

**Nucci v Nucci**

2012 NY Slip Op 31931(U)

July 11, 2012

Supreme Court, Suffolk County

Docket Number: 44836/2010

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**COPY**

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

GARY NUCCI,

Plaintiff,

-against-

FRANK A. NUCCI, Individually, and as  
Trustee of The FRANK NUCCI FAMILY  
REVOCABLE TRUST and The FRANK  
NUCCI FAMILY IRREVOCABLE TRUST,  
FRANK D. NUCCI, as Trustee of The FRANK  
NUCCI FAMILY REVOCABLE TRUST, JOHN  
DOE and JANE DOE Being Unknown  
Persons in possession of premises 249  
Beverly Road, Huntington Station, New York,

Defendants.

ORIG. RETURN DATE: MARCH 2, 2011  
FINAL SUBMISSION DATE: JANUARY 19, 2012  
MTN. SEQ. #: 001  
MOTION: MOT D

**PLTF'S/PET'S ATTORNEY:**  
LAW OFFICE OF MICHAEL G. LEAVY  
191 NEW YORK AVENUE  
HUNTINGTON, NEW YORK 11743  
631-673-7555

**DEFT'S/RESP ATTORNEY:**  
CHRISTOPHER MODELEWSKI, P.C.  
44 ELM STREET - SUITE 18  
HUNTINGTON, NEW YORK 11743  
631-423-8989

Upon the following papers numbered 1 to 10 read on this motion \_\_\_\_\_  
TO DISMISS \_\_\_\_\_

Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Amended Affirmation  
in Support and supporting papers 5, 6; Affirmation in Opposition and supporting papers 7,  
8; Memorandum of Law in Opposition 9; Reply Affirmation 10; it is,

**ORDERED** that this motion by defendants, FRANK A. NUCCI,  
Individually, and as Trustee of The FRANK NUCCI FAMILY REVOCABLE  
TRUST and The FRANK NUCCI FAMILY IRREVOCABLE TRUST, and FRANK  
D. NUCCI, as Trustee of The FRANK NUCCI FAMILY REVOCABLE TRUST  
(collectively "defendants"), for an Order:

KAK

(1) pursuant to CPLR 3211 (a) (5), dismissing the within action against defendants for a failure to state a cause of action based upon a prior release given by plaintiff; or, pursuant to CPLR 3211 (a) (5) and 213 (8), because the claims are time-barred; or, pursuant to CPLR 3016 (b), because the complaint lacks the particularity required by statute and case law, and further, because the plaintiff has no valid claim to real property under Article 15 of the Real Property Actions and Proceedings Law; and as to the claims regarding the power of attorney that those be dismissed because the principal is, and has been deceased since November 6, 2008, and under CPLR 217, the claim which should be pleaded as a special proceeding is time-barred; and

(2) granting counsel fees previously agreed to by plaintiff and permitting additional written submissions on the amount of attorney's fees to be paid by plaintiff, or setting this matter down for a hearing on damages including attorney's fees; or, in the alternative

(3) in the event that the complaint is not dismissed, pursuant to CPLR 8501 (a), requiring plaintiff, a resident of the State of Florida, to post a bond; and

(4) pursuant to CPLR 6514, canceling of record the Notice of Pendency filed in this matter,

is hereby **GRANTED** solely to the extent provided hereinafter. The Court has received opposition hereto from plaintiff GARY NUCCI.

This action was commenced by plaintiff GARY NUCCI against his brother, defendant FRANK A. NUCCI, and his nephew, defendant FRANK D. NUCCI, the son of defendant FRANK A. NUCCI. Plaintiff asserts four causes of action against defendants sounding in fraud, undue influence, coercion, and conversion, all with respect to the assets of Francis Nucci and the Estate of Francis Nucci a/k/a Frank Nucci, who died on November 6, 2008.

Francis Nucci was the father of plaintiff and defendant FRANK A. NUCCI. Plaintiff alleges, among other things, that on or about November 4, 1997, defendant FRANK A. NUCCI fraudulently induced Francis Nucci to transfer the real property commonly known as 249 Beverly Road, Huntington Station, New York, to "FRANK NUCCI" and "FRANK A. NUCCI," "as Trustees of the FRANK NUCCI REVOCABLE TRUST." Thereafter, by deed dated April 26, 2010,

defendant FRANK A. NUCCI transferred the subject property to himself. Plaintiff further alleges that defendant FRANK A. NUCCI fraudulently induced Francis Nucci to transfer other assets either directly to defendant FRANK A. NUCCI, or indirectly through the FRANK NUCCI FAMILY REVOCABLE TRUST and the FRANK NUCCI FAMILY IRREVOCABLE TRUST. Moreover, plaintiff alleges that defendant FRANK A. NUCCI improperly utilized his position as power of attorney for Francis Nucci to convert assets belonging to Francis Nucci for the benefit of defendant FRANK A. NUCCI. Based upon the foregoing, plaintiff claims that he has been deprived of his inheritance rights as to the assets belonging to his father. As such, plaintiff seeks a judgment declaring that the transfers of the subject premises were null and void; that defendants account for any sums collected by them in connection with the rental of the subject premises; that defendant FRANK A. NUCCI account for his conduct as attorney-in-fact for Francis Nucci; that defendant FRANK A. NUCCI account for the assets of the trusts; and that defendant FRANK A. NUCCI account for any assets transferred by Francis Nucci to or for defendant FRANK A. NUCCI's benefit during the period July 1, 1997 to the present; and reforming all of the trusts referred to herein to include plaintiff as a fifty (50%) percent beneficiary of said trusts.

Defendants have now filed the instant motion to dismiss plaintiff's complaint in its entirety. Defendants argue that the complaint should be dismissed because plaintiff executed a release in connection with the settlement of a prior lawsuit between the parties commenced in 1997. Defendants further argue that the applicable six-year statute of limitations bars the instant fraud claims. Additionally, defendants argue that the fraud claims should be dismissed as lacking the requisite elements thereof, as well as the particularity mandated by CPLR 3016 (b). Finally, defendants contend that plaintiff cannot now challenge the validity of the power of attorney, as the principal is deceased and the four-month statute of limitations has run on a challenge to such power of attorney. In the alternative, if the Court does not dismiss this action, defendants request that plaintiff be required to post a bond, pursuant to CPLR 8501 (a), as he is a non-resident of New York.

After filing the instant motion to dismiss, on or about October 3, 2011, plaintiff served an amended verified complaint as of right pursuant to CPLR 3025 (a). The amended complaint contains additional factual allegations concerning defendant FRANK A. NUCCI's alleged undue influence upon his father, as well as an allegation that "defendant FRANK A. NUCCI created additional falsehoods, including concocting a vicious untruth that plaintiff was not

the biological son of their father, FRANCIS NUCCI, solely for the purpose of inducing FRANCIS NUCCI to disown plaintiff and his family.” Defendants request that this Court apply their motion to dismiss to the amended complaint.

In opposition hereto, plaintiff argues that the amended complaint now contains the requisite specificity regarding the fraud claims in compliance with CPLR 3016 (b). In addition, plaintiff alleges that he never intended to release his inheritance claims in the release he signed on June 25, 1997. Instead, plaintiff contends that the release given was solely for the purpose of terminating plaintiff’s interest in a specific insurance trust entitled, “Frank Nucci Insurance Trust,” of which plaintiff was a beneficiary. Furthermore, plaintiff alleges that all the claims asserted herein relate to post-release conduct. Plaintiff contends that after their father died, defendant FRANK A. NUCCI “targeted his greed upon his father’s assets,” and “concocted a vicious lie that Gary was not the biological son of their father.” Plaintiff claims that he only became aware of this “vicious lie” in 2010, and promptly commenced this action within that same year. Accordingly, plaintiff argues that the release cannot act as a bar to the instant action; that there is no valid statute of limitations defense; and that the amended complaint makes sufficiently specific fraud allegations. However, plaintiff consents to the posting of security for costs pursuant to CPLR 8501 (a).

Defendants herein rely on an “Accounting, Receipt and Release” executed by plaintiff on June 25, 1997, which provides in pertinent part:

6. I, my estate, distributees, heirs, successors and/or assigns, shall not at any time commence or authorize another on my behalf to commence any legal action, claim or demand against FRANK NUCCI, the Grantor, FRANK A. NUCCI, the Trustee or the Trust; and, notwithstanding the foregoing, I further acknowledge, covenant and represent that I, my estate, distributees, heirs, successors and/or assigns shall hold harmless and indemnify FRANK NUCCI, the Grantor, FRANK A. NUCCI, the Trustee or the Trust and any newly established trust for any and all costs and expenses relating to any legal action, claim or demand, including attorneys’ fees, brought by me or on my behalf

(Accounting, Receipt and Release, executed on June 25, 1997, at ¶ 6).

The Court finds that the aforementioned release was made in connection with the dissolution of the Frank Nucci Insurance Trust, and released defendant FRANK A. NUCCI from liability with respect to that insurance trust. Although the Court is aware that the release contains the language “and any newly established trust,” the Court finds that such language refers to any newly established trusts that may contain the life insurance policy or policies, or proceeds thereof, contained in the original Frank Nucci Insurance Trust. Thus, the Accounting, Receipt and Release, executed by plaintiff on June 25, 1997, does not act as a bar to the instant action.

Next, regarding defendant’s statute of limitations arguments, CPLR 213 (8) provides that “the time within which [a fraud] 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” (CPLR 213 [8]; see CPLR 203 [g]; *Town of Poughkeepsie v Espie*, 41 AD3d 701 [2007]; *Espie v Murphy*, 35 AD3d 346 [2006]). 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” (*Town of Poughkeepsie v Espie*, 41 AD3d at 705). Here, plaintiff challenges the transfer of the real property in 2010, and other unidentified assets, based upon defendant FRANK A. NUCCI’s alleged fraud and undue influence over Francis Nucci. Plaintiff alleges that he only discovered this fraud in 2010, when he learned that defendant FRANK A. NUCCI had told their father that plaintiff was not his biological son. Accepting as true the allegations in the complaint, as this Court is constrained to do on this pre-answer motion to dismiss, and affording plaintiff the benefit of every favorable inference (see e.g. *Matter of Eastern Oaks Dev., LLC v Town of Clinton*, 76 AD3d 676 [2010]), the Court finds that plaintiff’s first, second, and third causes of action are not time-barred by the applicable statute of limitations (see CPLR 203 [g], 213 [8]). Additionally, the Court finds that plaintiff has now satisfied the pleading requirement of CPLR 3016 (b).

With respect to plaintiff’s fourth cause of action seeking to challenge defendant FRANK A. NUCCI’s use of the power of attorney given to him by Francis Nucci, the Court notes that such power of attorney terminated upon Francis Nucci’s death on November 6, 2008 (see General Obligations Law § 5-1511 [1] [a]). A special proceeding may be commenced pursuant to General Obligations Law § 5-1510 for the purpose of, among other things, determining

whether the power of attorney was procured through duress, fraud or undue influence, or removing the agent upon the grounds that the agent has violated the fiduciary duties under the power of attorney (see General Obligations Law § 5-1510 [2] [c], [f]). Notwithstanding the foregoing, plaintiff seeks an accounting herein for defendant's conduct as attorney-in-fact for Francis Nucci. "A proceeding to compel an accounting by a fiduciary is governed by a six-year statute of limitations" (*In re Estate of Meyer*, 303 AD2d 682, 683 [2003]; see CPLR 213 [1]; *Matter of Barabash*, 31 NY2d 76 [1972]; *Matter of Hiletzaris*, 33 Misc 3d 1214A [Sup Ct, Queens County 2011]; *Matter of Garson*, 2 Misc 3d 847 [Sup Ct, New York County 2003], *affd* 17 AD3d 243 [2005]), and the Court finds that defendants have failed to meet their burden of establishing *prima facie* that the time in which to sue for an accounting has expired (see e.g. *Savarese v Shatz*, 273 AD2d 219 [2000]).

Finally, upon consent of plaintiff, the Court directs that plaintiff post an undertaking for costs in the amount of \$1,000.00, pursuant to CPLR 8501 (a) and 8503, within thirty days of the date the instant Order is served upon plaintiff with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: July 11, 2012

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION