

<b>Frater v Lawson-Calder</b>
2018 NY Slip Op 33964(U)
March 14, 2018
Supreme Court, Nassau County
Docket Number: 603324/17
Judge: Julianne T. Capetola
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At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 14<sup>th</sup> day of March 2018

P R E S E N T:

HON. JULIANNE T. CAPETOLA  
Justice of the Supreme Court

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NORMAN FRATER,

Plaintiff,

**DECISION AND  
ORDER ON MOTION**

Index No: 603324/17

Motion Sequence: 002



- against -

JANET LAWSON-CALDER,

Defendant.



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The following papers were read on this Motion:

Plaintiff's Notice of Motion and Supporting Documents and Memorandum of Law

Defendant's Affirmation in Opposition

Plaintiff's Reply Affirmation

Plaintiff in this civil action has moved by notice of motion for an order pursuant to CPLR §3211(a)(1), (5), and (7) dismissing Defendant's counterclaims and pursuant to CPLR §3211(b) dismissing the affirmative defenses. Defendant has opposed the motion, Plaintiff has replied, and the motion was deemed submitted February 20, 2018.

The underlying action was commenced by the Plaintiff by Summons and Complaint, and relates to a series of deed transfers. In 2007, Defendant owned a residential property (hereinafter the "Subject Property") subject to a mortgage which was in foreclosure. Plaintiff purchased the property subject to said mortgage and Defendant executed a deed to Plaintiff dated October 2, 2007 which was recorded October 23, 2007 (hereinafter the "2007 Deed"). Defendant claims that the parties simultaneously executed a contract titled a "Sales Agreement, Hold Harmless and Indemnification". Though Plaintiff refers to same as an "alleged contract", Plaintiff does not dispute the existence thereof nor his signature thereon. In that document (hereinafter the "Sales Agreement") Plaintiff agreed, amongst other things, to pay off the mortgage within two years from the date of closing and to keep the Subject Property "in good order including repairs, necessary improvements, lawn care, etc." and that "in the event purchaser fails or refuses to comply

with any of the terms and conditions herein, he represents, warrants and covenants that he will immediately re-transfer the property back to the seller or her successors and/or assigns for no consideration". Defendant further claims that, in 2009 the parties entered into an Amendment to Agreement (hereinafter the "2009 Amendment") wherein the time for Plaintiff to payoff the mortgage was extended to October 19, 2012. Plaintiff denies the validity of the 2009 Amendment, which is neither dated nor notarized, based on his allegation that his signature thereon is a forgery.

Plaintiff claims that, on June 6, 2016, Defendant, through a fraudulently executed deed bearing his forged signature, conveyed the Subject Property back to herself (hereinafter the "2016 Deed") and thereafter rented the Subject Property for profit. Plaintiff commenced the underlying action alleging six causes of action. Plaintiff claims the 2016 Deed is *void ab initio*, he claims conversion, that he is entitled to an accounting of the rents and profits Defendant has accrued since the unlawful conveyance, unjust enrichment, and seeks punitive damages and attorney's fees.

Defendant has counter-claimed for the following relief: a declaratory judgment declaring the 2007 Deed defective and *void ab initio*, or, in the alternative, declaring that Plaintiff held the Subject Property in a constructive trust for Defendant and fraudulently induced Defendant to execute the 2007 Deed in Plaintiff's favor, breach of contract with regard to the Sales Agreement and 2009 Amendment, specific performance in the form of the return of the re-conveyance of the property to Plaintiff, and fraud.

It must be noted that this is the second motion seeking the same relief. The first was denied with leave to renew inasmuch as Plaintiff had failed to name necessary parties, and that defect has now been corrected. Therefore, the Court entertains the instant motion anew.

In determining a motion for dismissal pursuant to CPLR §3211(a)(7), "the court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated". *Board of Education v. County of Westchester*, 282 A.D.2d 561 (2d. Dept. 2001). A motion to dismiss for failure to state a cause of action "cannot be sustained simply by showing that facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that material facts are only argumentatively averred. The pleading may be deficient in technical language or in logical statement, but, as against a demurrer or a motion of this character at the trial, the pleading will be deemed to allege whatever can

be implied from its statements by fair and reasonable intendment”. *Kain v. Larkin*, 141 N.Y. 144 (N.Y.C.A. 1894).

The underlying complaint alleges five causes of action, which will be addressed individually:

*First and Second Causes of Action: Declaratory Judgments*

“RPAPL 1501(1) provides that any person who “claims an estate or interest in real property” may “maintain an action against any other person ... to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, ... the defendant might make.” 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 (see *Matter of Marini*, 119 A.D.3d 584, 585, 989 N.Y.S.2d 487; *Jiles v. Archer*, 116 A.D.3d 664, 666, 983 N.Y.S.2d 283; *ABN AMRO Mtge. Group, Inc. v. Stephens*, 91 A.D.3d 801, 803, 939 N.Y.S.2d 70; *First Natl. Bank of Nev. v. Williams*, 74 A.D.3d 740, 742, 904 N.Y.S.2d 707; *GMAC Mtge. Corp. v. Chan*, 56 A.D.3d 521, 522, 867 N.Y.S.2d 204; *Cruz v. Cruz*, 37 A.D.3d 754, 832 N.Y.S.2d 217)”. *Deramo v. Laffey*, 149 A.D.3d 800 (2d. Dept. 2017).

With regard to the first cause of action which seeks a declaratory judgment declaring the 2007 Deed *void ab initio*, Plaintiff first argues that he has a defense predicated upon documentary evidence to refute these counterclaims inasmuch as the 2007 Deed exists and Defendant does not claim same to be a forgery, negating any claim that said deed is void at its inception. He further argues that, by contrast, the allegation that same was procured by fraudulent inducement or fraudulent means would render the 2007 Deed voidable, not void, which gives the deed legal effect until it is set aside, and even if the deed were determined to be voidable, the statute of limitations has run requiring the dismissal of the first counterclaim.

Pursuant to CPLR §213(8), as it relates to a cause of action based upon fraud, “the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it”.

. As it relates to the second counterclaim which seeks a declaratory judgment that the subject property was held in constructive trust by Plaintiff, Plaintiff argues that Defendant has failed to set forth the elements of such a claim and, in any event, the statute of limitations has run on that cause of action as well.

Plaintiff cited the matter of *Sharp v. Kosmalski* in support of their argument that Defendant has failed to set forth the elements of a cause of action for constructive trust, which states in relevant part,

“In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment (see *Janke v. Janke*, 47 A.D.2d 445, 366 N.Y.S.2d 910, *affd.* 39 N.Y.2d 786, 385 N.Y.S.2d 286, 350 N.E.2d 617; *Vassel v. Vassel*, 40 A.D.2d 713, 336 N.Y.S.2d 887, *affd.* 33 N.Y.2d 533, 347 N.Y.S.2d 434, 301 N.E.2d 422; *Foreman v. Foreman*, 251 N.Y. 237, 167 N.E. 428; *Sinclair v. Purdy*, 235 N.Y. 245, 139 N.E. 255; *Ahrens v. Jones*, 169 N.Y. 555, 62 N.E. 666; *Matter of O'Hara*, 95 N.Y. 403)”. Most frequently, it is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust (see *Bogert, Trusts and Trustees* (2d ed.), s 482, p. 132; 61 N.Y.Jur., *Trusts*, s 146, pp. 303—304)”. 40 N.Y.2d 119 (1976).

Plaintiff argues that Defendant has not alleged a confidential or fiduciary relationship of any kind between the parties, and that the transaction was nothing more than arms length in nature.

Further, Plaintiff argues that the same six year statute of limitations applies to an action to impose a constructive trust.

“An action to impose a constructive trust is governed by the six-year Statute of Limitations provided by CPLR 213(1), which ‘commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered’ (*Mattera v. Mattera*, 125 A.D.2d 555, 556–557, 509 N.Y.S.2d 831)”. *Mazzone v. Mazzone*, 269 A.D.2d 574 (2d. Dept. 2000).

Defendant, in her opposition, which includes an affirmation from counsel, and the same affidavit she submitted in connection with original motion on this matter which was dated July 27, 2017, contains no arguments whatsoever as it relates to the causes of

action which seek declaratory judgments. Accordingly, those counterclaims shall be dismissed.

Third Cause of Action: Breach of Contract  
Fourth Cause of Action: Specific Performance

“The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach”. *Dee v Rakower*, 112 A.D.3d 204 (2d. Dept. 2013).

Pursuant to CPLR §213(2), the statute of limitations for a cause of action sounding in breach of contract is six years.

Defendant alleges in her answer that Plaintiff breached the 2007 Sales Agreement and the 2009 Amendment by “failing to keep the mortgage current, keep the property in good repair and making payments to the [Defendant]”. Defendant’s answer contains no further specificity with respect to the alleged breaches including dates of the alleged breaches. However, in her opposition papers, Defendant states that “On January 9, 2009, NORMAN FRATER received a violation form [sic] the Town of Hempstead Department of Buildings for ‘illegal occupancy/construction without a permit and storage of a vehicle’ at the Subject Premises”, that “On March 5, 2009, NORMAN FRATER received a violation form [sic] the Town of Hempstead Department of Buildings for construction without a permit on the second floor of the Subject Premises”, that “On July 1, 2015, JANET CALDER received notice from the servicer on her loan, Bank of America, that not only did NORMAN FRATER not liquidate the mortgage, as promised in the ‘2007 Agreement with Amendment’ referenced above (please see Exhibit ‘D’), but he had also not paid made any payments [sic] since February 11, 2009” and that “On October 21, 2014, the New York Mellon Bank, the current holder of the note and mortgage for the Subject Property, commenced litigation against both JANET LAWSON-CALDER and NORMAN FRATER”.

Plaintiff argues in their motion papers that Defendant’s pleadings with respect to this cause of action are insufficient in that they fail to allege with any specificity the terms of each contractual document that are alleged to have been breached nor has she specified any specific damages to which she claims entitlement. Plaintiff has also argued that the 2009 Amendment does not constitute a contract and that, in any event, the claim is time-barred.

. At the outset the Court must take note of the fact that the answer is devoid of any details whatsoever with respect to specific breaches, and the fact that this is the second time this motion was filed, and the fact that the complaint was amended since the filing of the prior motion giving Defendant an opportunity to amend her answer which she chose not to do which renders her claim insufficiently plead. In addition thereto, according to Defendant's own admissions in her opposition papers, the specific breaches she alleges are, in fact time-barred. Defendant claims that Plaintiff failed to comply with the contract in that he failed to properly maintain the property and cites violations from the Town of Hempstead Department of Buildings from 2009 which would mean that any claim arising therefrom would have been subject to a statute of limitations which expired in 2015. Further, Defendant claims that Plaintiff failed to keep the mortgage current pursuant to the terms of the contract, and that she was named as a defendant in a foreclosure lawsuit in 2014 wherein it was alleged that the mortgage payments were defaulted on in 2009, which would also be subject to a 2015 statute of limitations. Inasmuch as Defendant concedes she was named in the lawsuit in 2014, she had ample time to have commenced suit against Plaintiff at that time.

Accordingly, the claim for breach of contract is both insufficiently plead and time-barred and must therefore be dismissed. Further, inasmuch as the breach of contract claim cannot be sustained, the specific performance claim which is predicated upon Defendant's success on the breach of contract claim must be dismissed.

*Fifth Cause of Action: Fraud*

“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*, 88 N.Y.2d 413 (N.Y.C.A. 1996).

As noted above, CPLR §213(8) states that, with respect to cause of action sounding in fraud, “the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it”.

“When a plaintiff brings a cause of action based upon fraud, ‘the circumstances constituting the wrong shall be stated in detail’ (CPLR 3016 [b]). ‘The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of,’ thus, ‘[w]e have cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud’ (Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d 486, 491, 860 N.Y.S.2d 422, 890 N.E.2d 184 [2008] [internal quotation marks and citation omitted] ). What is ‘[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action,’ and although under CPLR 3016(b) ‘the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud’ (id. at 492, 860 N.Y.S.2d 422, 890 N.E.2d 184). ‘Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct’ (id.). On a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems (Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994] )”. *Sargiss v. Magarelli*, 12 N.Y.3d 527 (2009).

The Defendant’s counterclaim simply states “That the plaintiff/defendant on the counterclaim has acted with fraudulent and criminal intent to deprive and scam the defendant/plaintiff on the counterclaim of her rightful ownership of the subject property”. The answer is devoid of specificity of any kind. Further, Defendant’s counsel’s affirmation in support of their opposition papers makes no mention of the fraud claim, and Defendant’s own July 2017 affidavit shines no light on specific allegations of fraud. Accordingly, the claim is insufficient and must be dismissed.

#### *Affirmative Defenses*

With respect to Defendant’s affirmative defenses, as they are stated in her answer they consist of nothing more than bare, conclusory allegations unsupported by any specific facts or evidence. Further, Defendant has made no specific reference whatsoever to her affirmative defenses in her opposition papers. With no specificity or evidentiary support whatsoever, the defenses must be dismissed.

In light of the forgoing, it is hereby:

ORDERED, that Plaintiff's motion is hereby granted in its entirety and all of Defendant's counter-claims and affirmative defenses are hereby dismissed.

Plaintiff shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

**ENTER**

Dated:

March 14, 2018

  
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HON. JULIANNE T. CAPETOLA  
J.S.C.

**ENTERED**

MAR 23 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE