

Fagan v One 56 St. Corp. Inc.
2022 NY Slip Op 32692(U)
August 10, 2022
Supreme Court, New York County
Docket Number: Index No. 156420/2021
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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DECIMA FAGAN, EDWARD FAGAN, JOYCE FAGAN,
SERETTA FAGAN,

Plaintiff,

- v -

ONE 56 STREET CORPORATION INC., THE ESTATE OF
FLAVIAN C. JEMMOTT, FLUSHING BANK, CATHERINE
COOPER JEMMOTT, JANE AND JOHN DOE 1-10

Defendant.
-----X

INDEX NO. 156420/2021

MOTION DATE 11/10/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 46, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for

DISMISS

Oral argument was heard on May 19, 2022 with Michael B. Neumann appearing on behalf of Plaintiffs Decima Fagan, Edward Fagan, Joyce Fagan, and Seretta Fagan (collectively “Plaintiffs”) and Christopher Clarke appearing on behalf of Defendant One 56 Street Corporation Inc. (“One 56”) Upon the foregoing documents, it is decided and ordered as follows.

I. Factual and Procedural Background

Henry and Rosalina Fagan owned the building located at 156 West 122 Street, New York, New York 10027 (the “Building”) (NYSCEF Doc. 38 at ¶ 4). Rosalina Fagan died intestate in 1966 and Henry Fagan died intestate in 1975 allegedly leaving their son, Densil Fagan as their sole surviving heir (*id.*; NYSCEF Doc. 39). Densil Fagan married Sybil Fagan and had four children who are the Plaintiffs (NYSCEF Doc. 39). Densil Fagan died in 1989 and Sybil Fagan died in 1998 leaving Plaintiffs as their sole surviving heirs (*id.*) Plaintiffs all live in Barbados. Allegedly, on October 3, 2012, Defendant Flavian C. Jemmott (“Jemott”) was a tenant of the Fagans who

fraudulently held himself out as the “sole heir” to the estate of Henry and Rosalina Fagan on an allegedly fraudulent deed transferring the Building to Defendant One 56 for no consideration (NYSCEF Documents 4, 38 at ¶ 6, 41).

On September 9, 2014 One 56 filed suit against Henry Fagan, Rosalina Fagan, the United States of America, the State of New York, and the City of New York seeking declaratory judgment that none of the defendants have any interest in the Building (*see One 56 Street Corporation v Henry Fagan et. al*, 158812/2014 Doc. No. 1) (the “2014 Action”). One 56 then moved for default judgment on November 3, 2014 after all defendants failed to answer. One 56 filed an affidavit of service and non-military affidavit stating Henry and Rosalina Fagan were served even though they had been dead for over 30 years prior to the commencement of the 2014 Action. Default judgment was granted by Hon. Manuel J. Mendez, J.S.C. on December 17, 2014 declaring that One 56 is the sole owner in fee simply of the Building (NYSCEF Doc. 42).

Meanwhile, on August 27th, 2015, Plaintiffs transferred any title they purported to have over the Building to Cheyenne Development Inc. (NYSCEF Doc. 17). In a document dated May 30, 2019, Cheyenne Development Inc. transferred back to Plaintiffs any title they received in 2015 (NYSCEF Doc. 45).

On February 22, 2017 the Plaintiffs sued One 56, Jemmott, Flushing Bank and Joseph Makhani¹ seeking to vacate the recording of the deed from Jemmott to One 56, voiding the transfer of title to the Building from Jemmott to One 56, and voiding mortgage liens placed by Flushing Bank on the Building (the “2017 Action”) (NYSCEF Doc. 13). On February 26, 2018 Plaintiffs again sued One 56, Joseph Makhani, Jemmott, and Flushing Bank seeking to vacate the recording

¹ Joseph Makhani has since been indicted for deed theft and mortgage fraud on two nearby Harlem brownstones at 107 West 118th Street and 135 West 131st Street ([Attorney General James Announces Indictment of Long Island Man for Deed Theft and Mortgage Fraud | New York State Attorney General \(ny.gov\)](#)).

of the deed from Jemmott to One 56 while also seeking to vacate the default judgment entered in the 2014 Action (the “2018 Action”) (NYSCEF Doc. 14). On April 18, 2018, Plaintiffs filed a notice of discontinuance of the 2017 Action (NYSCEF Doc. 15). In the 2018 Action, Defendants moved to dismiss Plaintiffs’ Complaint which was granted on September 6, 2018 by Hon. W. Franc Perry, J.S.C. after finding that Plaintiffs lacked standing (NYSCEF Documents 16; 63).

Plaintiffs filed an Amended Complaint on November 12, 2021, naming One 56, the Estate of Flavian C. Jemmott, Catherine Cooper Jemmott, and Flushing Bank as Defendants. Plaintiffs seek declaratory judgment stating they are the sole heirs of Henry and Rosalina Fagan and that the deed executed by Jemmott is void ab initio due to fraud (NYSCEF Doc. 38). Plaintiffs also seek to quiet title voiding the deed executed between Jemmott and One 56 (*id.*) One 56 and Flushing moved to dismiss Plaintiffs’ Amended Complaint arguing that the action is barred by collateral estoppel and *res judicata*, that documentary evidence establishes Plaintiffs do not possess any interest in the building and therefore lack standing, that the Court lacks subject matter jurisdiction and seeking sanctions (NYSCEF Doc. 9).

II. Discussion

This Court finds that Plaintiffs lack standing since there is an existing and presumptively valid judgment from another Court which states that One 56 “is the sole owner in fee simple” of the Building (NYSCEF Doc. 12). Therefore, this Court cannot find that Plaintiffs possess the requisite interest in the property to sustain this action. The default judgment entered in 2014 is presumed valid and unless reversed or annulled in a proper proceeding is not open to attack by parties or privies in any collateral action or proceeding (*Silvar v Commissioner of Labor of State*, 175 AD3d 95, 101 [1st Dept 2019]; *Specialized Indus. Services Corp. v Carter*, 68 AD3d 750, 752; [2d Dept 2009]). The remedy for fraud allegedly committed during a legal proceeding must

be exercised in that lawsuit by moving to vacate the civil judgment, and not by another action collaterally attacking that judgment (CPLR § 5015(a)(3); *Peter C. v Lisa F.*, 118 AD3d 631, 631-632 [1st Dept 2014]; *In re New York Diet Drug Litigation*, 47 AD3d 586 [1st Dept 2008]). Because the Court finds that Plaintiffs lack standing to assert ownership over the Building, the Court need not address Plaintiff's cause of action seeking a declaratory judgment declaring Plaintiffs to be the sole-heirs of the Estate of Sybil Fagan.

Moreover, while One 56 has moved for sanctions, the Court does not find Plaintiffs' counsel's actions in this case to warrant sanctions. This Court is granted wide discretion in whether or not to impose financial sanctions and/or costs on a party for engaging in frivolous conduct and given the recent indictment of Joseph Makhani (who was the president of One 56 and signed a mortgage on the Building on behalf of One 56) for fraud and property theft, the Court does not find this action frivolous (NYSCEF Doc. 72). While Plaintiffs' counsel should have first attempted to vacate the default judgment before bringing this action, the Court views this as a procedural blunder rather than frivolous behavior.

Accordingly, it is hereby,

ORDERED that Plaintiffs' Complaint is dismissed without prejudice.

This constitutes the Decision and Order of the Court.

8/10/2022
DATE

Mary V Rosado
MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

156420/2021 FAGAN, DECIMA ET AL vs. ONE 56 STREET CORPORATION INC. ET AL
Motion No. 001