

<b>Matter of Vidalex Capital 1 LLC v Theodorakopoulos</b>
2015 NY Slip Op 31348(U)
July 15, 2015
Supreme Court, Queens County
Docket Number: 709961/14
Judge: Howard G. Lane
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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IA PART 6**

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In the Matter of VIDALEX CAPITAL 1 LLC, as  
 assignee-in-interest to STERLING NATIONAL  
 BANK,

Index  
 Number 709961/14

Petitioner,

Motion Date: May 7, 2015

-against-

Motion Seq. No. 1

NIKOLAOS THEODORAKOPOULOS and  
 BELLMORE CITGO, INC.,

Motion Cal. No. 146

Respondents/Judgment Debtor.

HELEN DRIZIS, et al.,

Additional Respondents.

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The following numbered papers numbered read on this special proceeding by petitioner Vidalex Capital 1 LLC (Vidalex), as assignee in interest to Sterling National Bank for a judgment setting aside the transfer of real property by the judgment debtor Nickolaos Theodorakopoulos to Helen Drizis as fraudulent, and directing the sale of said real property pursuant to CPLR 5206. Respondent Helen Drizis cross moves for an order dismissing the petition on the grounds of statute of limitations, failure to state a cause of action and lack of personal jurisdiction, pursuant to CPLR 3211(a)(5)(7) and (8), and in the alternative seeks a protective order enjoining Vidalex from selling or executing on the subject real property until it is vacant or sold, pursuant to CPLR 5240.

	Papers <u>Numbered</u>
Notice of Petition.....	EF 2
Exhibits.....	EF 3-5
Cross Motion.....	EF 12
Aff. In Support of Cross Motion.....	EF 13-14
Exhibits.....	EF 15-23
Aff. Of Service.....	EF 24
Memorandum of Law in Support.....	EF 25
Aff. Of Service.....	EF 26
Aff. In Support of Cross Motion.....	EF 28
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Aff. In Further Supp. of Cross Motion....	EF 36
Aff. Of Service.....	EF 37
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Aff. Of Service.....	EF 39-41

Upon the foregoing papers the petition and cross motion are determined as follows:

Petitioner Vidalex alleges that it is the assignee of Sterling National Bank (Sterling), a judgment creditor. Sterling, in an action commenced in the Supreme Court, Nassau County entitled *Sterling National Bank v Bellmore Citgo, Inc. and Nicholas Theodrakopoulos*, Index No. 16753/2006, obtained an order granting a default judgment against the defendants in the sum of \$62,704.81, together with interest, on March 7, 2007. Said order was entered in the Office of the Nassau County Clerk on March 19, 2007. A judgment in said action in the sum of \$71, 403.19, together with costs of \$655.00, totaling \$72,058.19 was docketed on March 30, 2007 in the Office of the Nassau County Clerk.

In August 2008, Vidalex purchased a portfolio of judgments from Sterling, including the judgment Sterling recovered against Bellmore Citgo, Inc. and Nicholas Theodrakopoulos in the Supreme Court, Nassau County, in the sum of \$72,058.19. Sterling provided Vidalex with a written assignment of said judgment dated August 21, 2008, in which it stated that it had recovered said judgment on March 30, 2007 and that it was entered in the Office of the Clerk of the County of Nassau on March 30, 2007. A corporate acknowledgment of said assignment was executed on September 29, 2008. A copy of a certificate of judgment issued by the Clerk of the County of Nassau and dated

August 21, 2014, recites that the subject March 30, 2007 judgment was amended to reflect a transcript of the judgment was filed in Queens County on January 11, 2008, and an assignment to Vidalex on August 21, 2014.

Nikolaos Theodorakopoulos and Katina Theodorakopoulos purchased the real property located at 143-31 Quince Avenue, Flushing, New York, and have continuously resided at said premises since 1973. On January 3, 2008, Helen Drizis, the daughter of Nikolaos and Katina Theodorakopoulos purchased said real property from her parents and granted them a life estate. In connection with this transaction, Ms. Drizis obtained a mortgage loan in the sum of \$430,000.00, and used \$392,954.63 from said loan to pay off her parents' prior mortgage loan. The life estate deed was recorded on January 22, 2008. A satisfaction of the Theodorakopoulos mortgage was recorded on January 22, 2008. Mr. Theodorakopoulos is presently 83 years old and his wife Katina is presently 78 years old.

Vidalex commenced the within special proceeding on December 29, 2014, and seeks to set aside the transfer of the subject real property by the judgment debtor Nickolaos Theodorakopoulos to Helen Drizis as fraudulent, and directing the sale of said real property pursuant to CPLR 5206. Petitioner's first cause of action to set aside the transfer of the subject real property alleges that the conveyance was fraudulent, pursuant to Debtor & Creditor Law §§ 273, 274 and 275. The second cause of action seeks, upon the reinstatement of Nikolaos and Katina Theodorakopolous as owners, the sale of real property in order to satisfy said judgment.

The purported service of process on Helen Drizis under CPLR 308 (2) was defective since the petitioner attempted service by delivering the summons and complaint to her father, a person of suitable age and discretion, at the Flushing property, rather than at her actual place of business, dwelling place, or usual place of abode (*see Rios v Zorrilla*, 8 AD3d 463 [2d Dept 2004]; *Mourtil v Chi Ming Peng*, 295 AD2d 582 [2d Dept 2002]). The Court of Appeals, in applying the analogous provision in CPLR 308(4), made clear that the dwelling place contemplated by the statute is one at which the defendant or respondent is actually residing at the time of delivery (*see Feinstein v Bergner*, 48 NY2d 234 [1979]).

Here, the process server's affidavit submitted by petitioner recites that on January 13, 2015, service was made on Helen Drizis at 143-31 Quince Avenue, Flushing, New York, a "dwelling house (usual place of abode) within the state", by serving her father Nikolaos Theodorakopolous, a person of suitable age and discretion, and by mailing a copy of the petition to said address on January 14, 2015. Ms. Drizis, in her affidavit, states that since October 8, 1978, she has been and remains a permanent resident of 68-09 32nd Avenue, Woodside, New York, and submits various documents as

proof of her residence at the Woodside address. She states that she does not reside at the Flushing premises and did not reside there at the time of the purported service on January 13, 2015.

Petitioner, in its reply, concedes that it was unable to serve Ms. Drizis at the Woodside address, and has submitted an affidavit from a process server who states that he was unable to gain entry to the Woodside building on various dates, as either no one answered the intercom, or that a man who he spoke with via the intercom and identified himself as Helen Drizis' husband refused to allow him to gain entry to the building.

Petitioner, thus was aware that the Flushing address was not Ms. Drizis' actual residence at the time of delivery of process on January 13, 2015. Contrary to petitioner's assertion, the evidence presented does not establish that Ms. Drizis attempted to evade service. Moreover, to the extent that petitioner was unable to effectuate service pursuant to CPLR 308(1), (2) or (4), it was required to move for an order pursuant to CPLR 308(5), rather than fashioning an unauthorized method of service.

In addition, the court further finds that the within proceeding was not timely commenced. On a motion to dismiss a complaint or petition, pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant or respondent bears the initial burden of establishing, prima facie, that the time in which to sue has expired (*see DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 812 [2d Dept 2011]).

A cause of action based on constructive fraud is governed by a six-year Statute of Limitations (*see* CPLR 213 [8]), and such a cause of action arises at the time the fraudulent conveyance occurs (*see Wall St. Assocs. v Brodsky*, 257 AD2d 526, 530 [1st Dept 1999]). Here, all of plaintiff's claims are based upon constructive fraud pursuant to Debtor and Creditor Law §§ 273, 274 and 275 and were required to be commenced within six (6) years after the date that the fraud occurred, irrespective of the date of discovery (*see Felshman v Yamali*, 106 AD3d 948, 949-950 [2d Dept 2013]; *Gonik v Israel Discount Bank of N.Y.*, 80 AD3d 437, 438 [2011]). Therefore, as the subject real property was conveyed on January 3, 2008, Vidalex was required to commence the within action no later than January 3, 2014. In view of the fact that petitioner did not commence this action until December 29, 2014, the within petition is untimely.

Inasmuch as the court does not have jurisdiction over respondent Helen Drizis and as the within petition is barred by the statute of limitations, the court need not determine whether the petition states a cause of action or whether the assignment was properly filed. Accordingly, respondent Helen Drizis' cross motion to dismiss the petition is granted.

As Helen Drizis is a necessary party to this proceeding, and as the petition is dismissed as to her, the relief sought by petitioner is unavailable, and therefore the petition is dismissed as to all respondents.

This constitutes the order and judgment of the court.

Dated : July 15, 2015

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**Howard G. Lane, J.S.C.**