

Dodobayeva v Rubinoff

2023 NY Slip Op 35005(U)

September 12, 2023

Supreme Court, Queens County

Docket Number: Index No. 724253/2021

Judge: Phillip Hom

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.

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

FILED
9/15/2023
COUNTY CLERK
QUEENS COUNTY

PRESENT: HON. PHILLIP HOM PART 14

Justice

-----X

NELYA DODOBAYEVA,

Plaintiff,

- v -

ADELINA RUBINOFF, STEVEN DOBAY,

Defendants.

-----X

INDEX NO. 724253/2021¹

MOTION DATE 10/20/2022

MOTION SEQ. NO. 003 + cross-motion

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for STRIKE PLEADINGS.

And this cross-motion DISMISS

Upon the foregoing documents, it is ordered that Plaintiff’s discovery-related motion, and this cross-motion by Defendant Adelina Rubinoff to dismiss, are determined as follows:

On February 6, 2020, Plaintiff Nelya Dodobayeva (“Plaintiff”) commenced this action against Defendants, Adelina Rubinoff (“Rubinoff”) and Steven Dobay (“Dobay”) (collectively “Defendants”), seeking a judgment canceling the conveyance from Plaintiff to Rubinoff based upon fraud, declaring the quitclaim deed transferring Plaintiff’s interest to Rubinoff null and void, and imposing a constructive trust (EF Doc 20). A Notice of Pendency, dated February 3, 2020, was filed contemporaneously with the verified complaint (EF Doc 20). In an order, dated August 22, 2023, and entered August 24, 2023, this Court extended the Notice of Pendency for three years (EF Doc 85).

On or about July 26, 2004, Plaintiff and Rubinoff purchased real property known as 73-19 196th Street, Fresh Meadows, NY 11366, Block 7183, Lot 72 (the “Premises”), as tenants in common. Thereafter, Rubinoff and Dobay were married on December 19, 2004; however, Defendants are currently involved in a contested matrimonial action pending in the Supreme Court, Queens County, under Index No. 7348/2019 (the “Matrimonial Action”). Rubinoff commenced the Matrimonial Action on December 3, 2019, which was converted to an e-filing case on June 3, 2020, under Index No. 706694/2020. Plaintiff is Rubinoff’s mother-in-law, and Dobay is Plaintiff’s son. Defendants and their children have always resided at the Premises. Plaintiff claims

¹ The Court notes that this action was originally commenced on February 6, 2020, under Index No. 776/2020; however, on October 29, 2021, it was converted to an e-filing case under Index No. 724253/2021.

that she named son as a defendant, because he “might be inequitably affected by a judgment rendered in this action.”

Now, Plaintiff filed this discovery-related motion (Seq. No. 3); however, same was withdrawn pursuant to a stipulation, dated October 19, 2022 (EF Doc 68). Rubinoff cross-moves to dismiss the complaint on the grounds that Plaintiff fails to state a cause of action, and the action is time-barred, pursuant to CPLR 3211 (a) (7) and (5), respectively. Plaintiff opposes.

In support, Rubinoff submits, among other things, her affidavit (EF Doc 39), the summons with notice filed in the Matrimonial Action (EF Doc 40), Dobay’s answer in the Matrimonial Action, which was verified by Dobay himself (EF Doc 41), the summons and complaint in this action, coupled with the subject documents, including, the quitclaim deed, that Plaintiff filed in this action, a check executed by Dobay for the amount of the filing costs associated with the quitclaim deed, and the recording cover page of the quitclaim deed (EF Doc 45 & 46).

In opposition, Plaintiff submits, among other things, her affidavit (EF Doc 49), the deed for the Premises executed in 2004 (EF Doc 51), the 2004 real property transfer report (EF Doc 52), the 2013 quitclaim deed (EF Doc 53), and the summons and complaint in this action (EF Doc 62).

CPLR 3211 (a) (7)—generally

When considering “a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory” (*Law Offs. of Harry J. Binder & Charles E. Binder, P.C. v Fraga*, 207 AD3d 455, 456 [2d Dept 2022]). “The test to be applied is whether the complaint ‘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’” (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621 [2d Dept 1989] [emphasis added]).

Whether the plaintiff will ultimately be able to prove his or her claims, or whether the complaint will later survive a summary judgment motion, is irrelevant in considering a CPLR 3211 motion to dismiss (*see Endless Ocean, LLC v Twomey, Lathan, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 [2d Dept 2014]). In addition, “[a] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 682-83 [2d Dept 2017], quoting *Well v Yeshiva Rambam*, 300 AD2d 580, 580 [2d Dept 2002]).

CPLR 3211 (a) (5)—generally

A defendant moving to dismiss a complaint, pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, has the prima facie burden of establishing that the time in which to commence the action has expired (*see Aurilia v Carbonara*, 185 AD3d 767, 767 [2d Dept 2020]; *Berger v Stolzenberg*, 158 AD3d 738, 739 [2d Dept 2018]). Only when the movant satisfies its prima facie

burden will the burden shift to the nonmoving party to raise an issue of fact as to whether it commenced the action within the applicable limitations period, or whether the statute of limitations is tolled or is otherwise inapplicable (*id.*).

Fraud

“Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). The elements of a cause of action for fraud require, (1) a material representation of fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Weinstein v Levitin*, 208 AD3d 531, 532 [2d Dept 2022]; *Gruber v Donaldsons, Inc.*, 201 AD3d 887, 888 [2d Dept 2022]; *Benjamin v Yeroushalmi*, 178 AD3d 650, 654 [2d Dept 2019]). “A party cannot claim reliance on a misrepresentation when he or she could have discovered the truth with due diligence” (*Avery v WJM Dev. Corp.*, 197 AD3d 1141, 1144 [2d Dept 2021]).

Moreover, where a cause of action is based upon fraud, “the circumstances constituting the wrong shall be stated in detail” (CPLR 3016 [b]; *see Eurycleia Partners, LP*, 12 NY3d at 559; *Pludeman*, 10 NY3d at 491-92; *Weinstein*, 208 AD3d at 532; *Gruber*, 201 AD3d at 888-89). “However, the pleadings requirements of CPLR 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*Gruber*, 201 AD3d at 889).

Here, Plaintiff alleges that, on or about February 24, 2013, Rubinoff approached her and requested that she execute documents to enable her son, Dobay, to become an owner of the Premises. Plaintiff admits that she signed documents, including, the quitclaim deed, dated February 24, 2013, and recorded May 2, 2013; however, she alleges that she did not understand the legal significance of the documents she was signing, and she believed that she was assisting in the conveyance of an interest in the Premises to her son. Plaintiff also alleges that she possesses limited skills in the comprehension and use of the English language, as she is a native of Uzbekistan. The Court notes that Plaintiff personally verified the complaint, which is written in English and there is no evidence of a translation. Plaintiff claims that Rubinoff brought the already-signed documents to a notary and had Plaintiff’s signature notarized outside of her presence. Plaintiff further claims that she received no consideration for signing the documents that transferred her ownership interest in the Premises to Rubinoff. Plaintiff claims that, on or about January 12, 2020, she discovered that she had signed the documents “under false pretenses for the sole purpose of making [Rubinoff] the sole owner of the subject [Premises].”

It appears that Plaintiff’s cause of action alleging fraud is one of fraud in factum rather than fraudulent inducement, as she is claiming that she was misled by Rubinoff to sign documents, including, the quitclaim deed, which were entirely different from what she thought she was signing (*see Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 788 [2d Dept 2009]). “However, a party is under an obligation to read a document before signing it, and generally such a cause of action only arises if the signor is illiterate, blind, or not a speaker of the language in which the document is written” (*Ackerman v Ackerman*, 120 AD3d 1279, 1280 [2d Dept 2014]; *see Anderson v Dinkes & Schwitzer, P.C.*, 150 AD3d 805, 806 [2d Dept 2017]).

Nevertheless, based upon the complaint, Plaintiff fails to state a cause of action for fraud in factum, namely, that she was misled to sign something different from what she thought she was signing. The complaint does not allege that Plaintiff did not read the subject documents, or that she is illiterate, blind, or not a speaker of the language, i.e., English, in which the documents, including, the quitclaim deed, were written (*id.*). While Plaintiff claims that she possesses limited skills in the comprehension and use of the English language, as she is a native of Uzbekistan, she personally verified the complaint that was written in English.

Furthermore, the Court agrees with Rubinoff's argument that Plaintiff's affidavit in opposition is insufficient to cure such defect in the complaint. Plaintiff avers that her attorney drafted her affidavit in opposition, which is written in English, based upon what she said through a Russian interpreter. While Plaintiff states that an unidentified Russian interpreter translated her affidavit in opposition, she does not submit an affidavit in her native language, i.e., Russian, "accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate" (CPLR 2101 [b]). The Appellate Division, Second Department "has held that the absence of a translator's affidavit, required of foreign-language witnesses, renders the witness's English-language affidavit facially defective and inadmissible" (*Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011]; *see Gonzalez v Abreu*, 162 AD3d 748, 749 [2d Dept 2018]).

Regardless, Plaintiff's affidavit would not cure the defects in the complaint. While Plaintiff's affidavit alleges that she did not read the documents before signing same, it merely reiterates that her command of documents written in English is limited. She does not allege that she is blind, illiterate and/or cannot read or speak English. Plaintiff also does not allege that she had difficulty understanding what she was signing. She merely states that she "would not have understood the documents even if [she] had tried to read them." Therefore, Plaintiff fails to state a cause of action of fraud.

Furthermore, even if Plaintiff states a cause of action of fraud, same is time-barred for the reasons discussed below.

Statute of limitations for fraud—generally

"A cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or with reasonable diligence, could have been discovered, whichever is longer" (*Oggioni v Oggioni*, 46 AD3d 646, [2d Dept 2007]; *see* CPLR 203 [g] [1] and 213 [8]; *Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]; *Garguilio v Garguilio*, 291 AD2d 617, 617-18 [2d Dept 1994]).

"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'" (*Oggioni*, 46 AD3d at 648, quoting *Town of Poughkeepsie v Espie*, 41 AD3d 701, 705 [2d Dept 2007]; *see Sargiss*, 12 NY3d at 532). "A plaintiff's ability to discover an alleged fraud depends on whether he or she 'possessed knowledge of facts from which the fraud could reasonably have been inferred'" (*Espie*, 41 AD3d at 705, quoting *Northridge Ltd. Partnership v Spence*, 246 AD2d 582, 583 [2d Dept 1998]; *see Sargiss*, 12 NY3d at 532).

It is undisputed that this action was commenced more than six (6) years after the purported fraud occurred. Additionally, the Court finds that Rubinoff establishes her prima facie burden of establishing that the time in which to commence the action has expired, by showing that, with reasonable diligence, the alleged fraud could have been discovered more than two years earlier than this action was commenced (*see Cannariato v Cannariato*, 136 AD3d 627, 627-28 [2d Dept 2016]). The Court finds that Plaintiff fails to raise a triable issue of fact as whether she timely commenced this action. Thus, Plaintiff's fraud claim is dismissed as untimely.

Constructive Trust

"The elements of a cause of action to impose a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Loeuis v Grushin*, 126 AD3d 761, 763 [2d Dept 2015]; *see Kissane v Cashman*, 217 AD3d 932, 933-34 [2d Dept 2023]).

"An action to impose a constructive trust is governed by the six-year Statute of Limitations provided by CPLR 213 (1), which 'commences to run upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered'" (*Mazzone v Mazzone*, 269 AD2d 574, 574-75 [2d Dept 2000], quoting *Mattera v Mattera*, 125 AD2d 555, 556-57 [2d Dept 1986]; *see Statharos v Statharos*, 2023 WL 5064458, *2, 2023 NY App Div LEXIS 4233, *4 [2d Dept, August 9, 2023]; *Soscia v Soscia*, 35 AD3d 841, 843 [2d Dept 2006]). "A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition, or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property" (*Statharos v Statharos*, 2023 WL 5064458, *2, 2023 NY App Div LEXIS 4233, *4-5, quoting *Barone v Barone*, 130 AD3d 765, 766 [2d Dept 2015]).

Here, it is undisputed that Plaintiff signed the subject quitclaim deed, dated February 24, 2013, and recorded May 2, 2013, in which Plaintiff transferred her interest in the Premises to Rubinoff. This action was commenced on February 6, 2020, more than six (6) years after the allegedly wrongful transfer of the Premises by the quitclaim deed. Thus, to the extent that the complaint may be read to plead a cause of action to impose a constructive trust, it is time-barred (*see Soscia*, 35 AD3d at 843; *Mazzone*, 269 AD2d at 575; *Mattera*, 125 AD2d at 557). Thus, Plaintiff's cause of action to impose a constructive trust is dismissed as time-barred (*id.*).

Declaratory Judgment

"(I)n order to determine the statute of limitations applicable to an action for a declaratory judgment, a court must examine the substance of the action. Where it is determined that the parties' dispute can be, or could have been, resolved in an action or proceeding for which a specific limitation period is statutorily required, that limitation period governs" (*Statharos v Statharos*, 2023 WL 5064458, *2, 2023 NY App Div LEXIS 4233, *6, quoting *Village of Islandia v County*

of *Suffolk*, 162 AD3d 715, 716 [2d Dept 2018]; see *Mahabir v Snyder Realty Group, Inc.*, 217 AD3d 850, 851-52 [2d Dept 2023]).

Here, both causes of actions are governed by a six-year statute of limitations period. Thus, a six-year statute of limitations period applies to the declaratory judgment cause of action (*id.*). As such, Plaintiff’s declaratory judgment cause of action is dismissed as untimely for the same reasons mentioned above.

In accordance with the foregoing, it is hereby **ORDERED** that Plaintiff’s discovery-related motion is denied as moot; and it is further

ORDERED that Rubinoff’s cross-motion to dismiss is granted; and it is further

ORDERED that Plaintiff’s verified complaint is dismissed as time-barred; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

ORDERED that this Court’s Order, dated August 22, 2023, and entered August 24, 2023, in which the *lis pendens* was extended, is hereby vacated; and it is further

ORDERED that the Queens County Clerk is directed, upon payment of proper fees, if any, to cancel and discharge the *lis pendens* filed in this action on February 6, 2020, and extended by this Court’s Order, dated August 22, 2023, and entered August 24, 2023, against real property known as 73-19 196th Street, Fresh Meadows, NY 11366, Block 7183, Lot 72; and it is further

ORDERED that the Queens County Clerk shall enter upon the margin of the record a notice of cancellation referring to this Order; and it is further

ORDERED that Defendant Rubinoff shall serve a copy of this Order with Notice of Entry upon the Queens County Clerk, within twenty (20) days of the date of entry; and it is further

ORDERED that Defendant Rubinoff shall serve a copy of this Order with Notice of Entry upon Plaintiff and Co-Defendant Dobay, via NYSCEF, within ten (10) days of the date of entry.

This constitutes the Decision and Order of this Court.

Dated: September 12, 2023


PHILLIP HOM, J.S.C.

FILED
9/15/2023
COUNTY CLERK
QUEENS COUNTY