

Demarzo v Suburban Hous. Dev. & Research, Inc.

2015 NY Slip Op 31241(U)

July 6, 2015

Supreme Court, Suffolk County

Docket Number: 05274/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY**PRESENT:****WILLIAM B. REBOLINI**
Justice

Janet Demarzo, as Commissioner of the
Suffolk County Department of Social Services,
and the County of Suffolk,

Plaintiff,

-against-

Suburban Housing Development & Research, Inc.,
David Hilgendorff, Helene Evans, Mortgage
Electronic Recording Systems, Inc., ("MERS") as
Nominee for Greenpoint Mortgage Funding, Inc.,
MERS as Nominee for Astoria Federal Savings &
Loan Association, John and Jane Doe #1, John and
Jane Doe #2, and John and Jane Doe #3, the last
three names being fictitious and unknown to the
plaintiff, the persons or parties intended being the
tenants, occupants,

Defendants.

Attorney for Defendants
Greenpoint Mortgage Funding, Inc.
and Astoria Federal Savings & Loan Association:

Fidelity National Law Group
350 Fifth Avenue, Suite 300
New York, NY 10118

Index No.: 05274/2009Motion Sequence No.: 001; MG; CDMotion Date: 11/5/14Submitted: 1/14/15Motion Sequence No.: 002; MGMotion Date: 11/5/14Submitted: 1/14/15Motion Sequence No.: 003; MDMotion Date: 12/17/14Submitted: 1/14/15Attorney for Plaintiff:

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David Hilgendorff, Helene Evans:

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Clerk of the Court

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Upon the following papers numbered 1 to 44 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 24; Notice of Cross Motion and supporting papers, 25 - 32; 33 - 38; Answering Affidavits and supporting papers, 39 - 40; 41 - 42; 43 - 44; it is

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendants Suburban Housing Development And Research, Inc., ("Suburban"), David Hilgendorff ("Hilgendorff") and Helene Evans ("Evans") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against them is granted, and the notices of pendency filed by the plaintiffs shall be cancelled; and it is further

ORDERED that the motion by defendants Mortgage Electronic Recording Systems, Inc. ("MERS"), as nominee for defendants Greenpoint Mortgage Funding, Inc. ("Greenpoint") and Astoria Federal Savings & Loan Association ("Astoria") for an order pursuant to CPLR 3211(1)(7) and CPLR 3212 granting summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that the motion by plaintiff County of Suffolk ("County") for an order pursuant to CPLR 3212 granting summary judgment on the complaint is denied.

In this action, plaintiffs seek to quiet title and recover possession of five properties owned by the defendant Suburban. The properties, all located in the County of Suffolk are: 1394 Straight Path, Wyandanch; 740 Michigan Avenue, Bellport; 39 E. Chestnut Street, Central Islip; 551 Post Avenue, Bellport; and 23 Henry Street, Wyandanch. The complaint sets forth five alleged causes of action against Suburban: for reformation of the five deeds into Suburban from the County; unjust enrichment; breach of contract; a judgment declaring that the deeds to 23 Henry Street, Wyandanch and 551 Post Avenue are void and title should be confirmed in the plaintiffs; and for a constructive trust to the benefit of the plaintiff County. None of the causes of action allege claims against the defendants MERS, Greenpoint and Astoria.

Defendants Suburban, Hilgendorff and Evans now move for summary judgment dismissing the complaint pursuant to CPLR 3212. In support of the motion they submit, *inter alia*, their attorney's affirmation; the pleadings, with attached exhibits; copies of deeds to the subject properties; a portion of a contract between New York State, plaintiff County and defendant Suburban, undated, but bearing signatures from June and August 1988; and the affidavit of defendant Hilgendorff, sworn to on October 1, 2014. Defendants MERS, Greenpoint and Astoria cross-move for summary judgment pursuant to CPLR 3211(1) (7) and CPLR 3212 dismissing the complaint. In support thereof they submit, *inter alia*, their attorney's affidavit; copies of the pleadings, with attached exhibits; and copies of deeds to 1394 Straight Path, Wyandanch and 551 Post Avenue, Bellport. Plaintiffs also cross-move for summary judgment on each of the causes of action set forth

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in their complaint. In support thereof they submit, *inter alia*, their attorney's affidavit, copies of the pleadings, with attached exhibits

On or about October 14, 1986 the County entered into a contract with the State of New York, acting through the New York State Department of Social Services and defendant Suburban, pursuant to the State's Homeless Housing and Assistance program ("HHAP"), for the purpose of improving the supply of shelter and other housing for homeless persons. The HHAP project authorized the County to convey properties it had obtained by tax deed to Suburban for use in the project. Most of the funding for the project was provided by the State, with the remainder paid by the County. As a condition of accepting the State funding, distributed by the County, Suburban was required to maintain the rehabilitated properties as housing for the homeless for a minimum period of seven years. Suburban would receive rental payments as compensation for its services.

Pursuant to Section 1 (g) (I) of the agreement, the County was to transfer title to the premises listed in Appendix D "for a period of ten years, subject to the terms of Appendix E, appended hereto." However, Appendix E has not been submitted to the Court. Section 2 (c) of the agreement states, in relevant part:

Except as otherwise provided, neither the County nor the Grantee may transfer title to, or the right of possession of, or otherwise assign, encumber, convey, sublet, mortgage or otherwise dispose of the Project Premises until at least seven years occupancy and operation as a homeless shelter without prior written consent from the Department, which consent shall be in the sole discretion of the Department and may be on such terms as the Department deems necessary to satisfy the requirements of the Homeless Housing and Assistance Program . . .

Section 2(f)(I) of the agreement states, in relevant part:

In the event that title to the project premises has passed to the Grantee, the parties agree that if the Grantee fails to continue operation as a homeless project for the period stated in paragraph (a) of this section [seven years], the Department may require the County to exercise its right of reverter in accordance with the terms of Appendix E . . .

In 1988, the contract was amended to include additional properties in the project and to increase state funding to allow for the rehabilitation of these properties. The five properties which are the subject of this litigation were transferred to Suburban, pursuant to resolutions of the Suffolk County Legislature, by deeds dated as follows: 1394 Straight Path, Wyandanch, June 29, 1988; 740 Michigan Avenue, Bellport, January 11, 1989; 39 E. Chestnut Street, Central Islip, January 11, 1989; 551 Post Avenue, Bellport, January 11, 1989; and 23 Henry Street, Wyandanch, February 22, 1989.

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Resolution 938-86, for example, authorized the transfer of properties to Suburban for ten years, “subject to such restrictions and rights of reverter as *may* be required by the County Attorney incident thereto” [emphasis added]. The initial deed to the Straight Path property contained a reverter clause. This deed, however, had an error in the description of the property and the replacement deed which was filed did not contain a reverter clause. The deeds to Suburban of the other four subject properties also lacked a reverter clause.

In 2001, Suburban obtained a mortgage from defendant Astoria in the amount of \$150,000.00 for the Straight Path premises. In 2001, Suburban obtained a mortgage from defendant Greenpoint in the amount of \$75,000.00 for the Post Avenue premises.

By a letter of the plaintiff DeMarzo dated April 28, 2008, some twenty years after the deeding to Suburban of the Straight Path property, plaintiff DeMarzo demanded the return of the subject properties. By letter dated May 27, 2008, from Suburban’s attorney to the Suffolk County Law Department, it was noted that there were no reverter clauses in four of the deeds, in contrast to other deeds by the County to Suburban that did contain such clauses, and that Suburban was, thus, the fee simple owner of the properties. By letter dated December 19, 2008 to defendant Hilgendorff, as executive Director of Suburban, plaintiff DeMarzo requested that, “in order to avoid the need for legal action” Suburban assist in “reforming” the five deeds to the subject properties. This action was filed by the County on or about February 19, 2009.

The affidavit of David Hilgendorff, the executive director of Suburban, states that Suburban maintained these properties, as they were required to pursuant to the contract herein. He also states that these properties are still being used as housing for the homeless. He further notes that the County has transferred large numbers of properties obtained by tax deed to Suburban and other non-profit corporations for their homeless programs, some with reverter clauses, some without. Finally, he states that each of the deeds recites that consideration was received by the County from Suburban.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

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As a preliminary matter, the plaintiffs have failed to establish the exact terms of the transfer of the subject properties to defendant Suburban. Pursuant to Section 1(g)(I) of the agreement, the County would transfer title to the subject properties “for a period of ten years, subject to the terms of Appendix E, appended hereto.” However, plaintiffs have failed to submit this portion of the agreement to the Court and, as a result, there is no proof as to what those terms may have been. Furthermore, Resolution 938-86, for example, authorized the transfer of properties to Suburban for ten years, “subject to such restrictions and rights of reverter as *may* be required by the County Attorney incident thereto” (emphasis added). Thus, it is unclear from the incomplete record what type of reverter clauses, if any, the deeds were to contain, beyond one reference a potential failure by Suburban to continue operation as a homeless project for the seven year period pursuant to the contract (*see* Section 2(f)(I) of the agreement.) It is further noted that, contrary to the claim of the plaintiffs, the deeds to the E. Chestnut, Post Avenue and Henry Street properties are not void due to lack of authorization. Resolution 0894-87 authorized the Commissioner of the Department of Real Estate to deed the properties to the Department of Social Services “to be used in the Homeless Housing Assistance Program and the Trust Fund Program.” These parcels were then used in the Housing Assistance Program pursuant to the contract with Suburban, as per the authorization by the County Legislature.

An owner in possession has the right to invoke the aid of a court in equity at any time when he is the sole owner in possession, to have an apparent, though, in fact, not real encumbrance discharged from record, and such right is never barred by statute of limitations; however, where a party is not in possession, such owner must assert an equitable claim within the time prescribed by statute or he will lose his right to maintain it (*Piedra v Vanover* 174 AD2d 191, 579 NYS2d 675 [2d Dept 1992]). In other words, “[a] person claiming title to real property, but not in possession thereof, must act, affirmatively and within the time provided by statute” (*see WPA Acquisition Corp. v Lynch*, 82 AD3d 1215, 1216, 920 NYS2d 223 [2d Dept 2011]; *Downes v Peluso*, 115 AD2d 454, 495 NYS2d 691 [2d Dept 1985]; *Piedra v Vanover, supra*).

Plaintiffs seek reformation of the five deeds granting the subject properties to the defendant Suburban. With regard to 1394 Straight Path, Wyandanch and 740 Michigan Avenue, plaintiffs alleged basis is a scrivener’s mistake in the drafting of the deeds. With regard to 39 East Chestnut, Central Islip they allege scrivener’s error and seek rescission because this deed was never recorded. However, title to property vests upon the delivery of a properly executed deed. The fact that a deed may not be recorded until a later date does not affect the validity of the conveyance (*see DRT Construction Co. v BH Associates*, 269 AD2d 783, 702 NYS2d 738, [2d Dept 2000]; *Crossland Sav., FSB v Patton*, 182 AD2d 496 [1st Dept 1992], lv denied 80 NY2d 755 [1992]; *James v Lewis*, 135 AD2d 785, 522 NYS2d 897 [2d Dept 1987]; *Sofsky v Rosenberg*, 163 AD2d 240, 559 NYS2d 873 (1st Dept 1990), aff’d 76 NY2d 927, 563 NYS2d 52 [1990] (deed recorded 23 years after delivery); *see also* Real Property Law 244). Here, the fact that the deed to the East Chestnut property has not been recorded is not relevant to the motions before the Court. With regard to 551 Post Avenue, Bellport and 23 Henry Street, Wyandanch, plaintiffs allege scrivener’s error, as well as claiming that the transfers were unauthorized gifts of public funds.

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The defendants Suburban, Hilgendorff and Evans have established their entitlement to summary judgment dismissing the complaint, as the plaintiffs' causes of action are time-barred. Initially the Court notes that the complaint does not set forth any causes of action against the individual defendants Hilgendorff and Evans.

The causes of action, other than that for reformation of the deeds, first accrued seven years after the delivery of each deed, when the reverter clauses purportedly went into affect, those dates being June 30, 1995 (1394 Straight Path, Wyandanch); January 12, 1996 (740 Michigan Avenue, Bellport, 39 E. Chestnut Street, Central Islip, 551 Post Avenue, Bellport); and February 23, 1996 (23 Henry Street, Wyandanch).

A cause of action seeking reformation of an instrument on the ground of mistake accrues, and the six-year limitations period begins to run, on the date the mistake was made (*see Johnson v Broder*, 112 AD3d 788, 977 NYS2d 291 [2d Dept 2013]; *Taintor v Taintor*, 50 AD3d 887, 888, 855 NYS2d 642 [2d Dept 2010]). This rule also applies to scrivener's errors (*1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329, 331, 834 NYS2d 133 [1st Dept 2007]; *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547, 634 NYS2d 669 [1995]). It is further noted that the doctrine of mutual mistake "may not be invoked by a party to avoid the consequences of its own negligence" (*Gitelson v Quinn*, 118 AD3d 403, 987 NYS2d 329, 330 [1st Dept 2014]; *P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201, 640 NYS2d 558 [1st Dept 1996]). Furthermore, a party who executes a deed is presumed to know its contents and is conclusively bound by it (*see Whitby v Whitby*, 106 AD3d 729, 964 NYS2d 247 [2d Dept 2013]; *Holcomb v TWR Express, Inc.*, 11 AD3d 513, 514, 782 NYS2d 840 [2d Dept 2004]).

Here, the six year statute of limitations for reformation accrued on the dates of delivery of the respective deeds and expired for each of the deeds no later than 1995. Plaintiffs' attempt to invoke CPLR 203(g), alleging that they brought this action within two years after discovering the underlying facts of their claim, is not dispositive. The two-year date-of-discovery accrual for reformation claims based on mistake does not apply to claims for reformation where, as here, plaintiffs prepared and possessed copies of the documents containing the alleged mistake, the documents are a matter of public record and they did not exercise the requisite diligence necessary to toll accrual of the six-year limitations period, having taken no action for more than twenty years. Thus, their claim was time-barred when it was not brought more within the six-years after delivery of the deeds (*see also 1414 APF, LLC v Deer Stags, Inc.*, 39 AD3d 329, 331, 834 NYS2d 133 [1st Dept 2007]; *Federal Deposit Ins. Corp. v Five Star Management, Inc.*, 258 AD2d 15, 692 NYS2d 69 [1st Dept 1999]). Since reformation of the deeds is denied there is no cause of action for reverter and that issue is moot. However, based upon the record, even if the deeds, had contained a reverter clause, no action was taken by the County within ten years of the accrual of the claims for reverter, which occurred, at the latest, on February 23, 2006. The plaintiffs having commenced this action more than 10 years after the County's claims accrued, their claims are barred by RPAPL 612 (1) (*People v Avilas, Inc.*, 29 AD3d 764, 765, 816 NYS2d 136 [2d Dept 2006]; *see also Stonegate Family Holdings, Inc. v Revolutionary Trails, Inc.*, 73 AD3d 1257, 900 NYS2d 494 [3d Dept 2010], *lv. to app. den.* 15 NY3d 715, 913 NYS2d 643 [2010]).

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Plaintiffs' breach of contract cause of action was time-barred, since it was not interposed within six years after its accrual in accordance with the statute of limitations set forth in CPLR 213(2), which occurred, at the latest, on February 23, 1996 (*see Mosab Constr. Corp. v Prospect Park Yeshiva, Inc.*, 124 AD3d 732, 2 NYS3d 197 [2d Dept 2015]; *Paonessa v C & L Bldr./Dev., Inc.*, 50 AD3d 1334, 1335, 856 NYS2d 276 [3d Dept 2008]). Plaintiffs' claim of a continuing failure of Suburban to use the properties as housing for the homeless is unsupported by any documentation or an affidavit from someone with personal knowledge.

Under New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts and pled in the alternative, a six-year statute of limitations applies (*see Maya NY, LLC v Hagler*, 106 AD3d 583, 585, 965 NYS2d 475 [2013]; *Knobel v Shaw*, 90 AD3d 493, 495, 936 NYS2d 2 [1st Dept 2011]). Thus, the alleged unjust enrichment claim is also barred by the applicable statute of limitations, which began to run, at the latest, on February 23, 1996.

Plaintiffs' cause of action to impose a constructive trust is time-barred by the six-year statute of limitations. The cause of action accrued upon the occurrence of the wrongful act giving rise to a duty of restitution, at the latest, on February 23, 1996 (*see CPLR 213[1]*; *Bodden v Kean*, 86 AD3d 524, 927 NY S2d 137 [2d Dept 2011]; *Auffermann v Distl*, 56 AD3d 502, 867 NYS2d 527 [2d Dept 2008]).

Finally, and fully dispositive of this action, CPLR 212 (a) provides that "[a]n action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action" (CPLR 212[a]; *see Elam v Altered Ego Realty Holding Corp.*, 114 AD3d 901, 981 NYS2d 124 [2d Dept 2014]; *WPA Acquisition Corp. v Lynch*, 82 AD3d 1215, 1216, 920 NYS2d 223 [2d Dept 2011]). The record herein establishes that the County was not "seized or possessed" of the subject properties within ten years prior to the bringing of this action. Thus, plaintiffs, having waited more than twenty years to act, have no legal ground upon which to bring this action and it must be dismissed.

Turning to the motion for summary judgment by the defendants MERS, Greenpoint and Astoria, based upon a review of the allegations of the complaint and the evidence submitted, the complaint fails to state a cause of action against the defendants and their motion should be granted (*see Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.*, 117 AD3d 1005, 1006, 986 NYS2d 532 [2d Dept 2014]; *Peterec-Tolino v Harap*, 68 AD3d 1083, 1084 [2d Dept 2009]).

Accordingly, the motion for summary judgment by the defendants Suburban, Hilgendorff and Evans dismissing the complaint and all cross-claims is granted, and the notices of pendency filed by the plaintiffs shall be cancelled. The motion by the defendants MERS, Greenpoint and Astoria for summary judgment is granted in all respects. The plaintiffs' motion for summary judgment is

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denied, as each of its causes of action are barred by the applicable statute of limitations, due to the failure to timely act to protect the County's alleged interests in these properties.

Dated: 7/6/2015


HON. WILLIAM B. REBOLINI, J.S.C.

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