

Allfour v Bono
2012 NY Slip Op 32038(U)
August 1, 2012
Sup Ct, Suffolk County
Docket Number: 41887-10
Judge: Elizabeth H. Emerson
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INDEX
NO.: 41887-10

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 4-12-12; 5-31-12
SUBMITTED: 4-19-12; 5-31-12
MOTION NO.: 003-MOT D; ACAP
 004-MD

-against-

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SALVATORE A. BONO
Defendant Pro Se
216 Captains Way
West Bay Shore, New York 11706

Defendants.

Upon the following papers numbered 1-77 read on these motions to amend and to dismiss ;
 Notice of Motion and supporting papers 1-6; 7-60 ; Notice of Cross Motion and supporting papers____;
 Answering Affidavits and supporting papers 61-73 ; Replying Affidavits and supporting papers 74-75 ;
 Other 76-77 ; it is,

ORDERED that the motion by the defendant Salvatore Bono, inter alia, for an order dismissing the complaint is denied; and it is further

ORDERED that the motion by the plaintiff for an order amending the complaint and the notice of pendency is granted to the extent indicated below; and it is further

ORDERED that the plaintiff is directed to serve and file an amended complaint and notice of pendency within 30 days after the date of entry of this order; and it is further

ORDERED that the caption shall hereafter read as follows:

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

ALLFOUR dba ALBARANO HOLDING CO.

x

Plaintiff,

-against-

**SALVATORE BONO, GEOFFREY M. PARKINSON
and LAURA J. NILES FOUNDATION INC., C/O
MICHAEL J. LANGAN, PUBLIC ADMINISTRATOR
OF SUFFOLK COUNTY, ASTORIA FEDERAL
SAVINGS AND LOAN ASSOCIATION and
“JOHN DOE and/or “JANE DOE” (Said names being
fictitious it being the intention of Plaintiff to designate
any and all occupants of the premises being foreclosed
herein, and any parties, corporations or entities, if any,
having or claiming an interest or claiming an interest or
lien upon the mortgaged premises.)**

Defendants.

x.

The motion by the defendant Salvatore Bono, which is denominated as a motion to dismiss for lack of standing (*see*, CPLR 3211[a] [3]) and related relief, is actually a motion for summary judgment since service of an answer cut off Bono’s right to make a CPLR 3211 motion to dismiss (*see generally*, CPLR 3211[e]; Siegel, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:52). CPLR 3211 (c) empowers the court to treat a motion to dismiss as a motion for summary judgment, after adequate notice to the parties, when the proof submitted to the court is as complete as it usually is on a motion for summary judgment pursuant to CPLR 3212 (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3211:44). Notice is not required, however, when the parties have laid bare their proof and clearly charted a summary judgment course (*see*, **Matter of Weiss v North Shore Towers Apts. Inc.**, 300 AD2d 596; **Kavoukian v Kaletta**, 294 AD2d 646, 647). The court finds that the parties in this case have laid bare their proof and charted a summary judgment course. Accordingly, the court will treat the motion as one for summary judgment without further notice to the parties.

Any of the grounds on which a CPLR 3211 motion could have been made before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by way of a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (*see*, CPLR 3211[e]; Siegel, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:20). Bono's answer includes lack of standing as an affirmative defense. Accordingly, the branch of Bono's motion which is for dismissal of the complaint due to lack of standing is deemed to be for summary judgment on CPLR 3211 (a) (3) grounds.

Bono argues that the plaintiff lacks standing to maintain this action because the note and mortgage that are the subject of this action identify the lender as "Allfour dba Albarano Holding Co." not "Allfour dba Albarano Holding Corporation," the plaintiff herein. The plaintiff does not allege, nor does the record reflect, that the note and mortgage were assigned from Allfour dba Albarano Holding Co. to Allfour dba Albarano Holding Corporation.

Defects, mistakes, and irregularities in pleading are to be ignored by the court absent a showing of prejudice (*see*, CPLR 104, 2001, 2101[f], 3025[c]; 3026; **First Wisconsin Trust Co. v Hakimian**, 237 AD2d 249). Further, captions should be liberally construed and defects in form should be disregarded unless demonstratively prejudicial or a timely objection has been made (*Id.* at 249). Mistakes relating to the name of a party involving a misnomer or misdescription of the legal status of a party fall within the category of irregularities that are subject to correction by amendment, particularly when the other party is not prejudiced and should have been well aware from the outset that a misdescription was involved (*see*, **Cutting Edge, Inc. v Santora**, 4 AD3d 867, 868; **Homemakers, Inc., of Long Is. v Williams**, 100 AD2d 505, 507).

The court finds that no prejudice resulted from the miscaptioning of the summons and complaint in this case. Bono was well aware of the misnomer, having raised it in a previous foreclosure action between the parties, which was dismissed on other grounds; as an affirmative defense in his answer to this action; and again in support of his motion to dismiss this action. Moreover, the misnomer may easily be corrected by amending the complaint. Accordingly, the branch of Bono's motion which is to dismiss the complaint for lack of standing is denied, and the complaint is amended sua sponte (*see*, **Rossignol v Silvernail**, 185 AD2d 497, 499; **Ramos v Triborough Bridge & Tunnel Auth.**, 179 AD2d 471, 473; Connors, Practice Commentaries McKinney's Cons Laws of NY, Book 7B CPLR C3025:17 at 109-110). The plaintiff is directed to serve and file an amended complaint correcting the name of the plaintiff in the caption within 30 days after the date of entry of this order.

In addition to lack of standing, Bono argues that dismissal is warranted because the action was commenced beyond the six-year period of limitations applicable to foreclosure actions (*see*, CPLR 213 [4]). Since the statute of limitations is included as an affirmative defense in Bono's answer, it has not been waived (*see*, CPLR 3211 [e]).

Contrary to Bono's contentions, the action is not time-barred. The record reveals that Bono made his last payment to the plaintiff on the loan that is the subject of this action on August 9, 2005. The action was commenced on November 17, 2010, within the six-year period. Accordingly, dismissal is not warranted.

Bono also seeks an order voiding, cancelling, annulling, and discharging the mortgage that is the subject of this action and transferring ownership of the subject property to his children free and clear of all liens, judgments, and encumbrances. Bono makes a myriad of arguments in support thereof including, but not limited to, fraud and deception by the plaintiff's attorney and others; violations of his constitutional and civil rights; violations of federal law including, inter alia, the Truth in Lending Act (15 USC § 1601 et seq.); and violations of New York State law including, inter alia, General Business Law § 349 and various sections of the Penal Law. Bono submits his own affidavit and a voluminous amount of documentary evidence in support of his arguments.

As previously discussed, Bono has already answered the complaint. His answer contains 17 counterclaims against the plaintiff for the same relief that he now seeks, i.e., a judgment voiding and discharging the mortgage that is the subject of this action and transferring ownership of the subject property to his children. Moreover, Bono's counterclaims are based on substantially the same theories of recovery, statutes, and purported violations of state and federal law as his motion. Accordingly, the court finds that Bono is, in effect, moving for summary judgment on his counterclaims.

The court's main function on a motion for summary judgment is issue finding rather than issue determination. Since summary judgment is a drastic remedy, it should not be granted when there is any doubt as to the existence of a triable issue of fact. In reviewing a motion for summary judgment, the court must accept as true the evidence presented by the nonmoving party and must deny the motion if an issue of fact is even arguable or debatable (*see, Kaung v Board of Managers of the Biltmore Towers Condominium Assoc.*, 22 Misc 3d 854, 856 [and cases cited therein], *affd* 70 AD3d 1004). The court's review of the papers submitted in support of and in opposition to Bono's motion reveal numerous triable issues of fact that preclude the granting of summary judgment. Accordingly, Bono's motion is denied.

The plaintiff moves to amend the complaint and the notice of pendency to add three judgment creditors as party defendants and to add a cause of action against Bono sounding in quasi contract. CPLR 3025 (b) provides that leave to amend pleadings "shall be freely given upon such terms as may be just." Thus, motions for leave to amend are liberally granted absent prejudice or surprise (*Long Is. Tit. Agency, Inc. v Frisa*, 45 AD3d 649). A court should not examine the merits of the proposed amendment unless the insufficiency or lack of merit is clear and free from doubt (*Id.*). Leave should be denied when the proposed amendment is palpably insufficient as a matter of law or totally devoid of merit (*Id.*).

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Since the three judgment creditors are necessary defendants to this foreclosure action (*see*, RPAPL 1311 [3]), the court grants the plaintiff's motion insofar as it seeks to add as party defendants Geoffrey M. Parkinson and Laura J. Niles Foundation Inc., c/o Michael G. Langan; the Public Administrator of Suffolk County; and Astoria Federal Savings and Loan Association. Accordingly, the plaintiff is directed to personally serve them with a supplemental summons and amended complaint within 30 days after the date of entry of this order.

Turning to the plaintiff's proposed cause of action sounding in quasi contract, the existence of a valid and enforceable written contract precludes recovery in quasi contract for events arising out of the same subject matter (**Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, 70 NY2d 382, 388). A quasi contract only applies in the absence of an express agreement and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment (*Id.*). It is impermissible to seek damages in quasi contract when the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties (*Id.* at 389).

The proposed second cause of action for unjust enrichment seeks to recover from Bono amounts expended by the plaintiff for taxes, insurance, and the upkeep of the property. The mortgage agreement between the parties, the existence of which is undisputed, clearly covers such payments, and the record reveals that the plaintiff fully performed under that agreement. Thus, the plaintiff may not seek quasi contractual remedies. In any event, any amounts for which Bono may be liable will be determined after the sale of the premises upon the plaintiff's motion for a deficiency judgment pursuant to RPAPL 1371. Accordingly, the plaintiff's motion is denied insofar as it seeks to amend the complaint to add a cause of action against Bono sounding in quasi contract or unjust enrichment.

HON. ELIZABETH HAZITT EMERSON

Dated: August 1, 2012

J.S.C.