

**Gibbons v Volpe**

2007 NY Slip Op 34305(U)

December 10, 2007

Supreme Court, Queens County

Docket Number: 0024347/2004

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X  
WYATT GIBBONS, ESQ., as Guardian Ad  
Litem for RALPH VOLPE, and MARIS  
GORDON, ESQ., as Guardian Ad Litem for  
TERESA LATTANZIO,

Index No.: 24347/04  
Motion Date: 9/26/07  
Motion Cal. No.: 13  
Motion Seq. No.: 5

Plaintiffs,

-against-

PETER and ELEANOR VOLPE, Individually  
and as Trustees of the Peter B. Volpe Living  
Trust dated March 5, 1996, and as Trustees of  
the Eleanor Volpe Living Trust dated  
March 5, 1996,

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendants, for an order: (1) striking plaintiffs' Jury Demand; (2) imposing sanctions against plaintiffs and awarding defendants costs and attorneys' fees incurred in the making of this motion; and (3) granting defendants a trial preference, pursuant to CPLR § 3403.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 4
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Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action for injunctive relief and the imposition of a constructive trust on the premises known as 72-32 Caldwell Avenue, Maspeth, New York, commenced by plaintiffs in

October 2004, against defendants Peter and Eleanor Volpe, the brother and sister-in-law of plaintiffs. By order of this Court dated April 1, 2005, plaintiffs' motion for injunctive relief, to amend the complaint, and for the appointment of a guardian ad litem, and defendants' cross-motion for dismissal, or in the alternative, a stay of the action, were granted to the extent that James Sarlis, Esq., was appointed as guardian ad litem for plaintiff Ralph Volpe, a hearing was scheduled to determine the competency of plaintiff Teresa Lattanzio, and the matter was stayed. The remaining portions of the motion and cross-motion were denied without prejudice to renew following the determination of the hearing. Thereafter, the proposed guardian notified counsel that he was unable to serve in the appointed capacity. Subsequently, by order of this Court dated October 12, 2005, Wyatt Gibbons, Esq., and Maris Gordon, Esq., were appointed as guardians ad litem for plaintiffs Volpe and Lattanzio, respectively.

By supplemental order of this Court dated October 17, 2005, the previous motion and cross-motion submitted for decision on February 9, 2005, were restored to the motion calendar for determination of the outstanding issues. By further order of this Court dated November 16, 2005, those branches of the restored motion and cross-motion which sought to amend the complaint to add defendants in their capacities as trustees of the Peter B. Volpe Living Trust, and to dismiss for failure to name a necessary party, were granted to the extent that the trust entities were joined as parties to the action, and plaintiffs were directed to file and serve a supplemental summons and amended complaint on the additional parties within 20 days after service of a copy of that order. Moreover, the prongs of the restored motion and cross-motion to restrain defendants from commencing or maintaining any proceedings to recover possession of premises located at 72-32 Caldwell Avenue, Maspeth, New York and from selling, transferring or encumbering the subject premises, and to dismiss the complaint as time-barred, were denied without prejudice to renew following the joinder of the necessary parties. In the interim, defendants were enjoined from commencing or maintaining summary proceedings to recover possession or from selling, transferring or encumbering the subject premises.

Thereafter, defendants moved for an order renewing their opposition to plaintiff's motion for a preliminary injunction, renewing their cross-motion for dismissal, pursuant to CPLR 3211, on the ground that the action is barred by the applicable Statute of Limitations, and dismissing so much of this action as is asserted by Maris Gordon, Esq., as Guardian Ad Litem for Teresa Lattanzio, inasmuch as Teresa Lattanzio has vacated the premises which are the subject of this action. By order dated July 24, 2006, those branches of the underlying cross-motion for dismissal were denied, the motion for injunctive relief was granted, and the parties were directed to appear for a hearing to determine the amount of the undertaking on August 24, 2006, which was subsequently adjourned to September 25, 2006. Pursuant to conference on that day, the parties entered into a stipulation so-ordered by this Court, agreeing to hold the issue of the posting of an undertaking in abeyance until October 30, 2006, and completing all discovery, including depositions, within 120 days therefrom. Subsequent thereto, by letters dated October 25 and 26, 2006, the parties sought an enlargement of time to ascertain the status of plaintiff Lattanzio's health from her physician, and defendants requested that the control date be rescheduled for November 15, 2006. Based upon further letters from plaintiffs dated November 14 and December 4, 2006, and defendants dated November 30,

2006, this Court set the matter down for a conference on December 13, 2006, to address the feasibility of plaintiff Lattanzio returning to the second floor apartment, which has been vacant as a result of her stay in an extended care facility since 2005. By conference on the record, at which the respective guardians ad litem and counsel gave their appearances, this Court, after hearing argument with respect to the subject apartment, held that in view of the serious condition of plaintiff Lattanzio's health, as delineated by her physician, her apartment should be made available for the purposes of generating revenue through the rental thereof. In furtherance of that conference and by order of this Court dated December 14, 2006, it was ordered, inter alia, that plaintiff Lattanzio vacate the subject premises, and remove all items of personalty by January 27, 2007, in lieu of the posting of a bond as a condition of the preliminary injunction.

Thereafter, on July 11, 2007, plaintiffs demanded a trial by jury of all issues, pursuant to CPLR §4102(a). By letter dated July 12, 2007, counsel for defendants requested that plaintiffs withdraw the demand, asserting that plaintiffs are not entitled to a trial by jury inasmuch as the only claim in the action is for the imposition of a constructive trust. By response dated the same day, plaintiffs declined to withdraw the jury demand. It is upon the foregoing that defendants move for an order striking plaintiffs' jury demand, imposing sanctions against plaintiffs and awarding defendants costs and attorneys' fees incurred in the making of this motion, and granting defendants a trial preference, pursuant to CPLR § 3403.

Here, the instant complaint seeks the imposition of a constructive trust, which is an equitable claim. See, Eickler v. Pecora, 12 A.D.3d 635 (2<sup>nd</sup> Dept.2004). "The usual elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (citations omitted). [T]he ultimate purpose of a constructive trust is to prevent unjust enrichment and, thus, a constructive trust may be imposed 'when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest'(citations omitted)." O'Brien v. Dalessandro, 43 A.D.3d 1123, 1124 (2<sup>nd</sup> Dept. 2007); see, Losner v. Cashline, L.P., 41 A.D.3d 789 (2<sup>nd</sup> Dept. 2007); Rocchio v. Biondi, 40 A.D.3d 615 (2<sup>nd</sup> Dept. 2007); Osborne v. Tooker, 36 A.D.3d 778 (2<sup>nd</sup> Dept. 2007); Cruz v. McAneney, 31 A.D.3d 54 (2<sup>nd</sup> Dept. 2006). As such, "it is basic that there is no right to a trial by jury, constitutional or statutory, of equitable actions (citations omitted)." Davis v. Southridge Co-op. Section IV, Inc., 110 A.D.2d 880, 882 (2<sup>nd</sup> Dept.1985). Further, even if the instant complaint also asserted legal causes of action which would be triable by jury, plaintiffs' right to a jury trial would be waived by their joining of an equitable claim with legal claims. See, Tiffany At Westbury Condominium v. Marelli Development Corp., 34 A.D.3d 791 (2<sup>nd</sup> Dept. 2006); Ayromlooi v. Staten Island University Hosp., 7 A.D.3d 475 (2<sup>nd</sup> Dept. 2004); Chim Chul Yi v. Marcy Realty Co., 291 A.D.2d 368, 736 N.Y.S.2d 883 (2<sup>nd</sup> Dept. 2002). Consequently, notwithstanding plaintiffs' contentions to the contrary, and their misplaced reliance upon the recent Appellate Division, Second Department decision, to wit, Northbay Const. Co., Inc. v. Bauco Const. Corp., 38 A.D.3d 737 (2<sup>nd</sup> Dept. 2007), plaintiffs' are not entitled to trial by jury in this equitable action.

Nevertheless, plaintiffs' contentions and reliance upon the aforementioned decision with respect to their filing of the jury demand is germane to the issue on frivolity and sanctionable conduct. Part 130.1 of the Rules of the Chief Administrator of the Court (22 NYCRR 130-1.1), authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and defines conduct frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

The "intent of [Part 130.1] is to prevent the waste of judicial resources and to deter [vexatious] litigation and dilatory or malicious litigation tactics." Kernisan v. Taylor, 171 A.D.2d 869 (2<sup>nd</sup> Dept.1991); see, McKiernan v. McKiernan, 277 A.D.2d 434 (2<sup>nd</sup> Dept. 2000); Stow v. Stow, 262 A.D.2d 550 (2<sup>nd</sup> Dept.1999). The Rule further provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a "broad pattern of the [plaintiffs'] conduct in this regard and not just the question [of] whether a strand of merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation []." Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1<sup>st</sup> Dept.1999); see, Wecker v. D'Ambrosio, 6 A.D.3d 452 (2<sup>nd</sup> Dept. 2004). "Sanctions are retributive, in that they punish past conduct. They also are goal-oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (citation omitted)." Id. at 34 (1<sup>st</sup> Dept.1999).

Here, plaintiffs contend that a jury demand was filed because "although the ultimate relief sought is the imposition of a constructive trust, the parties' central underlying dispute is a factual one which is appropriate for jury resolution." They further opined that "juries in the Second Department have recently been employed to decide factual issues in actions for constructive trusts," and cites to the 2007 Appellate Division decision, Northbay Const. Co., Inc. v. Bauco Const. Corp., 38 A.D.3d 737 (2<sup>nd</sup> Dept. 2007). In this decision, plaintiff Northbay Construction Co., Inc., commenced action No. 1, seeking, inter alia, damages for breach of fiduciary duty, an accounting, and the imposition of a constructive trust. In action No. 2, the Crecco plaintiffs, as shareholders of Northbay, brought

a similar action against Dominick Bauco and Northbay. The two actions were tried jointly before a jury. After trial, the Supreme Court denied defendants' request that the verdict sheet contain a causation interrogatory with respect to whether Dominick Bauco's alleged breach of his fiduciary duty caused Northbay any damages. In reversing the interlocutory judgment on the law, and remitting the matter to the Supreme Court, Westchester County, for a new trial, the Appellate Division, Second Department, stated the following [38 A.D.3d 737, 738]:

To prove a breach of fiduciary duty, the "plaintiff must establish that the alleged misrepresentations or other misconduct were the direct and proximate cause of the losses claimed" (Laub v. Faessel, 297 A.D.2d 28, 30 [2002]; see, Stafford v. Reiner, 23 A.D.3d 372 [2005]). Thus, it was for the jury, as the trier of fact, to determine whether Dominick [Bauco] proximately caused the losses claimed through his alleged breach of fiduciary duty (see, generally, Canonico v. Beechmont Bus Serv., Inc., 15 A.D.3d 327, 328 [2005]). Thus, there must be a new trial because "[b]y . . . refusing to charge the jury on proximate cause, the Supreme Court removed causation from the jury's consideration and decided the issue as a matter of law" (id.). Furthermore, because a party must prove that there was a breach of fiduciary duty for a constructive trust to be imposed, there must be a new trial on that issue as well (see, Old Republic Natl. Tit. Ins. Co. v. Cardinal Abstract Corp., 14 A.D.3d 678, 680 [2005]).

In reliance upon this decision, plaintiffs state that "Second Department case law supports the use of a jury to determine whether the requisite fiduciary relationship exists... This proposition has been cited by recent decisions in the course of explaining the requirements for a constructive trust, implying that a jury shall resolve the factual issues in an action seeking such relief."

Although this Court does not agree with plaintiffs' assessment of the case law, and more specifically, the general application of North Bay to stand for the proposition that there is a right to trial by jury in equitable claims for the imposition of constructive trusts, implicit in this decision is the recognition by the Appellate Division, Second Department, that there are circumstances where a trial by jury is appropriate when the relief requested is the imposition of a constructive trust. Notwithstanding, as the Appellate Division, Second Department neither specifically addressed the issue of the appropriateness of a jury trial in equitable or mixed issue matters, nor was the record clarified as to this point, this Court continues to be governed by the principle of law that there is no right to a jury in equitable claims. Nevertheless, this Court finds that plaintiffs' position is not without merit in light of the inference that can be reasonably drawn from the aforementioned case. Consequently, notwithstanding the contentions of defendants, this Court finds that the facts and circumstances surrounding the making of the subject jury demand was not frivolous within the meaning of 22 NYCRR 130-1.1(c) and thus, the imposition of costs and sanctions is not warranted.

Accordingly, the motion by defendants, for an order striking plaintiffs' jury demand, imposing sanctions against plaintiffs and awarding defendants costs and attorneys' fees incurred in the making of this motion, and granting a trial preference, is granted to the extent that the jury demand filed by plaintiffs hereby is stricken, and defendants' shall have a trial preference. A copy of this order shall be served upon the clerk of the trial term office within thirty (30) days of service of a copy of this order with notice of entry. That branch of the motion for sanction against plaintiffs for frivolous motion practice is denied.

Dated: December 10, 2007

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J.S.C.