

Bozzetti v Pohlmann

2008 NY Slip Op 33196(U)

December 1, 2008

Supreme Court, Greene County

Docket Number: 08-1086

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

ARMAND BOZZETTI
and CAROL BOZZETTI,

Plaintiffs,

DECISION and ORDER
INDEX NO. 08-1086
RJI NO. 19-08-3901

-against-

HORST POHLMANN
and KAY POHLMANN,

Defendants.

Supreme Court Greene County All Purpose Term, November 14, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs and defendants are feuding owners of adjoining parcels of real property located in the Town of New Baltimore, New York. Plaintiffs' complaint sets forth six causes of action related to the parties disputes arising from their respective ownership. Prior to answering, defendants move to dismiss plaintiffs' first, second, third and fourth causes of action. Defendants' motion seeks dismissal of plaintiffs' first and second causes of action claiming a defense based upon documentary evidence (CPLR §3211[a][1]), the third and fourth causes of action alleging they fail to state a cause of action (CPLR §3211[a][7]) and, alternatively, the

fourth cause of action because it is not pled with specificity (CPLR §3016[b]). Because defendants failed to properly demonstrate their entitlement to judgment pursuant to CPLR §3211[a][1] their motion to dismiss the first and second causes of action is denied. However, defendants properly demonstrated that plaintiffs' third and fourth causes of action fail to state a cause of action, pursuant to CPLR §3211[a][7], and their motion is granted.

In the context of a CPLR §3211 motion the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]).

Specifically, relative to a "motion to dismiss on the ground that the action is barred by documentary evidence [CPLR §3211[a][1]], such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law". (Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]). The documentary evidence submitted must resolve "all factual issues as a matter of law and definitively dispose.. of the plaintiff's claim". (Wallach v. Hinckley, 12 AD3d 893 [3d Dept. 2004]).

The "documentary evidence" submitted by defendants in support of their motion consists of two unfiled surveys. The surveyor who prepared both surveys was hired by defendants to prepare them, specifically for purposes of this litigation. The surveys purport to set forth the boundary lines of the parties parcels and the locations of a disputed utility easement. However, just as an affidavit created by one of the parties for purposes of litigation fails to properly support a motion to dismiss brought pursuant to CPLR §3211(a)(1), neither can the defendants' proffered

surveys. (Williamson, Pickett, Gross, Inc. v. Hirschfeld, 92 AD2d 289 [2d Dept. 1983]; see Realty Invs. of USA v Bhaidaswala, 254 AD2d 603 [3d Dept. 1998]). Similarly, the defendants' submission of an unsigned letter from Central Hudson Gas & Electric Corporation, fails to qualify as competent "documentary evidence". No proper foundation is laid for its submission on this motion, nor are any of the claims made therein substantiated. As defendants' submissions fail to qualify as "documentary evidence" under CPLR §3211(a)(1) or definitively dispose of plaintiffs' claim, that part of their motion seeking dismissal of plaintiffs' first and second causes of action is denied.

Turning next to defendants' motion, pursuant to CPLR §3211(a)(7), to dismiss plaintiffs' third and fourth causes of action, "[o]n a motion to dismiss for failure to state a cause of action, the court must liberally construe the [complaint], accept all of its allegations as true, accord [plaintiffs] every favorable inference and decide only whether the alleged facts fit within any recognized legal theory." (Abele v. Dimitriadis, 53 AD3d 969, 968 [3d Dept. 2008]).

Plaintiffs' third cause of action alleges an "abuse of process" claim. The elements of an abuse of process claim are: "regularly issued process, either civil or criminal, an intent to do harm without excuse or justification, and use of the process in a perverted manner to obtain a collateral objective." (Minasian v. Lubow, 49 AD3d 1033, 1035-36 [3d Dept. 2008])[quoting Plataniotis v. TWE Advance/Newhouse Partnership, 270 AD2d 627 [3d Dept. 2000]].

Here, plaintiffs' third cause of action alleges that process was issued when a criminal complaint was filed at the direction or encouragement of defendants, that the defendants directed false statements be made in support of the criminal process, and that the defendants intended harm by such process. However, the complaint does not claim that the defendants "utilized the

process in a manner inconsistent with the purpose for which it was designed”. (Minasian, supra). Nor does the complaint allege that the process itself was issued by defendants. Accordingly, plaintiffs’ have failed to allege sufficient facts to set forth an abuse of process claim.

Plaintiffs’ fourth cause of action sounds in fraud in the inducement. “The elements of fraud require plaintiff to demonstrate that defendants knowingly misrepresented a material fact with the intent to deceive plaintiff and, after having justifiably relied upon such misrepresentation, plaintiff experienced [damages].” (State v. Industrial Site Services, Inc., 52 AD3d 1153, 1157 [3d Dept. 2008]). “As relevant here, a misrepresentation may include a present, but undisclosed, intent not to perform.” (Young v. Williams, 47 A.D.3d 1084, 1086 [3d Dept. 2008][internal citations omitted]).

Here, plaintiffs’ complaint alleges that the parties entered into an easement agreement, that the defendants had no intent to perform their obligations under the agreement at the time they entered the agreement, and that defendants have not abided by the terms of the agreement. The complaint, liberally construed, alleges damages by claiming defendants “interfere[d] with and restrict[ed]” plaintiffs’ use of their property. Plaintiffs’ complaint does not, however, allege reasonable reliance on the allegedly misrepresented fact. Plaintiffs’ affidavit in opposition, likewise, fails to allege reasonable reliance. Accordingly, plaintiffs’ complaint fails to set forth each and every element of a fraud in the inducement cause of action.

As defendants’ motion to dismiss plaintiffs’ fraud in the inducement claim is granted under CPLR §3211(a)(7), the court need not address defendants’ motion to dismiss such cause of action pursuant to CPLR §3016(b).

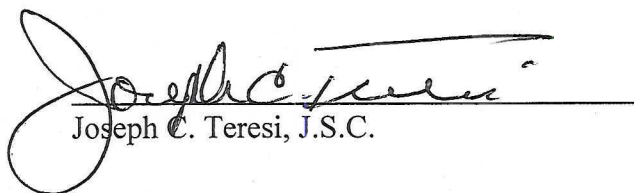
Accordingly, defendants’ motion to dismiss plaintiffs’ first and second causes of action

are denied and defendants' motion to dismiss plaintiffs' third and fourth causes of action is granted.

All papers, including this Decision and Order are being returned to the attorneys for the defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: December 1, 2008
Albany, New York



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated October 3, 2008; Affidavit of Michael Moore, dated October 3, 2008, with attached Exhibits 1-4.
2. Affidavit in Opposition of Brendan F. Baynes, dated October 30, 2008 with Attached Exhibits "A" - "E"; Affidavit in Opposition of Armand Bozzetti, dated October 30, 2008 with Attached Exhibits "A" - "G".
3. Reply Affidavit of Michael Moore, dated November 12, 2008, with attached Exhibit 1; Reply Affidavit of Joanne Darcy Crum, dated November 11, 2008, with attached Exhibits 1-2;