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| <b>Stewart v VSR Stewart Mgt., LLC</b>   |
| 2018 NY Slip Op 30433(U)   |
| March 13, 2018   |
| Supreme Court, Kings County  |
| Docket Number: 518856/16   |
| Judge: Lawrence S. Knipel  |
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13<sup>th</sup> day of March, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

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SHIRLEA STEWART, Individually, and as a Member  
of VSR STEWART MANAGEMENT, LLC,

Plaintiff,

- against -

VSR STEWART MANAGEMENT, LLC,  
VIRGINIA CRUZ, a/k/a VIRGINIA STEWART,  
a/k/a VIRGINIA STEWART CRUZ, SEAN CRUZ,  
TIFFINY CRUZ, RUTH STEWART,  
VSR MANAGEMENT, INC., POSITIVE SOLUTIONS  
MANAGEMENT, LLC, WEISSMAN EQUITIES NYC REAL  
ESTATE FUND, LLC, WE 490A JEFFERSON LLC,  
MODERN BANK, N.A., and NICHOLAS VALENTINO,  
a/k/a NICK VALENTINO,

Defendants.

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**DECISION AND ORDER**

Index No. 518856/16

Mot. Seq. No. 3

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion, Affirmation,  
Memorandum of Law, and Exhibits Annexed \_\_\_\_\_  
Affirmation in Support and Exhibit Annexed \_\_\_\_\_  
Affirmation in Opposition, Memorandum of Law, and  
Exhibit Annexed \_\_\_\_\_  
Reply Affirmation \_\_\_\_\_

97-103, 104  
112-113  
116-118  
121

Upon the foregoing papers, the defendant WE 490A Jefferson LLC (the defendant) moves, preanswer, to dismiss the Second Amended Verified Complaint, dated June 14, 2017

(the complaint), insofar as asserted against it as time-barred pursuant to, inter alia, CPLR 3211 (a) (5).<sup>1</sup>

*Facts and Allegations*<sup>2</sup>

The defendant is the record owner of the commercial real property located at 490A Jefferson Avenue in Brooklyn, New York (the property). This action, commenced on October 25, 2016, challenges the validity of one of the deeds in the chain of title to the property; more specifically, the deed from defendant VSR Management, LLC (VSR) to defendant Tiffany Cruz (Tiffany), dated September 9, 2005, and recorded on November 17, 2005 (the deed). According to the plaintiff Shirlea Stewart (Shirlea), she first became aware of the existence of the subject deed “[i]n or about 2015” (¶ 70), which was approximately ten years after its recordation but approximately one year before the inception of this action.

Shirlea, by way of the fifth cause of action in her complaint, seeks to divest the title to the property from the defendant and to vest such title in VSR. To support her theory, she advances a two-pronged challenge to the validity of the deed as “void an initio.” Her first ground for the challenge to the deed, as pleaded in the third cause of action of her complaint, is that VSR lacked the authority to convey the property to Tiffany. In that regard, Shirlea

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<sup>1</sup> Although the defendant also cites in its moving papers documentary evidence under CPLR 3211 (a) (1) and failure to state a claim under CPLR 3211 (a) (7) as additional reasons for dismissal of the complaint, it tacitly acknowledges that these grounds are devoid of merit, considering that its memorandum of law exclusively relies on the statute-of-limitations defense under CPLR 3211 (a) (5) as the sole basis for dismissal of the complaint against it.

<sup>2</sup> As are set forth in the complaint. All paragraph references are to the complaint as defined herein. Full capitalization has been omitted in quotes from the complaint.

alleges that (1) VSR is a limited liability company which was owned in equal shares (one-third) by three members: Shirlea and her sisters, Ruth Stewart (Ruth) and Virginia Stewart, also known as Virginia Cruz and as Virginia Stewart Cruz (Virginia) (§ 63); (2) Tiffany is Virginia's daughter (§ 15); (3) the deed was "fraudulently executed in that it does not bear the genuine signature of a member of . . . VSR" (§ 67); (4) VSR "did not execute knowingly any document purporting to be a deed in favor of . . . Tiffany" (§ 67); (5) VSR "did not execute, deliver, or otherwise authorize the alleged deed" (§ 73); (6) "[u]pon information and belief: a) the alleged deed bears a forged signature[; and] b) the forged signature bears a resemblance to the signature of . . . Virginia . . . ; but it is not the true and actual signature of that defendant" (§ 75); (7) "[t]he document purporting to be the alleged deed is a forgery" (§ 76); (8) "[t]he executed document purporting to be the alleged deed was obtained by . . . Tiffany . . . by false pretenses or other surreptitious means unbeknownst to plaintiff[ ]" (§ 77); (9) "[a]t the time of the making of the alleged deed, or at some later time unknown to the plaintiff[ ], . . . Virginia and Ruth . . . knew, or came to know, that it was: a) a forgery; b) obtained by false pretenses or other surreptitious means unbeknownst to plaintiff; [or] c) a false document" (§ 78); and (10) Tiffany, "knowing the alleged deed was a forgery, presented it to the Kings County Clerk for recordation" (§ 79).

The second ground on which Shirlea is challenging the deed at issue, as pleaded in the fourth cause of action of her complaint, is that its certificate of acknowledgment is "faulty." In particular, she alleges that the deed "does not bear a certificate of acknowledgment in due form pursuant to [Executive Law § 135] for a deed to be recorded

in the public record, because it: a) fails to identify the individual who purportedly executed the instrument [on VSR's behalf]; and b) fails to state the capacity in which [s]aid individual purportedly executed the instrument" (§ 96).

### *Discussion*

As noted, the defendant moves, preanswer, to dismiss the complaint pursuant to CPLR 3211 (a) (5) on the basis that the claims against it are time-barred. "In resolving a motion to dismiss pursuant to CPLR 3211 (a) (5), this Court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference" (*Elia v Perla*, 150 AD3d 962, 963 [2d Dept 2017]). "To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*Stewart v GDC Tower at Greystone*, 138 AD3d 729, 729 [2d Dept 2016]). "Only then does the burden shift to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period" (*id.* at 730).

Pursuant to CPLR 213 (8), the statute of limitations for actions based on fraud is the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud. As this is a pre-answer motion to dismiss, the Court must presume the veracity of the allegations

of the complaint that someone forged the deed at issue and fraudulently conveyed the property from, and on behalf of, VSR to Tiffany. Relying on *Faison v Lewis*, 25 NY3d 220 (2015), *rearg denied* 26 NY3d 946 (2015), Shirlea claims that the deed at issue was void ab initio, even though the conveyance of the underlying property occurred more than ten years ago, and that the defendant's statute-of-limitation defense does not apply. At issue in *Faison* was the ownership of a house that formerly was jointly owned by the plaintiff's father and aunt. The aunt conveyed her half-interest in the house to her daughter, the defendant in *Faison*. The daughter then allegedly recorded a "corrected deed" conveying the plaintiff's father's half-interest to herself as well. Eight years later, the daughter obtained a loan from Bank of America secured by a mortgage on the house. Thereafter, the plaintiff was appointed the executor of her father's estate and commenced an action for a declaration that the "corrected deed" recorded by the aunt's daughter was void as a forgery. The IAS court granted the motion to dismiss the complaint in its entirety as time-barred. The Second Department modified the order as to some defendants, but held that plaintiff's claim as against the aunt's daughter and Bank of America was still subject to a six-year statute of limitations applicable to fraud claims under CPLR 213 (8) (*see Faison v Lewis*, 106 AD3d 1047, 1048 [2d Dept 2013]). The Court of Appeals reversed, holding that because the complaint alleged a forged deed, the aunt's daughter and Bank of America could not rely on the statute of limitation as a defense. The Court of Appeals explained:

"Defendant [Bank of America] contends that plaintiff's claim is time-barred because forgery is a category of fraud, and, like any other claim based on fraud, an action challenging a forged deed is subject to the limitations period of CPLR 213 (8). That

conclusion cannot be squared . . . with general principles of real property law. Nor is it supported by compelling policy reasons. On the contrary, our long-standing commitment to the protection of ownership interests and the integrity of our real property system favors the continued treatment of challenges to forged deeds as distinct from other claims, and exempt from a statute of limitations defense.”

(*Faison*, 25 NY3d at 227 [footnote and internal citations omitted]).

Here, Shirlea’s allegations fall within the scope of activities condemned by the Court of Appeals in *Faison*, precluding the defendant from invoking any statute of limitations defense. The defendant contends that Shirlea’s reliance on *Faison* is misplaced. According to the defendant:

“This case is not one of ‘forgery’ and invoking that term does not make it so. Forgery occurs when someone signs another person’s name to a document without that person’s knowledge and/or consent. Here the alleged forger (daughter) (or another unnamed conspirator) and the alleged ‘forger’ (mother) are not adverse to each other. Instead, as alleged by the Plaintiff [Shirlea], they are co-conspirators who are accused by the Plaintiff of conspiring together in a fraudulent scheme over the last 14 years to deprive the Plaintiff of her interest in the VSR Stewart Management, LLC entity and the subject property.”

(Defendant’s Reply Affirmation, dated October 9, 2017, ¶ 3).

The defendant’s textual argument – that a forgery is distinct from a conspiracy – does not hold water. It is true, as the defendant contends, that “[f]orged deeds and/or encumbrances are those executed under false pretenses, and are void ab initio,” whereas “a fraudulently induced deed is merely voidable, not void” (*Weiss v Phillips*, 157 AD3d 1, 11 [1st Dept 2017]). Yet, the legal theory of fraud in the inducement does not apply, at this stage of litigation, because the complaint alleges, as one of the theories of recovery, that

(1) Shirlea did not execute the deed at issue in any capacity, and (2) Virginia's alleged signature on the deed is not hers.

Even if the Court were to accept the defendant's statute-of-limitations defense under CPLR 213 (8), the outcome of its motion would remain the same. The discovery accrual rules in CPLR 203 (g) and 213 (8) permit the tolling of a fraud claim for two years from the time plaintiff discovered, or should have discovered, the underlying fraud. As set forth above, the complaint alleges (in ¶ 70) that Shirlea first became aware of the existence of the deed at issue "[i]n or about 2015,"<sup>3</sup> which was approximately one year before the inception of this action and, therefore, her claims as against the defendant are timely (*see Reisner v Langenthal*, 2017 NY Slip Op 31157[U] [Sup Ct, NY County 2017]).

### ***Conclusion***

Based on the foregoing and after oral argument, it is hereby

ORDERED that the defendant's preanswer motion to dismiss in Seq. No. 3 is *denied*; and it is further

ORDERED that Shirlea's counsel shall electronically serve a copy of this decision and order with notice of entry on the defendant's counsel, as well as on other defendants (by electronic means on those who have appeared in this action and by first-class mail on those

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<sup>3</sup> The contention of the nonmoving defendant Modern Bank, N.A. (the nonmoving defendant) in ¶ 22 of its supporting affirmation that Shirlea was aware of the fraud since October 2003, is incorrect, as its citations to ¶¶ 39 and 42 of the complaint do not support its contention. Paragraph 39 of the complaint alleges that "[s]ince on or about October 30, 2003, the co-defendant Virginia . . . took it upon herself to conduct all the affairs of VSR . . . without consulting the other members of such entity." Paragraph 42 of the complaint similarly alleges that "since October 30, 2003, the [co-]defendant Virginia has failed and refused to account for the rents and profits of VSR . . . , and the said real property which is its principal asset, and to turn[ ] over the same."



who have not appeared in this action), and shall electronically file an affidavit of said service with the Kings County Clerk; and it is further

ORDERED that, pursuant to CPLR 3211 (f), the defendant shall electronically file and serve its answer to the complaint within ten days after electronic service of a copy of this decision and order by Shirlea's counsel on the defendant's counsel.

The parties are reminded of their next scheduled appearance in Commercial Part Trial 4 on March 16, 2018.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

  
J. S. C.  
HON. LAWRENCE KNIPEL