

<b>Fandorf Props., Inc. v Classic Brownstones Unlimited, LLC</b>
2015 NY Slip Op 32089(U)
August 4, 2015
Supreme Court, New York County
Docket Number: 113094/2010
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

FANDORF PROPERTIES, INC. and  
MICHAEL ADAMSON as Administrator  
of the Estate of Randolph Adamson,

INDEX NO. 113094/2010  
MOTION DATE 06-24-2015  
MOTION SEQ. NO. 006  
MOTION LEAD NO. \_\_\_\_\_

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Plaintiffs,

-against-

CLASSIC BROWNSTONES UNLIMITED,  
LLC, 15 WEST 129<sup>TH</sup> STREET CORP.,  
and CATHAY BANK,

Defendants.

The following papers, numbered 1 to 8 were read on this motion to renew, cross-motion to  
dismiss. COUNTY CLERK'S OFFICE  
NEW YORK

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

1-3, 4-5

Answering Affidavits – Exhibits \_\_\_\_\_

6-7,

Replying Affidavits \_\_\_\_\_

8

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion  
for leave to renew is denied, Defendant Cathay Bank's (herein "Bank") cross-motion  
dismissing the Amended Complaint is denied as moot.

Plaintiffs bring this action pursuant to Article 15 of the Real Property Actions  
and Proceedings Law for a judgment declaring that they are the owners of real  
property located at 15 West 129<sup>th</sup> Street, New York, New York 10027 (herein  
"Building"). Plaintiffs allege that the deed transferring the Building to the defendants  
Classic Brownstones Unlimited, LLC (herein "Brownstones") and 15 West 129<sup>th</sup> Street  
Corp. (herein "15 West") was a forgery and thereby the defendants converted the  
Building. Bank holds two mortgages on the Building.

The Building was owned by Randolph Adamson who on May 21, 1974  
transferred title to Fan-Dorf Properties, Inc. (herein "Fan-Dorf"), by virtue of a deed.  
In October of 2000 the Building was transferred from Fan-Dorf to 15 West. The deed  
was signed by Robert Adamson, as president, was duly notarized and recorded in the  
Office of the City Register of the City of New York on October 20, 2000. The deed  
and Building were transferred five times from 2001 to 2006, at which point the deed  
and Building were transferred to Brownstones.

Plaintiffs claim that the deed transferring the Building from Fan-Dorf to 15 West  
is a forgery. Brownstones claims that it is a bona fide purchaser for value that  
purchased the Building in an arms length transaction.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Plaintiffs served an Amended Complaint dated October 1, 2014 adding defendant Bank to this action, asserting causes of action seeking to quiet title to the Building and removing two security interests held by Bank on the Building totaling \$800,000.

Bank moved to dismiss the Amended Complaint as against it pursuant to CPLR § 3211(a)(1),(3), and (7) for a defense founded upon documentary evidence, lack of capacity to maintain this action, and for failure to state a cause of action. Bank argued that the corporate entity, Fan-Dorf, has no right to relief because it did not exist in the year 2000 when the alleged fraudulent transfer was made. Fan-Dorf was dissolved in 1993 by the New York State Secretary of State for its failure to pay franchise taxes.

In an Order dated March 13, 2015, this Court granted dismissal of the Amended Complaint as asserted against Bank. Fan-Dorf was dissolved by the Secretary of State of New York ten (10) years prior to the alleged fraudulent transfer taking place due to Fan-Dorf's failure to pay New York State franchise taxes from 1993 up until dissolution. This Court held that Fan-Dorf lacked capacity to maintain this action because it was dissolved at the time of the alleged fraudulent transfer and at the time this action was commenced.

After Bank filed its motion to dismiss, but prior to this Court's March 13, 2015 Order, Michael Adamson sought to have Fan-Dorf reinstated by paying past due franchise taxes to the New York State Department of Taxation and Finance. As of March 18, 2015, Fan-Dorf has been reinstated by the New York State Department of Taxation and Finance.

Fan-Dorf now seeks leave to renew Bank's prior motion to dismiss the Amended Complaint. Fan-Dorf argues that its reinstatement subsequent to the filing of Bank's motion to dismiss entitles it to retroactive reinstatement and allows it to maintain this action, thereby making dismissal of the Amended Complaint as against Bank improper.

Bank cross-moves to dismiss the Amended Complaint pursuant to CPLR § 3211(a)(1), (3), (5), and (7).

CPLR § 2221(e) states that a motion for leave to Renew (1) shall be identified specifically as such, (2) shall be based upon facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination, and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.

A motion for leave to renew is addressed to the sound discretion of the court (Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp., 64 A.D.3d 85, 878 N.Y.S.2d 97 [2<sup>nd</sup> Dept., 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Renna v. Gullo, 19 A.D.3d 472, 472, 797 N.Y.S.2d 115 [2<sup>nd</sup>

Dept., 2005] citing to *Rubinstein v. Goldman*, 225 A.D.2d 328, 329, 638 N.Y.S.2d 469 [1<sup>st</sup> Dept., 1996]; see CPLR § 2221[e]). A motion for leave to renew must be based on additional material facts existing at the time the prior motion was made, but the material facts were not known to the party seeking leave to renew (*Nassau County v. Metropolitan Transp. Authority*, 99 A.D.3d 617, 953 N.Y.S.2d 183 [1<sup>st</sup> Dept., 2012] citing to, *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1<sup>st</sup> Dept., 1979]).

Leave to renew the prior motion is denied. This action was commenced in 2010 and litigated for four years prior to Fan-Dorf paying its past due franchise taxes and seeking to be reinstated by the Secretary of State of New York. It was only after Bank made its motion to dismiss that plaintiffs sought the reinstatement of Fan-Dorf. Fan-Dorf only sought reinstatement over four years after the commencement of this action, and over twenty years after it had been dissolved by the Secretary of State of New York for failure to pay franchise taxes. Fan-Dorf submits proof that it paid the New York State Department of Taxation and Finance a \$55.00 filing fee, but has yet to pay its back taxes.

The facts claimed by plaintiffs as a basis for renewal were not diligently pursued by plaintiffs, and do not form a basis for leave to renew. Fan-Dorf failed to exercise due diligence prior to the commencement of this action and during the four years of extensive motion practice and discovery.

Further, Fan-Dorf was involuntarily dissolved in 1993 by the Secretary of State of New York for its failure to pay franchise taxes pursuant to New York Tax Law. The Secretary of State of New York, pursuant to §203-a(3) has the authority to "make a proclamation ... declaring [delinquent corporations] dissolved and their charters forfeited pursuant to the provisions of this section" (Id.).

"A dissolved corporation may not carry on new business (see Business Corporation Law § 1005 [a] [1]) and no longer has the right to commence an action in the courts of this State, except in specific circumstances permitted by statute" (*MMI Trading, Inc. v. Nathan H. Kelman, Inc.*, 120 A.D.3d 478, 479, 989 N.Y.S.2d 911, 912 [2<sup>nd</sup> Dept., 2014]). "While a corporate dissolution may not affect the corporation's right to carry on business for the purpose of winding up its affairs, new business is prohibited absent reinstatement by payment of back taxes" (*Metered Appliances v. 75 Owners Corp.*, 225 A.D.2d 338, 638 N.Y.S.2d 631, 632 [1<sup>st</sup> Dept., 1996]). "The general rule is that where a corporate term of existence has expired but the corporation carries on its affairs and exercises corporate powers as before, it is a de facto corporation" (*Ludlum Corp. Pension Plan Trust v. Matty's Superservice, Inc.*, 156 A.D.2d 339, 340, 548 N.Y.S.2d 292, 293 [2<sup>nd</sup> Dept., 1989]).

In a letter addressed to plaintiffs dated June 5, 2014 from the New York State Department of Taxation and Finance, the New York State Department of Taxation and Finance stated that "[a] dissolved corporation that is merely a record title holder of real property located in New York State as nominee for the benefit of others, and is otherwise inactive, is not conducting business in New York State as contemplated by [§203-a(3)] of the New York State Tax Law" (see Cross-Moving papers, Exhibit L).

Fan-Dorf was dissolved in 1993 and the alleged fraudulent transfer of the Building occurred in 2000, seven years after dissolution. This action was commenced in 2010. In 2015, after paying a \$55 filing fee to the New York State Department of Taxation and Finance, plaintiffs obtained a Consent to Reinstatement (see Moving Papers, Exhibit B). The New York State Department of Taxation and Finance explicitly stated that Fan-Dorf was not conducting business as contemplated by §203-a(3) of the New York State Tax Law. Fan-Dorf was not conducting business post-dissolution; was not winding down business post-dissolution; was not a defacto corporation because it did not carry on affairs and exercise corporate powers post-dissolution as it did prior to dissolution; and the alleged fraudulent conveyance occurred after dissolution.

Fan-Dorf has not paid its franchise taxes in over twenty (20) years. It now seeks to assert a claim accruing in 2000 and having a ten (10) year statute of limitations. Due to its dissolution in 1993 for failure to pay its franchise taxes, Fan-Dorf lacked standing as of 1993 to avail itself of the New York State Courts. Were this Court to allow Fan-Dorf to maintain this action asserting a cause of action that accrued in 2000 while Fan-Dorf was dissolved, Fan-Dorf would be allowed to supercede the 10 (ten) year statute of limitations by indefinitely tolling the statute of limitations.

In *Lewis v. Schwartz*, 119 A.D.2d 116, 506 N.Y.S.2d 32, the Appellate Division, First Judicial Department addressed this issue and stated, in relevant part, that:

"If this Court were to affirm Special Term's decision, it would have to adopt a reading of § 203-a(7) of the Tax Law indefinitely extending a dissolved corporation's time to seek release of foreclosed property for as long as the possibility of corporate revivification exists, a theoretically limitless period. Thus, if fifty years after dissolution a corporation were to pay its franchise tax it would, to paraphrase Special Term, still have the right (that it had at the time of dissolution) to redeem the property by paying the back taxes. Presumably, during the 50 years or whatever period intervened between dissolution and reinstatement, the City would be obliged to retain the property or at the very least any funds received from its condemnation (see Admin. Code § D17-25.0(f)) so as not to impair the dissolved corporation's apparently undying "equity" in its late asset.

...

Indeed, Special Term's construction of Tax Law § 203-a(7) so as to toll the running of the redemption period indefinitely is not only impracticable, forcing the City, at least in theory, to retain properties or funds derived from their condemnation in perpetuity, it also works a gross inequity.

...

The rule espoused by Special Term in fact creates a strong incentive to a corporation with property subject to in rem foreclosure to forfeit its charter so as to preserve its "equity" in the property for as long as it takes to finance release. Clearly, this was not the result intended by the Legislature when it enacted § 203-a(7) of the Tax Law. That provision is better understood as an inducement to prompt payment of franchise taxes so that those rights restored to the corporation can be exercised before the time for doing so lapses" (Lewis v. Schwartz, 119 A.D.2d 116, 120, 506 N.Y.S.2d 32, 35, [1<sup>st</sup> Dept., 1986]).

In 172 East 122 Street Tenants Ass'n v. Schwarz, 73 N.Y.2d 340, 537 N.E.2d 1281, 540 N.Y.S.2d 420, the New York Court of Appeals addressed the Lewis v. Schwartz case. The Court of Appeals relied on Business Corporation Law § 1005(a)(1) and § 1006(b) in holding that a dissolved corporation does not have any remedy to any right or claim existing after dissolution, unless the dissolved corporation is winding up affairs or has an explicit statutory remedy. The Court in 172 East 122 Street Tenants Ass'n v. Schwarz did not address, distinguish or overturn the portion of the holding in Lewis v. Schwartz that precluded the indefinite and perpetual tolling of the statute of limitations by a dissolved corporation pending the possibility of a retroactive corporate revivification.

Fan-Dorf's motion for leave to renew this Court's March 13, 2015 decision dismissing the Amended Complaint as against Bank is denied. Bank's cross-motion to dismiss the Amended Complaint is denied as moot because Fan-Dorf's motion for leave to renew is denied and the Amended Complaint remains dismissed as against Bank.

Accordingly, it is ORDERED that plaintiffs' motion for leave to renew defendant Cathay Bank's prior motion to dismiss the Amended Complaint is denied, and it is further,

ORDERED, that Defendant Cathay Bank's cross-motion dismissing the Amended Complaint is denied as moot, and it is further,

ORDERED, that the remaining parties appear for a Conference in IAS Part 13 located at 71 Thomas St., Rooms 210, New York, New York on September 9, 2015 at 9:30 AM.

**FILED**

AUG -7 2015

MANUEL J. MENDEZ  
J.S.C.

Enter:

COUNTY CLERK'S OFFICE  
NEW YORK  
Dated: August 4, 2015

MANUEL J. MENDEZ  
J.S.C.

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