

MacKenzie v Croce

2007 NY Slip Op 32619(U)

August 6, 2007

Supreme Court, Suffolk County

Docket Number: 0019018/2005

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

FRANK MACKENZIE and
PAULA MACKENZIE,

Plaintiffs,

-against-

SALVATORE CROCE and
VIOLA D. CROCE,

Defendants.

ORIG. RETURN DATE: MARCH 29, 2007
FINAL SUBMISSION DATE: APRIL 12, 2007
MTN. SEQ. #: 003
MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
TARTAMELLA, TARTAMELLA & FRESOLONE
235 BROOKSITE DRIVE
HAUPPAUGE, NEW YORK 11788
631-366-2300

DEFT'S/RESP ATTORNEY:
ROBERT W. DAPELO, ESQ.
110 N. OCEAN AVENUE - SUITE A
PATCHOGUE, NEW YORK 11772
631-654-9500

Upon the following papers numbered 1 to 6 read on this motion _____
TO AMEND PLEADINGS AND OTHER RELIEF

Notice of Motion and supporting papers 1-3; Affidavit in Opposition and supporting papers 4, 5; Replying Affidavits and supporting papers 6.

Defendants have filed the instant application seeking an Order, pursuant to CPLR 3025(b), granting leave to amend their Answer to add the affirmative defense of the Statute of Frauds, and to interpose the following counterclaims: (1) a claim for money damages against plaintiffs for reasonable use and occupancy of the subject premises, including any rent which plaintiffs have allegedly failed to pay during the pendency of this action; (2) a claim for property damage to the subject property during the pendency of this action; and (3) a claim for an award of costs and expenses to defendants from plaintiffs upon the ground that plaintiffs did not commence this action and file the *lis pendens* in good faith. Defendants also seek an Order granting permission to defendants, and any licensed contractor retained by them, to inspect and assess the subject premises for such damage thereto that has been suffered during the pendency of this action, under the supervision of the Suffolk County Police Department; and granting permission to defendants and their contractor to resume and complete

the repairs and renovations to the premises previously commenced by defendants. Plaintiffs have submitted an affidavit and an affirmation in opposition, and defendants have filed a reply affirmation in response thereto. Accordingly, the Court has considered the foregoing submissions in rendering the within decision and Order.

In this action, plaintiffs seek, among other things, the imposition of a constructive trust on the premises located at 5 Beverly Court, Moriches, New York. The defendants are the deeded owners of the premises and the parents of plaintiff PAULA MACKENZIE. Based upon an alleged agreement of the parties made on or about September 1, 1997, plaintiffs seek an Order directing the defendants to convey the premises to the plaintiffs for the sum of \$96,000.00 minus any monies paid previously to the defendants for the premises.

CPLR 3025(b) provides in pertinent part that, “[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just” (CPLR 3025[b]). Leave to amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court’s discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 2007 NY Slip Op 5247 [2d Dept]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 2007 NY Slip Op 5234 [2d Dept]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

Initially, defendants seek to amend their Answer to add the affirmative defense of the Statute of Frauds. By Order dated December 19, 2005 (Werner, J.), the Court addressed this defense in the context of a motion to dismiss based upon the ground that any alleged oral agreement was barred by the Statute of Frauds:

While the Statute of Frauds (General Obligations Law § 5-703) requires that a conveyance of real property must be in writing, a cause of action for imposition of a constructive trust on real property is not barred by this statute, rather, “the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance (§ 5-703[4]).” *Panetta v. Kelly*, 17 A.D.3d 163, 792 N.Y.S.2d 455 (1st Dep’t, 2005).

(Short Form Order, Werner, J., 12/19/05). As such, that branch of defendants' application seeking leave to amend their Answer to include the affirmative defense of the Statute of Frauds is denied.

Next, defendants seek to interpose the following counterclaims: (1) a claim for money damages against plaintiffs for reasonable use and occupancy of the subject premises, including any rent which plaintiffs have allegedly failed to pay during the pendency of this action; (2) a claim for property damage to the subject property during the pendency of this action; and (3) a claim for an award of costs and expenses to defendants from plaintiffs upon the ground that plaintiffs did not commence this action and file the *lis pendens* in good faith. Defendants seek to interpose the aforementioned counterclaims at this juncture based upon, among other things, information revealed during the deposition of plaintiff FRANK MACKENZIE (defendants allege that they only received a signed transcript of the deposition on January 30, 2007), as well as information "reported" to defendants of physical damage to the property. In opposition, plaintiffs allege that defendants have only filed the instant application in an attempt to delay the matter.

The Court notes that plaintiffs have not addressed the lease agreement entered into by defendant/landlord SALVATORE CROCE and plaintiff/tenant PAULA (CROCE) MACKENZIE dated August 22, 2002, which indicates a monthly rent of \$1,750.00. In addition, while plaintiffs argue that there is no "viable allegation" of any damage to the premises, they do not deny the existence of any property damage. Moreover, plaintiffs have not demonstrated that any surprise or prejudice would result from the proposed amendments. As such, that branch of defendants' motion seeking to interpose the three counterclaims delineated above, is granted.

Further, defendants seek permission to inspect and assess the subject premises for any damage which has been suffered during the pendency of this action, with a licensed contractor retained by them, under the supervision of the Suffolk County Police Department. Defendants also seek permission to resume and complete the repairs and renovations to the premises previously commenced by defendants. Defendants have not cited any authority for these requests, or alleged that the repairs and renovations sought are necessary to preserve the property. As such, these requests are denied. However, the Court notes that information regarding the current condition of the property may be gleaned during further discovery on defendants' counterclaims.

In view of the foregoing, defendants' application for leave to serve an amended answer is granted to the extent that defendants shall serve an amended answer, in conformance with the foregoing, within thirty days of service of a copy of the within decision and Order with notice of entry. Plaintiffs may then reply to the counterclaims within the statutory time periods depending on the place and method of service of defendants' amended answer.

The foregoing constitutes the decision and Order of the Court.

Dated: August 6, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court