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| <b>Torres v Equity Holdings LLC</b>                                                                                                                                                                                            |
| 2021 NY Slip Op 31031(U)                                                                                                                                                                                                       |
| March 30, 2021                                                                                                                                                                                                                 |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: 517615/20                                                                                                                                                                                                       |
| Judge: Ingrid Joseph                                                                                                                                                                                                           |
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At an IAS Term, Part 83 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 30th day of March, 2021.

P R E S E N T:

HON. INGRID JOSEPH,  
~~Hon. Ingrid Joseph~~  
**Supreme Court Justice** Justice.

-----X

Jose Anibal Torres, Edna Ivette Lozada  
 Torres, Bereswinda Ledee f/k/a Bereswinda  
 Torres, Gloria Janet Torres Francisquini  
 f/k/a Gloria Alvarez and Melida M. Torres  
 Figueroa f/k/a Melida M. Torres,

Plaintiffs,

- against -

Index No. 517615/20

Equity Holdings LLC,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

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

23-34  
36-38  
39

Upon the foregoing papers in this action to quiet title to the property at 418 and 420 Lorimer Street in Brooklyn ("Property"), defendant Equity Holdings LLC ("Equity") moves (Motion Sequence 2) for an order, pursuant to CPLR § 3211 (a)(1) and (a)(7), dismissing the complaint and vacating the notice of pendency filed against the Property.

By an October 22, 1986 deed, Anibal Torres (Torres) owned the Property. By a June 24, 2002 deed (2002 Deed), plaintiffs, Torres' heirs, purportedly transferred the Property to Equity for \$150,000. On June 31, 2002, the 2002 Deed in favor of Equity was recorded with the County Clerk's office.

On September 18, 2020, more than eighteen years later, plaintiffs commenced this action to quiet title to the Property by filing a summons and an unverified complaint seeking "to set aside a

certain fraudulent deed recorded against [the Property]" (complaint at ¶ 1). The complaint alleges "[u]pon information and belief, Plaintiffs did not sign the Fraudulent [2002] Deed" and "[u]pon information and belief, Martin Kofman, the notary public who purportedly acknowledged the Plaintiffs' signatures on the Fraudulent [2002] Deed, is a suspended New York State attorney . . ." who plaintiffs never met (*id.* at ¶¶ 9 and 10). The complaint further alleges "[u]pon information and belief, [Equity] did not tender any consideration for the Fraudulent [2002] Deed, let alone tender any consideration to Plaintiffs" (*id.* at ¶ 12).

The first cause of action seeks an order cancelling and discharging the 2002 Deed because it is an alleged "forgery and constitutes an exception to title, to Plaintiffs' detriment" (*id.* at ¶¶ 13 and 16). The complaint asserts a second cause of action for unjust enrichment based on Equity's alleged collection of rental income from the Property since 2002 (*id.* at ¶ 18).

Equity moves to dismiss the complaint on the grounds that plaintiffs' allegation, that the 2002 Deed was fraudulent, is barred by the 10-year statute of limitations. Equity argues that "Plaintiffs were clearly seized of the Property more than 10 years ago" and "Plaintiffs were aware that title transferred, insofar as they have paid no real estate taxes for the Property since the date of the [2002] conveyance." Equity asserts that dismissal is also warranted under the doctrine of laches because "[t]he 18-year delay in commencing this action severely prejudiced [it] in that it spent nearly two decades operating the Property, obtaining permits for renovations and assuming all responsibilities of property owner (which it is) including, but not limited to, payment of insurance, taxes and operating expenses."

Additionally, Equity argues that the 2002 Deed has a presumption of validity because plaintiffs' signatures were duly notarized and "[t]his presumption is further supported by copies of the drivers licenses of the signatories (Exhibit E) which were presented at the closing." Equity submits an affidavit from Shimon Katz (Katz), its managing member, who submits copies of: (1) the 2002 Deed; (2) plaintiffs' drivers licenses; (3) copies of checks paid to plaintiffs; (4) the title bill; and (5) the closing statement. Katz attests that he attempted to obtain cancelled checks from the bank as evidence that Equity paid plaintiffs for the Property, however, "the bank does not keep records as far back as 2002 and as such I am unable to produce copies of the cancelled checks." Katz attests that "the checks annexed as an exhibit to the motion were provided to the Plaintiffs as payment."

Plaintiffs, in opposition, submit an attorney affirmation arguing that Equity's motion must be

denied, pursuant to CPLR § 3211 (e), because “this is Defendant’s second application brought under Section 3211, the first one being marked off due to Defendant’s failure to appear at the January 21, 2021 motion return date.” Plaintiffs argue that “[t]o date, Defendant has offered no excuse for its failure to appear for oral arguments, nor has Defendant sought to vacate its default in appearance, but instead has merely refiled the same application.”

Regarding the merits of Equity’s dismissal motion, plaintiffs argue that “as a matter of law, a claim to set aside a deed on the grounds of forgery has no statute of limitations” under the Court of Appeals’ 2015 holding in *Faison v Lewis*, 25 NY3d 220, 226 (2015), since a forged deed is void. Plaintiffs further argue that “laches is unavailable to a party with unclean hands” and “Defendant is the facial beneficiary of a forged deed, which would presume Defendant’s unclean hands and thus make laches unavailable as a defense.” Plaintiffs assert that “Defendant’s submission of Plaintiffs’ drivers’ licenses do not establish laches or even Plaintiffs’ participation in the closing” because “Defendant does not establish the source of this document or whence it was obtained.” Plaintiffs further assert that “[t]he checks submitted by Defendant are not cancelled and hence do not establish that they were ever negotiated or received.” Finally, plaintiffs argue that the legal presumption of due execution of the 2002 Deed “is rebuttable, not conclusive.”

Equity, in reply, argues that its dismissal motion is not barred by the single-motion rule set forth in CPLR § 3211 (e) because its initial motion (in mot. seq. one) was never considered by the court and adjudicated on the merits.

Regarding the merits of its dismissal motion, Equity argues that “[a]s a prerequisite for the inapplicability of the statute of limitations, Plaintiffs must duly allege that the deed at issue was forged” “[h]owever, Plaintiffs’ Complaint falls short of this requirement.” Equity asserts that plaintiffs did not submit affidavits “undermining the authenticity of the documentary evidence” or rebutting the presumption that the 2002 Deed was duly executed and “each and every one of Plaintiffs’ allegations of forgery in the Complaint is made only ‘[u]pon information and belief’ and does not rise to the level of a factual allegation.” Equity argues that “[s]ince Plaintiffs have not sufficiently alleged fraud in the Complaint, their reliance on *Faison* is misplaced.”

The Court of Appeals has held that “[o]n a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*see*, CPLR § 3026)” and “[w]e accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference,

and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Importantly, the Second Department has held that even facts alleged “upon information and belief” must be considered as true on a dismissal motion pursuant to CPLR § 3211 (a)(7) (see *Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [1989]). Furthermore, “[u]nder CPLR § 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.* at 88).

As a preliminary matter, Equity’s dismissal motion (filed on February 2, 2021) is not precluded under the “single motion rule” set forth in CPLR § 3211 (e) because Equity’s initial CPLR § 3211 (a) dismissal motion was “marked off” the calendar on January 21, 2021 and was never adjudicated on the merits. As the Second Department has held, “[t]he purpose of the single-motion rule is not only to prevent delay before answer . . . but also to protect the pleader from being harassed by repeated CPLR § 3211 (a) motions . . . and to conserve judicial resources” (*Oakley v County of Nassau*, 127 AD3d 946, 947 [2015]). Equity’s instant dismissal motion was promptly filed after its initial dismissal motion was marked off the calendar and before any judicial resources were expended.

Equity’s motion to dismiss the complaint as time-barred by the ten-year statute of limitations is denied, pursuant to the Court of Appeals’ holding in *Faison v Lewis* (25 NY3d 220, 226 [2015]). In *Faison*, the Court of Appeals held that because the complaint alleged a forged deed, defendants could not rely on the statute of limitations as a defense:

“Given the clarity of our law that a forged deed is void ab initio, and that it is a document without legal capacity to have any effect on ownership rights, the question remains whether a claim challenging a conveyance or encumbrance of real property based on such deed is subject to a time bar. Our case law permits only one answer: a claim against a forged deed is not subject to a statute of limitations defense” (*Faison*, 25 NY3d at 226).

Contrary to Equity’s contention, the allegations in plaintiffs’ complaint must be considered true on a CPLR § 3211 motion to dismiss, even if those allegations are alleged “upon information and belief.” Because the complaint sufficiently alleges that the 2002 Deed was a forgery, that plaintiffs did not sign the 2002 Deed and that they did not receive payment for the Property, plaintiffs’ claims are not subject to a statute of limitations defense, as a matter of law.

Equity's motion to dismiss the complaint based on the doctrine of laches is denied, since the laches defense requires a showing of equitable estoppel, which is unavailable to a party with unclean hands (*see Bunge Corp. v Manufacturers Hanover Trust Co.*, 31 NY2d 223, 228 [1972]; *Kraker v Roll*, 100 AD2d 424, 432 [1984]). At this early stage of the action, it is unclear if Equity was involved in an alleged forgery of the 2002 Deed, and thus, Equity's dismissal motion based on laches is denied as premature.

Finally, Equity's motion to dismiss the complaint, pursuant to CPLR § 3211 (a) (1), based on documentary evidence is denied because the documentary evidence submitted by Equity does not conclusively refute plaintiffs' allegations of forgery in the complaint. While Equity's submission of copies of plaintiffs' drivers' licenses is some evidence supporting the validity of the 2002 Deed, they do not conclusively establish that the plaintiffs presented their drivers licenses at the closing and signed the 2002 Deed. Similarly, Equity's submission of copies of checks do not conclusively establish its defense to plaintiffs' allegations, especially since Equity was admittedly unable to obtain copies of the cancelled checks proving that it paid plaintiffs for the Property in 2002. Accordingly, it is

**ORDERED** that Equity's dismissal motion is denied; and it is further

**ORDERED** that Equity shall file its answer to the complaint within 30 days after this decision and order is served with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R

  
HON. INGRID JOSEPH, J. S. C.

**Hon. Ingrid Joseph  
Supreme Court Justice**