

<b>Mojumder v 300 Malcolm X LLC</b>
2020 NY Slip Op 31636(U)
May 22, 2020
Supreme Court, Kings County
Docket Number: 512090/16
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 22<sup>nd</sup> day of May, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

-----X

JAKIR H. MOJUMDER,  
Plaintiff,

- against -

300 MALCOLM X LLC,  
Defendant.

-----X

300 MALCOLM X LLC,  
Third-Party Plaintiff,

- against -

MOJIBUR RAHAMAN D/B/A R & S GENERAL  
CONSTRUCTION,

Third-Party Defendants.

-----X

The following papers numbered 1 to 8 read on this motion:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
  
Reply Affidavits (Affirmations) \_\_\_\_\_  
  
Memos of Law \_\_\_\_\_

Papers Numbered

1, 2, 3  
4, 5  
  
6  
  
7, 8

Defendant 300 Malcolm X LLC moves (Motion Sequence 5) for summary judgment dismissing the complaint, and plaintiff cross-moves (Motion Sequence 6) for leave to serve an amended supplemental bill of particulars.

Plaintiff commenced this action to recover money damages for injuries allegedly sustained as a result of defendant's negligence and violations of Labor Law § 200, 240(1) and 241(6). Defendant contends, *inter alia*, that plaintiff was not a person employed within the ambit of the Labor Law, defendant was not an owner within the meaning of the Labor law, and defendant was not negligent.

Defendant contends that third-party defendant was retained to perform exterior work on defendant's building, that the exterior work was completed by 2014, and that all work was completed by early 2015. Plaintiff's alleged injuries were sustained in June 2016. Plaintiff was apparently assisting third-party defendant on some touch-up work. Whether plaintiff was an employee within the ambit of the Labor Law, whether plaintiff was an employee altogether, whether third-party defendant was acting within the ambit of the Labor Law, what exactly they were touching up and what exactly happened to cause plaintiff's alleged injuries, are just some of the heavily contested questions of fact that are raised in this motion. Defendant's managing member avers he "mentioned" to third-party defendant on the street two years after work was completed that small spots had appeared on the rooftop cornices, and that "the issue is that the paint apparently had not fully adhered to the new sheet metal that was installed." This, too, raises a question of fact, whether the owner - contractor

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

stature 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.

ENTER,

J. S. C.

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Hon. Lawrence Krüpel