

221 A.D.3d 992

Supreme Court, Appellate Division,
Second Department, New York.

Brocha LIPSZYC, appellant,

v.

Shmuel Munish LIPSZYC, et al., respondents.

2021–05916

|
(Index No. 615689/19)|
Argued—June 20, 2023|
November 29, 2023**Synopsis**

Background: Wife, who had commenced an action for divorce against husband, filed suit against husband and husband's corporation, alleging that husband had convinced her to transfer her interest in the marital residence to the corporation by representing that she would always have “an equitable interest” in the property and that the transfer was for “convenience purposes” only, and seeking a judgment declaring the transfer null and void based upon fraud, as well as the imposition of a constructive trust. The Supreme Court, Nassau County, [Julianne T. Capetola, J.](#), granted defendants' motions for summary judgment and denied wife's cross-motion for leave to amend the complaint. Wife appealed.

[Holding:] The Supreme Court, Appellate Division, held that fact issues existed as to whether wife could have discovered alleged fraud in transfer of residence before commencing divorce action.

Affirmed as modified.

West Headnotes (4)

[1] Limitation of Actions 🔑 Diligence in discovering fraud

When determining the applicability of the six-year statute of limitations for fraud, the

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. [N.Y. CPLR § 213\(8\)](#).

[2] Limitation of Actions 🔑 Discovery of Fraud

Generally, for the six-year statute of limitations to begin running on a fraud claim, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute. [N.Y. CPLR § 213\(8\)](#).

[3] Limitation of Actions 🔑 Motion

Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a cause of action for fraud should not be dismissed on motion asserting the six-year statute of limitations and the question should be left to the trier of facts. [N.Y. CPLR § 213\(8\)](#).

[4] Limitation of Actions 🔑 Fraud and concealment of cause of action**Summary Judgment** 🔑 Limitations and laches

Genuine issues of material fact existed as to whether wife could, with reasonable diligence, have discovered alleged fraud in the transfer of the marital residence to husband's corporation earlier than when she commenced a divorce action against husband, precluding summary judgment under the six-year statute of limitations for fraud claims, in wife's action for a judgment declaring transfer of the residence to be null and void based upon fraud and for imposition of a constructive trust. [N.Y. CPLR § 213\(8\)](#).

Attorneys and Law Firms

****94** Law Offices of [Eyal Talassazan](#), P.C., Garden City, NY, for appellant.

Sokolski & Zekaria, P.C., New York, NY (Daphna Zekaria of counsel), for respondent Shmuel Munish Lipszyc.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale, NY (Greg S. Zucker and Michael J. Gelfand of counsel), for respondent Chabad Lubavitch of Plainview, Inc.

VALERIE BRATHWAITE NELSON, J.P., JOSEPH J. MALTESE, WILLIAM G. FORD, BARRY E. WARHIT, JJ.

DECISION & ORDER

***992** In an action, inter alia, for a judgment declaring a conveyance of real property to be null and void based upon fraud and to impose a constructive trust, the plaintiff appeals from an order of the Supreme Court, Nassau County (Julianne T. Capetola, J.), dated June 24, 2021. The order, insofar as appealed ***993** from, granted those branches of the motion of the defendant Chabad Lubavitch of Plainview, Inc., which were for summary judgment dismissing the causes of action alleging fraud and constructive trust insofar as asserted against it, in effect, upon searching the record, awarded summary judgment to the defendant Shmuel Munish Lipszyc dismissing those causes of action insofar as asserted against him, and denied the plaintiff's cross-motion for leave to amend the complaint.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof granting that branch of the motion of the defendant Chabad Lubavitch of Plainview, Inc., which was for summary judgment dismissing the cause of action alleging fraud insofar as asserted against it, and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provision thereof, in effect, ****95** upon searching the record, awarding summary judgment to the defendant Shmuel Munish Lipszyc dismissing the cause of action alleging fraud insofar as asserted against him; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiff.

In 1999, the plaintiff Brocha Lipszyc (hereinafter Brocha) and the defendant Shmuel Munish Lipszyc (hereinafter Shmuel) purchased their marital residence in Woodbury, Nassau County (hereinafter the Woodbury property), taking title as tenants by the entirety. They then began operating a Chabad center from the Woodbury property. In August 1999, Brocha and Shmuel transferred ownership of the Woodbury property to the defendant Chabad Lubavitch of Plainview,

Inc. (hereinafter the Chabad). Shmuel is allegedly the “sole stockholder, officer and Director” of the Chabad. After the transfer, Brocha and Shmuel continued to reside and operate the Chabad center there.

In 2018, Brocha commenced an action for divorce against Shmuel. Allegedly, it was then that she realized that she had not retained an equitable interest in the Woodbury property and that it would not be considered marital property. In 2019, Brocha commenced this action against the defendants seeking, among other things, a judgment declaring that the conveyance of the Woodbury property to Chabad was null and void based upon fraud, and to impose a constructive trust. Brocha alleged that Shmuel had convinced her to transfer her interest in the Woodbury property by representing that she would always have “an equitable interest” in the property, and that the transfer was for a tax benefit and for “convenience purposes” only. Chabad moved for summary judgment dismissing the complaint insofar as asserted against it, and Brocha cross-moved ***994** for leave to amend the complaint. The Supreme Court granted Chabad's motion, concluding, inter alia, that the fraud and constructive trust causes of action were time-barred, and, in effect, upon searching the record, awarded summary judgment in favor of Shmuel dismissing those causes of action insofar as asserted against him. The court denied Brocha's cross-motion. Brocha appeals.

[1] [2] [3] A cause of action based on fraud must be commenced within six years of the fraud or within two years from the time that the plaintiff discovered the fraud or with reasonable diligence could have discovered it (*see CPLR 213[8]*; 203[g]; *Sargiss v. Magarelli*, 12 N.Y.3d 527, 532, 881 N.Y.S.2d 651, 909 N.E.2d 573). “The 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. Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a [cause of action] should not be dismissed on motion and the question should be left to the trier of facts” (*Sargiss v. Magarelli*, 12 N.Y.3d at 532, 881 N.Y.S.2d 651, 909 N.E.2d 573 [citation, alterations, and internal quotation marks omitted]; *see Rattner v. York*, 174 A.D.2d 718, 721, 571 N.Y.S.2d 762).

[4] Here, Chabad established that the fraud cause of action was instituted more than six years from the date of the alleged act of fraud. However, the plaintiff alleges that she did not discover the fraud until 2018 when she commenced the divorce action. In support of its motion, Chabad failed to establish, prima facie, that the alleged fraud could have been discovered earlier with reasonable diligence, and, **96 therefore, failed to establish that the cause of action was time-barred (see *Sargiss v. Magarelli*, 12 N.Y.3d at 532, 881 N.Y.S.2d 651, 909 N.E.2d 573; *Ferdico v. Pabone*, 125 A.D.3d 718, 719, 4 N.Y.S.3d 88; *Vilsack v. Meyer*, 96 A.D.3d 827, 829, 946 N.Y.S.2d 595). Therefore, the Supreme Court should have denied that branch of Chabad's motion and, for

the same reasons, it also erred in awarding summary judgment dismissing that cause of action insofar as asserted against Shmuel.

The parties' remaining contentions are without merit.

BRATHWAITE NELSON, J.P., MALTESE, FORD and WARHIT, JJ., concur.

All Citations

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