

McLean v Solny

2023 NY Slip Op 34272(U)

November 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 500005/2021

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 27th day of November 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
DEAN MCLEAN and VLADIMIR JANVIER
Plaintiff(s)

Index No: 500005/2021

-against-

ORDER

SANFORD SOLNY; BEDFORD AVE OWNERS INC.;
CADET DORCEUS; 2555 BEDFORD AVE, LLC
Defendant(s)

-----X
The following e-filed papers read herein:
Notice of Motion/Affirmation in Support/Affidavits Annexed
Exhibits Annexed/Reply.....
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

NYSCEF Nos.:
93-100; 131-132
101-129

In this action Sanford Solny (“Solny”) and Bedford Ave Owners Inc. (“Bedford”) (Collectively “Defendants”) move (Motion Seq. 3) for an order to Dismiss Dean McLean (“McLean”) and Vladimir Janvier (“Janvier”) (Collectively “Plaintiffs”) complaint pursuant to CPLR 3211(a)(5) based upon the statute of limitations and CPLR 3211(a)(7) for failure to state a cause of action by Janvier. Plaintiffs have opposed the motion on the grounds that the action is timely, and that Plaintiffs have asserted viable causes of action.

This action arises out of an allegedly fraudulent deed transfer dated May 23, 2014, wherein Plaintiff McLean alleges that he was deprived of his rightful 50% ownership interest in the premises located at 2555 Bedford Ave. Brooklyn, New York 11226 (“Subject Premises”). Plaintiff Janvier owns the remaining 50% interest. In the complaint, Plaintiffs allege that in 2014, when Plaintiffs possessed joint ownership of the Subject Premises, that Defendant Solny, acting on behalf of Defendant Cadet Dorceus (“Cadet”) and individually, advised McLean that he could be absolved of all liability on the current mortgage secured on the property by conducting either a “short sale” or “partition of sale” of his ownership interest. McLean claims that Solny and Cadet represented to him that in order to effectuate the sale, McLean would have to first transfer his ownership interest to Solny and Cadet and/or another entity created by Solny via a deed transfer. Plaintiffs state that subsequent to the deed transfer, none of the Defendants took any measures to effectuate a “short sale” or “partition of sale” or any measures to absolve McLean of liability on the existing mortgage. In the underlying action, Plaintiffs seek in part a

declaratory judgment that any documents executed by McLean for the benefit of the Defendants be deemed void and vacated, including the May 23, 2014, deed and also that the fraudulent deed be cancelled by the Kings County Clerk, restoring McLean's interest in the property.

In support of its motion, Defendants argue that Plaintiffs have not asserted a viable cause of action against them, and assuming arguendo that Plaintiffs have, that the statute of limitations on any causes of action have expired. Defendants state that Plaintiffs conspired and committed mortgage fraud at the time of purchasing the property, wherein Janvier paid McLean \$10,000.00 to use McLean's credit and name on the mortgage, falsely representing to the bank that McLean would be an occupant of the property. Defendants claim that Janvier does not have a viable cause of action because there was never a contract or any dealing between Janvier and the Defendants therefore no fraud could have been committed against Janvier. Additionally, Defendants assert that because Janvier retained his 50% interest in the property, he cannot claim conversion. Furthermore, Defendants argue that McLean does not have a viable cause of action because he validly sold his interest, received consideration, and signed all of the sale documents before a commissioner of oaths. Defendants state that McLean fails to present sufficient evidence reflecting that affirmative promises were made in exchange for a conveyance. Defendants also submit that Janvier initially commenced an action on May 13, 2015, against them and McLean under Index # 505902/2015 alleging harm as a result of the transfer, which was abandoned.

In opposition, Plaintiffs argue that Solny, who is currently disbarred, has been criminally charged on three separate occasions for defrauding homeowners under "short sale" deals, including for the Subject Premises in this action.¹ Plaintiffs state that the Governor's Executive Orders during the COVID-19 Pandemic, tolled the statute of limitations, which are now deemed timely. Further Plaintiffs assert that in the event that dismissal is granted, that it should only relate to the moving Defendants since Cadet and 2555 Bedford Ave, LLC have not appeared in this action and that since the Notice of Motion only seeks dismissal pursuant to CPLR 3211(a)(7) against Janvier, that dismissal cannot be considered against McLean.

On a motion pursuant to CPLR § 3211(a)(5) to dismiss a cause of action on the ground that it is barred by the statute of limitations, the moving defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired (see *Avery v WJM Dev. Corp.*, 197 AD3d 1141 [2nd Dept. 2021]; *HSBC Bank USA, N.A. v Gold*, 171 AD3d 1029, 1030 [2nd Dept. 2019]; *Barry v Cadman Towers, Inc.*, 136 AD3d 951 [2nd Dept. 2016]). If that initial burden is satisfied, the plaintiff must then raise a

¹ Upon information and belief, homeowners at risk of foreclosure were told by Solny that they qualified for a "short sale" deal wherein the lender would settle for less than the balance of the mortgage. Homeowners believed that they were selling their home in exchange for debt forgiveness and sometimes small monetary payouts but instead would end up signing documents that transferred the property to another party.

question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff commenced the action within the applicable limitations period (*HSBC Bank USA, N.A.* at 1030; *Barry* at 952; *Coleman v Wells Fargo & Company, et al.*, 125 AD3d 716 [2nd Dept. 2015]).

New York Executive Order 202.67, enacted on March 20, 2020, in pertinent part, suspended the statute of limitations “for any civil cases...until November 3, 2020.” The court in *Brash v Richards*, 195 AD3d 582 [2021] held that the Executive Order created a tolling period of 288 days, which was not intended to add a blanket 228 days to Plaintiffs’ time to file, but rather that any time that remained on the limitations period as of March 20, 2020, would be added back and start to run again once the limitations period resumed on November 4, 2020.

Pursuant to CPLR 213(2) and (8), an action based upon contract or fraud must be commenced within six years. 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. Moreover, an action for a declaratory judgment is generally governed by a six-year statute of limitations and is time-barred if commenced more than six years after it accrues (*Trump Village Section 4, Inc. v Young*, 217 AD3d 711 [2d Dept. 2023]; *Kogut v Village of Chestnut Ridge*, 214 AD3d 777 [2d Dept. 2023]; quoting *Save the View Now v Brooklyn Bridge Park Corp.*, 156 AD3d 928 [2d Dept. 2017]). An action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties (see CPLR 3001; *Young* at 714). A dispute matures into a justiciable controversy, as necessary for an action for declaratory relief to accrue, when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights (*Id.*; see *Anson v Incorporated Vil. of Freeport*, 193 AD3d [2d Dept. 2021]).

Here, while six years from May 23, 2014, would have been May 23, 2020, under the COVID toll, Plaintiffs had a remaining 64 days when the limitations period resumed on November 4, 2020, making the new deadline January 7, 2021. Plaintiffs’ action was commenced on December 31, 2020, and therefore their causes of action for breach of contract and fraud are timely.

Pursuant to CPLR 212(a), an action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action. RPAPL 1501(1) provides that any person who “claims an estate or interest in real property” may “maintain an action against any other person ... 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, ... the defendant might make.” Under RPAPL 1501(4), where the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage ... has expired,” any person with an estate or interest in the property may maintain an action

“to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom.”

Here, the statute of limitations expires May 23, 2024, and therefore Plaintiffs’ cause of action to quiet title is timely.

Pursuant to CPLR 214, a cause of action alleging conversion is subject to a three-year limitations period. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession (*Siegler v. Lippe*, 189 AD3d 903 [2d Dept. 2020]). A cause of action for conversion accrues when the conversion or taking occurred, and not from discovery (see CPLR214[3]; (*Sporn v. MCA Records, Inc.*, 58 NY2d 482 [1983]; *Obstfeld v. Thermo Niton Analyzers, LLC*, 168 AD3d 1080 [2d Dept. 2019])).

Here, Plaintiffs’ cause of action for conversion accrued on May 23, 2014 when the deed was transferred and expired on May 23, 2017. Therefore, Plaintiffs’ cause of action for conversion is time barred.

Accordingly, Defendants’ motion to dismiss Plaintiffs’ complaint pursuant to CPLR3211(a)(5) is granted only to the extent that Plaintiff’s second cause of action for conversion is dismissed as being time barred.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boehm*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To state a cause of action to recover damages for fraud, which must be pleaded with the requisite particularity under CPLR 3016(b), a plaintiff must allege “a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*DeMartino v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf*, 189 A.D.3d 774 [2d Dept. 2020]; *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 A.D.3d 914 [2d Dept. 2009]). If the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations (*ACA Financial Guar. Corp. v Goldman, Sachs, & Co.*, 25 N.Y.3d 1043 [2015]; *Danann Realty Corp. v Harris*, 5 N.Y.2d 317 [1959]; *Schumacher v Mather*, 133 N.Y. 590 [1892]; *R. Vig Properties, LLC v Rahimzada*, 213 A.D.3d 871 [2d Dept. 2023]). Moreover, “when the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy (*ACA Financial Guar Corp.* at 1045; *Central Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269 [2011]). Whether justifiable reliance exists presents an issue of fact, which should be reserved for a trier of fact (*DDJ Management, LLC v Rhone Group LLC*, 15 N.Y.3d 147 [2010]). Additionally, a cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of a contract (*Emby Hosiery Corporation v Tawil*, 196 A.D.3d 462 [2d Dept. 2021]; *Gorman v Fowkes*, 97 A.D.3d 762 [2d Dept. 2012]). However, if the complaint alleges a misrepresentation of “present facts that [are] collateral to the contract and served as an inducement to enter into the contract, [then] a cause of action alleging fraudulent inducement is not duplicative of a breach of contract cause of

action (*Emby Hosiery Corporation* at 464; *Did-it.com, LLC v Halo Group, Inc.*, 174 A.D.3d 682 [2019]).

Accordingly, that branch of the motion for an order pursuant to CPLR § 3211(a)(7) dismissing Plaintiffs' cause of action for fraud is denied as Plaintiffs complaint adequately alleges fraud inter alia paragraphs 56-84; 101-118.

To state a cause of action pursuant to RPAPL Article 15 to quiet title to the subject property, a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title to the property, such as in a deed or other instrument that is actually invalid or inoperative (*Wood v Villanueva*, 175 AD3d 1465 [2d Dept. 2019]; *Cudjoe v Boriskin*, 157 AD3d 654 [2d Dept. 2018]).

Accordingly, that branch of the motion for an order pursuant to CPLR § 3211(a)(7) dismissing Plaintiffs' cause of action to quiet title is denied as Plaintiff's Complaint adequately states a cause of action, inter alia, paragraphs 119-140.

Accordingly, it is hereby,

ORDERED, that Defendants' motion to dismiss Plaintiffs' complaint pursuant to CPLR 3211(a)(5) based upon the statute of limitations is granted to the extent that only Plaintiffs' second cause of action for conversion is dismissed as being time barred, and it is further,

ORDERED, that Defendants' motion to dismiss Plaintiffs' complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is denied.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**