

Cascone v Cascone

2007 NY Slip Op 31570(U)

June 8, 2007

Supreme Court, Richmond County

Docket Number: 0102212/2006

Judge: Joseph J. Maltese

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

PART DCM 3

Index No.: 102212/2006

Motion No.: 1 & 2

JULIA CASCONE,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

ROCCO P. CASCONE, JR.,

Defendants

The following items were considered in the review of these motions for summary judgment and consolidation

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 3
Answering Affidavits	2
Replying Papers	
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 1 the defendant, Rocco P. Cascone, Jr., moves this court for an order dismissing this action for failure to state a cause of action pursuant to CPLR § 3211(a)(1) and § 3211(a)(7); for sanctions pursuant to CPLR § 8303; and for costs, fees, and disbursements pursuant to 22 NYCRR § 130-1.1-a. The plaintiff opposes this motion and additionally moves for an order consolidating this action with another action currently being adjudicated in the Supreme Court, Richmond County.

In this action, the complaint states that there are six causes of action; to wit: 1) Conversion; 2) Fraud/Misrepresentation; 3) Unfair Advantage; 4) Conversion¹; 5) Misappropriation; and 6) Conspiracy. In the prayer for relief, the plaintiff seeks the amount of \$722,534.00 together with interest, costs, disbursements, attorney's fees, and punitive damages.

¹The plaintiff pleads conversion twice in the complaint.

This action arises from a dispute between a brother and sister over the house that their father had left to them, in trust, after he had passed away. Pursuant to the trust instrument, upon the death of Rocco Cascone, Sr., the plaintiff and the defendant were permitted to live in the trust property located at 228 Sand Lane, Staten Island, New York, rent free for 18 months at which time they would be required to vacate the premises or contract to purchase it.

In or about May 2004, the plaintiff contacted Gary DeFillipo, Esq. to discuss the possibility of purchasing the entire trust property which consisted of a three story frame house and an adjacent vacant lot. Thereafter, the plaintiff spoke with the defendant and his wife Ligaya Cascone and they agreed to purchase only the house, as equal partners of one third each. The plaintiff also suggested, and the parties agreed to retain the services of Gary DeFillipo, Esq. to represent all of the parties in the purchase and closing on the house to minimize and share legal expenses. In August 2004, the agreement was reached between the parties to purchase the house, and a bid of \$193,000.00 was accepted by the Trust for the house. A contract of sale was executed on behalf of the plaintiff, defendant, and his wife by Mr. DeFillipo, as he had each of the parties sign a Power of Attorney to act on their behalf solely in connection to the real estate transaction. The parties also agreed that as one third share owners of the property, each would be responsible for one third of the expenses associated with the property.

After the contract was entered into for the purchase of the house, the adjacent lot was sold, and a closing conducted. Thereafter, in April 2005, the plaintiff and defendant each received two Trust Asset distribution checks in the amounts of \$39,363.28 and \$21,903.92 for a total of \$61,297.20. These checks represented the plaintiff's and defendant's share of the proceeds from the liquidation of the vacant lot trust asset.

Thereafter, according to the defendant, the plaintiff voluntarily and without deception asked the defendant to deposit her Trust checks into the defendant's bank account with the understanding and agreement that the defendant would pay the plaintiff's personal obligations, including but not

limited to, attorney's fees, credit card bills, cellular phone bills, car repair bills, upon her request. Additionally, the plaintiff's obligations under the agreement between the parties for the maintenance and repair of the purchased house, as well as the utility bills, water and sewer bills, property taxes and premise insurance.

In May of 2005, the defendant began making payments and/or withdrawals from the plaintiff's funds for the plaintiff's personal benefits. Each check made payable to the plaintiff or cash was endorsed and cashed by the plaintiff.

Also, in May, 2005, a dispute occurred between the parties herein and the Trust over contractual issues where the plaintiff, defendant, and his wife were forced to file a Notice of Pendency against the trust together with a summons and complaint for breach of contract and specific performance. Because of the litigation continuing for more than a year, the parties incurred legal expenses of which they each agreed to be personally liable for at the one third share. The defendant, with full knowledge and consent of the plaintiff, deducted one third of the attorney's fee from the plaintiff's trust distribution funds for payments of her obligation from the legal representation. In May 2006, a settlement was reached between the Trust and the parties which required that a closing date for the property located at 228 Sand Lane be set for a date certain in June 2006.

Shortly thereafter, the plaintiff demanded a one half share interest in the property purchased. However, the plaintiff was unsuccessful in obtaining the financing to raise the capital for a one half interest. The plaintiff then retained new counsel, Lee M. Nigen, Esq., to represent her interest at the closing of the property located at 228 Sand Lane. Several dates were set for the closing and each time, Attorney Nigen demanded that the closing be postponed. On or about June 28, 2006, the plaintiff, through her new attorney, commenced this lawsuit. To date, the closing has never occurred.

Additionally, as a result of the payments made by the defendant, on behalf of and with the consent of the plaintiff for her personal obligations, together with the payments made directly to the plaintiff, as well as the deductions for the plaintiff's agreed upon one third obligation under the trust instrument for the maintenance, repair, utility, and insurance premiums for 228 Sand Lane, as well as the attorney's fees due, there is a \$46,295.00 balance remaining from the original \$61,276.20 that the plaintiff had asked the defendant to hold in his account. The defendant has attached as exhibits each and every one of the cancelled checks, as well as a statement of account from his banking institution.

The plaintiff opposes this motion arguing that she has properly pled causes of actions for conversion, fraud/misrepresentation, unfair advantage, conversion, misappropriation, and conspiracy.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." (*Jacobs v. Macy's East, Inc.*, 262 A.D.2d 607 [2d Dept 1999]; *Leon v. Martinez*, 84 N.Y.2d 83 [1994]). It is not the courts role to determine the merits of a cause of action on a CPLR 3211(a)(7) motion. (*Stukuls v. State of New York*, 42 N.Y.2d 272 [1977]; *Jacobs v. Macy's East Inc.*, supra; *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633 [1976].) In the case at bar, the complaint adequately states causes of action for, *inter alia*, conversion: the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. (*State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249 [2002].) Therefore, the defendant's instant motion is denied.

As for the plaintiff's cross motion to consolidate this action with the previous action filed in Richmond County entitled *Rocco P. Cascone, et al. v. Estate of Rocco P. Cascone, et al.*, Index Number 101521/2005, unopposed, it is hereby granted. That action, currently before Justice McMahon of this court, although previously thought to be settled, has arisen with a motion to enforce the money judgment/settlement previously entered into by the Cascone parties and the Trust.

This instant action, arises from the same set of facts and circumstances as the action before Justice McMahon and must be consolidated with the same.

Accordingly, it is hereby:

ORDERED, that the defendant's motion for an order pursuant to CPLR § 3211(1), § 3211(7); § 3212; §8303; and 22 NYCRR 130.1-1a is denied; and it is further

ORDERED, that the plaintiff's cross motion for consolidation is granted; and it is further

ORDERED, that this action be transferred to DCM Part 5 of the Supreme Court, Richmond County; and it is further

ORDERED, that the parties shall contact the clerk of DCM Part 5 for the further scheduling of these consolidated actions.

ENTER,

DATED: June 8, 2007

Joseph J. Maltese
Justice of the Supreme Court