

Pichardo v Herskowitz
2021 NY Slip Op 33186(U)
December 20, 2021
Supreme Court, Bronx County
Docket Number: Index No. 812858/2021E
Judge: Kenneth L. Thompson Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

CECILIA L. PICHARDO, FRANCISCO PICHARDO,
PURS PICHARDO,

Index No: 812858/2021E

Plaintiff,

DECISION AND ORDER

-against-

Present:

MICHAEL HERSKOWITZ, ESQ.

HON. KENNETH L. THOMPSON, JR.

Defendants

_____ X

The following papers numbered 1 to read on this **motion to dismiss the complaint**

No On Calendar of November 1, 2021

PAPERS

Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----motion sequence #1 NYSCEF

Replying Affidavit and Exhibits-----motion sequence #1 NYSCEF

Memorandum of Law-----motion sequence #1 NYSCEF

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3211(a)(1) & (7), on grounds of expiration of the statute of limitations pursuant to CPLR 214, and for failure to plead the complaint's sole cause of action with the particularity required by CPLR 3016(b). Plaintiffs' complaint alleges a single cause of action, breach of fiduciary duty.

With respect to the issue of the particularity of pleading a breach of fiduciary duty:

A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b) (*see Chiu v Man Choi Chiu*, 71 AD3d 621, 623; *Tsutsui v Barasch*, 67 AD3d 896, 898; *Daly v Kochanowicz*, 67 AD3d 78, 95; *DeRaffele v 210-220-230 Owners Corp.*, 33 AD3d 752; *Ozelkan v Tyree Bros. Env'tl. Servs., Inc.*, 29 AD3d 877, 879; *Rasmussen v ACT. Env'tl. Servs.*, 292 AD2d 710, 712).

(*Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 [2nd Dept 2011]).

The complaint alleges that defendant is an attorney that represented plaintiffs in purchasing a multi-family home. Plaintiffs further allege that “Defendant had a previous working relationship with Seller that he failed to disclose to Plaintiffs, constituting a breach of the fiduciary duty owed to Plaintiffs as their attorney.”¹ Plaintiffs further allege that “Defendant failed to disclose to Plaintiffs the existence of the violations and the risks associated with closing on a property with open violations.”² Clearly, the aforementioned allegations are particularized.

The only relief sought in the complaint is for the breach of fiduciary duty is for money damages, \$1,000,000. “A breach of fiduciary duty claim falls under either a three-year or six-year limitation period, depending on the nature of the relief sought (*Loengard v. Sante Fe Indus.*, 70 N.Y.2d 262, 266; *Ghandour v. Shearson Lehman Bros.*, 213 A.D.2d 304, 306, *lv denied* 86 N.Y.2d 710). Because plaintiff's breach of fiduciary duty claim seeks only money damages, the applicable limitations period is three years. (*Yatter v. William Morris Agency, Inc.*, 256 A.D.2d 260, 261 [1st Dept 1998]).

With respect to the statute of limitations, the significant dates alleged in the complaint are as follows. Just prior to the closing on February 21, 2017, two complaints were made to the New York City Department of Buildings regarding work being done on the pertinent property without a permit. The complaints were lodged on December 12, 2016, and December 27, 2016. Plaintiffs allege that as a result of these complaints, “[s]ince April 6, 2017, plaintiffs have been unable to occupy the property and have had to bear the cost of alternative housing arrangements while remaining responsible for the mortgage, taxes, insurance and

¹ Complaint, paragraph 14.

² Complaint, paragraph 21.

utilities of the Property, a multi-family home which they cannot occupy.”³

We now turn to the question of when IDT's breach of fiduciary duty claim accrued. A tort claim accrues as soon as “the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint” (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). As with other torts in which damage is an essential element, the claim “is not enforceable until damages are sustained”

(*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 140 [2009]).

Plaintiffs' claim became enforceable, at the latest, on April 6, 2017. Therefore, the three year statute of limitations expired on April 6, 2020. However, by Executive Order of the Governor of New York, the time to commence this action was tolled from March 20, 2020 until November 3, 2020. Therefore, on March 20, 2020, there were 17 days until the statute of limitations to commence this action would expire. The toll was lifted on November 3, 2020, and the statute of limitations expired 17 days later on November 20, 2020. This action was commenced on September 23, 2021 well after the statute of limitations had

³ Complaint, paragraph 26.

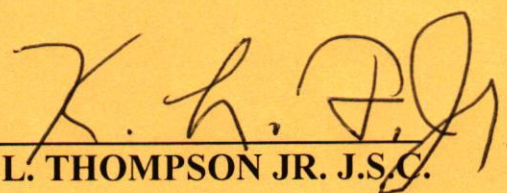
expired.

Accordingly, defendant's motion to dismiss his action is hereby granted.

The foregoing constitutes the decision and order of the Court.

The Clerk is directed to enter judgment accordingly.

Dated: 12/20/2021


KENNETH L. THOMPSON JR. J.S.C.