

Sears v Karas
2015 NY Slip Op 32276(U)
December 3, 2015
Supreme Court, Tioga County
Docket Number: 45495
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State
of New York held in and for the Sixth Judicial
District at the Tioga County Courthouse, Owego,
New York, on the 2nd day of OCTOBER, 2015.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

LINDA SEARS,

PLAINTIFF,

-vs-

TIMOTHY KARAS and THE ESTATE OF
PATRICIA KARAS

DEFENDANT.

DECISION AND ORDER

Index No. 45495
RJI No. 2015-194-M

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon Timothy Karas, et al's ("Defendants") motion for summary judgement pursuant to CPLR §3212. Linda Sears ("Plaintiff") opposes the motion.

Defendants submit a Notice of Motion dated July 20, 2015 with an Affidavit of Timothy Karas dated July 16, 2015 (with exhibits) and a Memorandum of Law dated July 24, 2015. Plaintiff submitted a Plaintiff's Affidavit dated September 8, 2015 and a Memorandum of Law dated September 17, 2015.

Although there are significant factual disputes, there are some basic facts upon which the parties agree. On March 13, 2000, Doris Sears, deeded her property to her two daughters, Plaintiff and Patricia Karas ("Decedent") while retaining a life estate. On January 25, 2001, Plaintiff deeded her interest in the subject property to Decedent. Doris Sears died May 7, 2007. Decedent died September 29, 2014. Plaintiff then filed the instant claim against the Decedent's estate and Timothy Karas, Decedent's husband.

The primary area of dispute is the circumstances under which Plaintiff transferred her interest in the subject property to Decedent. Plaintiff alleges that she agreed to transfer the property to her sister so that a home improvement loan could be obtained to make necessary repairs. She alleges that she was told this would be a temporary transfer and that her interest in the property would ultimately be deeded back to her in the future. She further alleges that she received no consideration for the transfer and fully expected to regain her interest in the property. She alleges fraud in the inducement in that the Defendants never intended to return the property to her.

Defendants allege that Plaintiff was unwilling to sign loan documents for the home improvement loan for the subject property and insisted on being removed from the deed. The deed was prepared and provided to Plaintiff who executed the deed which was subsequently recorded. There was no contractual agreement between Plaintiff and Decedent and no reservation of rights

by Plaintiff.

Defendants argue that this matter is time barred pursuant to CPLR 213 (8), and the Statute of Frauds, and that Plaintiff has failed to offer evidence to support the elements of fraud in the inducement.

Summary Judgment

When seeking summary judgment, the movant must make a *prima facie* case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Statue of Limitations

A cause of action for fraud is untimely if it is commenced more than six years after the fraud occurred, or more than two years after the fraud was discovered or could have been discovered with reasonable diligence, whichever is longer. *See* CPLR 213 (8); *County of Ulster v. Highland Fire Dist.*, 29 AD3d 1112, 1115 (2006), *lv denied* 7 N.Y.3d 710 (2006). Here, Plaintiff concedes that the action was not brought within six years of the alleged fraud occurring on January 25, 2001, the date Plaintiff transferred her interest to Decedent. Rather, Plaintiff is arguing that the action was timely filed within two years after the alleged fraud was discovered or could have been discovered. Plaintiff urges that the death of the Decedent on September 29, 2014 and the subsequent refusal to return her interest in the subject property was the point of discovery of the

alleged fraud, and that she had no ability to discover the fraud until she was refused her interest in the property.

Defendant argues that when Plaintiff left the property in the spring of 2001, she was effectively barred from the property and that this gave her sufficient knowledge that her interest would not be returned to her and therefore triggered the statute of limitations. Defendant argues that at the very least, the death of Doris Sears on May 7, 2007 triggered the statute of limitations as at that time, Plaintiff knew or should have known that Decedent would not be returning her interest in the subject property.

“Whether a plaintiff could have discovered a fraud by exercising reasonable diligence ‘turns on whether the plaintiff was possessed of knowledge of facts from which the fraud could be reasonably inferred....’ *Abele Tractor and Equipment Co., Inc. v. John Balfour*, 2015 NY Slip Opinion 08688 (3rd Dept. 2015) (citation omitted). Whether a Plaintiff could have reasonably discovered a fraud with due diligence “turns on whether the plaintiff was possessed of knowledge of facts from which the fraud could be reasonably inferred. Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute” *Sargiss v. Magarelli*, 12 NY3d 527, 532 (2009) (internal quotation marks, brackets and citation omitted).

In this Summary proceeding, Defendant bears the burden to set forth a prima facie case that the statute of limitations has not been met. However, other than citing various historical facts and dates, Defendant has failed to offer any proof that the Plaintiff “was possessed of knowledge of facts from which a fraud could be reasonably inferred”. *Abele* at 4.

In addition, determination of Plaintiff’s knowledge of an alleged fraud is very fact laden and “is a mixed question of law and fact which should not be resolved summarily unless it conclusively appears that the plaintiff had knowledge of facts which should have caused him or her to inquire and discover the alleged fraud.” *Hoffman v. Cannone*, 206 AD2d 740, 741, (3rd Dept. 1994); see *Trepuk v. Frank*, 44 NY2d 723, 724-725 (3rd Dept. 1978); *Jeffrey BB. v. Cardinal McCloskey*

School & Home for Children, 257 AD2d 21, 24-25 (3rd Dept. 1999). Whether a Plaintiff exercised reasonable diligence in discovering a fraud is an issue reserved to the trier of fact. *See Mitschele v. Schultz*, 36 AD3d 249, 255-256 (3rd Dept. 2006).

In the present matter, the Defendants have failed to provide conclusive evidence of the Plaintiff's knowledge of the alleged fraud, and therefore failed to sustain their burden regarding the statute of limitations. Therefore, the Defendants' Motion for Summary Judgment pursuant to CPLR §213 (8) is DENIED.

Statute of Frauds

Defendants argue that since there was no written agreement between the Plaintiff and the Decedent regarding a piece of real property, any claim by the Plaintiff must fail by operation of the Statute of Frauds or General Obligations Law §5-703 (2). However, the Statute of Frauds is an affirmative defense, which if not pled, is waived. *Bourdeau Bros., Inc. v. Jeffrey Bennett*, 74 AD3d 1542 (3rd Dept. 2010); *see* CPLR 3018 (b); *see also Wooten v. State*, 302 AD2d 70 (4th Dept. 2002).

In the present matter, Defendants filed an Answer on May 18, 2015. Notably missing from the various affirmative defenses raised is the Statute of Frauds. Since the affirmative defense of Statute of Frauds has not been pled, the Court finds that pursuant to CPLR 3018 (b), it has been waived.

In addition, even if the Statute of Frauds had been pled as an affirmative defense, it is unavailing in this matter as "that the Statute of Frauds may not be used to perpetrate a fraud." *Duncombe v. Crocker-Wheeler*, 232 AD 137, 141 (1st Dept. 1931), *citing Thompson v. Simpson*, 128 NY 270, 287 (1891); *M. H. Metal Product Corporation v. April*, 251 NY 146, 150 (1929). Here, Plaintiff is alleging fraud in the inducement wherein the Defendants caused her to give up a valuable

interest in a piece of real property without consideration¹ based upon the belief that the interest would ultimately be returned. Under such circumstances and considering that this transaction occurred between family members, the Statute of Frauds cannot be utilized to shield a potential fraud.

Therefore, the motion for Summary Judgment pursuant to General Obligations Law §5-703 (2) is DENIED.

Sufficiency of Pleadings

“In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury”. *Lama Holding Co. v. Smith Barney, Inc.*, 88 NY2d 413, 421 (1996); *see, Channel Master Corp. v. Aluminium Ltd. Sales*, 4 N.Y.2d 403 (1958); *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995). Such matters must be pled such that “the circumstances constituting the wrong shall be stated in detail”. CPLR §3016 (b).

In her complaint, the Plaintiff alleges that she was approached by Defendants and told that she needed to *temporarily* transfer her interest in the subject property to Decedent so that a home improvement loan was necessary to make needed repairs. Defendants are alleged to have told her that the transfer was necessary due to Plaintiff’s alleged poor credit. Plaintiff alleges that she signed the deed based upon the misrepresentation of Defendants that the transfer would be “temporary”. Plaintiff alleges that Defendant’s knew that the transfer would not be *temporary* and fraudulently induced her to transfer the property.

¹Of note is the fact that the Defendants do not even allege that there was consideration for the Plaintiff’s transfer of her interest.

The Court finds that such allegations, if proved, would support the elements of a claim of fraud. Therefore, the Defendants have failed to make a *prima facie* case that the pleadings were insufficient, as a matter of law, to maintain a claim for fraud in the inducement. Therefore, the motion for Summary Judgment based upon the insufficiency of the pleadings is DENIED.

The Defendants have alleged that the Plaintiff will not be able to prove her claim due to limitations imposed by CPLR §4519 commonly referred to as the "Deadman's Statute". However, this argument is unavailing as "New York's Dead Man's Statute by its terms makes testimony by an interested witness "concerning a personal transaction or communication between the witness and the deceased" excludable only "[upon] the trial of an action or the hearing upon the merits of a special proceeding"" *Phillips v. Kantor*, 31 NY2d 307 (1972) *quoting* CPLR §4519. Merely arguing that, for evidentiary reasons, Plaintiff will not be able to prove her claim is insufficient to support their burden to submit a *prima facie* case for summary judgment.

This constitutes the Decision and Order of the Court.

Dated: December 3, 2015
Owego, New York


HON. EUGENE D. FAUGHNAN
Supreme Court Justice