STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOHN A. COREY and SUSAN B. COREY,

Plaintiffs,

-against-

MARY T. COREY,

Defendant.

DECISION and ORDER
RJI NO. 01-12-108483
INDEX NO. 3758-12

Supreme Court Albany County All Purpose Term, November 30, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Tully Rinckey, PLLC
Douglas Rose, Esq.
Attorneys for Plaintiffs
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Albany, New York 12205

Sanford Finkel, Esq.
Attorney for Defendant
68 Second Street
Troy, New York 12180

TERESI, J.:

Plaintiffs[1] commenced this action seeking rescission of two deeds, executed in 1991 and 1997, that conveyed 20 Lori Lane, Latham, New York (hereinafter "20 Lori Lane") to their daughter Mary Cory. Prior to answering, Mary Cory moves to dismiss the complaint pursuant to CPLR §3211(a)(5)'s statute of limitations provision. Plaintiffs oppose the motion. Because Mary Cory demonstrated her entitlement to dismissal, her motion is granted.

[1]Because each of the parties share the same surname, each party will be referred to individually by their forename.

"To dismiss a cause of action pursuant to CPLR 3211(a)(5), on the ground that it is barred by the Statute of Limitations, a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired." (Morris v Gianelli, 71 AD3d 965, 967 [2d Dept 2010] quoting Savarese v Shatz, 273 AD2d 219 [2d Dept 2000]; Simons v Bassett Health Care, 73 AD3d 1252 [3d Dept 2010]). Only if such showing is made will the burden shift "to the plaintiffs to aver evidentiary facts establishing that the case at hand falls within [an exception to the limitations period]." (Minichello v N. Assur. Co. of Am., 304 AD2d 731, 732 [2d Dept 2003], quoting Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc., 168 AD2d 822 [3d Dept 1990][internal quotation marks omitted]).

As is applicable here, "[w]here... rescission is sought on the ground of actual fraud, the Statute of Limitations is six years from the commission of the fraud or two years from when the plaintiff discovered or should have discovered the fraud, whichever is later." (Hoffman v Cannone, 206 AD2d 740 [3d Dept 1994]; CPLR §§213[8] and 203[g]; Coombs v Jervier, 74 AD3d 724 [2d Dept 2010] lv to appeal denied, 16 NY3d 709 [2011]). This "limitations period for a fraud cause of action applies [equally] to a cause of action alleging forgery." (Shalik v Hewlett Assoc., L.P., 93 AD3d 777 [2d Dept 2012]). Additionally, "[t]he inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was possessed of knowledge of facts from which [the fraud] could be reasonably inferred. Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute." (Sargiss v Magarelli, 12 NY3d 527, 532 [2009], quoting Erbe v. Lincoln Rochester Trust Co., 3 NY2d 321 [1957]).

On this record, Mary Cory established the "commission of the fraud" dates applicable to

each deed. Plaintiffs' complaint alleges that the 1991 deed, that transferred 20 Lori Lane from John and Susan to John and Mary Cory, was a forgery. It was allegedly executed on February 19, 1991, and neither Plaintiff had knowledge of its execution at that time. Upon such pleadings, Plaintiffs first fraud claim accrued on either February 19, 1991 or February 20, 1991, the day such deed was recorded. (Coombs v Jervier, supra). Thereafter, by deed executed January 30, 1997, Plaintiffs' complaint alleges that 20 Lori Lane was transferred, in fee, from John and Mary Cory to Mary Cory alone. This deed was allegedly obtained by "misrepresentation, deception, fraud, and undue influence" not forgery[2], as Plaintiffs intended to transfer only a life estate to Mary Cory. Plaintiffs thereby acknowledged that John signed the 1997 deed, and he now "cannot generally avoid the effect of the document on the ground that he... did not read it or know its contents." (Augustine v BankUnited FSB, 75 AD3d 596, 597 [2d Dept 2010]; Cash v Titan Fin. Services, Inc., 58 AD3d 785 [2d Dept 2009]; Pimpinello v Swift & Co., 253 NY 159 [1930]). He was therefore, upon signing the 1997 deed, "possessed of knowledge of facts from which [the fraud] could be reasonably inferred" because the deed's language itself transferred a fee interest not a life estate. (Sargiss v Magarelli, supra). Upon these pleadings, Plaintiffs' second fraud claim accrued on either January 30, 1997 or January 31, 1997, the day such deed was recorded. (Coombs v Jervier, supra).

Because the applicable six year statute of limitations on both of Plaintiffs' claims expired well prior to commencement, Mary Cory met her initial burden of establishing that the time in which to sue has expired on both of Plaintiffs' causes of action.

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[2] Despite CPLR §3016(b)'s particularity requirement, the complaint does not state in detail the circumstances constituting Mary Cory's misrepresentation, deception, fraud or undue influence.

With the burden shifted, "the burden of establishing that the fraud could not have been discovered prior to the two-year period before the commencement of the action rests on the plaintiff who seeks the benefit of the exception." (Von Blomberg v Garis, 44 AD3d 1033, 1034 [2d Dept 2007]). Although Plaintiffs state that they "discovered" the two fraudulent deeds in January 2012, they offer no proof or allegations addressing when they "could have" discovered the alleged fraud. Their singular reliance on "discovery" is simply unavailing. Moreover, because the 1991 deed is explicitly referenced in the 1997 deed and John admits that he signed the 1997 deed, the Plaintiffs could have discovered the alleged 1991 forgery in 1997. Nor have Plaintiffs explained why the 1997 deed was not executed by both John and Susan, if at that time they were unaware of Susan's interest in 20 Lori Lane being cut off by the 1991 deed.

Accordingly, Defendant's motion is granted and the complaint is dismissed.

This Decision and Order is being returned to the attorney for Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 12, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated November 6, 2012; Affidavit of Sanford Finkel, dated November 6, 2012; Affidavit of Mary Cory, dated November 5, 2012, with attached Exhibit A.
2. Affidavit of John and Susan Cory, dated November 9, 2012.
3. Affidavit of Sanford Finkel, dated November 20, 2012.