

<b>Matter of Black United Fund of N.Y., Inc.</b>
2016 NY Slip Op 32192(U)
October 21, 2016
Supreme Court, New York County
Docket Number: 110537/05
Judge: Ronald A. Zweibel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50Q

-----x  
In the Matter of the Application of : Decision, Order and  
BLACK UNITED FUND OF NEW YORK, INC., : Judgment  
Petitioner, pursuant to Section 511 : Index Number 110537/05  
of the New York State Not-for-Profit  
Corporation Law, for leave to convey :  
the real estate located at 2261  
Seventh Avenue (Block 1918, Lot 1), :  
New York, New York, 2265 Seventh  
Avenue (Block 1918, Lot 3), New York, :  
New York, 2267 Seventh Avenue (Block  
1918, Lot 4), New York, New York, 2269:  
Seventh Avenue (Block 1918, Lot 63),  
New York, New York, and 2271-73 :  
Seventh Avenue (Block 1918, Lot 61),  
New York, New York, a parcel of :  
improved land.

-----x  
BUFNY HOUSES ASSOCIATES, WILLING : Index Number 451498/15  
WORKERS BAPTIST CHURCH, ATLANTICREST,  
INC., :

Plaintiffs,:

-against- :

BLACK UNITED FUND OF NEW YORK, INC, :  
BUFNY HOUSES ASSOCIATES, LLC, 2273  
REALTY, LLC, 2261-2273 ACP :  
RESIDENCIES, LLC, BUF PLAZA, LLC,  
CHICAGO TITLE INSURANCE COMPANY AND :  
FIRST AMERICAN TITLE COMPANY,

Defendants.

-----x  
ZWEIBEL, J.:

Under Index Number 110537/05, Plaintiffs BUFNY Houses  
Associates ("BHA") moves for "clarification" of this Court's  
December 11, 2014 decision which this Court will treat as motion  
for permission to reargue and to renew. While this motion was

pending, BHA, Willing Workers Baptist Church ("WWBC") and Atlanticrest, Inc. ("Atlanticrest") commenced a new action in Brooklyn Supreme Court under Index Number 451498/15. 2261-2273 ACP Residences, LLC ("ACP"), BUF Plaza, LLC ("BUF") and First American Title Insurance Company ("First American") (all "Defendants") moved to dismiss the complaint filed by Plaintiffs in Brooklyn pursuant to CPLR 3211(a)(1), (3), (5) and (7); cancelling the Notice of Pendency filed by Plaintiffs pursuant to CPLR 6514(b) and awarding costs and expenses pursuant to CPLR 6514(c) and (iii) imposing sanctions against Plaintiffs and their counsel pursuant to 22 NYCRR 130-1.1. Chicago Title Insurance Company ("Chicago Title") also moved to dismiss the claims against it alleging that the Plaintiffs failed to sufficiently allege a claim of fraud against it and that Plaintiffs' claims were barred by collateral estoppel. The Brooklyn matter was transferred to this Court to join Index Number 110537/05 as the claims in Plaintiffs' motion are similar to those raised before this Court and partially decided by this Court's December 11, 2014 decision.

By way of background, in 2005, Black United Fund of New York, Inc. ("BUFNY") filed a petition ("2005 Petition") seeking permission to convey property located at 2261 Seventh Avenue, 2265 Seventh Avenue, 2267 Seventh Avenue, 2269 Seventh Avenue and

2271-73 Seventh Avenue (the "Property") to 2273 Realty LLC in exchange for a 15% interest in 2273 Realty LLC,<sup>1</sup> because the mortgage on the Property was in default and the Property was scheduled to be sold at a foreclosure sale. The 2005 Petition stated that BUFNY, as the sole remaining partner of BHA, had the authority to sell the property. BUFNY's partner in BHA, Atlanticrest, Inc., was an inactive business corporation which was dissolved in 1992. The Petition included a Resolution of the Board of Directors of the Black United Fund of New York, Inc., dated May 24, 2005, unanimously approving the conveyance of the Property by BUFNY, through its wholly owned affiliate BUFNY Houses Associates.

On August 25, 2005, after reviewing the Petition, as well as the investigation and recommendations of the New York State Attorney General, this Court approved the sale of the Property to 2273 Realty LLC in a written Order ("August 2005 Order"). BUFNY, pursuant to the August 2005 Order, conveyed the New York deed, dated October 21, 2005 ("First Deed") to 2273 Realty LLC and the deed was recorded.

In 2012, 2273 Realty LLC subsequently sold the Property to 2261-2273 ACP Residences, LLC ("ACP") for \$6,750,000 and

---

<sup>1</sup>Also known on the New York City Tax map as Block 1918, Lots 1, 3, 4, 61 and 63.

transferred title via a deed dated August 14, 2012 and recorded on August 31, 2012. In 2014, ACP sold the property and transferred its title to the property to its successor in interest BUF Plaza, LLC ("BUF Plaza") via deed dated August 13, 2014. The deed was then recorded.

In 2013, BHA filed a motion for modification of the August 2005 Order either declaring BHA to be the true owner of the 15% interest in 2273 Realty LLC or vacating the August 2005 Order and declaring BHA to be the true owner of the Property. BHA argued that the rights conveyed by BUFNY to 2273 Realty LLC by way of a quit claim deed and this Court's Order was ineffective as the person who obtains title to property via a quit claim deed has the same rights of the person who transferred the title. Since BUFNY was not the rightful owner of the property, BUFNY could not transfer what it did not have and therefore, the purchaser had no right to the property. After extensive briefing, conferencing and oral arguments, this Court, in a Decision and Order, dated December 11, 2014, and entered on January 20, 2015, permitted ACP to intervene in the proceeding and denied BHA's request to set aside the 2005 sale of the Property when BHA admitted that it could not afford to pay off the mortgage and taxes that resulted in the property being sold in the first place and finding that upon ACP's acquisition of the Property from 2273 Realty, LLC, ACP

became the true and rightful owner of the Property and that BHA had no ownership, right or interest in or to the Property (see December 11, 2014 Order). The issue of whether BUFNY engaged in fraudulent activity with respect to the 2005 transfer, after being extensively briefed by the parties, was held in abeyance by this Court while the parties engaged in discovery with respect to the question of the ownership of the 15% interest in 2273 Realty LLC that BUFNY received pursuant to the 2005 sale.

Approximately, two weeks after this Court issued its decision, on December 26, 2014, BHA, Willing Workers Baptist Church ("WWBC") and Atlanticrest, Inc. ("Atlanticrest") commenced a new action in Brooklyn Supreme Court under Index Number 451498/15 entitled:

BUFNY Houses Associates, Willing Workers Baptist Church Atlanticrest, Inc. v. Black United Fund of New York, Inc, BUFNY Houses Associates, LLC, 2273 Realty, LLC, 2261-2273 ACP Residencies, LLC, BUF Plaza, LLC, Chicago Title Insurance Company and First American Title Company,

and also filed a Notice of Pendency on the Property. Plaintiffs did not inform the Supreme Court in Brooklyn about the New York County action and this Court's prior decisions in this matter.

In the Brooklyn matter, BHA, again arguing in essence that it is the "owner in fee" of the Property, moved to quiet title to the Property and to void the October 21, 2005 deed conveying title from BHA to 2273 Realty, LLC due to purported fraud by

BUFNY.

Thereafter, BHA made the instant motion for "clarification," which is really a motion to reargue and renew in 2014, more than 30 days after entry of this Court's December 11, 2014 Order. Based on this Court's review of the papers, the Kings County action substantially seeks a second bite at the apple by attempting to re-litigate the same issues either resolved by this Court's 2014 Order or still pending before this Court in order to obtain basically the same relief sought in the New York County action. When the Court in the Brooklyn action was informed by the respondents of the instant New York County action, the Honorable David I. Schmidt ordered the Brooklyn proceeding consolidated with the New York County proceeding and transferred to New York County to join the instant proceeding.

In March of 2016, after numerous oral arguments, this Court signed a separate order vacating the *lis pendens* BHA had put on the property. ACP then cross-moved for sanctions.

As BUFNY and ACP have argued, BHA's motion for modification is really a motion for leave to reargue and renew with respect to this Court's December 11, 2014 Decision and Order (see Arbor Realty Funding LLC v. 51<sup>st</sup> St. Development Co., LLC, 67 AD3d 559 [1<sup>st</sup> Dept. 2009]).

At the outset, CPLR Rule 2221(d)(3) requires that motions to

reargue be made within thirty (30) days after service of the Notice of Entry. Since BHA's motion was filed more than 30 days after entry of this Court's order, defendant's motion for "clarification" which this Court will treat as a motion to reargue is untimely and denied on that basis.

Additionally, pursuant to CPLR 2221, in pertinent part, "[a] motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order ...

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact.

(e) A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new 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.

Here, BHA has failed to satisfy the legal standard for either a motion to reargue or renew.

A motion to renew "is intended to draw the Court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention"

(Aetna Casualty and Surety Company v. Certain Underwriters at Lloyd's, London, 176 Misc.2d 598, 600 [Sup.Ct. N.Y.Co. 1998], aff'd \_A.D.2d\_, 692 N.Y.S.2d 384 [1st Dept. 1999]). Renewal is inappropriate in the instant case because BHA has simply failed to allege any new or additional facts. Indeed, the only new facts seem to have been raised by BUFNY, who points to some documents which seem to further put the legitimacy of BHA's claims in question.

This Court is not sure that there is not merit to BUFNY's doctrine of laches argument. The original petition allowing the sale of the property was granted in 2005. BHA waited over eight years and several transfers of the property to bring this motion to vacate the property sale. As ACP notes, the deed in question, whether or not it was a quit claim deed, was recorded at the Office of the City Registrar at the New York City Department of

Finance in 2005 and was therefore, a matter of public record. BHA, according to the affidavit of Reverend Morton Van Allen, apparently knew about the transfer of property from BUFNY to 2273 Realty by 2008. Yet, BHA waited until July of 2013 to bring the instant action. BHA has not set forth sufficient good cause for the delay.

"The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party (Skrodelis v. Norbergs, 272 A.D.2d 316, 316 [2nd Dept 2000] [internal citations omitted]). The mere lapse of time without a showing of prejudice will not sustain a defense of laches (id.). In addition, there must be a change in circumstances making it inequitable to grant the relief sought (id.). Prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay (id.)" (Jones v. Evans, 2016 Slip Op. 51278, 2016 WL 4743677 [Sup. Ct. Kings Co. 2016]).

As previously discussed, BHA was on notice of the sale since 2005 when the case was decided and the papers filed. They clearly were on notice since 2008. While BHA did nothing, several transfers of the property occurred. Here, BHA, by waiting eight years, which appears to this Court may have been

"an unreasonable and inexcusable delay that results in prejudice" to ACP as the subsequent purchaser who would have had no reason to question the title as fraudulent despite it having been a quit claim deed in light of this Court's approval of the initial sale (see Real Property Law § 266; Congregation Yetev Lev D'Satamar, Inc., 219 A.D.2d 186, 190-191 [2<sup>nd</sup> Dept. 1996]). As the Appellate Division, Second Department noted, "[i]f deeds could be invalidated and property rights overturned with the ease argued here by the plaintiffs, the resulting chaos in organized society would surpass that which follows an earthquake or any other catastrophe which destroys the archives of the people" (id., at 191 [internal citation omitted]). After eight years, the buyer had a right to rely on the sale done pursuant to this Court's order. Moreover, any fraud would have been perpetrated by BUFNY, not ACP as ACP argues. As this Court has made clear, any relief in the form of damages must come from BUFNY and not from the return of the property for which ACP, an innocent bona fide purchaser, paid nearly \$7 million dollars. As a result of defendant's actions in Brooklyn, it is clear that ACP has "suffered an injury, change of position, loss of evidence, or some other disadvantage resulting from the delay" cause by BHA sitting on its hands for eight years. Clearly any other result would be unfair. Whether BHA is entitled to anything after

waiting nearly eight years is a separate issue that will be determined after a hearing.

On the other hand, a motion for leave to reargue pursuant to CPLR 2221 "may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27[1st Dept. 1992]; Aetna Casualty and Surety Company v. Certain Underwriters at Lloyd's, London, 176 Misc.2d, at 600). "Reargument does not provide a party with an opportunity to advance new arguments. Nor may a party seek reargument to address issues previously decided" (Aetna Casualty and Surety Company v. Certain Underwriters at Lloyd's, London, 176 Misc.2d, at 600; see Rubenstein v. Goldman, 225 A.D.2d 328 [1st Dept. 1996]; Bliss v. Jaffin, 176 A.D.2d 106, 108 [1st Dept. 1991]; Foley v. Roche, 68 A.D.2d 558, 567 [1st Dept. 1979]).

BHA has similarly failed to meet their burden of providing this Court with a basis upon which to grant a motion for reargument. BHA keeps harping on the fact that a quit claim deed was used to transfer title. First, the Court notes that "[i]t has long been the law that a quit claim deed is as effective as a "warranty" deed provided that the title of the grantor is not defective (Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.,

2007 WL 1040809 [SDNY 2007], aff'd 312 Fed. Appx. 433 [2nd Cir 2009], cert denied 558 U.S. 938 [2009] [citing Fletcher v. Delaware, L & W.R. Co., 79 F.2d 306 (2d Cir.1935); Obrey v. Collins, 121 Misc. 93, 95 [Sup.Ct. Schenectady Co.1923]]. "In modern practice, a quit claim is used when a grantor intends to convey only such interest as he has as opposed to a grant of the fee or other estate with warranty of title, and it is just as effective to pass such title as any other form of conveyance" (id. [internal citations omitted]). Second, regardless of whether or not a quit claim deed was utilized, the Property in question was going to be sold in 2005 in order to satisfy creditors, and Petitioner/Plaintiffs stated during a conference before this Court that it was unable to pay the debt owed on the property then and now. If the Property had not been sold pursuant to the Order of this Court, it would have been sold at forfeiture for a potentially lesser price. Accordingly, the result would have been the same and, assuming BHA can prove its interest to a share of the proceeds from the sale of the property, all it would have been entitled to is a share of the remainder of the money from the sale after all creditors were paid. In other words, BHA has no interest in the physical property purchased first by 2273 Realty LLC, which was then sold and title transferred to ACP and then to BUF Plaza, LLC because

the property was purchased for value, there is no evidence in the record that the purchaser had notice of any fraudulent intent by the immediate grantor, BUFNY, and it was purchased pursuant to an order of this Court, after an investigation by the New York State Attorney General, authorizing the sale (see Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. V. 31 Mount Morris Park, LLC, 76 AD3d 465 [1st Dept. 2010]). Moreover, BHA has yet to sufficiently demonstrate that BUFNY was not the owner of the property at the time that the quit claim deed at issue was used to transfer the title of the Property at the time of sale pursuant to this Court's order (see Green v. 119 West 138<sup>th</sup> Street LLC, 142 AD3d 805 [1<sup>st</sup> Dept. 2016]). Because the Court does believe that an issue of fact exists as to whether BHA or any of the other plaintiffs are entitled to any money that may remain from the original sale of the Property, this Court is referring this matter for a hearing to determine whether BHA is entitled to any money left over from the sale after all the creditors were paid.

Accordingly, this Court finds that under these circumstances, this Court has neither overlooked nor misapprehended the facts or the law, nor did this Court mistakenly arrive at its decision in reaching its original decision.

Finally, contrary to BHA's claims otherwise, this Court does not believe that there is anything that it needs to clarify with respect to its Decision and Order of December 11, 2014. As far as this Court is concerned the issue as to the current ownership of the Property is settled and there is no reason for this Court to revisit that issue at this time.

As to the issue of fraud on this Court with respect to any funds that remained from the sale of the property after all the creditors were paid off, both sides are now claiming that the other side is committing a fraud on the Court. As the Court of Appeals observed in CDR Créances S.A.S. v. Cohen, 23 NY3d 307 (2014):

Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution ...

(id., at 318, quoting Anderson v. Dunn, 19 U.S. 204, 227 [1821]). Therefore, "a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice" (id.). "Fraud on the court involves wilful conduct that is deceitful and obstructionistic, which injects misrepresentations and false information into the judicial

process so serious that it undermines the integrity of the proceeding. It strikes a discordant chord and threatens the integrity of the legal system as a whole, constituting a wrong against the institutions set up to protect and safeguard the public (id. [internal citations and quotation marks omitted]).

The Court of Appeals has noted that amongst the characteristics of "cases finding such fraud is a systematic and pervasive scheme, designed to undermine the judicial process and thwart the non-offending party's efforts to assert a claim or defense by the offending party's repeated perjury or falsification of evidence. Fraud on the court warrants heavy sanctions, including the striking of an offending party's pleadings and dismissal of the action" (id. [internal citations and quotation marks omitted]).

Fraud on the Court must be proven "by clear and convincing evidence ... that the offending party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action" (id., at 321 [internal citations and quotation marks omitted]). "A court must be persuaded that the fraudulent conduct, which may include proof of fabrication of evidence, perjury, and falsification of documents concerns issues that are central to the truth-finding process" (id., at 321-322 [internal citations and quotation marks omitted]).

"Essentially, fraud upon the court requires a showing that a

party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense" (id., at 322 [internal citations and quotation marks omitted]). "A finding of fraud on the court may warrant termination of the proceedings in the nonoffending party's favor" (id., at 322 [internal citations and quotation marks omitted]). "For when a party lies to the court and its adversary intentionally, repeatedly, and about issues central to the truth-finding process, it can fairly be said that the party has forfeited the right to have the claim decided on the merits" (id., at 322 [internal citations and quotation marks omitted]). Therefore, once a court concludes that clear and convincing evidence establishes fraud on the court, it may dismiss an action so long as the Court exercises restraint and discretion (id., at 321-322 [internal citations and quotation marks omitted]).

Defendant's Brooklyn action, that was transferred to this Court and consolidate with the original action is dismissed. This Court is extremely troubled by BHA's attempt to bring a new action in Brooklyn Supreme Court without informing that Court about the action before this Court and this Court's decisions in the New York County case. ACP, as the non-offending party, asks

this Court to impose sanctions, including awarding reasonable attorney fees and other reasonable costs incurred as a result of their actions. BHA opposes ACP's application.

This Court denied BHA's motion to declare BHA the sole and true owner of the Property and to set aside all subsequent sales and deed transfers on December 11, 2014. On December 26, 2014, BHA, through new counsel, filed a duplicative complaint in Supreme Court, Kings County, against ACP seeking to: (a) quiet title to the Property and void ACP's title; and (b) void the October 21, 2005 deed conveying title from BHA to 2273 Realty LLC due to purported fraud perpetrated by BUFNY. BHA did not disclose to that Court that this Court had denied them the identical relief two weeks earlier. BHA's motion in Brooklyn Supreme Court was frivolous in light of this Court's order. The proper means of challenging this Court's decision was to move to reargue or renew its application in front of this Court or to appeal this Court's decision to the Appellate Division, First Department.

When BHA's new attorney in the Brooklyn case was informed of this Court's decision, BHA still proceeded with this action. ACP then moved to transfer the Kings County case to this Court. Over BHA's objection, the Hon. David I. Schmidt directed that the Kings County case be transferred to New York County and

consolidated with the original matter.

Once the Brooklyn matter joined the New York County case, ACP again moved to dismiss the Kings County case and asked for sanctions before this Court. BHA made the same argument that this Court had previously rejected, and issued an order vacating the Notice of Pendency filed in conjunction with the Kings County complaint.

BHA brought the new action in Brooklyn despite separately moving for clarification before this Court with respect to the Court's December 11, 2014. BHA did not inform this Court of the Brooklyn action, ACP did. As ACP notes, the CPLR does not provide for clarification but rather treats a motion for clarification as motion to reargue (see e.g. Arbor Realty Funding LLC v. 51<sup>st</sup> St. Development Co., LLC, 67 AD3d 559 [1<sup>st</sup> Dept. 2009]).

Moreover, with respect to BHA's allegations of fraud, that the property was "stolen," and that ACP should have known that the "deed was defective," these are just that allegations. The matter is being set down to hear and report before a referee and at that time, BHA may present any evidence that is relevant to their claims. However, this Court does not believe that BHA was acting in good faith when it brought the action in Brooklyn Supreme Court without informing the Court about the matter before

this Court. The Court believes that it was improperly brought and it is dismissed and any lien on the property is removed.

Pursuant to NYCRR §130-1.1(a), this Court, "in its discretion, may award to any party or attorney in any civil action or proceeding ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct..." Conduct is frivolous under 22 NYCRR §130-1.1(c) if:

For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

"In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (id.).

This Court finds that BHA's action in starting a new proceeding in Brooklyn Supreme Court on basically the same grounds as BHA's motion before this Court, without informing the Court in Brooklyn of this matter or this Court's decision in this matter, was "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure" ACP, as the current owners of the property in question (see 22 NYCRR §130-1.1[c][2]). The Court notes that BHA also failed to name or serve ACP in the original matter while simultaneously seeking to have the deed by which ACP obtained the property in question declared null and void in addition to its improper actions in relation to the bringing of the Brooklyn matter. The Court does not find that BHA has set forth any "arguable and credible grounds" for their actions and that an award of sanctions to ACP is appropriate.

As to ACP's request for sanctions, this matter has been briefed extensively and this Court does not believe any further hearing is necessary. ACP's request for sanctions against BHA is granted and the Court is referring this matter to a referee to hear and report for the purpose of determining ACP's reasonable costs and attorney's fees, not to exceed \$5,000, related to their Brooklyn action. ACP's request for sanctions with respect to BHA's motion for clarification is denied.

As to BHA's allegations that Chicago Title Insurance Company ("Chicago Title") violated its duty to BHA "to make sure the chain of title was correct." Chicago Title claims that this argument is meritless. This Court agrees.

Generally, "a title company hired by one party is not, absent evidence of fraud, collusion, or other special circumstances, subject to suit for negligent performance by one other than the party who contracted for its services" (Velazquez v. Decaudin, 49 AD3d 712, 716 [2<sup>nd</sup> Dept. 2008], quoting Calamari v Grace, 98 AD2d 74, 83 [2<sup>nd</sup> Dept. 1983]; see Sabo v Alan B. Brill, P.C., 25 AD3d 420, 421 [1<sup>st</sup> Dept. 2006]). However, "[o]ne who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered 'substantial assistance' to the fiduciary in the course of effecting the alleged breaches of duty" (id., at 716, quoting Caprer v Nussbaum, 36 AD3d 176, 193 [2<sup>nd</sup> Dept 2006], citing Wechsler v Bowman, 285 N.Y. 284, 290 [1941]). "[P]rivacy is not required to assert a claim based on fraud or intentional misconduct (id.). Here, there is no allegation that the plaintiff had any relationship or contact with Chicago Title. In other words, plaintiff did not hire Chicago title. As Chicago Title, argues, the only "fraud"

alleged in this case is the purported fraud committed on this Court when it issued the original 2005 Order authorizing the sale of the properties in question (Sferlazza April 8, 2016 Opp:12). Therefore, contrary to plaintiff's claims otherwise, there was no evidence of fraud, collusion or other special circumstances on the part of Chicago Title (see id; Sabo v. Alan B. Brill P.C., 25 AD3d, at 421). Accordingly, Chicago Title's motion to dismiss it from the Kings County Action is granted and all claims against Chicago Title with respect to this case are dismissed.

Accordingly, it is ORDERED and ADJUDGED that all counts alleged by BHA against Chicago Title in the Kings County Action are dismissed with prejudice, and it is further

ORDERED and ADJUDGED that BHA is prohibited from commencing any further actions or proceedings against the parties in this matter with respect to the subject properties without prior leave of the Court until the present matter is completed, and it is further

ORDERED and ADJUDGED with respect to the remaining issues in this matter, that the matter is to be assigned to a Special Referee upon completion of the Special Referee Information Sheet and the parties are directed to complete that sheet and submit it to Room 119 at 60 Centre Street, New York, New York 10013 upon entry of this decision and order and it is further

ORDERED that the Special Referee is to hear and report on:

1. whether a fraud was committed on this Court with respect to the initial sale of the property by BUFNY; and
2. if a fraud was committed, when was the fraud discovered and was it discovered after the Statute of Limitations on fraud claims had run<sup>2</sup> and
3. if there was a fraud committed, what portion of the proceeds from the sale of the property BHA is entitled to, if anything, after all moneys owed creditors were paid?

and it is further

---

<sup>2</sup>There is a possibility that part of this whole matter may be barred by the Statute of Limitations. BHA alleges fraud. A claim of fraud, in addition to alleging that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and the other party justifiably relied upon such misrepresentation or concealment resulting in injury (Loeuis v. Grushin, 126 AD3d 761, 764 [2d Dept. 2015][internal citations omitted]), must be raised within six years from the commission of the fraud, which would have been in 2005 or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later. It appears that the fraud may have been, or should have been, discovered in 2008. If it was discovered in 2008, the aggrieved party had until 2010 to bring the instant action. However, the instant action was not commenced until 2013, which is five years later. It is well settled that while an owner who is in possession of real property need not comply with the time limitations in an action to discharge an incumbrance on his title, a person claiming title, but not in possession, must act affirmatively within the period provided by the Statute of Limitations (Welch v. Prevost Landowners, Inc., 202 A.D.2d 803, 804-805[ 3<sup>rd</sup> Dept 1994], citing Orange and Rockland Utils. v. Philwold Estates, 52 N.Y.2d 253, 261 [1981]; Ford v. Clendenin, 215 N.Y. 10, 16, 109 N.E. 124). The application of this rule to the present case is foreclosed at this time because it cannot be definitively determined on this record when the fraud was actually discovered.


ORDERED that the Special Referee also hear and report on what constitutes reasonable costs and attorney fees with respect to the Brooklyn Action commenced under Index Number 451498/2015, that was transferred by the Hon. David I. Schmidt to join the instant New York matter, and it is further

ORDERED and ADJUDGED that BHA's motion for Clarification/Reargument and Renewal is denied in its entirety, and it is further

ORDERED and ADJUDGED that any Notices of Pendencies, *Lis Pendens* or liens placed on the subject property by BHA, Willing Workers Baptist Church or Atlanticrest, Inc., in conjunction with respect to Index Number 451498/2015, transferred to this Court from Brooklyn Supreme Court by the Hon. David I. Schmidt on March 25, 2015, are vacated and removed with prejudice.

This constitutes the Decision, Order and Judgment of this Court.<sup>3</sup>

ENTER:

  
Hon. Ronald A. Zweibel, JSC

Dated: October 21, 2016

---

<sup>3</sup>The Court is annexing a copy of the Special Referee Form that the parties are to fill out for the convenience of the Parties.