

Ivry v Richards

2017 NY Slip Op 31334(U)

May 22, 2017

Supreme Court, Queens County

Docket Number: 707239/2016

Judge: Cheree A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

MOSHE IVRY,

Index No. 707239/2016

Plaintiff,

Motion

Date: November 16, 2016

-against-

Motion Cal. No. 75

CLEMENT RICHARDS, ET AL.,

Motion Sequence No. 1

Defendants.

FILED
JUN 21 2017
COUNTY CLERK
QUEENS COUNTY

The following e-file papers numbered 12-25, 29-32 submitted and considered on this pre-answer motion by defendants Yaniv Nasimi and Maor Development for an Order pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the complaint.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 12-25
Affirmation in Opposition-Affidavits-Exhibits.....	EF 29-30
Affirmation in Reply-Affidavits-Exhibits.....	EF 31-32

The motion is denied. Defendants Yaniv Nasimi and Maor Development are directed to file a verified answer within 30 days of the date of this Order served with notice of entry.

This is an action to quiet title to real property pursuant to Real Property Actions and Proceedings Law article 15. Plaintiff Moshe Ivry (hereinafter "Ivry") filed a summons and verified complaint on June 20, 2016. Ivry alleged that on October 26, 2007, he purchased real property known as and located at 123-08 Irwin Place, Jamaica New York 11435, Block 12483, Lot 0011 and that the deed to the property was duly recorded with the City Register of the City of New York on November 15, 2007. Ivry obtained a mortgage in the amount of \$337,500.00 from Washington Mutual Bank, F.A. He thereafter defaulted on the mortgage and JP Morgan Chase Bank, N.A., (hereinafter "Chase") as successor in interest to Washington Mutual Bank, F.A. commenced an action to foreclose on the mortgage, filing an action on July 15, 2009 in the Supreme Court, Queens

County titled *JP Morgan Chase Bank, N.A.* (hereinafter "Chase") *against Moshe Ivry*, under Index number 018787/2009. Chase alleged that Ivry defaulted on his mortgage as of February 1, 2009.

As a result of the default, Ivry alleged to have obtained the assistance of co-defendant Roi Yosef (hereinafter "Yosef"). Ivry and Yosef purportedly worked together to negotiate loss mitigation so that Ivry could avoid foreclosure and losing his property at a foreclosure auction. Chase subsequently agreed to a reduced payoff in satisfaction of the Mortgage to avoid the auction.

As a bonafide purchaser for value, defendant Nasimi obtained approval from Chase to purchase the property. Nasimi did not have any relationship with either Ivry or co-defendant Yosef.

In order to effectuate the short sale closing, Ivry purportedly executed a power of attorney with Yosef on November 1, 2010, naming Yosef as his principal to act on his behalf and also granted him authority to act as Ivry's attorney in fact in real estate transactions. Movants alleged that the document is also duly notarized. Ivry contended that he never signed this power of attorney. A copy of the power of attorney was duly recorded on November 4, 2010 with the City Register of the City of New York. Ivry alleged that Yosef forged his name on the power of attorney. Ivry seeks to quiet title to the subject property and void all subsequent transfers.

The short sale closing was held on November 3, 2010 and Nasimi obtained title to the premises by way of a bargain and sale deed executed by Yosef as Ivry's agent, duly recorded on November 15, 2010 with the City Register of the City of New York. The sale was approved by Ivry's bank, Chase. Nasimi alleged that he obtained title insurance as part of the short sale through EAM Land Services, Inc, and that the power of attorney was presented at the closing and the title closer also spoke to Ivry who was not able to attend the closing.

Nasimi further alleged that he deeded the subject premises to Maor, which is a corporation under his sole control. The deed was recorded with the City Register of the City of New York on November 15, 2010. The foreclosure action initiated by Chase was voluntarily discontinued on March 23, 2011 based upon Chase's acceptance of the mortgagor's request for a short sale of the mortgage. Nasimi contended that Ivry participated in the short sale and consented to it, which was acknowledged by Ivry's bank and his loan was paid off. Moreover, Ivry received a benefit as a result of the satisfaction of mortgage and all his debts and liens were paid off related to the subject mortgage as of November 3, 2010.

Maor sold the subject premises to co-defendant Clement Richards on July 14, 2011 and the deed was recorded on July 14, 2011 with the City Register of the City of New York. Movants maintained that Ivry's commencement of the action on June 20, 2016 after he knowingly sold title to the premises and received substantial benefits and therefore, the matter should be dismissed against Yaniv Nasimi and Maor Development.

Pursuant to CPLR 3211 (a) (1), a party may move for judgment dismissing one or more causes of action asserted against it on the ground that a defense is founded on documentary evidence.

The motion should only be granted if the documentary evidence submitted by the movant refutes the allegations of the complaint and establishes a defense to the matter as a matter of law (*see generally Gawrych v Astoria Fed. Sav. and Loan*, 148 AD3d 681 [2017]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). Under CPLR 3211 (a) (5), a party may move for judgment dismissing one or more causes of action on the ground that the cause of action cannot be maintained because the statute of limitations has expired, and the movant must make a prima case that the time in which to commence the action has now elapsed (*see generally Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193 [2d Dept 2017]). A party may move for judgment dismissing one or more causes of action asserted against it in on grounds that the pleading fails to state a cause of action (*see CPLR 3211 [a] [7]; Leon v Martinez*, 84 NY2d 83 [1994]). In determining a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, the facts as they are alleged are accepted as truthful and the “proponent of the pleading is given the benefit of every favorable inference (*Bank of America, N.A. v 414 Midland Ave. Assocs, LLC*, 78 AD3d 746 [2d Dept 2010]).

In opposition, Ivry maintained that there is no basis for the Court to grant the requested relief. Ivry alleged that he did not know that Yosef or someone working for him forged his name on the power of attorney and as a result, he is of the belief that he has stated a valid claim for quiet title. Moreover, the documents submitted by the movants are signed by Yosef only or falsely on his behalf. He was unaware of what transpired with the property because he was living in Israel and never gave Yosef the authority to sell the subject property. Moreover, based upon duly recorded documentation, Ivry purchased the property for \$375,000.00; Nasimi bought the property for \$160,000.00 and then transferred the property to Maor for no consideration, then Maor sold the property to defendant Clement Richards for \$370,000.00. Ivry seeks to also disgorge all profits earned by defendants that flow from the voided transfer of title.

In reply, movants repeated the sentiments contained in the moving papers.

The documents submitted by movants failed to establish a defense as a matter of law. Genuine issues of fact surround the validity of the power of attorney purportedly executed between Ivry and Yosef. “If a signature on a power of attorney is forged, the document executed by the purported attorney-in-fact pursuant to the power of attorney is void. If documents purportedly conveying a property interest are void, they convey nothing, and a subsequent bona fide purchaser or bona fide encumbrancer for value receives nothing. A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid” (*First Nat. Bank of Nevada v Williams*, 74 AD3d 740 [2d Dept 2010]; *see also Davis v Dunnet*, 239 NY 338 [1925]; *Deramo v Laffey*, __ AD3d __, 2017 NY Slip Op 02772 [2d Dept 2017]; *Cox v Cox*, 112 AD3d 875 [2d Dept 2013]; *Countrywide Home Loans, Inc. v United Gen. Title Ins. Co.*, 109 AD3d 950 [2d Dept 2013]; *ABNAMRO Mtge. Group Inc., v Stephens*, 91 AD3d 801 [2d Dept 2012]; *GMAC Mtge. Corp. v Chan*, 56AD3d 521 [2d Dept 2008]). Whether or not Ivry was aware of the potential fraud is a triable issue of fact which cannot be resolved on this motion (*Hoffman v Kraus*, 260 AD2d 435 [2d Dept 1999]. Additionally, “Real Property Law § 266 does not protect a bona fide purchaser or encumbrancer for value where there is fraud in the factum, as the deed is void and conveys no title” (*see Williams v Mentore*, 115 AD3d 664 [2d Dept 2014]).

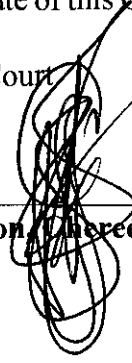
The action which plaintiff Moshe Ivry seeks to quiet title is governed by a ten year statute of limitations (*see* CPLR § 212 [a]; *Elam v Altered Ego Realty Holding Corp.*, 114 AD3d 901 [2d Dept 2014]). Ivry has sufficiently pled that he was in possession of the subject property within ten years of the commencement of the action. Thus, the Court finds that the matter has been timely commenced (*see* CPLR 3211 [a] [5]).

The Court finds that plaintiff has pled a claim to quiet title to the subject property sufficient to withstand this motion to dismiss.

Therefore, the motion is denied. Defendants Yaniv Nasimi and Maor Development are directed to file a verified answer within 30 days of the date of this Order served with notice of entry.

This constitutes the decision and Order of the Court

Dated: May 22, 2017



Hon. Chereé A. Buggs, JSC

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