

Saleh v Kaliskas

2016 NY Slip Op 31381(U)

June 21, 2016

Supreme Court, Queens County

Docket Number: 710534/2015

Judge: Thomas D. Raffaele

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA PART 13
Justice

KAMEL SALEH, Individually and as x
Managing Member of 3529 31st Street, LLC
and 3529 31st Street, LLC,

Plaintiff,

-against-

GREGORY KALISKAS AS TRUSTEE OF THE
GREGORY KALISKAS REVOCABLE TRUST,
BORN TO BUILD, LLC, GEORGE HOURANI
23-62 STEINWAY ST., LLC and KAZLOW &
KAZLOW,

Defendants. x

Index
Number 710534 2015

Motion
Date April 5, 2016

Motion Seq. Nos. 1 & (2)

FILED
JUN 24 2016
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 21 were read on these motions by defendants to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (5).

	<u>Papers Numbered</u>
Notices of Motion - Affirmations - Exhibits	1-9
Answering Affirmations - Exhibits	10-17
Reply Memoranda of Law	18-21

Upon the foregoing papers, it is ordered that defendants' motions are determined as follows:

Defendant, Born to Build, LLC (Born to Build), in an action brought in the Supreme Court, Nassau County (Index No. 002345/2011), obtained a default judgment against Ibrahim Saleh in May, 2011. In an effort to collect the judgment, Born to Build

issued levies against three properties allegedly belonging to said judgment debtor. Plaintiff in the instant action moved, in the Nassau action, to vacate the levies, claiming that Ibrahim, who is plaintiff's brother, had no interest in those properties. After a hearing, such application was denied, and the levies were upheld. On December 22, 2011, the subject property herein was sold at a marshal's sale, and, on June 27, 2012, deeded to defendant, Gregory Kalikas as Trustee of the Gregory Kalikas Revocable Trust (Kalikas), (sued here incorrectly as "Gregory Kaliskas as Trustee of the Gregory Kaliskas Revocable Trust"). In the interim, on October 10, 2012, Kamel Saleh moved for reargument of the decision denying his motion to vacate the levies, and, on February 22, 2013, his motion was granted to the extent that the levy and sale of the subject property herein was vacated.

Plaintiff commenced the instant lawsuit on or about October 8, 2015, asserting three causes of action. None of the causes of action specifically enunciates the legal basis therefor. The First Cause of Action states that defendant, "George Hourani, as the managing member of" Born to Build, levied upon and sold the subject property which did not belong to the judgment debtor, Ibrahim Saleh. Further, it alleged that defendant, Kazlow & Kazlow, the attorneys for Born to Build, "wrongfully seized control of ... the property ... either intentionally or negligently." The Second Cause of Action contained the allegation that Kalikas had knowledge that the seller of the subject property "was not the true owner and that the purchase price was significantly below fair market value." The Third Cause of Action alleged "plaintiffs are entitled to a judgment vacating the disposition of the property by sale to" Kalikas.

Defendants, Born to Build, Hourani and the Kozlow firm (Seq.1), and defendant, Kalikas (Seq. 2), now move to dismiss plaintiff's verified complaint, as against each, pursuant to CPLR 3211 (a) (5), based on statute of limitations, contending that the allegations of the complaint sound in tort, and plaintiffs have failed to commence this action within three years of the date of the alleged injury, as required by statute. Plaintiffs oppose.

"[A] cause of action does not accrue until an injury is sustained" (*Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex.*, 87 NY2d 36, 43 [1995]). With tort claims, "accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*City Store Gates Mfg. Corp. v Empire Rolling Steel Gates Corp.*, 113 AD3d 718, 719 [2014], quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). As such, defendants contend that plaintiff's cause of action accrued upon the transfer of title to the subject property to Kalikas on June 27, 2012, and, thus, the statute of limitations for "an action to recover damages for an injury to property" (CPLR 214 [4]), expired on June 27, 2015, several months prior to the commencement of

this lawsuit. Plaintiffs' argument that the limitations period should have been measured from February 22, 2013, when the denial of the motion to vacate the levies was overturned, is without merit.

Contrary to plaintiffs' assertion in opposition, the First and Second Causes of Action in the complaint failed to state facts supporting allegations that defendants knowingly and intentionally misrepresented material facts for the purpose of inducing reliance, and that there was actual and justifiable reliance by plaintiffs, which led to damages, and were, therefore, inadequate to support causes of action for fraud (*see Theaprin Pharmaceuticals, Inc. v Conway*, 137 AD3d 1254 [2016]; *Fulton v Hankin & Mazel, PLLC*, 132 AD3d 806 [2015]; *Priestley v Panmedix, Inc.*, 134 AD3d 642 [2015]; *Wilson v Neighborhood Restore Housing*, 129 AD3d 948 [2015]). Additionally, the allegations of the First and Second Causes of Action did not fit into any of the other categories of CPLR 213, thereby denying plaintiff the benefit of that statute's six-year period within which to commence a lawsuit.

As the filing of the instant action occurred without the three-year statutory period for actions in tort, the First and Second Causes of Action are barred, as against the moving defendants, under CPLR 214 (4).

However, plaintiffs' Third Cause of Action is couched in terms of an action for possession of real property, wherein plaintiffs are seeking to quiet title to the subject property. Here, plaintiffs have sufficiently alleged possession of the subject property within 10 years of commencing this action, by demonstrating they are the alleged "legal title" holder of the premises (RPAPL 311; *see Elam v Altered Ego Realty Holding Corp.*, 114 AD3d 901 [2014]). As such, said cause of action is governed by the 10-year statute of limitations of CPLR 212 (a) (*see In re Marini*, 119 AD3d 584 [2014]), and is not, herein, subject to dismissal pursuant to CPLR 3211 (a) (5), based on a failure to commence the cause of action within the applicable statute of limitations.

Defendant, Kalikas, also moved to dismiss only the Second Cause of Action in plaintiffs' complaint, pursuant to CPLR 3211 (a) (5). For the same reasons as stated above, such motion is granted, and the Second Cause of Action is dismissed as against Kalikas.

The parties' remaining contentions and arguments are either without merit, are not before the court, or need not be addressed in light of the aforementioned determination.

Accordingly, the branches of the motion by defendants, Born to Build, Hourani and the Kazlow firm, seeking dismissal of the First and Second Causes of Action in

plaintiffs' complaint, pursuant to CPLR 3211 (a) (5), are granted. The branch of said defendants' motion seeking dismissal of the Third Cause of Action in plaintiffs' complaint is denied. Defendant, Kalikas' motion seeking dismissal of the Second Cause of Action as against him is granted.

Dated: June 21, 2016



Thomas D. Raffaele, J.S.C.

FILED
JUN 24 2016
COUNTY CLERK
QUEENS COUNTY