At an IAS Term, Part 41 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 22nd day of March, 2018.

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

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MARCUS PATTERSON,

Plaintiff,

- against -

Index No: 508154/14

RAQUETTE REALTY, LLC,

Defendant.

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The following papers are numbered and read herein:	NYSCEF
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	42-44; 11; 56-57; 59-68; 70-72; 106-108
Opposing Affidavits (Affirmations)	74; 75-76; 109- 113
Reply Affidavits (Affirmations)	80-81; 114
Affidavit (Affirmation)	
Other Papers Memoranda of Law	45; 69; 77-79; 82

Upon the foregoing papers, motion sequence numbers 3, 4, 5, 6 and 8 are consolidated for disposition. In motion sequence number 3, plaintiff Marcus Patterson moves for an order, pursuant to CPLR 3212, granting him summary judgment on his first cause of action. In motion sequence number 4, defendant Raquette Realty, LLC (Raquette), moves for an order, pursuant to CPLR 3215, granting it a default judgment on its counterclaim and scheduling an inquest for an assessment of damages. In motion sequence number 5, Raquette cross-moves for an order: (1) pursuant to CPLR 3212, granting summary judgment dismissing the complaint in its entirety; (2) pursuant to CPLR 3211(a)(7) and 3016(b), dismissing the complaint for the failure to meet the heightened pleading requirement of fraud; and

(3) pursuant to CPLR 3216, dismissing the complaint with prejudice for failure to prosecute. In motion sequence number 6, plaintiff cross-moves for an order granting him leave to file a late pleading or accepting his late pleading. In motion sequence number 8, Raquette moves for an order marking the notice of pendency filed by plaintiff cancelled and discharged as of record.

Facts And Procedural Background

This action seeks to determine ownership of property located at 1084 Madison Street in Brooklyn (the Property). The deeds herein indicate that plaintiff purchased the Property from Michael C. Engel on July 8, 2008, which deed was recorded on July 30, 2008 (the Engel-Patterson Deed). By deed dated November 6, 2012 and recorded on December 21, 2012, plaintiff transferred title to Raquette (the Raquette-Patterson Deed).

Plaintiff commenced this action on September 5, 2014, pursuant to Real Property Action and Proceedings Law, Article 15, seeking a judgment declaring that defendant and every person claiming under it are barred from all claims to an estate or interest in the Property; that it be adjudged and finally determined that plaintiff is vested with an absolute and unencumbered title in fee to the Property; that possession of the Property be awarded to him; and that defendant immediately remove itself from the Property. On the same day, plaintiff filed a notice of pendency.

After defendant failed to appear, plaintiff was granted a judgment and order of default on May 13, 2015. By order dated July 15, 2015, that judgment was vacated and defendant was directed to file an answer on or before August 21, 2015. The order further provided that defendant shall maintain and operate the premises and account for all income and expenses. Defendant filed an answer on August 21, 2015 that interposed 16 affirmative defenses and a counterclaim seeking damages premised upon plaintiff's alleged fraud.

Dismissal Of The Complaint Pursuant To CPLR 3216

The court will first address defendant's claim that this action should be dismissed pursuant to CPLR 3216, since dismissal on this ground would render a determination on the merits moot.

Defendant's Contentions

In support of its demand for dismissal, defendant alleges that on April 22, 2016, it sent a 90-day notice to plaintiff pursuant to CPLR 3216. As of the date the cross motion was made, September 2, 2016, plaintiff had not responded to the outstanding discovery requests and had not filed a note of issue.

Plaintiff's Contentions

In opposition, plaintiff alleges that after defendant's default was vacated, he failed to submit any further pleadings, allegedly as the result of legal issues faced by his then attorney, who was arrested and subsequently incarcerated. On May 9, 2016, plaintiff filed the pending motion for summary judgment. Accordingly, plaintiff argues that he has a reasonable excuse for his default, i.e., law office failure; that his moving and opposition papers filed on the pending demands for relief establish that he has a meritorious cause of action; and that defendant will not be prejudiced by having this action decided on the merits.

Discussion

In addressing this demand for relief, the court first notes that it is well settled that:

> "'CPLR 3216 is an "extremely forgiving" statute (*Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]), which "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed"' (*Kadyimov v Mackinnon*, 82 AD3d 938, 938 [2d Dept 2011], quoting *Davis v Goodsell*, 6 AD3d 382, 383 [2d Dept 2004]). [CPLR 3216] prohibits the Supreme Court from dismissing a complaint based on failure to prosecute whenever a plaintiff has shown a justifiable excuse for the delay and the existence of a potentially meritorious cause of action . . ."

(*Gordon v Ratner*, 97 AD3d 634, 635 [2d Dept 2012]).

The determination of what constitutes a reasonable excuse lies within the court's discretion (*see e.g. Pollock v Meltzer*, 78 AD3d 677, 677 [2d Dept 2010]; *Santiago v New York City Health & Hosps. Corp.*, 10 AD3d 393, 394 [2d Dept 2004]).

Under the circumstances presented here, the court finds that plaintiff's explanation regarding his prior attorney's legal problems and subsequent incarceration constitutes excusable law office failure (*see Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633-634 [2003] [plaintiff demonstrated a justifiable excuse for the delay, i.e., it was caused by disbarment of counsel and was not willful or made with intent to abandon the action, but rather was the result of neglect on the part of the previous attorneys]; *see generally Bischoff v Hoffman*, 112 AD3d 659, 660 [2d Dept 2013]; *Las Palmeras De Ossining Rest. v Midway Ctr.*, 107 AD3d 853, 854 [2d Dept 2013]). Such a finding is particularly appropriate herein, where a default judgment had previously been entered against defendant for its default in answering the complaint and later vacated. The court further finds, as is more fully discussed hereinafter, that the papers submitted on the pending applications sufficiently demonstrate that plaintiff has a potentially meritorious cause of action.

Implicit in this holding is the finding that plaintiff's failure to file a note of issue in the requisite 90-day period does not mandate dismissal. In this regard, plaintiff's filing of a motion for summary judgment approximately one month after being served with the 90-day notice demonstrates that he did not intend to abandon the action (*see generally Lee v Rad*, 132 AD3d 643, 644 [2d Dept 2015] [plaintiff's cross motion to strike defendant's answer for his willful failure to appear for a court-ordered deposition established that she was unable to timely file a note of issue]; *Ramon v Zangari*, 116 AD3d 753, 754 [2d Dept 2014] [the record demonstrated affirmative steps taken by plaintiff to continue the prosecution of this action that were inconsistent with an intent to abandon it]; *Davis v Goodsell*, 6 AD3d 382,

384 [2d Dept 2004] [the pendency of plaintiff's timely motion to compel discovery from the defendant negated any inference that plaintiff intended to abandon her action]).

Finally, defendant fails to demonstrate that plaintiff's delay in prosecuting this action works to its prejudice (*see e.g. US Bank v Saraceno*, 147 AD3d 1005, 1006 [2d Dept 2017]; *Belson v Dix Hills A.C.*, 119 AD3d 623, 624 [2d Dept 2014]).

Raquette's Request For Default On It's Counterclaim

The court will next address defendant's motion for the entry of a default judgment on its counterclaim, since granting defendant this relief would similarly require denial of plaintiff's motion for summary judgment.

Defendant's Contentions

Raquette argues that since it served its answer with counterclaim on August 21, 2015, plaintiff's reply was due by September 10, 2015. Raquette goes on to argue that plaintiff's counsel's subsequent legal problems and his indictment on May 25, 2016 do not excuse the failure to serve a timely reply. In fact, defendant notes that plaintiff's counsel filed a Notice of Appeal on August 20, 2015. Raquette again argues that plaintiff fails to submit an affidavit establishing that he has a meritorious defense to the counterclaim. In addition, Raquette argues that it has been severely prejudiced by plaintiff's pattern of willful delay and refusal to prosecute this action for over a year. Finally, defendant argues that plaintiff exhibited a pattern of willful default and neglect in that he also failed to respond to interrogatories and to submit to a deposition.

Plaintiff's Contentions

In opposition, as discussed above, plaintiff argues that he did not submit an answer to defendant's counterclaims because his attorney failed to move this action forward as a result of his own legal problems and subsequent incarceration. Plaintiff also argues that he

has a meritorious defense to defendant's counterclaim.

Discussion

It is well settled that:

> "In order to successfully oppose a motion for leave to enter a default judgment based upon the plaintiff's failure to serve a reply to a counterclaim, a plaintiff must establish a reasonable excuse for the delay and demonstrate a meritorious defense (*see Bensimon v Fishman*, 242 AD2d 551 [2d Dept 1997]). It is generally left to the sound discretion of the Supreme Court to determine what constitutes a reasonable excuse (*see Scarlett v McCarthy*, 2 AD3d 623 [2d Dept 2003]) and a meritorious defense (*see Fidelity & Deposit Co. of Md. v Andersen & Co.*, 60 NY2d 693, 695 [1983])."

(*Beizer v Funk*, 5 AD3d 619, 620 [2d Dept 2004]).

It is equally well settled that:

> "In exercising its discretion in this regard, the Supreme Court 'may accept law office failure as an excuse' (*Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 904 [2d Dept 2008]; *see* CPLR 2005; *Papandrea v Acevedo*, 54 AD3d 915, 916 [2d Dept 2008]; *Goldstein v Meadows Redevelopment Co Owners Corp. I*, 46 AD3d 509, 511 [2d Dept 2007]; *Chiarello v Alessandro*, 38 AD3d 823, 824 [2d Dept 2007]). 'However, law office failure should not be excused . . . where allegations of law office failure are conclusory and unsubstantiated' (*Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d at 904; *see Petersen v Lysaght, Lysaght & Kramer, P.C.*, 47 AD3d 783, 784 [2d Dept 2008]; *Wechsler v First Unum Life Ins. Co.*, 295 AD2d 340, 341 [2d Dept 2002])."

(*Wells Fargo Bank v Cervini*, 84 AD3d 789, 789-790 [2d Dept 2011]; *accord White v Daimler Chrysler*, 44 AD3d 651, 651 [2d Dept 2007]).

For the reasons discussed above in denying defendant's request for dismissal of this action pursuant to CPLR 3216, its request for a judgment of default on its counterclaim is also denied. From this it follows that plaintiff's request for an order accepting his late filing of his reply to the counterclaim is granted.

Raquette's Request For Dismissal Pursuant To CPLR 3211(a)(7) And 3016(b)

Defendant's Contentions

In support of this demand for relief, defendant argues that plaintiff fails to meet the heightened pleading requirements of fraud.

Plaintiff's Contentions

In opposition, plaintiff argues that he pleads his case with sufficient particularity to meet the statutory requirements.

Discussion

"As a general rule '[pleadings] should be liberally construed and a complaint should not be dismissed for failure to state a cause of action when a cause can be discerned in the facts alleged, no matter how poorly those facts are stated'" (*Lapis Enters v International Blimpie*, 84 AD2d 286, 292 [2d Dept 1981], quoting *Greschler v Greschler*, 71 AD2d 322, 325 [2d Dept 1979], *mod on other grounds* 51 NY2d 368 [1980]). Pursuant to CPLR 3016(b), however, "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." To meet these requirements, a pleading must "identify the exact misrepresentation made, the person who made it, or when or where it was made" (*Westdeutsche Landesbank Girozentrale v Learsy*, 284 AD2d 251, 252 [1st Dept 2001]).

Herein, the court finds that plaintiff adequately states a cause of action for fraud by alleging that Joshua Dardashian, who is affiliated with Raquette, represented that if plaintiff transferred the Property to his company, title would be returned to him after the encumbrances and liens were satisfied.

Summary Judgment

Plaintiff's Contentions

In support of his motion for summary judgment, plaintiff claims that the Raquette-Patterson Deed fails to convey any interest in the Property to defendant, since it was obtained by fraud and is accordingly voidable. Plaintiff also contends that the transfer is unconscionable because it was made without consideration. More specifically, plaintiff alleges that as a first time home buyer, he retained Benjamin J. Turner to act as his attorney to purchase the Property. Plaintiff subsequently obtained a mortgage through Mr. Turner and used the proceeds to improve the Property and to convert it into a two-family house, where he and his common law wife, Ebonice Thomas, and a tenant could reside. Plaintiff goes on to allege that by the end of 2010, he had missed at least two payments and the mortgage was in default.

Plaintiff further alleges that in May of 2012, he began to receive telephone calls from people claiming that he was responsible to pay off mortgages in an amount of more than $500,000 that were taken out against the Property before Mr. Engel purchased it. Mr. Turner then contacted Mr. Dardashian, who claimed to be a licensed real estate agent who owned a company called Promax, to assist plaintiff in defending against foreclosure. Plaintiff asserts that Mr. Dardashian convinced him to convey title to the Property to Promax so that the company could negotiate on plaintiff's behalf. Accordingly, plaintiff signed the Raquette-Patterson Deed on November 6, 2012; plaintiff was not represented by counsel at that time and he contends that he received no consideration for the transfer.

Plaintiff goes on to explain that the parties agreed that during the period of negotiating payment of the outstanding debt, which was estimated to take one to two years, Mr. Dardashian would collect the rental proceeds to pay expenses on the Property and his fee.

Plaintiff also contends that Mr. Dardashian agreed to lend Ms. Thomas $8,000 that would be deducted from future rent to help them meet their expenses. Plaintiff thus signed a document acknowledging this advance. Plaintiff also contends that Mr. Dardashian instructed him to move out of the Property because the bank would not negotiate directly with Mr. Dardashian if plaintiff was residing at the premises. Plaintiff thus claims that he moved out in early 2013.

Plaintiff goes on to aver that Mr. Dardashian allegedly represented that once the mortgages and/or liens were satisfied, title would be returned. In exchange, Raquette would rent the Property and collect an ongoing management fee. When plaintiff demanded the return of the Property in the summer of 2014, however, Mr. Dardashian contended that he had purchased the Property from plaintiff for $8,000 and paid over $500,000 to satisfy a mortgage; plaintiff estimates the value of the Property to be approximately $400,000 as of November 2012. Plaintiff also contends that he later learned that there had not been a foreclosure proceeding commenced against the Property. In addition, plaintiff emphasizes that no mortgage was recorded against the Property.

Defendant's Contentions

In opposition to plaintiff's motion for summary judgment and in support of its cross motion, Raquette argues that plaintiff's story is fabricated, he cannot demonstrate justifiable reliance upon Raquette's alleged misrepresentations and he waived any fraud claim he may have had when he executed a sworn statement acknowledging the terms of the agreement between the parties. More specifically, Raquette argues that it is the lawful owner of the Property, contending that the transfer was valid, proper and in accordance with the terms agreed to between the parties. Raquette also argues that although plaintiff first denied that he obtained a mortgage on the Property, he later admitted that he took out a mortgage in the

amount of $533,850 and executed a note and mortgage so indicating. The note was assigned to CitiMortgage and the assignment was similarly signed by plaintiff. For unexplained reasons, the mortgage was never recorded.

In his affidavit, Mr. Dardashian alleges that contrary to plaintiff's assertions, plaintiff approached him seeking to sell the Property because he was unable to pay the mortgage. In this regard, defendant also asserts that although plaintiff claimed to have been current in his mortgage payments through the end of 2010, documentary evidence establishes that he received a notice of default on December 15, 2008. Mr. Dardashian also claims that plaintiff was not residing at the Property, as is allegedly evidenced by a copy of his drivers license, which was issued on December 21, 2011, and by certain employment records.

Thereafter, because plaintiff was in default, the parties agreed that plaintiff would sell the Property to Raquette for $8,000, plus the payment of the outstanding mortgage. On November 6, 2012, Mr. Engel executed a corrected deed because the original deed was unsigned and was not notarized. In addition, it was plaintiff who introduced Mr. Dardashian to Mr. Turner, who acted as a notary on the corrected deed. On the same day, plaintiff swore in an affidavit that he had consulted with his attorney and had chosen to move forward with the transfer to Raquette without his attorney being present; simultaneous with the transfer, Mr. Dardashian personally delivered a cashier's check in the sum of $8,000 to plaintiff, payable to Ms. Thomas, as directed by plaintiff.

In accordance with the parties' agreement, Mr. Dardashian negotiated a payoff with CitiMortgage to satisfy plaintiff's unrecorded mortgage and note. By letter dated October 18, 2013, CitiMortgage's loan servicer advised plaintiff that the subject mortgage would be satisfied for the sum of not less than $118,800, plus expenses. In this regard, on October 19, 2013, plaintiff executed an affidavit that states:

> "Once the short sale is approved and funds are transferred from Raquette Realty LLC to CitiMortgage and Raquette Realty LLC receives a payoff letter from CitiMortgage, Marcus Patterson will no longer be obligated under the terms of CitiMortgage loan #: (2005482197). Marcus Patterson will be released from all obligations pertaining to the loan on 1084 Madison Street, Brooklyn, New York.
>
> "I, Marcus Patterson, did sign over the deed to Raquette Realty LLC on 11/6/12. I did have an opportunity to consult with an attorney, and chose not to use an attorney. I do understand that I gave up all rights to the property at the time of the deed transfer."

Mr. Dardashian further alleges that on October 22, 2013, Raquette paid off the mortgage by wire transfer to CitiMortgage in the sum of $121,457.54. By letter dated October 22, 2013 from G.C. Services, plaintiff was advised that the outstanding mortgage, with a balance of $530,718.54, was settled for the sum of $118,800.

Mr. Dardashian also contends that following transfer of the Property to Raquette, defendant took over full management and control of the Property and plaintiff did not perform or pay for any construction or maintenance. Because the Property had been illegally rented as a two-family building, there was no rent being paid by either existing tenant and defendant was forced to take both tenants to Housing Court to evict them. On August 18, 2014, defendant's engineer filed to reopen an old application to convert the Property from a one-family home to a legal two-family dwelling.

Mr. Dardashian goes on to allege that at no point did he or anyone from Raquette ever represent to plaintiff, or anyone else, that following the transfer of the Property from plaintiff to Raquette, the Property would be transferred back to plaintiff once the mortgage was satisfied. Mr. Dardashian opines that such an allegation makes no sense, since there is no reason why Raquette would negotiate with the bank and spend significant sums of money to pay off the mortgage and then transfer the Property back to plaintiff without any

compensation.

In specifically addressing plaintiff's claim of fraud, defendant asserts that since plaintiff was able to contact CitiMortgage and ascertain the validity of the underlying claims, he is unable to establish reliance. In addition, Raquette alleges that plaintiff cannot rely upon any statement by Raquette that the Property would be returned to him after the mortgage was satisfied, since it is well established that an alleged oral promise to transfer property is unenforceable and cannot be reasonably relied upon where a complete and integrated written agreement exists. Similarly, any such oral agreement would be barred by the Statute of Frauds. Finally, Raquette argues that plaintiff ratified any fraudulent agreement by accepting benefits of the agreement, having knowledge of the fraud.

Defendant accordingly concludes that based upon these facts and documentary evidence, plaintiff's motion for summary judgment should be denied and its cross motion for summary judgment should be granted.

Summary Judgment

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party moving for summary judgment "bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law" (*Holtz v Niagara Mohawk Power*, 147 AD2d 857, 858 [3d Dept 1989]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Disputed Area v City of New York*, 271 AD2d 635, 635 [2d Dept 2000]).

Once such a showing has been established, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient

to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). It is equally well settled that in making the determination of whether a movant has satisfied the requisite burden of proof, the nonmovant is entitled to the benefit of every favorable inference (*see e.g. Negri v Stop & Shop*, 65 NY2d 625 [1985]; *Louniakov v M.R.O.D. Realty*, 282 AD2d 657 [2d Dept 2001]). Further, "the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002], citing *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366 [2d Dept 1985]). Thus, "'[r]esolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact'" (*Torres v Saint Vincent's Catholic Madison Estates Downtown. Ctrs.*, 117 AD3d 717, 718-719 [2d Dept 2014], quoting *Kahan v Spira*, 88 AD3d 964, 966 [2d Dept 2011]; *see also Capelin Assoc. v Globe Mfg.*, 34 NY2d 338 [1973]).

Fraud

"'A deed based on forgery or obtained by false pretenses is void ab initio'" (*First Natl. Bank of Nevada v Williams*, 74 AD3d 740, 742 [2d Dept 2010], quoting *Cruz v Cruz*, 37 AD3d 754, 754 [2d Dept 2007]). Further, "[i]n the case of fraud in the factum, the maker is induced to sign something entirely different than what he thought he was signing. The instrument is 'void ab initio'" (*Dalessio v Kressler*, 6 AD3d 57, 61 [2d Dept 2004], citing *First Natl. Bank of Odessa v Fazzari*, 10 NY2d 394, 397 [1961]; *Mix v Neff*, 99 AD2d 182-183 [3d Dept 1984]). In contrast, "fraud in the inducement renders the obligation voidable based upon facts occurring prior or subsequent to its execution" (*Dalessio*, 6 AD3d at 61, citing *Mix*, 99 AD2d at 183).

In this case, plaintiff admits that he signed a deed conveying the Property to

defendant, as well as other documents stating that he knowingly transferred the Property. Accordingly, plaintiff himself establishes that he was aware of the meaning of the documents that he signed. From this it follows that he is alleging fraud in the inducement. The elements of this cause of action are "'representation of a material existing fact, falsity, scienter, deception and injury" (*Channel Master v Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]).

Herein, plaintiff alleges that Mr. Dardashian represented that he would negotiate to satisfy plaintiff's outstanding mortgages and that once the encumbrances were cleared, he would transfer the Property back to plaintiff. Plaintiff further explains that the payment of the $8,000 that Mr. Dardashian now claims was part of the purchase price was actually an advance of rent received so that plaintiff could meet his expenses while Mr. Dardashian was negotiating with the bank. Similarly, plaintiff explains that Mr. Dardashian told him that he (plaintiff) would have to vacate the premises or the bank with not negotiate with his company. Plaintiff contends that Mr. Dardashian made these representations knowing that he did not intend to reconvey the Property to plaintiff. Accordingly, based upon these allegations, plaintiff makes a prima facie showing of fraud.

In opposition, however, defendant relies upon Mr. Dardashian's version of the facts and the documents that plaintiff executed. Thus, issues of fact are raised that cannot be resolved on the papers now before the court.

From this it follows that neither plaintiff nor defendant is entitled to summary judgment on plaintiff's claim of fraud or defendant's counterclaim (*see generally Johnson v Melnikoff*, 65 AD3d 519, 520-521 [2d Dept 2009] [the court properly granted that branch of plaintiff's motion for summary judgment declaring that the mortgage on the subject property was null and void, and denied that branch of the mortgagee's cross motion for

summary judgment declaring that its mortgage was valid, under circumstances where after financing her purchase with a mortgage, plaintiff had discussions with representatives of a company and believing that she was signing documents that would effectuate a refinancing of her mortgage loan, she unwittingly executed a deed conveying title to the subject property to the defendant]; *Betz v NYC. Premier Props.*, 38 AD3d 815, 815 [2d Dept 2007] [the court properly denied defendant's motion for summary judgment dismissing the complaint as premature prior to discovery under circumstances where plaintiffs commenced the action alleging that defendants fraudulently induced them into executing the sale and lease of their property by misrepresenting that the arrangement was a means of refinancing the property]).

Real Property Law § 265-a

Plaintiff's Contentions

Plaintiff also argues that, in the alternative, he is entitled to summary judgment on his complaint on the ground that the agreement between him and Raquette violates the requirements of Real Property Law (RPL) § 265-a, the Home Equity Theft Prevention Act (the Act).

Defendant's Contentions

In opposition, defendant argues that plaintiff's reliance on RPL 265-a is misplaced, since the Property was not his residence. To support this claim, defendant alleges that CitiMortgage flagged plaintiff's account for fraud when his tax records, employment records and driver's license indicated that he did not claim the Property as his primary residence. In this regard, defendant alleges that at the time of the transfer, plaintiff was in the process of converting the Property to a legal two family home where he intended to live, although he was actually renting out two illegal units.

The Law

The Home Equity Theft Prevention Act (the Act), New York Real Property Law § 265-a, became effective on February 1, 2007, with the intention of preventing abusive and fraudulent practices by purchasers of distressed properties who falsely promise to save properties and to reconvey them to the homeowners at a future date (*see generally* (*U.S. Bank v Mar*, 2008 NY Slip Op 32174[U] [Sup Ct, NY County 2008]). The Act is intended to save homeowners from losing homes which are in foreclosure or default (RPL 265-a[1][a]). The court has further noted that "the Home Equity Theft Prevention Act is a remedial statute, designed to stem an anticipated rise in so-called 'mortgage rescue' schemes, and its provisions should be liberally construed in favor of equity sellers" (*Lucia v Goldman*, 68 AD3d 1064, 1066 [2d Dept 2009]).

As is also relevant herein, RPL 265-a(2)(e) defines an equity purchaser as "any person who acquires title to any residence in foreclosure or, where applicable, default, or his or her representative as defined in this subdivision." RPL 265-a(2)(f) defines an equity seller as "a natural person who is a property owner or homeowner at the time of the equity sale." RPL 265-a(2)(h) defines "property owner" or "homeowner" as "any or all record title owners of the residential real property in foreclosure or, where applicable, default at the time of the equity sale." RPL 265-a(2)(k) defines "residence" and "residential real property" as "residential real property consisting of one- to four-family dwelling units, one of which the equity seller occupies or occupied at a time immediately prior to the equity sale as his or her primary residence." RPL 265-a(3) provides the font of the type that must be used in any agreement and (a)(4) goes on to provide, in detail, the terms that must be included in a contract subject to the Act, including a statement that the contract is subject to cancellation; the terms of payment or other consideration including, but not limited to, any services of any

nature which the equity purchaser represents he or she will perform for the equity seller before or after the sale: the time, if any, at which physical possession of the residence is to be transferred to the equity purchaser and the residence vacated by the equity seller; and the terms of any reconveyance arrangement. In addition, RPL 265-a(5) and (6) provide that any contract subject to the Act may be rescinded within five days and must contain a notice of cancellation. RPL 265-a(7) limits the actions that the equity purchaser can engage in during this period, including prohibiting the purchaser from accepting from any equity seller an execution of, or inducing any equity seller to execute, any instrument of conveyance of any interest in the residence in foreclosure or default; paying the equity seller any consideration; making any false or misleading statement regarding the value of the residence; and assisting the equity seller in saving the house or preventing a completed foreclosure. RPL 265-a(8) also provides that any transaction subject to the Act that is in violation of its provisions is voidable and the transaction may be rescinded by the equity seller within two years of the date of the recording of the conveyance of the property in foreclosure or default.

Discussion

Herein, the above discussed documents reveal that plaintiff and defendant did not execute a contract of sale prior to the transfer of the Property as is required by the Act. In addition, plaintiff alleges that Mr. Dardashian engaged in conduct that is prohibited pursuant to RPL 265-a(7). Accordingly, if the Act applies, plaintiff may well be entitled to have the deed rescinded.

Plaintiff, however, fails to make a prima facie showing that the Act is applicable in that he fails to establish that he resided at the Property as his primary residence at the time that he deeded the Property to defendant. In this regard, the court notes that plaintiff alleges that when he entered into the agreement with Mr. Dardashian, he was in the process of

converting the Property from a one-family home to a two-family and had spent tens of thousands of dollars to make it habitable. He also alleges, however, that he needed the rental income from the Property to pay his expenses. Accordingly, since plaintiff attaches no documentary evidence to his papers that would prove that he resided at the Property and/or that he invested money to renovate it at the time of the transfer to Mr. Dardashian, plaintiff has not made a prima facie showing of entitlement to summary judgment.

Similarly, however, defendant offers no evidence to establish that the Property was not occupied by plaintiff as his primary residence at the time of the transfer, but was instead occupied by two tenants. In this regard, the court notes that although defendant contends that eviction proceedings had to be brought against the tenants, no evidence regarding these alleged eviction proceedings is provided to the court. Accordingly, defendant similarly fails to make a prima facie showing of entitlement to summary judgment on its counterclaim.

Notice Of Pendency

Defendant's Contentions

In support of this motion, Raquette argues that the notice of pendency filed by plaintiff on August 26, 2014 has been rendered invalid and ineffective because pursuant to CPLR 6315, such notices expire after three years from the date of filing by operation of law. Thus, the notice of pendency at issue herein expired on August 26, 2017, because plaintiff did not make a timely motion to extend it. Defendant further argues that since a notice of pendency may not be filed in any action in which a previously filed notice of pendency has been cancelled or vacated, the notice of pendency cannot be reinstated.

Plaintiff's Contentions

In opposition, plaintiff argues that he filed the notice of pendency in this action on September 5, 2014, so that it expired on September 5, 2017. He goes on to contend that the

motion to cancel the notice of pendency should be denied as moot, given the fact that dispositive motions have been pending since this time. He also asserts that since the commencement of this action, the Property has been conveyed to another company, which he believes is a shell company or a subsidiary of defendant, or that defendant has attempted to refinance or further encumber it. Plaintiff also argues that cancelling the notice of pendency would cause irreparable harm to both plaintiff and third parties. He thus concludes that it is in the best interests of the all parties concerned that the matter be decided on the merits and that defendant be denied any ability to transfer, sell or encumber the Property.

Plaintiff also now advises the court that he has discovered that AIC, a mortgage discharge company, submitted a settlement proposal to Citi Mortgage on March 28, 2013. By letter agreement dated October 18, 2013, G.C. Services agreed to accept $118,800, plus closing costs, in satisfaction of his mortgage. Plaintiff thus contends that had he known that he could have reduced the mortgage to this amount, he would have been able to keep up with the mortgage payments and would not have transferred the Property to defendant. Under the facts of this case, as discussed above, plaintiff also argues that the transfer of the Property to defendant a year earlier was made in violation of RPL 265-a and b.

Defendant's Reply

In reply, defendant argues that plaintiff does not deny that the strict statutory construction of CPLR 6513 provides that a notice of pendency is valid for only three years unless it is extended prior to its expiration. Defendant emphasizes that plaintiff does not dispute that he did not make a request to extend the notice of pendency before it expired. In this regard, defendant also points out that although the pending motions were orally argued on October 24, 2017, after the notice of pendency had expired, plaintiff made no mention of this. Finally, defendant notes that the additional issues raised by plaintiff in opposition to this

motion are relevant to the pending motions for summary judgment, and have no bearing on whether the notice of pendency should be cancelled.

Discussion

Pursuant to CPLR 6513:

> "A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period."

In interpreting this provision, the Court of Appeals explained that:

> "A notice of pendency is valid for three years from the date of filing and may be extended for additional three-year periods upon a showing of good cause (*see* CPLR 6513). The extension, however, must be requested prior to the expiration of the prior notice (*see id.*). This is an exacting rule; a 'notice of pendency that has expired without extension is a nullity' (13 Weinstein-Korn-Miller, NY Civ Prac P 6513.04 [2000]; *see Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 405 [2d Dept 1983]; *Robbins v Goldstein*, 32 AD2d 1047 [2d Dept 1969]). For practical purposes, there is no distinction between the effect of an expired or cancelled notice of pendency--both are void. Thus, the 'no second chance' rule we established in *Israelso v Bradley*, 308 NY 511, 516 [1955] for a cancelled notice of pendency applies with equal force to one that has expired. Because CPLR 6513 provides that a notice of pendency terminates automatically on the expiration of the three-year period unless extended, a lapsed notice of pendency may not be revived (*see Robbins v Goldstein*, 32 AD2d 1047; *In re Kodo Props.*, 63 BR 588, 590 [Bankruptcy Court, Eastern District of New York 1986]; *Carvel-Dari Freeze Stores v Lukon*, 219 NYS2d 716 [City Ct, New York City 1961])."

(*In re Sakow*, 97 NY2d 436, 442 [2002]).

Applying the above principles of law to the facts of this case, the court finds that the notice of pendency was filed with the court on September 5, 2014. Inasmuch as plaintiff made no timely application to extend it, the notice of pendency is no longer in effect, is

hereby cancelled and cannot be reinstated or extended.

Conclusion

Plaintiff's reply to defendant's counterclaim shall be deemed served, nunc pro tunc, upon service of a copy of this order with notice of entry. The notice of pendency filed against the Property on September 5, 2014 has expired pursuant to CPLR 6513. Defendant is directed to serve a copy of order and decision upon the County Clerk, who is directed to cancel the notice of pendency forthwith. All other relief requested is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

2018 MAY -2 AM 8:02