

**Rosner v Caputo**

2023 NY Slip Op 31374(U)

April 26, 2023

Supreme Court, New York County

Docket Number: Index No. 154299/2022

Judge: Lisa S. Headley

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

PRESENT: HON. LISA S. HEADLEY PART 28M

*Justice*

-----X

ELAINE ROSNER

Plaintiff,

- v -

WAYNE CAPUTO,

Defendant.

-----X

INDEX NO. 154299/2022

MOTION DATE 03/14/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

Before the Court is the motion by defendant, Wayne Caputo (“defendant”), for an Order to dismiss the Verified Complaint pursuant to *CPLR §3211(a)(1),(5) and (7)*. Plaintiff, Elaine Rosner (“plaintiff”), filed opposition papers, and defendant filed a reply.

**The Plaintiff’s Complaint**

In the complaint, plaintiff claims that the defendant was her certified public accountant. Plaintiff contends that the defendant told her he would help her with the property she owns at 63 West 92<sup>nd</sup> Street, New, York, N.Y. 10025 (“subject property”). Plaintiff alleges that a contract of sale and joint venture agreement which was signed by plaintiff and the defendant on or about July 12, 2004, and December 31, 2003, is now void, invalid and unenforceable. Plaintiff claims that the defendant coerced her into signing that contract of sale on July 12, 2004, and the contract was back-dated to December 31, 2003, for tax and sale purposes. Plaintiff specifically alleges that the defendant was aware that plaintiff was not a real estate professional and took advantage of her. Plaintiff claims that the defendant, as a certified public accountant, had a duty to not entice any of his clients into fraudulent and one-sided business deals.

In the complaint, plaintiff alleges that since the contract of sale and joint venture agreements were signed, the defendant never paid any mortgage recording tax concerning the subject property. Plaintiff alleges that the defendant has never made any payments due under the contract of sale. In addition, plaintiff alleges that the defendant never signed any personal guarantees or any documents relating to the mortgage of the subject property that would evidence that defendant assumed any portion of the mortgage property.

Plaintiff commenced this action for fraudulent conveyance, quiet title pursuant to *RPAPL §15*, for a declaratory judgment, rescission, permanent injunction, fraud, compensatory damages, punitive damages, and intentional infliction of emotional distress. Plaintiff claims that based on

defendant's fraud and concealment, she had no knowledge of the defendant's actions until after reasonable diligence. In addition, plaintiff claims that due to the failure of consideration of the contract, the defendant's claim to fifty percent of the ownership of the subject property is nonexistent. The plaintiff contends that although defendant made a few mortgage payments, this does not arise to the duties, obligations, or terms under the contract of sale and joint venture agreements.

In addition, plaintiff contends that the defendant did not register as an owner or agent of the building with the NYC Housing Preservation & Development. Plaintiff also alleges that she pays all the real estate taxes and water bills, and cares for the subject property. Plaintiff contends that the defendant did not do anything to prevent the subject property from falling into disrepair. Plaintiff contends that the defendant never made any accounting to plaintiff as to monies he has collected for rent concerning the subject property. Plaintiff claims that the defendant never let her review any leases for the subject property and that he had maliciously caused an illegal lockout proceeding to be commenced against her in the Housing Court.

Plaintiff further alleges that the defendant prepared and executed a lease, without her knowledge, for the third-floor apartment with a non-party, who was also the petitioner who filed the illegal lockout case in housing court. Specifically, plaintiff claims that sometime in March 2022, the defendant broke into and changed the locks on the apartment on the third floor of the subject premises, and then after discovering the apartment door locks were broken and changed, the plaintiff hired a locksmith and re-installed her locks. Moreover, plaintiff claims that the third-floor apartment was in need of substantial repairs and uninhabitable. Plaintiff claims that the petitioner in the Housing Court case was never in possession of the third-floor apartment, and never had any property, furniture, or possession in the third-floor apartment of the property. Plaintiff asserts that due to the defendant causing the illegal lockout case to be commenced against plaintiff, she has suffered damages. Accordingly, plaintiff commenced this action for fraudulent conveyance, quiet title pursuant to *RPAPL §15*, for a declaratory judgment, rescission, permanent injunction, fraud, compensatory damages, punitive damages, and intentional infliction of emotional distress.

#### **Defendant's Motion to Dismiss**

Defendant filed this motion to dismiss and argues that all the allegations, except for the malicious prosecution claim, are time-barred. In addition, defendant argues that the malicious prosecution claim must be dismissed for plaintiff's failure to state a cause of action. In support of the motion, the defendant submits the complaint, the deed for the subject property, the contract of sale and the joint venture agreement. Defendant contends that plaintiff and defendant executed a contract of sale and joint venture agreement with respect to the defendant's purchase from plaintiff of a 50% interest in the subject property. Defendant contends that the plaintiff also executed a Bargain and Sale Deed with Covenants against Grantor on or about July 12, 2004.

Defendant argues that the plaintiff, in her complaint, includes allegations, in great detail that the defendant failed to satisfy his alleged representations to plaintiff immediately with the closing of the property on July 12, 2004, or the days following, and therefore, plaintiff knew or

should have known of the alleged fraud. Defendant argues that the alleged breach of contract and other wrongdoing all began immediately after the contract transaction, therefore the alleged wrongdoing all began on or about July 12, 2004. Therefore, the defendant argues, *inter alia*, that the first cause of action for quiet title, which is subject to a ten-year statute of limitation must be dismissed; the second cause of action for declaratory judgment and fifth cause of action for fraud, which are subject to a six-year statute of limitations, must be dismissed; and the eighth cause of action for intentional infliction of emotional distress, which is subject to a one-year statute of limitation, must be dismissed.

Furthermore, the defendant argues that the third, fourth, sixth and seventh causes of action for rescission, compensatory damages and punitive damages are remedies only, and do not state a cause of action. Defendant argues that the plaintiff failed to plead fraud with particularity. Defendant argues that the claim for intentional infliction of emotional distress should also be dismissed as its time-barred and because plaintiff does not allege any extreme and outrageous conduct.

In addition, defendant argues that the plaintiff failed to plead facts supporting the punitive damages claim since the complaint does not contain any allegations of heinous conduct against the public or acts of high degree of moral turpitude, but rather this claim involves an ordinary business dispute. Lastly, the defendant argues that the complaint does not sufficiently plead malicious prosecution because there are no supporting facts indicating that defendant aided and abetted in causing the illegal lockout case proceeding in Housing Court, and the plaintiff failed to show that the housing court proceeding was commenced without probable cause and with malice.

#### **Plaintiff's Opposition to the Motion to Dismiss**

In opposition, the plaintiff submits, *inter alia*, her own sworn affidavit, the deed, the title search of the subject property, the defendant's affidavit submitted in the illegal lockout proceeding in housing court, the lease agreement between defendant and the purported tenant of unit 3 of the subject property, and the housing court's decision dated June 10, 2022, regarding the illegal lockout proceeding.

Plaintiff contends that she is the sole owner of the subject premises since July 19, 1988, and that she commenced this action within two years after discovering the fraud by defendant. Plaintiff claims that defendant used her trust and confidence in him, as her accountant, and she could not have reasonably discovered the fraud concerning her property in July 2004 until March or April of 2022, when the defendant asserted ownership property rights and attempted to seize possession of the subject property. Specifically, plaintiff contends that she became aware when the defendant broke the locks of an apartment in the subject property, and changed the locks without her knowledge, which then caused an illegal lockout proceeding where the defendant presented for the first time a "sham deed" dated March 22, 2022, to the Housing Court and his affidavit claiming ownership. The plaintiff argues that the defendant's deed is unrecorded and not in admissible form, and plaintiff demands to see the original document during discovery in this matter. Summarily, the plaintiff argues that the deed should be disregarded by this Court because it has not been authenticated, thus, such deed should not be admitted as a business record or any

other record. Furthermore, the plaintiff submits that the illegal lockout proceeding was terminated in her favor, and the housing court judge determined that the proceeding must be dismissed for failure to state a cause of action.

In addition, the plaintiff contends that she did not sign off on any lease, and defendant kept her unaware of any content of leases of the subject property. Plaintiff claims that the defendant promised to assist her with the management of the subject property, but at no time did he assert ownership. Plaintiff asserts that the defendant never paid any mortgage recording tax regarding the subject property and he never signed any personal guarantees relating to the mortgage of the subject property.

### **Defendant's Reply Affirmation**

In reply, the defendant argues that the plaintiff failed to rebut the statute of limitations argument, and defendant emphasizes that the five causes of action (fraudulent conveyance/quiet title, declaratory judgment for failure of consideration, fraud, and intentional infliction of emotional distress) are time-barred. Defendant also contends that plaintiff failed to rebut his arguments that the causes of actions for rescission, permanent injunction, compensatory damage, and punitive damage are remedies and plaintiff does not state a cause of action. Defendant also reiterates the arguments set forth in the motion, including that his broken promises to plaintiff about what he would do in the future does not amount to fraud.

### **DISCUSSION**

On a motion brought under *CPLR §3211(a)(1)* dismissal is warranted when “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”. Allegations that are “bare legal conclusions” or that are “inherently incredible or flatly contradicted by documentary evidence” are not sufficient to withstand a motion to dismiss.” *RTW Retailwinds, Inc. v. Colucci & Umans*, No. 150794/20, 2023 WL 1974320 (N.Y. App. Div. Feb. 14, 2023).

On a motion brought under *CPLR §3211(a)(7)*, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the complaint as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

### **Malicious Prosecution**

“The tort of malicious prosecution protects the personal interest of freedom from unjustifiable litigation[,...] [t]he essence [of which] is the perversion of proper legal procedures.” *Broughton v. State of New York*, 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87, 335 N.E.2d 310 [1975], *cert. denied* 423 U.S. 929, 96 S.Ct. 277, 46 L.Ed.2d 257 (1975). To sustain a claim for malicious prosecution, a plaintiff must establish the following elements: (1) the initiation of a criminal proceeding against him or her, (2) termination of the proceeding in his or her favor, (3) lack of probable cause for the criminal proceeding, and (4) actual malice. *See also, Torres v. Police Officer Jones*, 26 N.Y.3d 742, 27 N.Y.S.3d 468, 47 N.E.3d 747 (2016). “Failure to establish any one of these elements defeats the entire claim.” *Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205, 208, 746 N.Y.S.2d 141 (1st Dep’t 2002); *See also, Cardoza v. City of New York*, 139 A.D.3d 151, 162 (1st Dep’t 2016).

After a review of the plaintiff's affidavit and the exhibits regarding the Illegal lockout case (*NYSCEF Doc. Nos. 14, 18, 19, 20, 21*), it is clear that the plaintiff was a respondent in an illegal lockout case in Housing Court, which is not a criminal proceeding, but rather the case is a civil proceeding. In addition, the defendant in this case did not initiate the illegal lockout case, but was also a co-respondent with the plaintiff. Accordingly, the ninth cause of action for malicious prosecution must be dismissed for failure to state a cause of action.

### Quiet Title

Defendant, in his motion, argues that all the allegations, except for the malicious prosecution claim, are time-barred. *See, CPLR §3211(a)(5)*. An action for quiet title is governed by *Real Actions & Proceedings Law (RPAPL) §1501(1)*, which provides:

Where a person claims an estate or interest in real property... may maintain an action against any other person, known or unknown, ... to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make[.]

#### *RPAPL §1501*

*RPAPL §1515* provides, *inter alia*, that the complaint must state the nature of the plaintiff's estate or interest, how it was acquired, that the defendant claims an interest adverse to the plaintiff, and describe the property.

Pursuant to *CPLR § 212(a)*, the statute of limitations applicable to this quiet title action is ten years. *See, CPLR §212(a)*. However, *CPLR §212(a)* must be read together with *RPAPL §311*, which provides that “the person who establishes a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title unless the premises have been held and possessed adversely to the legal title for ten years before the commencement of the action.” (*RPAPL §311*); *see, County of Suffolk Div. of Real Prop. Acquisition & Mgt. v. Kandler*, 20 Misc.3d 136[A], 2008 N.Y. Slip Op. 51525[U], 2008 WL 2814810 (App. Term, 2d Dept., 9th & 10th Jud. Dists.); *see also, 1–212 Weinstein–Korn–Miller, N.Y. Civ. Prac. CPLR ¶ 212.01*); *see also, Elam v. Altered Ego Realty Holding Corp.*, 114 A.D.3d 901, 903 (2d Dep’t 2014).

Here, the plaintiff claims that she owned the subject property since July 19, 1988, and that the defendant promised to assist her with the management of the subject property, but at no time did he assert ownership when executing the agreement. However, the plaintiff claims that she discovered that defendant claimed ownership when he broke and changed the locks, and attempted to lease Unit 3 in the subject premises in 2022. Subsequently, the defendant and plaintiff were sued in housing court based on an illegal lockout claim by a non-party. In the housing court case, the defendant annexed a copy of the deed, which indicated that the plaintiff and defendant are tenants in common in consideration of one dollar, and other good and valuable consideration. (*See, NYSCEF Doc. No. 7*).

Here, since the plaintiff claims she was in possession of the subject premises within 10 years of commencing this action, “the right of action to remove a cloud on title is a continuous one

accruing from day to day, and this right is not barred by the statute of limitations until the cloud is continued without interruption for a length of time sufficient to effect a change of title as a matter of law.” Accordingly, contrary to the defendant’s contention, the first cause of action for fraudulent conveyance/quiet title cause of action should not be dismissed.

### **Fraud**

Pursuant to *CPLR §213(8)*, “the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.” “A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff ‘possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence’.” *Coleman v. Wells Fargo & Co.*, 125 A.D.3d 716, 716, 4 N.Y.S.3d 93, quoting, *Town of Poughkeepsie v. Espie*, 41 A.D.3d 701, 705, 840 N.Y.S.2d 600; see, *Oggioni v. Oggioni*, 46 A.D.3d 646, 648, 848 N.Y.S.2d 245); see also, *Monteleone v. Monteleone*, 162 A.D.3d 761, 762 (2d Dep’t 2018).

Here, the plaintiff claims that she discovered that the defendant owned interest in the subject property only after being sued in Housing Court in 2022. In reviewing the affidavit from defendant filed in Housing Court where he states he is the co-owner of the subject property pursuant to a Bargain and Sale Deed, dated July 12, 2004. The plaintiff, in her affidavit in opposition, asserts the defendant promised to assist her with the management of the subject property, but at no time did he assert ownership. Plaintiff asserts that the defendant never paid any mortgage recording tax regarding the subject property and he never signed any personal guarantees relating to the mortgage of the subject property. This Court finds that the plaintiff timely filed the fraud cause of action within two years of discovering that the defendant purportedly co-owned the subject property. Therefore, the fifth cause of action for fraud is not dismissed.

### **Declaratory Judgment**

Plaintiff, in the verified complaint, seeks a declaratory judgment declaring that the Bargain and Sale Deed without Covenant Against Grantor dated July 12, 2004, to Wayne Caputo and Elaine Rosner as tenants in common of 73 West 92<sup>nd</sup> Street, New York, New York 10025 (“subject property”) is invalid and of no force and effect, and a declaratory judgment declaring that the plaintiff is the sole owner of the subject property.

“In determining the limitations period to be applied to a declaratory judgment action, courts must look to the underlying claim and the nature of the relief sought to ascertain whether the rights the parties are seeking to have adjudicated in the declaratory judgment action could have been raised in an action or proceeding having a statutorily prescribed limitation period; in the event that no prescribed period of limitations applies, the action will be governed by a six-year statute of limitations.” *Save The Pine Bush Inc. v. Town Bd. of Town of Guilderland*, 272 A.D.2d 689, 707 N.Y.S.2d 698 (3d Dept. 2000). Here, the plaintiff claims that the defendant perpetuated a fraud in obtaining ownership of the subject property, which has a statute of limitation of six years or two years from discovering such fraudulent conduct. *CPLR §213(8)*. Therefore, the

basis of the declaratory judgment on the underlying claim, that being fraud, has been timely filed and accordingly, the cause of action for declaratory judgment should not be dismissed.

**Intentional Infliction of Emotional Distress**

The defendant argues the eighth cause of action for intentional infliction of emotional (IIED) distress, which is subject to a one-year statute of limitation, must be dismissed.

The statute of limitations for a claim for IIED is one year. *CPLR §215; Gallagher v. Directors Guild of An., Inc.*, 144 A.D.2d 261, 262, 533 N.Y.S.2d 863 (1st Dep't.1988) (“claim for damages for an intentional tort is subject to the one-year limitations period,” including a claim for IIED). Plaintiffs made no specific opposition with respect to the time-limitations issue. Here, the action was commenced on or about May 18, 2022. Therefore, plaintiff’s claim for IIED is time-barred with respect to events that occurred prior to May 18, 2021. Accordingly, the eighth cause of action for intentional infliction of emotional distress should not be dismissed.

**Rescission, Permanent Injunction, Compensatory and Punitive Damages**

Furthermore, the defendant argues that the third, fourth, sixth and seventh causes of action for rescission, permanent injunction, compensatory damages, and punitive damages are remedies only, and do not state a cause of action.

“Rescission, as a matter of law, lies in equity and is a matter of discretion.” *See, Rudman v. Cowles Communications, Inc.*, 30 NY2d 1, 13 (1972). It is available “only where there is lacking [a] complete and adequate remedy at law and where the *status quo* may be substantially restored.” (*id.*, *Alper v Seavey*, 9 AD3d 263, 264 (1st Dep’t 2004). “In order to justify the court’s intervention to rescind a contract, a party must allege either fraud in the inducement of the contract or a breach of the contract which substantially defeats the purpose thereof.” *See, Callanan v. Keeseville, A usable Chasm & Lake Champlain R. R. Co.*, 199 NY 268, 284 (1910); *Babylon Assocs. v County of Suffolk*, 101 AD2d 207, 215 (2d Dep’t 1984); *see also, Zmod Process Corp. v. Am. Legal Process, Inc.*, 2006 N.Y. Slip Op. 30359[U] (N.Y. Sup Ct, New York County 2006). Here, the plaintiff has made a viable claim for fraud, which justifies the court to intervene and to rescind the purported agreement. Therefore, the motion to dismiss the cause third cause of action for rescission is denied.

In this action, plaintiff also seeks a permanent injunction, compensatory and punitive damages. In considering a motion to dismiss pursuant to *CPLR §3211* the court must accord a plaintiff every possible favorable inference. *Goshen v Mutual Life Ins. Co. of NY*, 98 N.Y.2d 314, 326 (2002) *citing, Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). In the case at bar, assuming all of the allegations in the complaint are true and resolving all inferences in favor of Plaintiff, this Court finds these causes of actions should not be dismissed.

Accordingly, it is hereby

**ORDERED** the ninth cause of action for malicious prosecution must be dismissed for failure to state a cause of action, and the defendant’s motion to dismiss the Ninth Cause of Action is **GRANTED**; and it is further

**ORDERED** the first cause of action for fraudulent conveyance/quiet title cause of action should not be dismissed and the defendant’s motion to dismiss the First Cause of Action is DENIED; and it is further

**ORDERED** the fifth cause of action for fraud should not be dismissed and the defendant’s motion to dismiss the Fifth Cause of Action is DENIED; and it is further

**ORDERED** the second cause of action for declaratory judgment should not be dismissed and the defendant’s motion to dismiss the Second Cause of Action is DENIED; and it is further

**ORDERED** the eighth cause of action for intentional infliction of emotional distress should not be dismissed and defendant’s motion to dismiss the Eighth Cause of Action is DENIED; and it is further

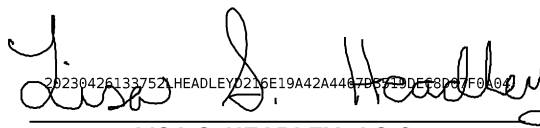
**ORDERED** the third, fourth, sixth and seventh causes of action for rescission, compensatory damages, permanent injunction, and punitive damages should not be dismissed and the motion to dismiss the third, fourth, sixth and seventh causes of actions are DENIED; and it is further

**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, defendant shall serve a copy of this decision/order upon the plaintiff with notice of entry; and it is further

**ORDERED** that the parties shall proceed with discovery in good faith and in an expeditious manner.

This constitutes the Decision and Order of the Court.

  
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LISA S. HEADLEY, J.S.C.

4/26/2023  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: