

<b>Fernandez v Polacios</b>
2017 NY Slip Op 32209(U)
September 26, 2017
Supreme Court, Queens County
Docket Number: 715268/2016
Judge: Thomas D. Raffaele
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13  
Justice

RODRIGO A. FERNANDEZ, x  
Plaintiff,

Index  
Number 715268 2016

-against-

Motion  
Dates: 4/5/17 Seq. Nos 3 and 4  
5/22/17 Seq. No. 5  
7/27/17 Seq. No. 6

ANGEL POLACIOS, FRANCIS Y. RUIZ,  
HYPOTHECA CAPITAL, LLC, NORALMA  
VECILLA, GENESIS REYES INC., HUGO  
AREVALLO, CLEAR TITLE AGENCY OF  
NEW YORK CORP., BLACKACRE TITLE  
AGENCY CORP.,

Defendants.

x

The following papers numbered 1 to 28 read on these four motions: (1) by defendant, Genesis Reyes, Inc. (Genesis) (Seq. 6), seeking leave to reargue a previous motion, pursuant to CPLR 2221 (d), and, upon reargument, denying the preliminary injunction and vacating the Civil Court stay from January 10, 2017; (2) by defendant, Frances Ruiz (Seq. 3), seeking dismissal of the First and Third causes of action as against her, pursuant to CPLR 3211 (a) (1) and (5); and (3) by defendant, Hugo Arevalo (Seq. 4), seeking dismissal of the action as against him, pursuant to CPLR 3211 (a) (5) and (7); and (4) by defendant Genesis (Seq. 5) seeking an order dismissing the first, second fourth and fifth causes of action based upon documentary evidence.

Papers  
Numbered

Notices of Motion - Affirmations - Affidavit - Exhibits .....	1-15
Answering Affirmations - Affidavit - Exhibits.....	16-24
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Upon the foregoing papers, it is ordered that the four above-mentioned motions are consolidated for the purpose of a decision and are decided as set forth herein.

Plaintiff commenced this action to “rescind” three deeds to property located in South Ozone Park, New York, based upon “fraud”, contending, among other things, that the subject deeds contained forged signatures. A previous order of this court, dated May 31, 2017, granted plaintiff’s motion for a preliminary injunction, enjoining the eviction proceeding in Civil Court, Queens County, and continuing the stay issued therein.

Defendant, Genesis, submitted its instant motion, pursuant to CPLR 2221 (d), seeking leave to reargue the May 31, 2017 order granting plaintiff a preliminary injunction, maintaining that the court was mistaken in its interpretation of the facts, with regard to plaintiff’s likelihood of success on the merits, and on the law, with regard to the necessity of an undertaking when a preliminary injunction is granted, in the prior decision (*see Rodriguez v Gutierrez*, 138 AD3d 964 [2016]; *Markovic v J&A Realty, LLC*, 124 AD3d 846 [2014]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939 [2014]; *Ahmed v Pannone*, 116 AD3d 802 [2014]).

This motion is denied. Movant has failed to establish that the court overlooked or misapprehended the relevant facts, and/or misapplied any controlling principle of law, as required by CPLR 2221 (d) (*see Hackshaw v Mercy Medical Center*, 139 AD3d 798 [2016]; *Vaccariello v Meineke Car Care Center, Inc.*, 136 AD3d 890 [2016]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888 [2015]).

However, the court’s May 31, 2017 order is hereby modified, *sua sponte*, solely to the extent of requiring plaintiff to post bond in the amount of \$100,000.00 within thirty days of service of a copy of this order with notice of entry on plaintiff and his counsel (*see* CPLR 6312 (b); *Mobstub, Inc. v www.staytrendy.com.* – AD3d –, 2017 N. Y. Slip Op. 06265 [2d Dept. 2017]; *Gerstner v Katz*, 38 AD3d 835 [2007]). The branch of Genesis’ motion seeking use and occupancy from plaintiff, pursuant to RPAPL § 745 (2) (a) and the cited Civil Court case, is denied as such statute and case law are not controlling in the instant matter.

Defendant, Arevalo, a notary public, moved to dismiss the complaint as against him (Seq. 4), and defendant, Frances Ruiz, a/k/a Frances Yetta Ruiz, apparently also known as Frances Newman Ruiz, an attorney, moved to dismiss the First and Third Causes of Action in plaintiff’s complaint as against her (Seq. 4), both asserting, among other things, that plaintiff’s action, based as it is on the grounds of fraud, was untimely commenced, and should be dismissed, pursuant to CPLR 3211 (a) (5). Defendant Genesis also moves for an order, pursuant to CPLR Sections 3211(a)(1)(5) and (7),

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dismissing the first, second, fourth and fifth causes of action in the complaint on the basis of documentary evidence, statute of limitations and failure to state a cause of action.

The statute of limitations for a fraud cause of action is “the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it” (CPLR 213 [8]; 203 [g]). On a motion to dismiss on statute of limitations grounds, the moving defendant has the initial burden of establishing that the time permitted to commence the action has expired, and, upon doing so, the burden shifts to the plaintiff to raise a question of fact as to timely service, or tolling, or inapplicability of the statute (*see Cannariato v Cannariato*, 136 AD3d 627 [2016]; *Coleman v Wells Fargo & Co.*, 125 AD3d 716 [2015]).

“A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence” (*Coleman v Wells Fargo & Co.*, 125 AD3d at 716, quoting *Town of Poughkeepsie v Espie*, 41 AD3d 701, 705 [2007]). “The burden of establishing that the fraud could not have been discovered before the two-year period prior to the commencement of the action rests on the plaintiff, who seeks the benefit of the exception” (*Lefkowitz v Appelbaum*, 258 AD2d 563, 563 [1999]; *see Celestin v Simpson*, – AD3d –, 2017 N. Y. Slip Op. 06153 [2d Dept. 2017]). In the case at bar, there are questions of fact, specifically but not limited to whether plaintiff could reasonably have been expected to have discovered the alleged fraud within the applicable statute of limitations. The papers submitted herein are replete with inconsistencies and a hearing is necessitated to assess the credibility of the parties and determine what exactly transpired with the subject deed.

Therefore, a hearing shall be held in Part 13, courtroom 26 of this court on Friday, November 13, 2017 at 9:30 A.M. to determine the facts and circumstances surrounding the transfer of the subject deed and all issues raised in the motion papers and opposition. All parties shall be present along with all necessary witnesses.

Accordingly, the motion by defendant, Genesis Reyes, Inc. (Seq. 6), seeking leave to reargue the previous motion, pursuant to CPLR 2221 (d), is denied, except as modified by the requirement that plaintiff post a bond, as aforementioned. The motions by defendant, Frances Ruiz (Seq. 3), seeking dismissal of the First and Third Causes of Action as against her, pursuant to CPLR 3211 (a) (5), is held in abeyance pending the determination at the hearing. Similarly, the motion by defendant, Hugo Arevalo (Seq. 4), seeking dismissal of the action as against him, pursuant to CPLR 3211 (a) (5), is held in abeyance pending the determination at the hearing. Also, the motion to dismiss the


[\*4]

complaint based upon documentary evidence by Genesis (Seq. 5) is held in abeyance pending the determination at the hearing.

There shall be no adjournments entertained, absent exigent circumstances.

The foregoing constitutes the decision and order of this court.

Dated: September 26, 2017



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Thomas D. Raffaele, J.S.C.

FILED  
OCT - 9 2017  
COUNTY CLERK  
QUEENS COUNTY