

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

PAUL ABRUZZI, as Administrator c.t.a. of the Estate of PASQUALE ABRUZZI, Deceased, Index
Number 702780 2017

Plaintiff(s) Motion
-against- Date June 13, 2017

BOND REALTY, INC. f/k/a BOND MOTORS, INC., BON REALTY CORP., RYAN TESSIER, as Executor of the Estate of THOMAS ABRUZZI, Deceased, DIANE SCHREIBER, as Executrix of the Estate of ROCCO JOSEPH ABRUZZI, Deceased JENNIFER ABRUZZI, SUSAN ABRUZZI, THERESA ABRUZZI, JOSEPH ABRUZZI, DOMENICA MAJORIE CENTRONE, and GC CROSS BAY REALTY, LLC. Motion
Cal. Numbers 1, 2, & 3
Motion Seq. Nos. 1, 2, & 3

Defendant(s) _____X

FILED
OCT - 5 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 11 read on this motion by defendant Bond Realty, Inc. f/k/a Bond Motors, Inc., defendant Bon Realty Corp., defendant Ryan Tessier, defendant Diane Schreiber, defendant Jennifer Abruzzi, defendant Susan Abruzzi, defendant Theresa Abruzzi, and defendant Joseph Abruzzi (collectively the Abruzzi defendants) for an Order granting summary judgment dismissing the complaint against them; and on this separate motion by defendant GC Cross Bay Realty, LLC for (a) summary judgment dismissing the complaint against it and (b) vacating the notice of pendency filed by the plaintiff, and on this separate motion by defendant Domenica Marjorie Centrone (Centrone) for an Order pursuant to CPLR §3211(a)(1), (5), and (7), dismissing the complaint against her.

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Notices of Motion - Affidavits - Exhibits.....	1-3
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The Court, sua sponte, amends its Order dated September 15, 2017, solely to the extent of correcting plaintiff's name in the caption. The remainder of the decision remains the same as follows:

Upon the foregoing papers it is ordered that the motion by the Abruzzi defendants (motion sequence 2) is granted. That branch of the motion (motion sequence 1) brought by defendant GC Cross Bay Realty, LLC which is for summary judgment dismissing the complaint against it is granted. That branch of the motion (motion sequence 1) brought by defendant GC Cross Bay Realty, LLC which is for an order cancelling the notice of pendency filed by the plaintiff in this case is granted. That branch of the motion by defendant Centrone (motion sequence 3) which is for an Order pursuant to CPLR §3211(a)(7) dismissing the complaint against her is granted. The remaining branches of the motion by defendant Centrone are denied as moot.

I. The Facts and Allegations

In 1964, Thomas Abruzzi (Thomas), Pasquale Abruzzi (Pat), and Rocco Abruzzi (Rocco), who were brothers, each owned a one-third interest in Bond Motors, a partnership which operated a Ford dealership in Queens, New York. The partnership owned nearly all of the property (lot 35 excepted) designated as Block 14030 on the Queens County Tax Map, which was originally comprised of lot numbers 1, 6, 20, 21, 22, 24, 25, 26, 28, 29, 33 and 35 and is now reconfigured as being comprised of lots 6 and 20 on the Queens County Tax Map (the subject property). The partnership had acquired the property located in Howard Beach, Queens by a deed dated October 13, 1964 from John Steven and Irene Steven, and the deed named the three brothers as grantees "doing business as a copartnership under the firm name of Bond Motors".

On June 13, 1967, the three brothers formed a corporation, Bond Motors, Inc., to be the successor of the partnership, and another brother, Joseph Abruzzi (Joseph), also became a shareholder in the corporation.

On February 27, 1968, Thomas, Pat, and Rocco executed two deeds conveying Bond Motors' title to some of the partnership property to the corporation, which also in that year purchased tax lot 35. The Abruzzi defendants allege that because of a ministerial error the deeds did not convey all of the partnership property to the corporation, although that was the intent of the brothers. The ministerial error allegedly consisted of the use of the metes and bounds description of some of the tax lots only. Nevertheless, Bond Motors, Inc. occupied all of the former partnership property, including property known as 160-06 and 160-10 Cross Bay Boulevard, Howard Beach, New York (the second tax lots), from 1971 through 1992, leasing part of it to the Post Office.

On March 22, 1969, Pat died, and his will was subsequently admitted to probate in the Suffolk County Surrogate's Court, with his surviving spouse, Marcella Abruzzi (Marcella) becoming the executrix of his estate of which she was the sole beneficiary. Marcella began an action against Bond Motors, Inc. which the parties settled by an agreement dated December 1, 1971, whereby the interest of Pat's estate in the corporation, which included some of the subject property, was bought out. In 1972, Marcella, as executrix of Pat's estate, filed an estate tax return stating that Pat owned no real estate and no jointly owned property.

In 1992, a deed was created which transferred the remaining part of the subject property held by the partnership (the second tax lots) to the corporation. The deed was signed by Thomas and Rocco, and someone placed the signature of Pat, who had been dead for approximately 23 years, on the deed also. The Abruzzi defendants allege that the 1992 deed was executed for the purpose of correcting the ministerial error which occurred in 1968 that omitted to transfer all of the partnership property to the corporation.

In 1994, the corporation transferred the second tax lots to Bon Realty, Inc, and in 2016 all of the property once held by the partnership were conveyed to GC Cross Bay Realty LLP.

Paul Abruzzi (Paul), the executor of Marcella's estate and now also the administrator cta of the estate of Pat, is the son of Pat and Marcella. Paul alleges that he recently discovered that Thomas, Rocco, and Joseph had fraudulently concealed Pat's interest in real property known as 160-06 and 160-10 Cross Bay Boulevard, Howard Beach, New York (the second tax lots). Paul further alleges that since someone forged Pat's signature on the 1992 deed, the instrument did not effectively convey his interest in the property purportedly conveyed and that the estate of Marcella presently holds that interest.

II. Procedural History

Paul began a prior action in the New York State Supreme Court, County of Queens (*Abruzzi v. Tessier*, Index No. 705013/16) for, *inter alia*, a judgment declaring that the 1992 deed is void as to Pat's interest in the property and that Marcella's estate presently holds that interest. Pursuant to a decision and order dated December 23, 2016, this Court granted a motion by the defendants for an order pursuant to CPLR §3211(a)(3) and (7) dismissing the complaint on the ground that Paul, at that time merely the executor of Marcella's estate, lacked the capacity to sue. After Paul obtained his appointment as the administrator cta of Pat's estate, he began the instant action by the filing of a summons and complaint on February 28, 2017.

The first cause of action seeks a declaratory judgment that (1) the 1992 deed purportedly signed by Pat and all subsequent deeds are null and void as to Pat's interest in

the property purportedly transferred by that deed and (2) Pat's estate is the owner of his interest in the property purportedly transferred by the 1992 deed. The second cause of action seeks an injunction prohibiting defendant GC Cross Bay Realty LLC from transferring title to the disputed property "until such time as the claims of Plaintiff have been determined ***". The third cause of action seeks an accounting of the income which Pat's estate is allegedly entitled to. The fourth cause of action seeks damages.

III. Discussion

A. The Motion By The Abruzzi Defendants

1. The Burdens of Proof On A Motion For Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***" (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324). The opponent of a motion for summary judgment has the burden of producing evidence showing that there is an issue of fact which must be tried (*see, Alvarez v. Prospect Hospital, supra*).

2. Transfer of Pat's Partnership Interest By Death to the Remaining Partners

Partnership Law §51, "Nature of a partner's right in specific partnership property," provides in relevant part: 1. A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. 2. The incidents of this tenancy are such that: *** (d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. ***" (*see, In re Havemeyer's Estate*, 17 NY2d 216; *Neilson v. 6D Farm Corp.*, 123 AD3d 676; *In re Sage's Estate*, 31 Misc2d 715). "[O]n the death of a partner his or her right in the partnership property vests, pursuant to statute, in the surviving partner or partners as legal owner and the only right of the deceased partner's estate is to an accounting. New York Partnership Law § 51(d)" (*Estate of Schwartzberg*, 99 AD2d 969 [1984]; *In re Sturman*, 222 B.R. 694, 710 [Bankr. S.D.N.Y. 1998]). The executors of a deceased partner have no interest in the firm assets but only the right to an accounting (*Guggenheim v. Helvering*, 117 F2d 469).

In the case at bar, the Abruzzi defendants made a prima facie showing that they are entitled to summary judgment on the ground that Thomas, Pat, and Rocco held the entire relevant property as tenants-in- partnership and that after Pat's death on March 22, 1969 his

interest in any of the relevant property that had not been transferred to the corporation passed to the surviving brothers by operation of law. As a consequence, Pat's signature on the 1992 deed which transferred the second tax lots to the corporation, whether placed on the deed by mistake or otherwise, does not matter. First, the relevant property was conveyed by deeds to "Thomas Abruzzi, *** Pasquale Abruzzi, *** and Rocco Abruzzi *** doing business as a co-partnership under the firm name of Bond Motors" (Emphasis added). This language is used to grant or receive property as a tenancy in partnership. Second, The Bond Motors Partnership leased part of the subject property to the United States Post Office, and the lease dated October 13, 1967 designates Bond Motors as the lessor. Paragraph 18 of the lease reads "It is expressly understood between the parties hereto that the terms and conditions of the Agreement in Lease executed by Bond Motors (Partnership) and accepted by the Government on April 29 1966 *** are made part of this lease ***" (Emphasis added). The signatures of Thomas, Rocco, and Pat each have the word "partner" below their names.

In opposition the plaintiff failed to raise a triable issue of fact. First, the listing of the partners' home addresses on the deed by which the partnership received the subject property does not suffice to raise a triable issue of fact concerning whether the brothers held the subject property as tenants in common. Second, the partnership was de facto and did not have to be documented. "A partnership is an association of two or more persons to carry on as co-owners a business for profit" (Partnership Law § 10 [1]). "When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties" (*Czernicki v. Lawniczak*, 74 AD3d 1121, 1124). Under all of the circumstances of this case, there is no genuine issue of fact concerning the formation and operation of a partnership by the Abruzzi brothers.

3. The Settlement Agreement

The Abruzzi defendants also successfully made a prima facie showing that they are entitled to summary judgment on the grounds of settlement and release.

Marcella began an action against Bond Motors, Inc. which the parties settled by an agreement dated December 1, 1971. All parties to the settlement agreement entered it with the intention that it would include the property once held by the partnership and then believed to be the same property transferred to the corporation. Joseph Abruzzi, the last surviving Abruzzi brother and shareholder in the corporation, swears: "The intention of the 1968 deeds was to convey the entire BMP Property to Bond Motors, Inc.[.] [H]owever, due to a scrivener's error a portion of the BMP property was inadvertently omitted from the 1968 deeds". Joseph's allegation that the 1968 deeds were intended to transfer the entire partnership property to the corporation is supported by documentation. The 1967 tax return

of the partnership shows that the partnership was in business in 1967 and states that \$304,718 was the value of the buildings and other fixed depreciable assets and \$463,322 was the value for the land. The 1968 tax return of Bond Motors, Inc. states these same amounts. Joseph's allegation that the 1968 deeds were intended to transfer all of the partnership property to the corporation is also corroborated by the estate tax return signed by Marcella which stated "0" as the total value for real estate and which did not list the disputed property as a property interest held by the decedent. Schedule F also did not list an interest in a partnership. The court notes in this connection that pursuant to the doctrine of tax estoppel, "a party to litigation may not take a position contrary to a position taken in an income tax return filed under oath" (*In re Frankel*, 123 AD3d 826, 828).

Joseph further alleges; "After Pasquale's death in 1969, Marcella commenced a lawsuit against Bond Motors, Inc. which was settled by an agreement dated December 1, 1971, pursuant to which Marcella was paid to buyout the interest of Pasquale's Estate in Bond Motors, Inc. The buyout included the Ford franchise, the BMP property on which it was located, and another corporation, Tom Roc Realty, all of which was set forth in the settlement agreement". The settlement agreement released Bond Motors, Inc. from any and all claims of Marcella, "her representatives, successors, and assigns". "[A]bsent fraud, duress, illegality or mistake, a release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim that is the subject of the release ***" (*Salewski v. Music*, 150 AD3d 1353, 1353-54).

In opposition, the plaintiff failed to raise a triable issue of fact.

4. Adverse Possession

"To establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period ***" (*Walling v. Przybylo*, 7 NY3d 228; *Ray v. Beacon Hudson Mountain Corp.*, 88 NY2d 154; *Beyer v. Patierno*, 29 AD3d 613; *Ropitzky v. Hungerford*, 27 AD3d 1031). The statutory period is ten years (*see, Ray v. Beacon Hudson Mountain Corporation, supra; Beyer v. Patierno, supra; Ropitzky v. Hungerford, supra*). In the case at bar, the Abruzzi defendants showed prima facie that Bond Motors, Inc. exclusively occupied all of the former partnership property, including the second tax lots, from 1971 through 1992, though leasing part of it to the Post Office as its tenant. Bond Motors, Inc. met the prescriptive period long before the alleged forged deed was executed. The plaintiffs also submitted prima facie proof through the affidavit of Joseph Abruzzi with supporting documentation that Bond Motors, Inc. occupied the property under a claim of right because all three brothers believed that the partnership had transferred all of its property to Bond Motors, Inc. pursuant to the deeds executed in 1968.

The Abruzzi defendants showed prima facie that Bond Motors, Inc. acquired title to all of the partnership property by adverse possession, if not otherwise, many years before the execution of the alleged forged deed. Thus, whether the brothers previously held title to the property as tenants in common, as the plaintiff alleges, or whether the brothers held title as tenants in partnership, as the Abruzzi defendants allege, does not matter. Nor does it matter that there was an alleged forged deed in 1992, long after Bond Motors met the prescriptive period. In opposition, the plaintiff failed to raise a triable issue of fact.

5. Statute of Limitations

Although the point is academic, the Court notes that the Abruzzi defendants are not entitled to summary judgment on statute of limitations grounds. It is true that CPLR §212, "Actions to be commenced within ten years," provides in relevant part: "(a) Possession necessary to recover real property. An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action. " (see, *Weichert v. Plumadore*, 152 AD3d 1190; *Downes v. Peluso*, 115 AD2d 454). "A person claiming title to real property, but not in possession thereof, must act, affirmatively and within the time provided by statute ***" (*Downes v. Peluso*, *supra*, 454, *Weichert v. Plumadore*, *supra*). In the case at bar, the Abruzzi defendants submitted proof that Bond Motors, Inc. and its successors have been in possession of all of the former partnership property since 1969.

Nevertheless, a claim against a forged deed is not subject to a statute of limitations defense, including CPLR §212(a). (*Estaba v. Estaba*, 129 AD3d 601; see, *Faison v. Lewis*, 25 NY3d 220. *Stevens v. Communicare Properties, LLC*, 111 AD3d 614). "The Court[of Appeals] found that, unlike other fraud-based causes of action, 'a claim against a forged deed is not subject to a statute of limitations defense' because of 'the clarity of our law that a forged deed is void ab initio, and that it is a document without legal capacity to have any effect on ownership rights' ***" (*Mazo v. Mazo*, 132 AD3d 1112, 1114, quoting *Faison v. Lewis*, *supra*, 226).

B. The Motion by Defendant GC Cross Bay Realty LLC

The second cause of action of the complaint, the only cause of action asserted against defendant GC Cross Bay Realty, LLC (GC), seeks an injunction prohibiting the defendant from transferring title to the disputed lots. Defendant GC argues that the plaintiff did not plead any substantive causes of action against it. "An injunction is a remedy, a form of relief that may be granted against a defendant when its proponent establishes the merits of its substantive cause of action against that defendant" (*Weinreb v. 37 Apartments Corp.*, 97

AD3d 54, 59). “Although it is permissible to plead a cause of action for a permanent injunction *** permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted by a plaintiff. (*Corsello v. Verizon N.Y., Inc.*, 77 AD3d 344, 368, mod. on other grounds 18 NY3d 777; *Weinreb v. 37 Apartments Corp.*, 97 AD3d 54). While the first cause of action does assert a substantive claim (“That, therefore, the 1992 deed and all subsequent deeds should be declared a nullity as to Pat’s interest in the PRT property”) (emphasis added), the Court has dismissed the first cause of action and all the other substantive causes of action asserted in the complaint. Defendant GC is entitled to the dismissal of the complaint against it.

Defendant GC is also entitled to the vacatur of the notice of pendency filed by the plaintiff in this case because it is overly broad. “[A] notice of lis pendens cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed ***” (*Braunston v. Anchorage Woods, Inc.*, 10 NY2d 302, 305). In the case at bar, the plaintiff filed his notice of pendency against all of the property held by defendant GC, although his causes of action in this case concern only an alleged interest in that part of the property purportedly conveyed by the 1992 deed.

C. The Motion By Defendant Centrone

Defendant Centrone, an attorney, drew Pat’s will and prepared the probate petition for Pat’s estate. She stated in the probate petition that Pat, at the time of his death, did not own any real property and that the gross value of all estate assets amounted to less than \$65,000. Bond Motors, Inc. purchased Pat’s interest in the corporation by an agreement dated December 1, 1971, at which time the plaintiff alleges the corporation had not acquired all of the relevant property. Pursuant to a deed dated, signed, and notarized on December 28, 1992, Rocco, Thomas, and purportedly Pat, who had died approximately 23 years earlier, transferred the second lots to Bond Motors, Inc. Centrone notarized all of the signatures on the deed, including Pat’s purported signature.

The complaint alleges that Centrone participated in fraud committed against Pat’s estate by (1) concealing his interest in the second lots and (2) notarizing his forged signature on the 1992 deed. In assessing a motion to dismiss a cause of action pursuant to CPLR §3211(a)(7), where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one ***” (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530). The plaintiff does not have a cause of action for fraud against defendant Centrone. First, as the Court has discussed above, the brothers acquired the relevant property as tenants in partnership, and Pat’s interest passed to the surviving brothers by operation of law. There was no need to conceal ownership of the property. Second, in order to prove a cause of action for fraud, a plaintiff must show that a defendant’s misrepresentations or wrongful conduct “were the direct and proximate cause” of damage (*Friedman v. Anderson*, 23 AD3d 163, 167; *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 151 AD3d 83).

As the Court discussed above, Pat's purported signature on the 1992 deed did not cause his estate or his beneficiaries any loss. By 1992, the disputed property had already passed to the other Partners by operation of law.

Dated:

SEP 29 2017

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