

Deutsche Bank Natl. Trust Co. v Point Holding Alpha LLC
2020 NY Slip Op 31635(U)
May 22, 2020
Supreme Court, Kings County
Docket Number: 511835/2018
Judge: Lawrence S. Knipel
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of May, 2020

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE
LOAN TRUST SERIES 2006-FF1, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2006-FF1,

Plaintiff,

- against -

Index No. 511835/2018

POINT HOLDING ALPHA LLC, DYCK-O'NEIL, INC.,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, CRIMINAL COURT OF THE CITY OF NEW
YORK, CONSOLIDATED EDISON CO., OF NEW YORK,
INC., NEW YORK CITY DEPARTMENT OF TAXATION
AND FINANCE, AND "JOHN DOE #1", THROUGH
"JOHN DOE #10", THE LAST TEN NAMES BEING
FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, THE
PERSON OR PARTIES INTENDED BEING THE PERSONS OR
PARTIES, IF ANY, HAVING OR CLAIMING AN INTEREST IN
OR LIEN UPON THE MORTGAGED PREMISES DESCRIBED
IN THE COMPLAINT,

Defendants.
-----X

The following papers numbered 1 to 5 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____

Papers Numbered

1, 2
3

Reply Affidavits (Affirmations)_____	4_____
_____Affidavit (Affirmation)_____	_____
Other Papers <u>Memorandum of Law</u> _____	5_____

Defendant Point Holding Alpha LLC (Point Holding) moves, in IAS Motion Sequence No. 1 to dismiss the complaint as time barred and to cancel the Notice of Pendency. Plaintiff cross-moves in IAS Motion Sequence No. 3, for leave to amend its complaint to add a cause of action, set aside the deed to Point Holding on the ground of actual fraud, and to add Jorge Velazquez as a party defendant.

On October 13, 2005, Jorge Velazquez signed a note promising to pay First Franklin the sum of \$448,000 with interest. The loan was secured by a mortgage in favor of First Franklin and signed by Velazquez, on premises located at 24 Roosevelt Place, in Brooklyn. The Note provides that if all or any part of the property was sold or transferred, without lender's prior written consent, lender may require immediate payment, or, under certain circumstances, might consent to the loan assumption.

By deed dated January 28, 2007, Velazquez transferred the property to Point Holding. The deed was apparently recorded in or about March 2007. On January 16, 2008, Velazquez filed for bankruptcy. The subject property is listed on Schedule A of the bankruptcy filing, with the following explanation: "Property was Transferred in March 2007 to Point Holding Alpha LLC who said that they would help Debtor." An order of discharge of the Bankruptcy Court is dated April 30, 2008.

Deutsche Bank commenced an action against Velazquez on August 23, 2006 (Index No. 25413/06). By order dated June 25, 2012, after the parties failed to appear at a conference, this court (Kramer, J.) dismissed the action for no appearance either side. By stipulation dated March 6, 2013, and entered April 10, 2013, the action was discontinued without prejudice.

The instant action against Point Holding was commenced on or about June 4, 2018.

In this motion, Point Holding argues that since the entire mortgage debt was accelerated by Deutsche Bank when it commenced the prior action against Velazquez on August 23, 2006, the action commenced against Point Holding is unquestionably time-barred unless plaintiff can prove its prior acceleration had been affirmatively revoked and the mortgage reinstated prior to the statute of limitations. Here, it is argued, the prior acceleration was not revoked by any affirmative act when the action was dismissed for nonappearance in June 2012. In addition, the Stipulation of Discontinuance was filed April 10, 2013, more than six years after the statute of limitations expired. In any event, it is contended, a voluntary discontinuance does not, without more, constitute a revocation of the election to accelerate.

Plaintiff opposes the motion and cross-moves to amend its complaint to allege fraud since the transfer “was fraudulent as to plaintiff” and plaintiff should be allowed to prove the fraud. Plaintiff contends that discovery is needed to explore the relationship between Velazquez and Point Holding, whether there was a written agreement between them, and whether Point Holding agreed to pay the mortgage. Plaintiff contends that Point Holding has not proven prima facie that the statute

of limitations expired, since the complaint was not verified and the statement therein that plaintiff elected to call due the entire amount of the mortgage was unsworn.

Plaintiff further argues that its motion for leave to amend should be granted since the allegations of fraud are not palpably insufficient to state a cause of action. There was a close relationship between the parties, plaintiff alleges, the transfer was questionable, the consideration inadequate, and Velazquez continued to hold himself out as the owner of the property.

Plaintiff alleges that it was not until Point Holding made its motion to dismiss that plaintiff learned of the facts giving rise to the fraud claim.

Point Holding argues in reply that the complaint was, in fact, verified, even if such was needed, which does not appear to be the law in the Second Department. Further, it is contended, nothing plaintiff can discover would change the undisputed fact that the instant action was commenced nearly 12 years after plaintiff accelerated the mortgage debt in the prior action. In addition, it is argued, the cross motion should be denied since it is patently devoid of merit. Plaintiff's purported cause of action accrued on January 28, 2007, when the deed to Point Holding was executed, or at the latest on March 7, 2007 when it was recorded, and this action is clearly time barred. Moreover, it is contended, the allegations made by plaintiff, upon information and belief, fall far short of the specificity necessary to properly state a cause of action for actual fraud. Plaintiff's rights were impaired by its own actions including its neglect to prosecute rather than by an alleged fraudulent conveyance.

A cause of action for actual fraud based on a fraudulent conveyance is governed by the six year statute of limitations for causes of action sounding in fraud. Where actual fraud is alleged, the statute of limitations is six years from the fraudulent transfer or two years from the time the fraud was discovered or could have been discovered with reasonable diligence (see CPLR 213[8]; *Bobash Inc. v Festinger*, 57 AD3d 464 [2d Dept. 2008]; *Island Holding LLC v O'Brien*, 6 AD3d 498 [2d Dept. 2004]; *cf. Ehrler v Cataffo*, 42 AD3d 424 [2d Dept. 2007]).

Here, the purported fraudulent transfer occurred on January 28, 2007, and the transfer was recorded on March 7, 2007. Velazquez' bankruptcy filing listed the subject property and the conveyance and the consideration, \$2000. Plainly, plaintiff knew or should have known of the alleged fraud many years before it commenced this action. Plaintiff's assertion that it was unaware of the possible fraud until July 2018 is belied by the record, unconvincing, and without merit. Plaintiff's proposed claim is clearly time barred. Moreover, plaintiff cannot even articulate the alleged fraud, and, after so many years, now wants to engage in discovery to find justification for its claim. The proposed amendment is palpably insufficient.

Accordingly, plaintiff's cross motion for leave to amend the complaint is denied. Point

Holding's motion to dismiss the complaint and to cancel the notice of pendency is granted.

Settle order on notice.

E N T E R,

J. S. C.

Hon. Lawrence Knipel