

**Coleman v Rubin**

2017 NY Slip Op 31351(U)

May 9, 2017

Supreme Court, Queens County

Docket Number: 712435/2016

Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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WALLEANA COLEMAN,

Index No. 712435/2016

Plaintiff,

Motion  
Date: December 20, 2016  
Fully submitted to Chambers  
February 17, 2017

-against-

Motion Cal. No. 27

MARJORIE RUBIN,

Motion Sequence No. 1

Defendant.

**FILED**  
MAY 18 2017  
COUNTY CLERK  
QUEENS COUNTY

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The following efile papers numbered 3-18 submitted and considered on this pre-answer motion by defendant Marjorie Rubin for an Order dismissing plaintiff Walleana Coleman's verified complaint pursuant to CPLR 3211 (a) (1) and (7) and for sanctions pursuant to 22 NYCRR §130-1.1.

	<u>Papers Numbered</u>
Notice of Motions-Affidavits-Exhibits.....	EF 3-16
Affirmation in Opposition-Affidavits-Exhibits....	EF 17
Reply Affirmation-Affidavits-Exhibits.....	EF 18
Plaintiff's verified complaint.....	EF 1

Defendant Marjorie Rubin's motion for an Order dismissing plaintiff Walleana Coleman's verified complaint pursuant to CPLR 3211 (a) (1) and (7) and for sanctions pursuant to 22 NYCRR §130-1.1. is granted in part and denied in part.

This action arises out of an alleged fraudulent transfer by defendant of real property located at 120-15 171<sup>st</sup> Street, Queens, New York. Plaintiff Walleana Coleman (hereinafter "Coleman") alleged that she held constructive title to the property. Coleman alleged that both defendant Marjorie Rubin and her deceased husband, Joseph Rubin, knew that both Coleman and her parents had fully

paid off the mortgage on the subject property, had paid the real estate taxes for years, and that Coleman was one of the listed notice parties in tax lien foreclosure proceedings involving such property. By way of background, Coleman alleged that she is the daughter of Ethel Alexander and the step-daughter of Vanborn Venito Alexander (hereinafter collectively "Alexanders"). She contended that in 1961, the Alexanders purchased the subject property pursuant to a deed from Carlton Homes, Inc, which was recorded in the Office of the City Registrar of the City of New York on or about December 11, 1961. The Alexanders' mortgage on the property with Franklin Society Federal Savings and Loan Association, was also duly recorded. After the Alexanders divorced, Ethel Alexander continued to live at the property after her husband left. Coleman said that she joined her mother to live at the property in the 1970's.

In March of 1964, Frank Reid Chevrolet obtained a default judgment against the Alexanders, however she stated that the Alexanders never knew of the action or default judgment entered against them. On March 3, 1971, a Sheriff's Sale of the property based upon the judgment was held at the Supreme Court of the State of New York, County of Queens. She stated that the Alexanders and the mortgagee were not served with notice of the sale. The property was sold to Arbee Holding Corp. (hereinafter "Arbee") by deed dated March 8, 1971 which was duly recorded with the Office of the New York City Registrar on April 13, 1971. She alleged that Rubin's deceased husband, Joseph Rubin was an officer and director of Arbee and that Arbee paid a minimal amount at the sale compared to the actual value of the subject property at that time. By deed dated December 14, 1973, Arbee transferred title to the subject property Junyer Holding Corp. (hereinafter "Junyer"), and she contended that Joseph Rubin was an officer and director of Junyer, and its owner.

For over forty years, Coleman alleged that Joseph Rubin, Arbee or Junyer did not take any steps to evict the Alexanders or her from the property or to provide notice that the property was now owned by them. She alleged that Joseph Rubin, Arbee and Junyer never paid any real estate taxes, mortgage payments, property insurance, water or sewer charges, costs or improvements from 1971 to December 2011. Ethel Alexander died in July 1977. Coleman stated that she continued to pay the aforementioned costs associated with the property, making all remaining mortgage payments until the mortgage was fully satisfied in 1991, and also had the real property taxes changed to her name. She said she paid all taxes until February 2012; paid all property insurance; made improvements to the property; made all repairs since 1977; and that her occupancy of the property was therefore hostile and under claim of right from 1977 through February 2012.

Coleman further alleged that in 1996, tax lien foreclosure proceedings were commenced by the City of New York and that she and Joseph Rubin were named as parties entitled to receive notice. After Joseph Rubin died, the property was transferred on December 30, 2011, which defendant Rubin signed as the executrix of the Estate of Joseph Rubin and on behalf of Junyer Holding Corp., for the sale price of \$152,000, less than the fair market value of the property. Further, the property was transferred on January 6, 2012, again on September 2012. In February 2012, she was evicted.

Coleman, filed a summons and verified complaint on October 18, 2016. In the first cause of action, Coleman alleged fraud; in the second cause of action, she alleged unjust enrichment. She

seeks damages on the first and second causes of action in the amount of \$250,000.00, and punitive damages in the amount of \$100,000.00.

Coleman filed a verified complaint on February 27, 2012 under Index number 4109/12. The affidavit in support of her application to proceed as a poor person filed with the complaint stated that her action was for “theif (sic) of title, thief of equity, fraud and unjust enrichment.” The application was denied by Order of Honorable Jeremy S. Weinstein on February 27, 2012, and the case was ultimately dismissed under CPLR §1101(d) for failure to pay the required court filing fees.

Coleman initiated another action under Index number 709900/2014 titled *Willeana Coleman against Marjorie Rubin, et. al.*, asserting allegations of fraud, conversion, conspiracy, unjust enrichment and breach of fiduciary duty against the defendants. This action was voluntarily discontinued without prejudice on February 26, 2015.

Then, Coleman initiated this action. On November 29, 2016 Rubin filed this pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) and for sanctions pursuant to 22 NYCRR §130-1.1. Rubin alleged that Coleman failed to allege the elements of fraud with particularity pursuant to CPLR §3016(b). Moreover, she contended that plaintiff had constructive notice of the real estate transfer based upon constructive knowledge of a public record. In opposition, Coleman alleged that her verified complaint set forth a cognizable claim for fraud and for unjust enrichment.

It is well settled on a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83 [1994]). The Court should accept the plaintiff’s allegations as true and afford plaintiff every possible favorable inference and determine whether the plaintiff’s allegations fit within a clearly identifiable legal theory (*Id.*). Pursuant to CPLR 3211 (a) (1) a plaintiff’s verified complaint should be dismissed if defendants documentary submissions conclusively establish a defense to plaintiff’s allegations as a matter of law (*Id.*). In assessing a motion under CPLR 3211 (a) (7), the “criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

“The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2d Dept 2012]). Pursuant to CPLR §3016(b) a claim for fraud must be pled with particularity. The purpose of the statute is to inform the defendant with respect to the incidents alleged ; however, the statute is not so strict as to prevent a valid claim from being litigated at an early stage where a deficiency in the pleading can be cured at a later stage in the litigation (*Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486 [2008]).

Coleman cannot demonstrate that there is a relationship between the parties which would

constitute a fiduciary or confidential relationship (see *Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2d Dept 2012]; *Barrett v Freifeld*, 77 AD3d 600 [2d Dept 2010]). Also, Coleman's claim that Rubin actively concealed a recorded deed is without merit since a duly recorded deed puts the public on notice of its filing. Here, Coleman was on constructive notice of the transfer of the property by virtue of the recording of the deed (see R.P.A.P.L § 291; *Parkway Woods, Inc. v Petco Enters.*, 201 AD2d 713 [2d Dept 1994]). Also, the crux of Coleman's verified complaint is that the decedents Ethel Alexander and Vanborn Venito Alexander were unaware of the default judgment against them March 18, 1964 or of the subsequent transfers of the property prior to their deaths. However, she will be unable to establish that the decedents lacked actual or constructive notice of the deed because her testimony would be hearsay and barred by the Dead Man's Statute (CPLR §4519). Therefore, her first cause of action is dismissed.

Addressing next Coleman's second cause of action of unjust enrichment, although defendants alleged that there is no privity between the parties, and that therefore, and Coleman's second cause of action fails, the Court finds that she should be afforded an opportunity to present evidence that she paid certain real estate taxes and related expenses on the subject property. To the extent that she has a valid claims for reimbursement within the applicable statute of limitations (CPLR §213 [2]), this cause of action cannot be dismissed at this juncture.

Turning to the portion of the defendant's motion seeking sanctions, the Court declines to exercise its discretion to impose sanctions (22 NYCRR 130-1.1); accordingly, that branch of her motion is denied.

Therefore the defendant's pre-answer motion to dismiss is granted to the extent that plaintiff's first cause of action is dismissed and the branch of defendant's motion seeking sanctions is denied. Defendant is directed to serve a verified answer within twenty (20) days of the date of this Order served with notice of entry.

This constitutes the decision and order of the Court.

Dated: May 9, 2017

  
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Hon. Cherie A. Buggs, JSC

**FILED**  
MAY 18 2017  
COUNTY CLERK  
QUEENS COUNTY