

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X
[Redacted]

Plaintiff,

- v -

[Redacted]

Defendant.

INDEX NO. 150312/2018

MOTION DATE 10/10/2019,
10/15/2019

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 104, 107, 151, 152, 153, 154, 155, 156, 160

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 159

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, (i) [Redacted], and [Redacted] (mtn. seq. no. 004) to dismiss the Amended Verified Petition pursuant to CPLR § 3211(a)(1), (a)(5), (a)(7), and (a)(8) as well as § 3215(c), and (ii) [Redacted] and [Redacted] (mtn. seq. no. 005) to dismiss the Amended Verified Petition pursuant to CPLR §3211(a)(1) and (a)(7) are both denied.

This is a special proceeding brought pursuant to CPLR § 5225 in which the petitioner [Redacted] [Redacted] seeks the turnover of certain real property in connection with a judgment (the **First Judgment**) entered in this court on December 18, 2017, in [Redacted]

favor of [REDACTED] and against respondent [REDACTED] in his individual capacity, for a total sum of \$22,193,220.52 in a prior action (the **Prior Action**) captioned [REDACTED]
[REDACTED]
[REDACTED] (Petition, NYSCEF Doc. 86, Ex. A). The First Judgment was subsequently corrected (the **Judgment**) on February 16, 2018 to award damages jointly and severally against [REDACTED] and all the Prior Action defendants, including respondent [REDACTED] (NYSCEF Doc. No. 120). The Judgment has not been unsatisfied.

The Verified Amended Petition (the **Petition**) alleges that to frustrate [REDACTED] efforts to collect in the Prior Action, [REDACTED] purposefully dissipated assets through a scheme of opening and closing dozens of corporate entities, including respondent [REDACTED]
[REDACTED]. The Petition alleges that [REDACTED] is [REDACTED] sole member (NYSCEF Doc. No. 86, ¶ 28, 33, *id.*, exs. E, I), that [REDACTED] owns respondent [REDACTED]
[REDACTED] which is the record owner of a condominium located in [REDACTED]
[REDACTED] (the **Property**) that [REDACTED] seeks to attach via this special proceeding (NYSCEF Doc. No. 86, ¶ 29; *id.*, ex. F). This Property has allegedly been used as office space, for which [REDACTED] issued payments to [REDACTED] as “administration of the expenses for office space,” and [REDACTED] also previously testified in 2015, as further discussed below, that the Property is used as a family apartment, including by [REDACTED] (*id.*, ¶ 32, *id.*, ex. H).

[REDACTED] now denies that he owns the Property and claims that it is actually owned by [REDACTED]
[REDACTED] his former spouse, and that he has no interest in either [REDACTED] as of 2010, which [REDACTED] in turn, contends is demonstrably false based on, among other things, Mr.

█ seeks to attach █ interest in █ as well as in the Property.

DISCUSSION

I. CPLR § 3211(a)(1)

Dismissal under CPLR § 3211(a)(1) is required when documentary evidence establishes the futility of a claim as a matter of law. To prevail on a CPLR § 3211(a)(1) motion to dismiss, the movant must demonstrate that “the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [quotation omitted]). Such dismissal is not appropriate here as the proffered documents raise more questions than they provide answers and the respondents’ arguments as to who owns what are contradictory. Moreover, with respect to █ he raised substantially the same arguments on his prior motion to dismiss in this action (Mtn. Seq. No. 002) before Justice Ramos, and Justice Ramos denied the motion (NYSCEF Doc. No. 24). █ is effectively asking this court to reverse that decision, which the court will not do. The motions to dismiss based on documentary evidence are denied.

II. CPLR § 3211(a)(5)

Dismissal under CPLR § 3211(a)(5) is required where a respondent can establish *prima facie* that the statute of limitations on a claim has run. The respondents argue that any action is untimely because the transfer of the █ withdrawal from █ occurred more than six years before the filing of the Petition. At best, when the transfer occurred would be an issue of fact because, as noted above, the documents in this case are contradictory and unclear, and █ testified in the Prior Proceeding *on September 30, 2015*, that “his family”

owned the Property and had since 2009 (i.e., his 2015 testimony contradicts his current claims of a prior 2010 transfer) (Epstein Aff., ex. F). Dismissal based on the statute of limitations here would be inappropriate.

III. CPLR § 3211(a)(7)

Under CPLR § 3211(a)(7), the court must accept all the facts alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference and determine only whether the facts fit within any cognizable legal theory. The facts alleged in the Petition plainly state a claim for fraudulent conveyance and sufficiently allege that the respondents disregarded corporate formalities to avoid the Judgment entered against [REDACTED] and [REDACTED] and to obfuscate [REDACTED] efforts to collect same.

IV. CPLR § 3211 (a)(8)

The court also has jurisdiction over [REDACTED]. Under CPLR 302(a)(4), the Court may exercise personal jurisdiction over any non-domiciliary who “owns, uses or possesses any real property situated within the state.” Moreover, under CPLR 302(a)(1), proof of even “one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). The court has jurisdiction over [REDACTED] based on her alleged use and ownership of the Property in Manhattan, which use and ownership she does not deny.

V. CPLR § 3215(c)

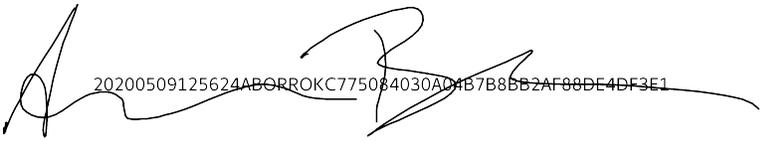
[REDACTED]

Under CPLR § 3215(c), a court shall dismiss an action as abandoned if the plaintiff fails to take any action against a defaulting defendant within a year “*unless sufficient cause is shown why the complaint should not be dismissed*” (CPLR § 3215[c] [emphasis added]). The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the trial court (*Maspeth Fed. Sav. & Loan Assn. v Brooklyn Heritage, LLC*, 138 AD3d 793, 794 [2d Dept 2016]). To the extent that the respondents argue that the Petition should be dismissed as to [REDACTED] because it was abandoned as service on this entity was not initially completed within a year of January 22, 2018, when it was filed, this argument is unavailing. [REDACTED] has shown “sufficient cause” for why the Petition should not be dismissed, i.e, the difficulty created by the respondents in serving the [REDACTED] entities and the efforts [REDACTED] took to notify [REDACTED] and [REDACTED] alleged alter egos, of the claims alleged in the Petition, as well as that it has a meritorious cause of action against the respondents. This is sufficient to withstand the motion. Contrary to respondents’ argument, and by the plain text of CPLR § 3215(c), dismissal under the circumstances is not mandatory, but discretionary (*Maspeth Fed. Sav. & Loan, supra*). Mindful of the public policy in favor of resolution of cases on the merits, the court declines to dismiss on this basis.

Accordingly, it is

ORDERED that motion seq. nos. 004 and 005 are denied, and it is further

ORDERED that the respondents are directed to serve an answer to the petition within 30 days of this decision and order.


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5/8/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

