire Mills, agreed to purchase the Building from the Church, a New York Religious Corporation, for the sum of \$263,600. The Contract was "subject to the consent, by court order, of the Supreme Court of the State of New York, County of New York" (Paragraph 35 of the Rider) and set the closing date on a day "which is no less than ten (10) and no more than thirty (30) calendar days from the date SELLER'S attorneys advise PURCHASER'S attorney of the issuance of the order of the Supreme Court authorizing this sale."

In May of 2006, the Church petitioned the court for an order, inter alia, approving the sale of the Building to “David Mills and Lenaire Mills or another similar purchaser for the sum of \$272,100 or greater amount” and permitting the Church to dissolve its religious corporation upon such sale and payment of the Church’s liabilities from the sales proceeds. The Court had before it the December 2002 Contract, attached to the Petition. By Order dated August 25, 2006 and Amended Order dated January 23, 2007, the court (Hon. Marcy Friedman) granted the Church’s petition and directed it to settle an order providing for, inter alia, the Church’s payment of its liabilities, disposition of its remaining assets, and filing of a certificate of dissolution with the Clerk of the Court. However, the Church never settled an order in accordance with Justice Friedman’s directions and the time to do so has long since run.

In any event, the parties herein did not set a date to close on plaintiff’s purchase of the Building, which, pursuant to the Contract, was to take place “no less than ten (10) and no more than thirty (30) calendar days” after plaintiff received notice of the order authorizing the sale. By this Court’s calculation, the last day to close was February 22, 2007, thirty (30) days from the January 23, 2007 Amended Order. Instead, without further order of the court, by Quitclaim Deed dated January 24, 2008, the Church, by Johnson, transferred title to the Building to Shiloh for no consideration. The Quitclaim Deed was filed and recorded with the Office of the New York City Register on March 12, 2008.

By Order to Show Cause dated February 5, 2015, plaintiff moved for a preliminary injunction prohibiting defendants from “disposing, conveying, mortgaging, transferring, selling or otherwise encumbering” the Building pending “complete adjudication” of this action. Defendants opposed the motion and cross-moved to dismiss the complaint upon the grounds set forth in their affirmative defenses. On February 26, 2015, after oral argument of the motion, this Court reserved decision but issued an order temporarily enjoining defendants from “disposing, conveying, mortgaging, transferring, selling or otherwise encumbering” the Building pending disposition of the motion and cross-motion.

#### Discussion

At the outset, Johnson lacked the requisite court approval to transfer the Building for no consideration from the Church to Shiloh by way of the January 24, 2008 Quitclaim Deed. Even assuming the August 25, 2006 Order and January 23, 2007 Amended Order were valid and enforceable – and they are not, as discussed below – those Orders only permitted the Church to *sell* the Building, whether to plaintiff “or another similar purchaser for the sum of \$272,100 or greater amount [emphasis added].” Johnson had no authority to simply give the Church’s property away to another Church, of which, conveniently, she is the sole Pastor and Trustee. Indeed, the Church’s Petition for approval of the sale of the Building, verified by Johnson herself, alleged that the Church “all but ceased operating”; could no longer provide for the financial upkeep of the Building; and that it would be in the Church’s “best interest” to sell the Building and use the proceeds to pay the Church’s obligations and debts, including reimbursement of \$60,000 owed to the Estate of Reverend William T. Johnson (plaintiff’s father, but no relation to Catherine Johnson).

However, and unfortunately, this is a classic case in which a plaintiff has slept on his rights. Notwithstanding the merit to plaintiff’s fraudulent transfer and specific performance claims, they

nevertheless fail upon Statute of Limitations and lack of standing grounds. Plaintiff's fraudulent transfer claim is barred by the six year Statute of Limitations contained in CPLR 213(8), which expired on January 24, 2014, six years from the January 24, 2008 no-consideration transfer. Because real property records are readily available to and easily accessible by the general public, plaintiff could have detected the transfer with "reasonable diligence" as of March 2008 when Johnson filed the Quitclaim Deed with the City Register's Office. Therefore, plaintiff cannot avail himself of the toll contained in CPLR 213(8), which would have extended the limitations period to two years from the date of discovery of the fraud. See generally Warwick Materials, Inc. v J.K. Produce Farms, Inc., 111 AD2d 805, 806 (2<sup>nd</sup> Dep't 1985) ("foreclosure sale ... gave sufficient notice of the Kobylaskis' claims so as to terminate any toll of the Statute of Limitations for fraud").

Even if timely, plaintiff's fraudulent transfer claim is barred upon the ground that plaintiff is not a judgment-creditor of the Church and therefore lacks standing to sue. See generally Board of Mngns. of Chocolate Factory Condominium v Chocolate Partners, LLC, 43 Misc3d 1223(A), 13 (Supreme Court, Kings County 2014) ("Moreover, with respect to the Board's third cause of action, even if such claim were not barred by the Statute of Limitations, in order to have standing to allege a fraudulent transfer under Debtor and Creditor Law § 273, a plaintiff must demonstrate that it was a "creditor" at the time of the conveyance."). Contrary to plaintiff's claim, the May 6, 2004 Order to Show Cause on the Church's Petition for approval of the Contract, which merely mentions plaintiff as purchaser on the Contract, does not amount to a valid court order directing the Church to pay plaintiff \$60,000 or afford plaintiff any rights in and to the Building such that he has standing to challenge the no-consideration transfer.

Plaintiff's specific performance claim suffers the same fate – it is barred by reason of plaintiff's lack of standing and the Statute of Limitations. Because the Church did not settle an order within sixty (60) days of, and in accordance with, Justice Friedman's January 23, 2007 Amended Order and has not sought leave to settle an order nunc pro tunc demonstrating "good cause" for its delay in doing so, the underlying Petition to approve the sale of the Building to plaintiff is deemed abandoned and the Petition dismissed. See 22 NYCRR § 202.48(a), (b) ("[p]roposed orders ... must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted"; "Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown."); Funk v Barry, 89 NY2d 364, 366 (1996) ("Failure to submit the order or judgment as directed within [the] timeframe [set forth in 22 NYCRR § 202.48] constitutes an abandonment of the motion or action unless good cause for the delay is shown"). In the absence of a valid and enforceable court order approving the Contract, plaintiff has no claim to purchase the Building and his cause of action for specific performance is subject to dismissal. Cf. Bujalski v Schmitt, 186 AD2d 1066, 1066 (4<sup>th</sup> Dep't 1992) (summary judgment dismissing the complaint granted where "plaintiff's action for specific performance, commenced before court approval of the sale was obtained, was premature").

Even if the August 25, 2006 and January 23, 2007 Orders remain valid and in effect, plaintiff's specific performance claim is nevertheless barred by the six year Statute of Limitations. Catherine Johnson's alleged breach of the Contract by refusing to set a closing date occurred on

February 22, 2007, the last day on which to close under the Contract. Thus, plaintiff had six years from February 22, 2007, or until February 22, 2013, in which to commence an action for specific performance of the December, 2002 Contract. The instant complaint alleging specific performance, filed on December 19, 2014, over seven years after the alleged breach, is untimely. See Ely-Cruikshank Co., Inc. v Bank of Montreal, 81 NY2d 399, 402 (1993) (“In New York, a breach of contract cause of action accrues at the time of the breach”).

There is no basis to apply the doctrine of equitable estoppel to toll the Statute of Limitations on plaintiff’s specific performance cause of action because plaintiff has not alleged any “specific actions” taken by Catherine Johnson upon which he reasonably relied and which prevented him from “timely bringing suit.” See Putter v North Shore Univ. Hosp., 7 NY3d 548, 552-553 (2006) (“A plaintiff seeking to apply the doctrine of equitable estoppel must “establish that subsequent and specific actions by defendants somehow kept [him or her] from timely bringing suit.”). According to plaintiff, Catherine Johnson flatly refused to set a closing date following court approval of the sale. Thus, plaintiff had “timely awareness” of Johnson’s breach as of February 22, 2007, the last day on which the closing could have taken place. See Pahlad v Brustman, 8 NY3d 901, 902 (2007) (equitable estoppel defense “inappropriate as a matter of law” where plaintiffs “had timely awareness of the facts requiring [them] to make further inquiry before the statute of limitations expired”). Plaintiff does not allege (nor does it appear from the papers) that Johnson lulled plaintiff into foregoing or delaying this lawsuit by deception or misrepresentations; rather, she simply, and quite obviously, refused to set a closing date. As noted above, given easy public access to property records, Johnson’s no-consideration transfer of the Building to Shiloh in January 2008, while unauthorized, did not prevent plaintiff from bringing the instant lawsuit.

It goes without saying that, in view of the dismissal of the complaint, plaintiff is not entitled to a preliminary injunction.

#### Conclusion

Motion denied, cross-motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Dated: May 14, 2015



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Arthur F. Engoron, J.S.C.