

Izqtierdo v Walter McDowell Jr. Estate
2020 NY Slip Op 33654(U)
September 25, 2020
Supreme Court, Queens County
Docket Number: 716570/2018
Judge: Pam Jackman Brown
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NEW YORK SUPREME COURT - COUNTY OF QUEENS

FILED

IAS PART 19

**9/28/2020
9:30 AM**

SHORT FORM ORDER

**COUNTY CLERK
QUEENS COUNTY**

Present: Hon. Pam Jackman Brown, JSC

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ALMANDO IZQLTIERDO,

Index No.: 716570/2018

Plaintiff,

Motion Date: 9/14/2020

-against-

Cal. No.: 18

**WALTER MCDOWELL JR. ESTATE,
and WALTER MCDOWELL III,**

Mot. Seq. No.: 006

Defendant.

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Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 37 through 43 read on this motion by Non-party, Ronfayzi, Inc. for an Order: (1) pursuant to CPLR § 2221(d), granting leave to reargue this Court's Decision and Order dated May 5, 2020, and upon reargument; (2) Pursuant to CPLR § 1012 or § 1013, allowing Ronfayzi, Inc. leave to intervene in this action; (3) Pursuant to CPLR § 1018 or § 3025, amending the complaint to include Ronfayzi, Inc.; (4) Pursuant to CPLR § 3211(a)(5) or CPLR § 1013, dismissing the instant complaint.; and (5) granting further relief as this Court deems appropriate.

	<u>PAPERS E-FILE NUMBERED</u>	
	Papers	Exhibits
Notice of Motion- Affidavits, Affirmations, Exhibits and Memorandum of Law Annexed	37 - 38	39 - 43

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

By summons and complaint dated October 30, 2018, Plaintiff commenced the

instant action against Defendant Estate of Walter McDowell, Jr., and Defendant Walter McDowell III, alleging fraud by Deceased Defendant, Walter McDowell Jr. in the transfer of various properties and monetary accounts. Plaintiff, also, commenced a similar action against, Non-Party, Ronfayzi, Inc. (hereinafter referred to as "Ronfayzi") by summons and complaint dated December 27, 2018, under Index number 719804/2018, also alleging fraud, among other allegations. Plaintiff's complaint against Ronfayzi was subsequently dismissed on February 13, 2020. By Order to Show Cause dated October 18, 2019, Ronfayzi moved to intervene as a Defendant in this action pursuant to CPLR § 1012, CPLR §1013, and pursuant to CPLR § 3211(a) to dismiss the complaint, which was subsequently denied. Ronfayzi submits the herein motion to reargue and upon reargument, allowing Ronfayzi leave to intervene in this action; allowing the complaint to be amended to include Ronfayzi; and to dismiss the instant complaint.

A motion to reargue may be brought where "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*Schneider v. Solowey*, 141 AD2d 813 [2nd Dept 1988]; see, CPLR § 2221[d]; *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 AD3d 1106 [2nd Dept 2017]; *Ahmed v. Pannone*, 116 AD3d 802 [2nd Dept 2014].)

Upon a timely motion, a person is permitted to intervene in an action as of right, among other things, "when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment" (CPLR § 1012[a][3]; see *Matter of Sclafani Petroleum, Inc.*, 173 AD3d 1042 [2d Dept 2019]; *Global Team Vernon, LLC v. Vernon Realty Holding, LLC*, 93 AD3d 819, 820 [2d Dept 2012]). Additionally, the court, in its discretion, may permit a person to intervene, among other things, "when the person's claim or defense and the main action have a common question of law or fact" (CPLR § 1013; see *Roman Catholic Diocese of Brooklyn, N.Y. v. Christ the King Regional High Sch.*, 164 AD3d 1394, 1396 [2d Dept 2018] ; *Trent v. Jackson*, 129AD3d 1062 [2d Dept 2015]).

The motion for leave to reargue is granted. The Court's decision dated May 5, 2020 is vacated. Ronfayzi, Inc. filed its motion to intervene within the one-year period following service of the summons and complaint. Specifically, the Summons and Complaint were filed on October 30, 2018 and per the affidavit of service, Defendants were served on November 1, 2018 by substitute service. Ronfayzi, Inc. filed their motion to intervene on October 18, 2019. As such the motion to intervene was timely.

Ronfayzi also seeks to be added to the complaint pursuant to CPLR § 1018 and CPLR § 3025. CPLR § 1018 states that, "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action."

Here, Ronfayzi purchased the premises from the Defendants on May 20, 2016,

acquiring all rights afforded with said purchase. As Plaintiff's complaint alleges the fraudulent transfer of the property and seeks to recover "... properties, money from bank accounts and life insurance that both defendants fraudulently obtained," Ronfayzi may be adversely effected by any judgment rendered. As such, the portion of the motion seeking to amend the complaint to add Ronfayzi as a Defendant in this action is granted.

To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. *Bailey v. Peerstate Equity Fund, L.P.*, 126 A.D.3d 738, 740 [2015]. Only then does the burden shift to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action or interposed the subject cause of action within the applicable limitations period. *Id.* at 740 citing *J.A. Lee Elec., Inc. v. City of New York*, 119 AD3d 652, 653, 990 NYS2d 223 [2014]; *Reid v. Incorporated Vil. of Floral Park*, 107 AD3d 777, 778, 967 NYS2d 135 [2013]; *Williams v. New York City Health & Hosps. Corp.*, 84 AD3d 1358, 1359, 923 NYS2d 908 [2011].

Whereas "a cause of action based on constructive fraud in New York is governed by a six-year statute of limitations (see CPLR § 213(8)), and such a cause of action arises at the time the fraudulent conveyance occurs." *Ehrler v. Cataffo*, 42 AD3d 424, 425 (2007); *Island Holding v. O'Brien*, 6 AD3d 498, 500 (2004); *Wall St. Assoc. v. Brodsky*, 257 AD2d 526, 530 (1999). On a claim of actual fraud, the statute of limitations is six years from the commission of the fraud or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later. *Loeuis v. Grushin*, 126 AD3d 761, 763-764 (2015). An actual fraud cause of action requires "that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and the other party justifiably relied upon such misrepresentation or concealment resulting in injury." *Id.* at 763 citing *Levin v. Kitsis*, 82 AD3d 1051, 1054, (2011).

The complaint, although inartfully drafted, contained allegations sufficient to state a cause of action as to actual and/or constructive fraud which resulted in Defendants, the Estate of Walter McDowell, Jr and Walter McDowell III's acquisition of "multiple properties," the subsequent transfer of the premises located at 177-26 Ursina Road, Jamaica New York, as well as the acquisition of assets from "personal and business bank accounts and a life insurance policy." Plaintiff's complaint alleges that the property was "fraudulently" transferred to Defendant's Walter McDowell Jr. on February 17, 2005 with the use of a fraudulent Power of Attorney. This action was commenced October 30, 2018, more than twelve years pass the underlying fraudulent acts. However, this Court finds that the facts of this case raise an issue as to applicability of the correct statute of limitation to determine if the action is indeed time barred. It is unclear, when

Plaintiff discovered the alleged fraud. Although the motion is not opposed, the issue of the when the alleged fraud was discovered is a basis not to dismiss this action at this time. The four corners of the complaint have a cognizable claim for fraud. Thus, the part of the motion dismissing the complaint is denied.

Accordingly, the motion is granted in part and denied in part. The portion of the motion seeking leave to reargue and to amend the caption to include Ronfayzi is granted. The portion of the motion seeking dismissal of the complaint is denied.

IT IS HEREBY ORDERED that movant must serve a copy of this Order with notice of Entry on Plaintiff and County Clerk within 15 days of the date of this Decision.

The above constitutes the Decision and Order of the Court.

Dated: September 25, 2020
Jamaica, New York



HON. PAM JACKMAN BROWN, J.S.C

FILED

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9:30 AM

**COUNTY CLERK
QUEENS COUNTY**