

**Viola v Giordano**

2009 NY Slip Op 32000(U)

August 20, 2009

Supreme Court, Nassau County

Docket Number: 003877/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

INDEX No. 003877/09

MOTION DATE: June 11, 2009  
Motion Sequence # 002, 003, 004

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ANTHONY VIOLA and JANE VIOLA,  
individually and as representatives of all  
other claimants under Lien Law Article 3-A  
trust similarly situated,

Plaintiffs,

-against-

ROBERT GIORDANO, GIORDANO  
CONTRACTING, INC., DOMINICK  
CERVI and DOMINICK CERVI, INC.,

Defendants.

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The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	XX
Affidavit in further Support & Opposition....	X
Reply Affirmation .....	X
Sur-Reply Affidavit.....	X
Memorandum of Law.....	XXX
Reply Memorandum of Law.....	XX

This motion, by plaintiffs, for an order pursuant to CPLR §§3211(a)(6), (a)(7) and 3211(b): (i) dismissing with prejudice the Giordano defendants' first through fourth counterclaims and their thirteenth through sixteenth affirmative defenses, (ii) dismissing with prejudice the Cervi defendants' second and third counterclaims and their thirteenth and

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fourteenth affirmative defenses, and (iii) granting such other and further relief in favor of plaintiffs and against defendants as this Court deems just and proper; and a cross-motion, by defendants Robert Giordano and Giordano Contracting, Inc. (hereinafter "Giordano defendants"), for an order:

pursuant to CPLR 3211(a)(7) and 3212 dismissing the verified complaint and all causes of action thereto as against defendants Robert Giordano and Giordano Contracting, Inc., on the grounds that the asserted causes of action either fail to state facts sufficient to constitute causes of action and/or there are no material issues of fact which require a trial; and

for an order granting such other and further relief as this Court deems just and proper, including the costs of this motion sequence; and

a cross-motion, by defendants Dominick Cervi and Dominick Cervi, Inc. (hereinafter "Cervi defendants", for an order:

pursuant to CPLR 3211(a)(7) and 3212, dismissing causes of action two, four, five, six, seven, eight, nine, ten and eleven of the verified complaint as against defendants Dominick Cervi and Dominick Cervi, Inc., on the grounds that the asserted causes of action either fail to state facts sufficient to constitute causes of action and/or there are no material issues of fact which require a trial; and for

an order granting such other and further relief as this Court deems just and proper, including the costs of this motion sequence,

are **all** determined as hereinafter set forth.

### **FACTS**

In August, 2007, plaintiffs entered into a written contract with Cervi Defendants for the construction of their new home. Plaintiffs instituted this action to recover for breach of contract, fraud, breach of statutory trust, to compel production of a verified trust statement, and for other claims allegedly arising from the defendants' breaches of and abandonment of, the building contract. The Cervi Defendants and Giordano Defendants have asserted

affirmative defenses to the plaintiff's claims and counterclaims sounding in malicious prosecution and abuse of process.

### **PLAINTIFFS' CONTENTIONS**

Plaintiffs move to dismiss defendants counterclaims and affirmative defenses pursuant to CPLR §§ 3211(a)(6), 3211(a)(7), and 3211(b). With respect to the malicious prosecution claim, the plaintiffs argue that the defendants cannot assert such causes of action until the completion of the present action because "termination in favor of the defendant" is an essential element of the cause of action. Similarly, the plaintiffs contend that the abuse of process claim lacks an essential element in that the commencement of an action is not "process capable of being abused." Further, the plaintiffs claim that the defendants do not allege special damages which is required to sustain both causes of action.

### **GIORDANO DEFENDANTS' CONTENTIONS**

These defendants assert that the preliminary injunction previously sought by the plaintiff qualifies as a judicial proceeding for the purposes of a malicious prosecution and abuse of process claim. Further, the defendants contend that they have suffered special damages in that the Order prohibited the Giordano defendants from "withdrawing, conveying, removing, encumbering, assigning, transferring, delivering or utilizing any funds and/or from paying any monies, except for ordinary & necessary living expenses."

The defendants cross move for summary judgment and to dismiss plaintiffs' claims pursuant to CPLR § 3211(a)(7), and § 3212. With respect to plaintiffs' tortious interference claim, the defendants contend that the allegations are conclusory and do not state how the defendants interfered with the contract or how they procured breaches of the contract. Regarding the fraud claim, the defendants argue that such a claim does not lie where the only fraud alleged arises from the breach of a contract. Additionally, the cause of action for violation of Lien Law article 3-A should be dismissed because Mr. Giordano is merely a subcontractor and thus the Giordano Defendants are not trustees for the plaintiff under the Lien Law. Further, the defendants contend that the trust funds were disbursed for proper trust purposes. Regarding plaintiffs' cause of action for a verified statement under Lien Law article 3-A, the defendants contend that the plaintiff has not sent notice in the precise manner required under § 76. Defendants argue that plaintiffs' unjust enrichment claim should be dismissed because the plaintiffs cannot claim damages under both a theory of unjust enrichment and a theory based upon a written contract. Further, the constructive trust claim

should be dismissed because the plaintiffs have not alleged a fiduciary relationship between themselves and the Giordano defendants, which is an essential element of a constructive trust cause of action. Defendants further assert that the plaintiffs cannot sustain a replevin cause of action because the complaint does not specifically identify the chattels alleged to be in the defendants' possession. The defendants also argue that they do not have any of the plaintiffs' property. Lastly, with respect to the eleventh cause of action, the defendants claim that a dispute arising from a home construction contract is an "inappropriate" subject for a General Business Law § 349 cause of action.

### CERVI DEFENDANTS' CONTENTIONS

The Cervi Defendants move for an Order pursuant to CPLR § 3211(a)(7) and § 3212 to dismiss plaintiffs, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action. Regarding the fourth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action, counsel for the Cervi Defendants concur with counsel for the Giordano defendants. The Cervi Defendants also concur with Giordano Defendants' opposition to plaintiffs' motion to dismiss Giordano Defendants' counterclaims sounding in malicious prosecution and abuse of process.

Regarding the second cause of action for breach of contract against Dominick Cervi, the defendant contends that the claim cannot be asserted against Mr. Cervi personally because the plaintiff has not alleged the elements necessary to hold Mr. Cervi personally liable for the actions of Dominick Cervi, Inc. With respect to plaintiff's fifth cause of action for violation of GBL § 772, the defendant contends that the plaintiffs have not supported the claim with the actual writings that induced the plaintiffs to contract with the Cervi Defendants.

### PLAINTIFFS REPLY

With respect to Plaintiffs' motion to dismiss, plaintiffs re-iterate their position that abuse of process and malicious prosecution claims are not ripe and cannot be asserted until the current action is decided.

Plaintiffs oppose defendants' motion to dismiss the cause of action for breach of contract against Dominic Cervi on the basis that Cervi is the alter ego of Dominic Cervi, Inc., and can be held personally liable for wrongs committed by the corporation. With respect to the motion to dismiss the tortious interference claim asserted against the Giordano

Defendants, the plaintiff argues that the claim is sufficiently detailed to withstand a motion to dismiss and that a summary judgment motion cannot be determined absent further discovery. Regarding the cause of action for fraud, the plaintiffs argue that the fraudulent misrepresentations were collateral to the contract, and thus are sufficient to sustain the cause of action. Regarding the cause of action for violation of GBL § 772, the plaintiffs argue that the complaint clearly exhibits which writings allegedly induced the plaintiffs to contract with the Cervi Defendants; thus, the claim is adequately plead. Regarding the sixth and seventh causes of action, violation of the Lien Law, and to compel a verified statement in accordance with Lien Law § 76, the plaintiff argues that the Court has already decided that the plaintiffs have standing to bring such causes of action. Further, the plaintiff argues that the court has the authority to compel defendants to produce a verified statement despite any defect in notice. With respect to the cause of action sounding in unjust enrichment, the plaintiff contends that they are able to assert both unjust enrichment and breach of contract when the contract has been fraudulently induced, abandoned and breached. Regarding plaintiffs cause of action sounding in constructive trust, the plaintiff claims that the plaintiffs are beneficiaries of, and defendants are trustees of, statutory trusts established under the Lien Law, thereby establishing a fiduciary relationship between plaintiffs and defendants. With respect to the replevin cause of action, the plaintiff contends that further discovery s required to ascertain which of plaintiffs' chattels is currently under defendants' control. Similarly, the plaintiff argues that the cause of action for violation of GBL § 349 requires further discovery.

### PLAINTIFFS' SUR-REPLY

The plaintiffs re-iterates that the subcontractors were not paid by the Cervi defendants. Further, they contend that the defendants did not provide the architect with documents required under the contract regarding payment scheduling. The plaintiffs also argue that GBL Section 349 is applicable because he did not draft the contract in his capacity as an attorney, therefore, the case still qualifies as a consumer case.

### DECISION

With respect to plaintiff's motion to dismiss Defendant Giordano's first counterclaim and thirteenth affirmative defense, both sounding in malicious prosecution— "the malicious institution of judicial proceedings without probable cause for doing so *which finally ends in failure*"— (Curiano v Suozzi, 63 N.Y.2d 113, 480 N.Y.S.2d 466 1984)(emphasis added) the motion is **granted** without prejudice. The defendants cannot assert a claim of malicious civil

prosecution absent a successful disposition of that action. (*See id.* at 469) For the foregoing reasons plaintiff's motion to dismiss Defendant Cervi's second counterclaim and fourteenth affirmative defense, also sounding in malicious prosecution, is also **granted** without prejudice.

Regarding plaintiff's motion to dismiss Defendant Giordano's third counterclaim and fifteenth affirmative defense, sounding in abuse of process, the motion is **granted**. Abuse of process has three essential elements:

"First, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification (cf. **James v Board of Educ. of Cent. School Dist. No. 1 of Towns of Orangetown and Clarkstown**, 37 NY2d 891). Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process".

**(Board of Education of Farmingdale v. Farmingdale Classroom Teachers Assoc.**, 38 N.Y.2d 397, 380 N.Y.S.2d 685, 1975) "The mere commencement of the underlying civil action, and the issuance, via proper judicial process, of provisional orders of attachment enjoining claimants from transferring or secreting assets, are insufficient to form the basis for an abuse of process claim." (**Park v State**, 226 A.D.2d 153, 640 N.Y.S.2d 100, 1<sup>st</sup> Dept., 1996). Herein, the defendants have not demonstrated any of the criteria required for such cause of action.

With respect to Cervi Defendants' motion to dismiss plaintiffs' second cause of action for breach of contract against Dominic Cervi, the motion is **granted**. A corporate official could be held liable for inducing the corporation to breach its contract if it is alleged and proven that the defendant "acted outside the scope of employment..., that he personally profited from the transaction in question, or that he committed independent tortious acts." (**Britvan v. Sutton & Edwards, Inc.**, 226 A.D.2d 490, 641 N.Y.S.2d 110, 2<sup>nd</sup> Dept., 1994).

The plaintiff does not set forth allegations to sustain such a claim; hence, the motion is **granted** and the claim for breach of contract is **dismissed** as against Dominic Cervi, personally.

Regarding the Giordano Defendants' motion for summary judgment and motion to dismiss plaintiffs' third cause of action, sounding in tortious interference with contractual relationships, the motion is **denied**. The plaintiff cannot demonstrate exactly how the Giordano Defendants induced the Cervi Defendants to breach the contract without deposing the Cervi Defendants' employees; hence the motion is **denied** without prejudice to the completion of discovery. (*See* **Peerless Insurance Co. v Allied Building Products Corp.** 15 A.D.3d 373, 789 N.Y.S.2d 715, 2<sup>nd</sup> Dept., 2005; CPLR 3212(f)).

The Giordano and Cervi Defendants' motion for summary judgment and motion to dismiss plaintiffs' fraud claim is **denied**. While "a fraud claim does not lie where the only fraud alleged arises from the breach of a contract,... a misrepresentation of material fact that is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud." (**Selingner Enterprises, Inc. v. Cassuto**, 860 N.Y.S.2d 533, 2<sup>nd</sup> Dept., 2008). Assuming that the facts alleged by the plaintiff are true, the defendants made several misrepresentations regarding the work completed in order to secure pre-mature payments from the plaintiffs. These misrepresentations are collateral to the contract, and induced the plaintiffs to pay the money due under the contract when the work was not adequately completed; hence, the plaintiff has a viable fraud cause of action against the defendants, and the motions to dismiss are **denied**; and as to summary judgment, as noted above, CPLR 3212(f) requires denial as well.

Regarding the Cervi Defendants' motion for summary judgment and to dismiss plaintiff's fifth cause of action, the motion is **denied**. In his complaint, the plaintiff has referred to several written statements that induced him to contract with the defendant. While the defendant claims that plaintiff will be unable to provide such statements, "The court may not weight the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned"; (**Glick & Dolleck, Inc. v. Tri-Pac**

Export Corp., 22 N.Y.2d 439, 1968) thus, the motion is **denied**.

Regarding the motion for summary judgment and motion to dismiss plaintiff's sixth cause of action for violation of Lien Law Article 3-A, the motion is **denied**. Lien Law § 71-a (4)(a) provides:

“Under a home improvement contract, payments received from an owner by a home improvement contractor prior to the substantial completion of work under the contract shall be deposited within five business days thereafter by the recipient in an escrow account in a bank, trust company, savings bank, or state or federal savings and loan association, located in this state.

Further, Lien Law §77(1) provides:

“A trust arising under this article may be enforced by the holder of any trust claims, including any person subrogated to the right of a beneficiary of the trust holding a trust claim, in a representative action brought for the benefit of all beneficiaries of the trust”.

Since plaintiffs claim to have compensated the subcontractors that were not paid by the defendants, the plaintiffs are subrogated to the rights of the subcontractor trust beneficiaries, and have standing to enforce those rights against the defendants. While the Giordano defendants claim that they were merely a subcontractor and the Lien Law is inapplicable to them, the existence of Mr. Giordano's presence throughout the contracting process and the plaintiffs' testimony that they dealt primarily with Mr. Giordano during construction raises an issue of fact as to whether the Giordano defendants actually were, or held themselves out to be, partners of the general contractor.

Additionally, the affidavit in support of the plaintiffs' contention that the subcontractors were not paid by the defendants is sufficient to defeat a summary judgment motion. "The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned." (Glick & Dolleck, Inc. v. Tri-Pac Export Corp., *supra*). For the foregoing reasons Giordano defendants' and the Cervi defendants' motions for summary judgment are **denied**.

With respect to the seventh cause of action to compel a verified statement of the Lien Law trust against all defendants, defendants' motion for summary judgment, on the grounds that said demand was procedurally defective, is **denied**. While the plaintiffs are required under Lien Law § 76(2) to request such a statement in a particular manner, §76(6) provides:

"This section does not limit the power of the court in an action pursuant to section seventy-seven of this chapter or in any other action or proceeding affecting trust assets or involving trust claims or the administration of the trust, to give directions with respect to production or examination of any books or records of the trustee".

Thus, the court has the authority to compel the defendants to produce a verified statement, despite any technical defect in the plaintiffs' request.

Regarding the eighth cause of action sounding in unjust enrichment, the Cervi Defendants' motion to dismiss is **granted**. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.... Even where a plaintiff may seek recovery on alternative theories, he must make an election of remedies at trial or upon submission of a motion for summary judgment." (Unisys Corp. v Hercules Inc., 224 A.D.2d 365, 638 N.Y.S.2d 461, 1<sup>st</sup> Dept., 1996). Since the plaintiffs assert a claim for breach of contract against the Cervi Defendants, they cannot also seek to recover under unjust enrichment; thus, the motion is **granted**. However, the motion is **denied** with respect to that part of the Giordano Defendants

motion. The plaintiffs do not assert a claim for breach of contract against the Giordano Defendants; therefore, the plaintiffs are not precluded from seeking to recover under unjust enrichment.

Regarding the ninth cause of action to impose a constructive trust, the motion to dismiss and for summary judgment is **denied** as against all defendants. To plead such a cause of action, four elements must be alleged: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment. (Sharp v. Kosmalski, 40 N.Y.2d 119, 386 N.Y.S.2d 72, 1976). A fiduciary relationship "exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation." (Restatement Second of Torts § 874). The Cervi Defendants owe the plaintiffs a fiduciary duty under the Contract and as trustees under the lien law; therefore, that portion of their motion is **denied**. With respect to the Giordano defendants, that part of the motion for summary judgment and to dismiss is also **denied** because an issue of fact exists as to whether the Giordano Defendants held themselves out to be partners of the general contractor, in which case they would owe a fiduciary duty to the plaintiff.

With respect to the cause of action sounding in replevin, the motion to dismiss and for summary judgment is **denied**. Further discovery is required to determine what, and if any, of plaintiff's property is currently under Defendants' control.

With respect to the cause of action for violation of General Business Law § 349, the motion to dismiss is **granted**. "Large, private, single-shot contractual transactions" do not fall under the statute. (Teller v Hayes, 213 A.D.2d 141, 630 N.Y.S.2d 769, 2<sup>nd</sup> Dept., 1995). "Because of the 'complex arrangements, knowledgeable and experienced parties and large sums of money' involved, the parties [do] not need the protection of General Business Law § 349" (*Id.* at 773 quoting Genesco Entertainment v. Koch 593 F.Supp. 743) GBL § 349 does not apply in this case to such a complex "single-shot contractual transaction." Thus, those portions of the respective motions to dismiss are **granted** as against all defendants.

Dated AUG 20 2009

*Stephen A. Bucaria*  
J.S.C.

**ENTERED**

AUG 25 2009