

Canecchia v Richmond Assoc. NY LLC

2021 NY Slip Op 34245(U)

December 22, 2021

Supreme Court, Richmond County

Docket Number: Index No. 150613/2021

Judge: Charles M. Troia

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X **Part IAS 1**

DOREEN CANECCHIA,

Plaintiff,

-against -

**RICHMOND ASSOCIATES NY LLC and BANK
OF AMERICA, N.A.,**

Defendants.

-----X

Present:

HON. CHARLES M. TROIA

DECISION AND ORDER

Index No. 150613/2021

**Mot. Seq. Nos: 001
002**

The following papers numbered 1 to 6 were fully submitted on the 8th of October 2021:

	Papers Numbered
Notice of Motion (Mot. Seq. No. 001) to Dismiss Pursuant to CPLR 3211(a)(1), (3), (5) and (7) and to Vacate Notice of Pendency Pursuant to CPLR §6512 by Defendant Richmond Associates NY LLC (Affirmation in Support of Motion to Dismiss with Supporting Exhibits) (Dated: June 16, 2021).....	1
Plaintiff’s Affirmation, Memorandum of Law in Opposition to Defendant Richmond Associates NY LLC’s Motion to Dismiss, with Supporting Exhibits (Dated: July 28, 2021).....	2
Reply Affirmation by Defendant Richmond Associates NY LLC (Dated: August 6, 2021).....	3
Notice of Motion (Mot. Seq. No. 002) for Joinder and Cross Claim by Non-parties Maria C. Del Rio, Alejandro Alonso and TC Brokers, LLC (Affidavits, Attorney Affirmation in Support of Joinder and Cross Motion with Supporting Exhibits) (Dated: August 12, 2021).....	4
Affirmation in Partial Opposition to Cross Motion for Joinder by Defendant Richmond Associates NY LLC (Dated: October 1, 2021).....	5
Plaintiff’s Affirmation, Memorandum of Law in Opposition to Motion of Non-parties Maria Del Rio and Alejandro Alonso for Joinder and Other Relief (Dated: October 1, 2021).....	6

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Upon the foregoing papers, defendant Richmond Associates NY, LLC's (hereinafter "Richmond") motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a) (1), (3), (5) and (7) and to vacate the notice of pendency is denied. The motion by non-parties Maria C. Del Rio, Alejandro Alonso and TC Brokers, LLC for joinder as necessary parties and, *inter alia*, for a declaration that Maria C. Del Rio is the rightful fee simple owner of the subject premises is also denied.

This action to quiet title concerns a residential dwelling located at 3096 Richmond Road, Staten Island, New York. Plaintiff, the residuary legatee and Executrix of her mother Marie Petosa's estate (*see* Letters Testamentary dated August 27, 2019; NYSCEF Doc. No. 33), instituted this action pursuant to Article 15 of the RPAPL on March 22, 2021 (*see* NYSCEF Doc. No. 1) with the filing of a summons and complaint and notice of pendency (*see* NYSCEF Doc. No. 2). Defendant Richmond is sued as the putative holder of title to the property, and Bank of America, N.A., is named as the putative holder or assignee of a mortgage encumbering the property. The defendants have appeared in the action, and all parties are presumably familiar with the long history of deed transfers and the related foreclosure case involving these premises.¹

¹ The following has been alleged: On **October 15, 1986** Dennis Petosa and Teresa Holman executed a deed conveying the premises (*i.e.*, block 4032, lot 53) to Dennis Petosa and his mother, Marie Petosa (*see* Complaint, para. 7). On **August 20, 1997**, Dennis and Marie executed a deed transferring the premises to Marie and her husband, Adrian Petosa (*id.*, para. 8). After Adrian's death in **2004** the elderly Marie experienced financial hardship. To stave off foreclosure, Marie attempted what she thought was a refinance of the mortgage, with the assistance of the non-parties Maria Del Rio and Alejandro Alonzo. Marie was purportedly defrauded into transferring her home to "straw man" Del Rio, on **July 5, 2007**, who then encumbered the property with two mortgages (\$484,000.00 and \$60,500.00) from Countrywide. Mortgage payments due from Del Rio were quickly in default.

On **February 1, 2008**, Bank of America commenced a foreclosure action against mortgagor Del Rio in Supreme Court, Richmond County, under Index No. 100478/2008 to foreclose the \$484,000.00 mortgage. Marie Petosa (sued as "John Doe") interposed a *pro se* answer alleging that her deed to Del Rio was fraudulently rendered as part of a deed/theft scheme. The foreclosure action was dismissed eight years later, on **June 21, 2016**, for plaintiff's failure to move for default against the mortgagor within one year pursuant to CPLR 3215(c). Plaintiff's motion to renew and reargue and Del Rio's motion for cancellation and discharge of the mortgage were denied on **June 18, 2018**. Marie Petosa died on **January 17, 2019**. On **August 20, 2019** Del Rio executed a quitclaim deed transferring the property to TC Brokers LLC. By deed dated **November 17, 2020**, TC Brokers conveyed the property to defendant *sub judice*, Richmond. A satisfaction of the \$484,000.00 mortgage was recorded on **September 24, 2020**.

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Richmond moves to dismiss the complaint on the grounds that the action is (1) barred by the six-year statute of limitations for fraud (CPLR 3211 [a][5]; *i.e.*, the fraud occurred in July of 2007, plaintiff was aware of it by 2008 as evidenced by her answer in the foreclosure action, and the quiet title action required commencement by 2014); (2) the plaintiff lacks standing to sue in her individual capacity (CPLR 3211 [a][3]), (3) the plaintiff fails to state a cause of action (CPLR 3211 [a][7]) because Marie Petosa's admitted execution of the deed on July 5, 2007 rendered the deed voidable rather than void *ab initio* and (4) the documentary evidence (CPLR 3211 [a][1]) entitled Richmond to rely upon the recording statute and stand as a bona fide purchaser.

Richmond also moves to vacate the notice of pendency on the grounds that the summons was not served within 30 days of filing the notice, pursuant to CPLR §6512, which provides: "A notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant..." Richmond sets forth that the notice of pendency was filed on March 22, 2021 [NYSCEF Doc. No. 2] but it was not served with process until June 3, 2021 [NYSCEF Doc. No. 18]).

Plaintiff opposes the motion in its entirety.

Richmond's motion to vacate the notice of pendency is denied. Plaintiff's submissions show that on March 30, 2021 Richmond was served with process by certified mail, return receipt requested, pursuant to CPLR §312-a (*see* NYSCEF Doc. No. 35). While Richmond argues that service of process was incomplete because it did not acknowledge service by returning/mailing the return receipt card, this argument is unavailing to vacate the notice of pendency. At most, a new notice of pendency may be filed if it is later determined that service was ineffective (*see Slutsky v. Blooming Grove Inn, Inc.*, 147 AD2d 208 [2d Dept. 1989]).

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The balance of Richmond's dismissal motion is also denied.

A pleading attacked for insufficiency must be accorded a liberal construction, and "if it states, in some recognizable form, any cause of action known to our law" it cannot be dismissed (*Clevenger v. Baker Voorhis & Co.*, 8 NY2d 187, 188 [1960]; see *Conroy v. Cadillac Fairview Shopping Ctr. Props.*, 143 AD2d 726 [2d Dept. 1988]; *Home Reporter v. Brooklyn Spectator*, 34 AD2d 956 [2d Dept. 1970]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, plays no part in the determination of a CPLR 3211 motion to dismiss (*Shaya B. Pac., LLC v. Wilson Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept. 2006]).

A motion to dismiss pursuant to CPLR 3211(a)(1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (see *McCue v. County of Westchester*, 18 AD3d 830, 831 [2d Dept. 2005]; *Held v. Kaufman*, 91 NY2d 425, 430-431 [1998]). Here, Richmond has failed to meet its burden of demonstrating that the recorded deeds underlying this quiet title action are of undeniable authenticity. Accordingly, Richmond's CPLR 3211 (a)(1) motion to dismiss is denied.

Plaintiff has presented proof, by way of Letters Testamentary issued by the Richmond County Surrogate, that she is the personal representative of her mother's estate. "The right to maintain an independent cause of action for the recovery of estate property...belong[s] to the personal representative of the decedent's estate" (*Stallsworth v. Stallsworth*, 138 AD3d 1102, 1103 [2d Dept. 2016]). There is no basis upon which to dismiss the complaint for plaintiff's lack of capacity, and Richmond's dismissal motion pursuant to CPLR 3211 (a) (3) must be denied.

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A claim against a forged deed is not subject to a statute of limitations defense (*see Faison v. Lewis*, 25 NY3d 220 [2015]). Here, plaintiff's complaint seeks to quiet title on the basis, *inter alia*, that the forged deed from the late Marie Petosa to non-party Maria Del Rio was void *ab initio*. Inasmuch as this court must take the facts as alleged in the complaint as true and give plaintiff the benefit of every possible favorable inference (*U. S. Bank Trust N.A. v. Miele*, 186 AD3d 526 [2d Dept. 2020]), Richmond's motion to dismiss the complaint for expiration of the statute of limitations pursuant to CPLR 3211 (a)(5) must likewise be denied.

A motion to dismiss made pursuant to CPLR 3211 (a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law (*see e.g., AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co.*, 5 NY3d 582, 590-591 [2005]). To succeed on its motion to dismiss, Richmond would have to establish - as a matter of law - that its status as a bona fide purchaser is not subject to inquiry. "[I]f a purchaser or encumbrancer knows facts that would excite the suspicion of an ordinarily prudent person and fails to investigate, the purchaser or encumbrancer will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed" (*Booth v. Ameriquest Mortg. Co.*, 63 AD3d 769, 769 [2d Dept. 2009]). Inasmuch as this is a pre-discovery motion, dismissal for plaintiff's alleged failure to state a claim for relief is denied.

The cross motion for joinder by the non-parties Maria C. Del Rio, Alejandro Alonso and TC Brokers, LLC is denied in its entirety.

"A party who ought to be joined is a party whose presence is necessary if complete relief is to be accorded to the persons who have already been joined or who might be inequitably affected by a judgment in the action (CPLR 1001[a]). The primary reason for compulsory joinder of parties

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is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter.

“In making the determination whether an absentee need be joined...it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party. It also must be determined if the court’s decision in the case, in the absence of the proposed parties, will have the element of finality for the protection of those before the court” (*Joanne S. v. Carey*, 115 AD2d 4 [1st Dept. 1986; *internal citations omitted*]).

The cross movants have failed to demonstrate that plaintiff or the defendants will be inequitably affected by a judgment in this matter absent the joinder of Maria Del Rio or Alejandro Alonso (*see Castaways Motel v. Schuyler*, 24 NY2d 120 [1969]). Plaintiff may obtain full relief by way of this quiet title action without such joinder, and the proposed defendants suffer no prejudice since they may institute their own action for “fees” owed to them.

Dismissal of the complaint based on *res judicata* is unavailing to the non-parties, since no judgment was rendered from a prior action involving the same parties and the same subject matter. Neither of the non-parties have asserted claims against the plaintiff or the two defendants, and plaintiff and defendants have not asserted claims against the non-parties.

Accordingly, it is

ORDERED, that the motion by Richmond Associates NY LLC to dismiss the plaintiff’s complaint pursuant to CPLR 3211 (a) (1), (3), (5) and (7) is denied; and it is further

ORDERED, that the motion by Richmond Associates NY LLC to vacate the notice of pendency pursuant to CPLR §6512 is denied; and it is further

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ORDERED, that the cross motion by Maria Del Rio, Alejandro Alonso and TC Brokers, LLC to be joined as necessary parties is denied; and it is further

ORDERED, that the parties return to IAS 1 on January 25, 2022, at 10:30, located at 26 Central Avenue, Staten Island, New York for a preliminary conference.

ENTER,



Dated: December 22, 2021

Hon. Charles M. Troia J. S. C.
Justice of the Supreme Court